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In *Torcaso v. Watkins*,[1] a recent case before the United States Supreme Court, petitioner was appointed a notary public by the Governor of Maryland but the commission was never issued because petitioner refused to make the following declaration: "I, Roy R. Torcaso, do declare that I believe in the existence of God."[2] This declaration was demanded of the petitioner in order to fulfill the requirement contained in Article 37 of the Maryland Declaration of Rights that state officers declare their belief in God.[3] The United States Supreme Court, reversing the Court of Appeals of Maryland, *held* that this "test" for office unconstitutionally invaded "the appellant's freedom of belief and religion" and that he was entitled to a writ of mandamus compelling the issuance of his commission.

The instant case is the latest chapter in the history of the test oath, an institution which appeared on the American scene before the United States was established. Religious tests and oaths were part of the machinery of the established churches

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evolution in social, statutory and judicial attitudes regarding the relationship between church and public schools, see JOHNSON & YOST, SEPARATION OF CHURCH AND STATE (2d ed. 1948).

[1] 367 U.S. 488 (1961).

[2] Torcaso v. Watkins, 223 Md. 49, –, 162 A.2d 438, 440 (1960).

[3] Article 37 declares "that no religious test *ought* ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution." (Emphasis added.) The Maryland Court of Appeals, in Torcaso v. Watkins, *supra* note 2, at –, 162 A.2d at 441-42, decided that the word *ought* was not used in a permissive sense with regard to belief in God, but that a declaration of such belief was mandatory and required no legislative enactment to make it so.

found in several of the American colonies prior to the revolution.[4] However, when the colonies formed the United States they provided in article VI of the federal constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[5] Shortly thereafter, in order to better protect the religious freedom of the people, the first amendment to the Constitution was ratified, providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

In *Reynolds v. United States,*[6] a prosecution for bigamy, the Supreme Court held that the first amendment prohibited Congress from regulating religious beliefs, but did not interfere with the regulation of overt acts harmful to the state, even if the act was done in the name of religion.

Both article VI and the first amendment protected religious freedom from impairment by the federal government, but neither of them provided such a guarantee with respect to state action. This situation was remedied by the passage of the fourteenth amendment, the first section of which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In *Gitlow v. New York,*[7] the Supreme Court assumed that the freedoms of speech and press protected by the first amendment are "among the fundamental personal rights and 'liberties' protected by the due process clause of the fourteenth amendment from impairment by the States."[8] Applying this principle in *Schneider v. State,*[9] some fourteen years later, the Court found that a law against soliciting on the public streets violated these liberties.

In *Cantwell v. Connecticut,*[10] the Court specifically included freedom of religion as one of the first amendment liberties protected from state interference by the fourteenth amendment.[11] The Court held unconstitutional a statute requiring that persons soliciting alms for religious causes obtain a certificate of permission from a state officer, who would determine whether the cause was in fact a religious one. The reasoning of the Court was that such a requirement imposed a prior restraint upon the exercise of religion, since it allowed a public officer to determine whether a body was religious *before* that body could function freely.[12]

Everson v. Board of Educ.,[13] while holding that the use of public funds to provide transportation for students of parochial schools was not a violation of due process or an establishment of religion, emphasized that neither the state nor federal government can "force [a person] . . . to profess a belief or disbelief in any religion."[14] However, *McCollum v. Board of Educ.* [15] held unconstitutional the use of public school

[4] BRADY, CONFUSION TWICE CONFOUNDED 7 (1954), quoting JERNEGAN, THE AMERICAN COLONIES 350 (1929).
[5] See 4 ELLIOT, DEBATES 191-200 (2d ed. 1937).
[6] 98 U.S. 145 (1878).
[7] 268 U.S. 652 (1925).
[8] *Id.* at 666.
[9] 308 U.S. 147,160 (1939).
[10] 310 U.S. 296 (1940).
[11] *Id.* at 303.
[12] *Id.* at 304.
[13] 330 U.S. 1 (1947).
[14] *Id.* at 15.
[15] 333 U.S. 203 (1948).

facilities for religious instruction, on the ground that such use violated the principles of freedom of religion and separation of church and state established in the earlier cases cited above. Finally, *McGowan v. Maryland*,[16] dealing with the validity of Sunday Closing Laws, stressed the invalidity of such laws if enacted for the purpose of aiding one or even all religions.[17] The laws in question were upheld on the ground that they were a legitimate exercise of the police power for the general good.[18]

The Court, in the instant case, rendered its decision in the light of the tradition established in the above-mentioned cases. This tradition maintains that the state may do nothing which aids one or several religions, or which impairs the rights of any. Nor may the state do anything which tends to lessen the religious liberty of any individual, subject to the exception that the state may prohibit *action*[19] obnoxious to the common welfare, although the practice in question be done in the name of religion. The Court found that the state was forcing a person to profess a belief in one religion, or rather in one type of religion, *i.e.*, theism in order to be commissioned a public officer. Although the plaintiff was not forced to hold office, and therefore was not forced to profess this belief, if the office is offered it must be free of any religious requirement. To enforce such a requirement would be to unconstitutionally invade "appellant's freedom of belief and religion."[20]

In an effort to reinforce its argument that a declaration such as the one required in the present case was a violation of constitutionally protected liberty, the Court pointed out that the adoption of article VI of the Constitution indicated that test oaths were repugnant to our national tradition.[21]

The Maryland Court of Appeals, in deciding that the Constitution did not forbid the declaration passed on in the instant case had emphasized that it would be ironical if an officer empowered to administer oaths before God were not required to believe in God.[22] However, though this is true, the validity of an oath is not affected by the fact that the one administering it does not believe in God. It is the belief of the person taking the oath that is pertinent.[23]

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[16] 336 U.S. 420 (1961).

[17] *Id.* at 453.

[18] *Id.* at 444-45.

[19] The rule with respect to pure belief not evidenced by overt action is that "one be permitted to believe what he will." American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950). See Dennis v. United States, 341 U.S. 494, 507-08 (1951). One early case in the area of religious belief, Davis v. Beason, 133 U.S. 333 (1890), upheld as valid a requirement that those registering to vote take the following oath: "[A]nd I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy . . . ; that I do not, and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy. . . ." *Id.* at 336. This oath appears to be an attempt to regulate adherence to a belief, whether or not that belief is acted upon. To the extent that the *Beason* case upholds this attempt, it no longer seems to be a controlling authority in light of the *Douds* case.

[20] Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

[21] *Id.* at 491.

[22] Torcaso v. Watkins, 223 Md. 49, –, 162 A.2d 438, 443-44 (1960). MD. ANN. CODE art. 68, § 3 (1957) provides that notaries shall have the power to administer oaths. Article I, § 10 prescribes the form of an oath: "In the presence of Almighty God I do solemnly promise or declare. . . ."

[23] When article VI was discussed in the North Carolina Convention on the adoption of the fed-

The conclusion of the Court in the instant case with respect to the unconstitutionality of religious test oaths is not startling, especially in view of the clear prohibition contained in article VI of the Constitution and the history and tradition of the United States. However, the significance of this case lies not in its conclusion, but rather in certain statements made by the Court with respect to past decisions in the area of freedom of religion. There had been some speculation that the decision of the Supreme Court in *Zorach v. Clauson*[24] was a retreat from the position taken in *Everson* and *McCollum*.[25] In the present case the Court emphatically denied that it had made such a retreat.[26] It stated:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a "person to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[27]

This seems to be a definitive statement of the law, since there was no dissenting opinion. Two justices, however, merely concurred in the result.

Torcaso v. Watkins synthesizes the American law of religious freedom: the state shall not aid or inhibit any religion or the practice thereof. The first amendment considers this freedom from the dual aspect of establishment of religion and impairment of rights. In practice the two are often intermingled, as the test oath in the present case indicates. This declaration both "establishes" theism and impairs the rights of the atheist. In the process of deciding cases concerned with both aspects of the problem the Supreme Court has evolved one law: to prevent establishment and protect free exercise there shall be complete separation of church and state. This case is an emphatic reiteration of that doctrine.

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eral constitution, the following remarks were made by James Iredell, later a Justice of the United States Supreme Court: "[I]t has been universally considered that, in administering an oath, it is only necessary to inquire if the person who is to take it, believes in a Supreme Being, and in a future state of rewards and punishments.... It is, however, necessary that such a belief should be entertained, because otherwise there would be nothing to bind his conscience that could be relied on; since there are many cases where the terror of punishment in this world for perjury could not be dreaded." 4 ELLIOT, DEBATES 193 (2d ed. 1937).

[24] 343 U.S. 306 (1952). In that case the Court held that the Constitution did not prohibit a program by which public school students were dismissed early in order to attend religious instructions. There were three dissenting opinions.

[25] See Engel v. Vitale, 18 Misc. 2d 659, 688, 191 N.Y.S.2d 453, 485 (Sup. Ct. 1959), *aff'd*, 11 App. Div. 2d 340, 206 N.Y.S.2d 183 (2d Dep't 1960), *aff'd*, 10 N.Y.2d 1010, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961).

[26] Torcaso v. Watkins, *supra* note 20, at 494-95.

[27] *Id.* at 495.