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Freedom to Worship Curiously

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The thought that a religion which has no effect upon the secular activities of its adherents is not a very good religion seems to be one point of agreement between the religious, the irreligious and the indifferent. A casual comparison of religious literature of today with that of a century ago impresses one that there has been a shift in emphasis from debate about theological dogma toward discussion of business and social morality and ethics. One result of this is a blurring of the distinction between that which is religious and that which is secular. One evidence of it is seen in the growing inclination of organized religious groups to concern themselves with laws governing labor relations, and with international affairs and the like. Another is found in the rapidly increasing tendency to repeal or ignore "blue laws" restricting activities which may be engaged in on Sunday. The constitutional provisions which Mr. Jefferson termed "a wall separating Church and State" were designed to keep the area of religious thought, religious profession, and religious ritual free from state control, and perhaps also to keep religious organizations, as such, out of the councils in which laws relating to business and society are framed. Neither the federal nor the state constitutions use the expression "separation of Church and State," but only such terms as "law establishing a religion," "place of worship," "religious opinion" and the like. The "wall of separation" is at least in part composed of accepted governmental and church policies which are subject to change and do from time to time change. As organized religion becomes dissatisfied with the narrow confines of the philosophical corner into which it has been fenced by the belief that there is a sharp distinction between that which is religious and that which is secular, it tends to breach the wall and deny any such distinction, only to find that one cannot breach a wall from inside out while retaining it as a barrier to those who wish to enter. Thus, government, acquiescing in the abolition of the distinction between the religious and the secular, may assert its right to control that which was formerly thought subject only to the dictates of the individual's conscience or the discipline of his religious group. In such a condition one who wishes to comply with the principle, "Render unto Caesar the things that are Caesar's and unto God the things that are God's," finds himself in difficulties because

the familiar landmarks are gone, and he can no longer locate the limits of Caesar's jurisdiction.

To locate that boundary one must distinguish between restraints which have been imposed upon government by expediency or political sagacity, and so subject to destruction by changing conditions, on the one hand, and the barriers which a government wholly lacking in wisdom may not pass. The problem is neither modern nor wholly American. In the days when Caesar was just the name of another Roman soldier Cicero was saying:[1]

> "What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly."

Saint Thomas Aquinas was of the same opinion, saying in language familiar to a modern sect, which might object to finding itself in agreement with so eminent a Catholic:[2]

> "(L)aws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law; and laws of this kind must nowise be observed, because, as stated in Acts. v:29, *we ought to obey God* rather than man."

Jeremy Bentham's reply, which should make him the patron saint of the police department, was:[3]

> "Is not this arming every fanatic against all governments? In the immense variety of ideas respecting natural and Divine law, cannot some reason be found for resisting all human laws? Is there a single state which can maintain itself a day, if each individual holds himself bound in conscience to resist the laws, whenever they are not conformed to his particular ideas of natural or Divine law? What a cut-throat scene of it we should have between

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[1]CICERO, DE LEGIBUS (Keyes' Translation), Bk. II, V, p. 385

[2]ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Part II 70, as quoted in HALL, READINGS IN JURISPRUDENCE 40. (Italics not mine).

[3]JEREMY BENTHAM, THE THEORY OF LEGISLATION, as quoted in HALL, READINGS IN JURISPRUDENCE 168.

all the interpreters of the code of nature, and all the interpreters of the law of God!"

It is not the purpose of this article to explore for the boundaries set by Divine Law nor to discover the restraints imposed upon the legislature by expediency or custom, but to endeavor to locate the limitations set by the people of the United States in the state and federal constitutions upon their governmental agencies. While there is some variation in the terminology used in the various state constitutions, no case has been found which seems to the writer to turn upon the peculiar wording of the constitution in question. Mr. Jefferson's *Bill for Religious Liberty,* adopted in 1786 by the Virginia General Assembly, was incorporated verbatim into many state constitutions, and its principles are reflected in the language of the others.[4] The way for its passage was paved by Mr. Madison's famous *Memorial and Remonstrance,* which was written to protest the passage of a proposed bill to levy a tax on property "for the support of Christian teachers," each taxpayer to be given a receipt specifying the "society of Christians" selected by him as the one whose teachers (i.e., ministers) were to receive the benefit of his payments. Since Mr. Madison introduced the original draft of the First Amendment in Congress and was largely instrumental in procuring its submission in final form to the states for ratification, Mr. Jefferson then being in France as our Ambassador, it seems clear that the protections intended to be afforded by it were the same in kind as those intended by the Virginia statute. The applicable portion of the Amendment reads: "Congress shall make no law establishing a religion, or prohibiting the free exercise thereof."

Until the ratification of the Fourteenth Amendment in 1868 there was clearly nothing in the United States Constitution protecting freedom of religious profession and practice from interference by the state governments, and for some sixty years thereafter this was still generally assumed to be so obvious as to require no discussion.[5] However, with the general acceptance of the view that the due process clause of the Fourteenth

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[4]After a preamble setting forth the belief that attempts to influence the mind by temporal punishments tend to beget habits of hypocrisy and to compel a man to contribute money to the propagation of opinions which he disbelieves is both sinful and tyrannical, this statute provided: "That no man be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief."

[5]See Reynolds v. United States, 98 U. S. 145, 162 (1878); Brunswick-Balke-Collan-

Amendment[6] requires the Court to declare unconstitutional state laws which, as a matter of substance, are arbitrary interferences with liberty, it was an easy step to define "liberty" to include those specific provisions of the first eight amendments believed to be so fundamental "that neither liberty nor justice would exist if they were sacrificed."[7] It is now well settled that whatever Congress is forbidden to do by the First Amendment the states are forbidden to do by the Fourteenth.[8] This being true, and it also appearing that there has never been any disposition on the part of state courts to interpret the several state constitutional provisions on the subject in any way different from that in which they thought the First Amendment should be interpreted, the accumulated state decisions under state constitutions may be regarded as secondary authorities of considerable value in locating the limits set upon state action by the Fourteenth Amendment. Though the language of the state and federal constitutions be the same, the state court, applying its constitution, may hold religious practices have a more, but not less, extensive protection than

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der Co. v. Evans. 228 Fed. 991 (D. Ore. 1916); People v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927).

[6]". . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

[7]Cardozo, J., in Palko v. Connecticut, 302 U. S. 319, 326, 58 Sup. Ct. 149 (1937). This expansion of the Fourteenth Amendment to include the principal provisions of the Bill of Rights seems to have been begun by Mr. Justice McReynolds in *Meyer v. Nebraska*, 262 U. S. 390, 43 Sup. Ct. 625 (1923), sustaining, as against a state statute, the right of a teacher in a parochial school to teach the Bible stories in the German language.

[8]"The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." Roberts, J., in Cantwell v. Connecticut, 310 U. S. 296, 303, 60 Sup. Co. 900 (1940). This doctrine has been followed in numerous recent cases: Illinois v. Board of Education, 68 Sup. Ct. 471 (U. S. 1948); Marsh v. Alabama, 326 U. S. 501, 66 Sup. Ct. 276 (1946); Follette v. McCormick, 321 U. S. 573, 64 Sup. Ct. 717 (1944); Board of Education v. Barnette, 319 U. S. 624, 63 Sup. Ct. 1178 (1944); Martin v. Struthers, 319 U. S. 141, 63 Sup. Ct. 862 (1943); Murdock v. Pennsylvania, 319 U. S. 105, 63 Sup. Ct. 870 (1943). See also: Everson v. Board of Education, 330 U. S. 1, 67 Sup. Ct. 504 (1947); Prince v. Massachusetts, 321 U. S. 158, 64 Sup. Ct. 438 (1944). It is, of course, also well settled that the protections of the Fourteenth Amendment apply not only to legislative action but to any official or agency exercising a power delegated by the state. Illinois v. Board of Education, 68 Sup. Ct. 471 (U. S. 1948); Smith v. Allwright, 321 U. S. 649, 64 Sup. Ct. 757 (1944); *Ex parte* Virginia, 100 U. S. 339 (1880).

the United States Supreme Court thinks is afforded by the Fourteenth Amendment. However, as in other matters asserted by litigants to be within the protection of state due process clauses similar to that in the Fourteenth Amendment, the tendency has been for the state courts to allow the state official considerably more power to regulate than the United States Supreme Court has thought permissible. Therefore, a fairly safe working rule seems to be that the boundaries beyond which neither the state nor the federal government may go in regulating religious profession and practice are those marked out by the First Amendment. State decisions holding the official has trespassed on forbidden ground are likely to be taken as locating points on the boundary, whereas state decisions sustaining governmental action will be regarded as merely persuasive in other courts.

Interferences with religious liberty may take the form of forbidding action required by conscience, or of requiring action generally regarded as secular but forbidden by the objector's conscience, or of requiring actual or ostensible support of a distasteful religion. Illustrations of the first type are found in laws regulating the time, place and manner of conducting religious services, laws forbidding polygamy, restraints upon proselyting and solicitation of funds, and in the denial to one professing certain religious views of privileges granted others. The second type of interference is found in the compulsory flag salute, compulsory military service, and compulsory medical attention cases. The third class includes compulsory attendance upon objectionable religious services, such as the reading of the Bible in the public schools, forced contributions through taxes, to the maintenance of objectionable religious institutions or workers, and laws restricting activities on Sunday.

Bentham's method of weighing the benefits to society against the pain caused the individual and his co-religionist by the interference with their freedom appears to be the approach commonly taken by the courts here just as it is in other types of due process cases. Contrary to Bentham, however, the courts give tremendous weight to the pains caused by interference with religious views so that it takes a clear showing of a substantial social benefit in order to tip the scales in favor of the law.[9] While the

[9]Speaking for the Court of the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," Mr. Justice Rutledge said: "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusion. . . . For these reasons any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or re-

cases do not speak of considering the number of those adhering to the dissenting group as an important factor in the weighing of benefits and burdens, it no doubt has some effect upon the process, though its principal bearing is by way of political restraint upon the legislator's inclination to enact a law invading their cherished freedoms. Despite the large number of recent decisions striking down laws restraining the right to engage in proselyting activities, the cases reflect a tendency to view prohibitive laws with more favor than laws requiring action forbidden by conscience. This seems reasonable, since compelling one to engage in a pursuit he deems a sacrilege is usually more of a shock to his conscience than forbidding him to do what he thinks is his affirmative duty,, and also because society usually benefits from the elimination of practices objectionable to it, whereas the value of compelling a grudging or hyprocritical compliance with its ceremonies is doubtful to say the least.

I. Forbidding Action Required by Conscience

Appropriately, the leading decision on governmental prohibition of an action thought required by religion is one of the few such cases involving an Act of Congress. In *Reynolds v. United States*[10] the defendant was indicted for bigamy under an Act of Congress applicable to the Territory of Utah. He was a member of the Church of Jesus Christ of the Latter Day Saints, commonly called the Mormon Church, and proved that it was then one of the accepted doctrines of his church that it was the duty of male members to practice polygamy.[11] The Court affirmed the conviction, saying, through Chief Justice Waite:[12]

> "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a

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motely but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible litigation." Thomas v. Collins, 323 U. S. 516, 530, 65 Sup. Ct. 315 (1945).

[10]98 U. S. 145 (1878).

[11]This is no longer one of the doctrines of the Mormon Church but is still adhered to and taught by a sect known as Fundamentalist Mormons. See Cleveland v. United States, 329 U. S. 14, 67 Sup. Ct. 13 (1947).

[12]The passage quoted appears at page 166 of the official report.

> necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"

Not long thereafter a divided Court sustained an Act of Congress dissolving the Mormon Church Corporation and providing that all its property not used for religious purposes escheat to the United States. Mr. Justice Bradley, speaking for the majority in sustaining this confiscation, said:[13]

> "The State [*i.e.*, government] has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced."

The spectacular snake-handling cults have not been before the United States Supreme Court, and only two cases involving them have reached state courts of last resort, one in Kentucky and the other in Virginia.[14] In each case the court sustained the power of the state to prohibit the practice, the Virginia court saying, "While the law cannot interfere with a person's religious belief or opinion, this is no excuse for an illegal act made criminal by the law of the land, even though such act is based on conscientious religious belief." Likewise most courts have found little difficulty in affirming convictions for commercial fortune telling, notwithstanding objections that the defendants were officials in the Spiritualist Church and so were practicing their religious beliefs,[15] nor have they

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[13]Mormon Church v. United States, 136 U. S. 1, 50, 10 Sup. Ct. 792 (1889). For more recent decisions sustaining convictions of Fundamentalist Mormons under the Mann Act and under a state statute forbidding polygamy see: Cleveland v. United States, 329 U. S. 14, 67 Sup. Ct. 13 (1947); State v. Musser, 175 P.2d 724 (Utah 1946).

[14]Lawson v. Commonwealth, 291 Ky. 437, 164 S. W.2d 927 (1943); Kirk v. Commonwealth, 44 S. E.2d 409 (Va. 1947).

[15]St. Louis v. Hellscher, 295 Mo. 293, 242 S. W. 652 (1922); Dill v. Hamilton, 137 Neb. 723, 291 N. W. 62 (1940); People v. Ashley, 184 App. Div. 520, 172 N. Y. Supp. 282 (2d Dept. 1926); People v. Brossard, 33 N. Y. S.2d 369 (1942); McMaster

been delayed long by the contentions of defendants that in undertaking to heal the sick without a license to practice medicine they were merely practicing the tenets of their religious faith, the defendants being shown to have exacted a fee for their ministrations which, in most instances, did not stop with prayer but included medication.[16] Again, it has been held within the power of government to forbid the use of intoxicating liquors or drugs despite the user's asserted belief that such use was permitted or even required by Divine Law.[17]

Many opinions sustaining interference with practices said to be commanded by conscience contain statements indicating that the court was influenced by considerable scepticism as to the sincerity of the alleged belief. This is especially true in cases dealing with practices in which the litigant had a financial interest, such as healing the sick or foretelling the future for hire, and those concerning activities generally regarded as contrary to good morals. In one instance in which at the request of a "stool pigeon," and for a cash consideration, a medium called up for conference the spirit of Minnehaha, who still lives romantically in Longfellow's poem but never had any other earthly existence, the Court said some mischievous spirit might have played a trick on the medium, but it strongly suspected the medium of playing one on the customer.[18] Mr. Justice Murphy has expressed doubt that cursing the chief of police is an exercise of a defendant's religion,[19] and a conviction for using the mails to defraud was sustained where the defendant mailed circulars claiming himself to be of divine origin, immortal and possessed of a supernatural mastery over disease, poverty and death, which mastery he would transmit to the addressee for a stipulated price.[20] The constitutional provisions were obviously not intended to give the age-old practice of obtaining money by false pretenses immunity from the law when masquerading

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v. State, 21 Okla. Cr. Rep. 318, 207 Pac. 566 (1922); State v. Neitzel, 69 Wash. 567, 125 Pac. 939 (1912). *Contra*: State v. DeLaney, 122 Atl. 890 (N. J. 1923).

[16]Fealy v. Birmingham, 15 Ala. App. 367, 73 So. 296 (1916); Smith v. People, 51 Colo. 270, 177 Pac. 612 (1911); State v. Marble, 72 Ohio St. 21, 73 N. E. 1063 (1905); State v. Verbon, 167 Wash. 140, 8 P.2d 1083 (1932).

[17]Shapiro v. Lee, 30 F.2d 971 (W. D. Wash. 1929); State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926); Sweeney v. Webb, 33 Tex. Civ. App. 324, 76 S. W. 766 (1903).

[18]McMaster v. State, 21 Okla. Cr. Rep. 318, 207 Pac. 566 (1922).

[19]Chaplinsky v. New Hampshire, 315 U. S. 568, 62 Sup. Ct. 766 (1942).

[20]New v. United States, 245 Fed. 710 (C. C. A. 9th 1917), *cert. denied*, 246 U. S. 665, 38 Sup. Ct. 334 (1917).

in the garb of religion, and the sincerity of the asserted belief would seem to be always a proper subject for judicial inquiry, but this leads easily into a type of inquiry which threatens the very freedom intended to be safeguarded by the First Amendment. In numerous opinions the judge's language shows he fell into the all too human error of doubting the sincerity of a belief which seemed to him unreasonable. Thus, in another of the Mormon cases, Mr. Justice Field, ordinary a staunch defender of individual freedom, said of the advocacy of polygamy, "To call their advocacy a tenet of religion is to offend the common sense of mankind,"[21] and similar statements are to be found in many of the more recent cases dealing with the unusual beliefs of Jehovah's Witnesses,[22] who were also an annoyance to Adolph Hitler.[23] The Constitution does not protect reasonable religious belief but sincere religious belief. While the unreasonableness of a belief may be some indication of the sincerity with which it is professed, willingness to endure ridicule and imprisonment seem stronger evidence on this point. In any event, for the courts to make the reasonableness of a belief a condition precedent to the operation of the First

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[21]Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299 (1890).

[22]In sustaining a compulsory flag salute in the public schools of Massachusetts over the objection of a youthful Jehovah's Witness that it caused her to salute a graven image in violation of the Second Commandment, Chief Justice Rugg said: "The flag salute and pledge of allegiance here in question do not *in any just sense* relate to religion. . . . It [the statute] does not *in any reasonable sense* hurt, molest, or restrain a human being in respect to 'worshipping God' within the meaning of the words in the Constitution. . . . The rule and the statute are well within the competency of legislative authority. *They exact nothing in opposition to religion.*" Nicholls v. Mayor of Lynn, 297 Mass. 65, 7 N. E.2d 577 (1937). In a similar case in Georgia, Chief Justice Russell said: "The act of saluting the flag of the United States is by no stretch *of reasonable imagination* a 'religious rite,'" Leoles v. Landers, 184 Ga. 580, 192 S. E. 218 (1937). In a similar case in the New York County Court, Justice Hill said: "Is saluting the United States flag a religious rite? *I think not.*" People *ex rel.* Fish v. Sandstrom, 3 N. Y. S.2d 1006, 167 Misc. 436 (1938). Italics throughout are mine, and I hasten to add that I too think the teachings of the original Mormons and of the Jehovah's Witnesses are, in these matters, most unreasonable, but I have no doubt that they were sincerely believed by the defendants in those cases, so that interferences with their putting these beliefs into practice were interferences with the free exercise of religion.

[23]"I consider them quacks. . . . I dissolve the 'Earnest Bible Students' in Germany; their property I dedicate to the people's welfare; I will have all their literature confiscated." Pronouncement of Adolph Hitler, April 4, 1936, as quoted by Circuit Judge Clark in Minersville School District v. Gobitis, 108 F.2d 683 (C. C. A. 3d 1940).

Amendment would limit religious freedom to the orthodox, and would be an even greater shock to the common sense of the American people than are the strange beliefs of some of the less popular sects. In another recent prosecution for using the mails to defraud, this dangerous approach to cases involving religious belief was repudiated. The evidence showed the defendant claimed immortality and a supernatural power over disease which he would impart to those making cash contributions. Mr. Justice Douglas, for the majority, held the trial judge had correctly withheld from the jury the question of the falsity of the defendant's doctrines, saying:[24]

> "The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When triers of fact undertake that task they enter forbidden domain. The First Amendment does not select any one group or any type of religion for preferred treatment."

Another danger lies in the tendency to lay too much emphasis upon the distinction between religious opinions and religious practices or actions. It is doubtful that even the Inquisition was much concerned with opinions carefully kept secret and undisclosed. While the decision that Congress has power to forbid polygamy in the territories was clearly sound, Chief Justice Waite's statement, "Laws are made for the government of actions,

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[24]United States v. Ballard, 322 U. S. 78, 64 Sup. Ct. 882 (1944). The Circuit Court having been in error on this point and not having considered other points raised by the defendant's appeal from the District Court, the Supreme Court remanded the case for consideration of those other matters. Dissenting, Chief Justice Stone and Justices Roberts and Frankfurter thought the convictions proper without inquiry into the truth or falsity of the defendant's doctrines, since the jury had found on sufficient evidence that he did not believe his own statements. Also dissenting, Mr. Justice Jackson felt the indictment should have been dismissed, saying: "How can the Government prove these persons knew something to be false which it cannot prove to be false? . . . When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him. I would dismiss the indictment and have done with . . . judicially examining other people's faiths." Thus while the members of the Court disagreed on other aspects of the case they were unanimously of the opinion that the Circuit Court of Appeals had erred in thinking the truth or falsity of the religious doctrine should have been determined in the District Court.

and while they cannot interfere with mere religious belief and opinion, they may with practices,"[25] when taken out of its context, as often happens, is dangerous in that it seems to offer a test of constitutionality and as such it is unreliable. The classic examples of religious heroism show the danger of such a distinction. According to the Biblical accounts, Daniel, the three young men put into the fiery furnace, Peter, John, Paul, and even Jesus himself, were not tried and punished for their opinions but for their acts expressing their faith in those opinions, all of which were regarded by their judges as clearly opposed to reason and common sense. Here, again, the recent decisions of the United States Supreme Court indicate that this fallacious test of governmental power has been discarded, and the test to be used is the true one of determining whether the act is sufficiently injurious to the peace, safety and general welfare of society to justify the great infringement of personal liberty inherent in every interference by government with the practice of a sincere religious opinion, however erroneous that opinion may be. Measured by this test, opinions are beyond government control, not because they are opinions, but because they do not endanger the public welfare enough to justify interference. Expressions of opinion, by word, act, or refusal to act, are free from governmental interference so long as they are made at such time and place and in such manner as not to constitute a clear and present danger to the public peace, safety, morals or welfare, and no longer.

On this basis the use on the streets, though in the course of religious services, of loud-speakers or musical instruments so as to disturb others in their normal and legitimate use of the same streets and of the adjoining property may be forbidden,[26] and one conducting a street meeting with-

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[25]Reynolds v. United States, 98 U. S. 145, 166 (1878).

[26]Hamilton v. Montrose, 109 Colo. 228, 124 P.2d 757 (1942), using a loud speaker in conducting a religious service on the streets in the business district so as to require occupants of business establishments to close their windows in order to converse with customers; Mashburn v. Bloomington, 32 Ill. App. 245 (1889), beating a drum in a Salvation Army street meeting, which frightened horses and which meeting caused a crowd to gather, obstructing traffic. Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 224 (1889), and State v. White, 64 N. H. 48, 5 Atl. 828 (1886), sustained convictions of playing a cornet and beating a drum, respectively, in religious processions in the streets without first obtaining a permit from the police. *In re* Frazee, 63 Mich. 396, 30 N. W. 72 (1886), reversed such a conviction on the ground that the ordinance in requiring a permit left the matter to the unregulated discretion of the mayor. The Massachusetts and New Hampshire decisions seem erroneous on this point, but not otherwise.

out such mechanical devices may be punished for using such a loud and boisterous manner or offensive epithets as to provoke a breach of the peace the New Hampshire court refusing to inquire into the accuracy of the names which the preacher and the bystander bestowed upon one another.[27] The Missouri court, through reversing the conviction of the pastor of a small but vigorous Negro church, who was charged with shouting "Amen," "Glory Hallelujah" and similar expressions in the course of his evening message in tones audible at from two to six blocks' distance, recognized that the minister must not conduct his services even within his church so as to be a nuisance to the neighbors. The court, in holding no nuisance had been proved, relied somewhat upon history, remarking, "Indeed there was once a time in this country when a minister whose voice would not have carried for a greater distance than two city blocks, would certainly have been accepted with greatly restrained enthusiasm, and most likely would have been regarded even by his most faithful parishioners as a downright failure in the ministry."[28] The overly prolonged and enthusiastic meetings of another Negro congregation led the South Carolina court to the conclusion that even services carried on within a regular church building can become a nuisance and, as such, be enjoined.[29] The evidence, which may not be wholly credited by those so unfortunate as never to have lived in the South after the crops have been laid by, showed:

> "The plaintiffs dance in the church, and, in the course of the meeting give forth weird and unearthly outcries. There is loud shouting, clapping of hands in unison, and stamping of feet. The incessant use of drums, timbrels, trombones, horns, scrubbing boards and wash tubs adds to the general clamor. Some of the votaries are moved to testify; others enter an hypnotic trance. The central pillars of the church are padded to protect them from injury during their transports. The tumult can be heard for many city blocks. Meetings are carried on daily from early hours of the evening until the early hours of the morning. . . . Fights often occur. . . . On one

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[27]Bennett v. Dalton, 69 Ga. App. 438, 25 S. E.2d 726 (1943); State v. Chaplinsky, 91 N. H. 310, 18 A.2d 754 (1943), *aff'd*, 315 U. S. 568, 62 Sup. Ct. 766 (1942). *But see* Gaffney v. Putnam, 197 S. C. 237, 15 S. E.2d 130 (1942), holding the preacher, conducting himself properly, has the usual right of self defense against an assault by a bystander who disapproves of his theology.

[28]City of Louisiana v. Bottoms, 300 S. W. 316 (Mo. App. 1927).

[29]Morison v. Rawlinson, 193 S. C. 25, 7 S. E.2d 635 (1940).

occasion a police officer arrested fifteen persons, taken from within and from without the church, for disturbing the peace. Upon another occasion the police attempted to arrest the head usher of the church who was engaged in a fight. He resisted arrest with a blackjack and a knife."

The right to believe and to worship would be incomplete without the right to share one's views with others and to seek to win them to one's faith, or lack of it, by giving information as to one's views, by exhortation, by critical analysis of contrary views, and by solicitation of financial assistance in carrying the truth to still others. These are some of the rights denied dissenters by governments which have established a religion, or an absence of religion, by royal or dictatorial decree,. and have sought to compel their subjects to cut their consciences to the offical pattern. They are included within the protection of the First Amendment, and the recent decisions of the Supreme Court show a purpose to protect them fully from state restrictions going beyond what is necessary to avoid a clear and present danger to the public peace, safety, morals and welfare. They have been given priority over property rights,[30] and though it seems to the writer that the Court went too far in so doing, it was moving in the direction of a generally accepted American belief that there is no danger to the public welfare quite so serious as that inherent in the prevention of the free exchange of ideas, so long as the exchange is attempted in a peaceful manner, and the ideas are not in themselves presently detrimental to the public morals or safety. Here the Court seems to be following a great lawyer of another day, who advised, "Let them alone, for if this counsel or this work be of men, it will come to naught, but if it be of God, ye cannot overthrow it."[31]

A tax not prohibitive in amount, and applied for forty years without discrimination to all house-to-house peddlers of goods, religious or secular, was held unconstitutional insofar as applied to Jehovah's Witnesses going from door to door within the city, offering their literature for sale.[32] The

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[30]Marsh v. Alabama, 326 U. S. 501, 66 Sup. Ct. 276 (1946), reversing the conviction of a Jehovah's Witness continuing to distribute literature on company-owned sidewalks of a company town after being informed she was on private property and warned to leave.

[31]Gamaliel in Acts V: 38, 39.

[32]Murdock v. Pennsylvania, 319 U. S. 105, 63 Sup. Ct. 870 (1943). Prior to this decision the contrary view prevailed in the state and lower federal courts: Winchester v. Leiby, 117 F.2d 661 (C. C. A. 1st 1941); Whisler v. West Plains, 43 F.

Court said such distribution of religious literature is not a commercial enterprise but a form of missionary evangelism as old as the printing press, as exempt from taxation as the right of the minister to preach a sermon in his church, and having no similarity to an income tax on the minister's salary to which the three dissenting justices likened it. The next year the Court made it clear that it is immaterial whether the peddler is an itinerant or a resident of the taxing municipality regularly going his rounds with his religious books and tracts, saying, "The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint."[33] Similarly, the Florida court has said, "To confer a free exercise of religious profession charged with an obligation like this [pointing the way to the virtues] and then lay a heavy tax on the performance of the obligation when no question of morals, safety and convenience is involved is contrary to the letter and spirit of the Declaration of Rights."[34] However, in California a non-discriminatory property tax on such literature in the warehouse of the sect has been sustained, and, it would seem, properly so, even if the customary state exemptions of church property from taxation be regarded as permissible.[35]

In order to prevent fraud a state or city may require a solicitor to establish his identity and his authority to solicit for the cause he purports to represent, and the time and manner of solicitation may be controlled to the extent necessary to protect the public peace, safety and convenience, but the Supreme Court has denied the authority of a state "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause,"[36] and has likewise

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Supp. 654 (W. D. Mo. 1942); Cook v. Harrison, 180 Ark. 546, 21 S. W.2d 966 (1929); Commonwealth v. Anderson, 272 Mass. 100, 172 N. E. 114 (1930); Commonwealth v. Murdock, 149 Pa. Super. 175, 27 A.2d 666 (1943); Follett v. McCormick, 204 S. C. 337, 29 S. E.2d 539 (1944).

[33]Follett v. McCormick, 321 U. S. 573, 64 Sup. Ct. 717 (1944).

[34]Terrell, J., in State *ex rel.* Singleton v. Woodruff, 153 Fla. 84, 13 So.2d 704 (1944).

[35]Watchtower Bible and Tract Society v. Los Angeles County, 182 P.2d 178 (Cal. 1947).

[36]Cantwell v. Connecticut, 310 U. S. 296, 307, 60 Sup. Ct. 900 (1940). See also dissenting opinion of Mr. Justice Rutledge, while a member of the Court of Appeals for the District of Columbia, in Busey v. District of Columbia, 129 F.2d 24 (C. A. D. C. 1942), denying the power of Congress to make a revocation of a permit to solicit for religious purposes depend upon the will of an administrative official.

held it unconstitutional for a city to require a permit for the distribution of literature, the granting of which permit is left to the discretion of the administrative officer.[37] The view of the Florida court is that "so long as such regulations apply to all alike, are devised with the interest of all those affected in view, and are consonant with reason, all social, political, religious, and other organizations may be required to conform to them," but an ordinance may not require the person soliciting them to obtain a permit from an officer of the city whose discretion in granting permits is unlimited.[38] This seems sound and there is nothing in these decisions by the United States Supreme Court to prevent reasonable rules of general application regulating the qualifications of the persons employed or limiting the times and places for distribution of literature so as to prevent interference with traffic.[39] Thus, unusual uses of the streets, such as parades likely to impede their normal use by others, may be forbidden in absence of a permit,[40] the granting of which, presumably, must not be left to the unguided discretion of the city officers. Because of its peculiar interest in children the state may forbid them, with or without their parents' presence and consent, to sell magazines, religious or otherwise, on the streets, the Supreme Court saying:[41]

> "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."

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[37]Lovell v. Griffin, 303 U. S. 444, 58 Sup. Ct. 666 (1938). Prior to the *Cantwell* and *Lovell* decisions, the prevailing view in the states was to the contrary: Coleman v. Griffin, 55 Ga. App. 123, 189 S. E. 427 (1937); Commonwealth v. Nichols, 301 Mass. 584, 18 N. E.2d 166 (1938); Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 224 (1889); State v. White, 64 N. H. 48, 5 Atl. 828 (1886); Maplewood v. Allbright, 13 N. J. Misc. 46, 176 Atl. 194 (1935); Pittsburgh v. Ruffner, 134 Pa. Super. 192, 4 A.2d 224 (1939).

[38]Ford v. Fort Myers, 153 Fla. 99, 13 So.2d 809 (1944).

[39]Jones v. Moultrie, 196 Ga. 526, 27 S. E.2d 39 (1944); *see* People v. Lo Vecchio, 185 Misc. 197, 56 N. Y. S.2d 354 (1945).

[40]Cox v. New Hampshire, 91 N. H. 137, 16 A.2d 508 (1941), *aff'd*, 312 U. S. 569, 61 Sup. Ct. 762 (1941). *But see* People v. Kieran, 26 N. Y. S.2d 291 (1941).

[41]Prince v. Massachusetts, 321 U. S. 158, 64 Sup. Ct. 438 (1944), *rehearing denied*, 321 U. S. 788, 64 Sup. Ct. 784 (1944). *Accord* as to the Constitution of Oregon, Portland v. Thornton, 174 Ore. 508, 149 P.2d 972 (1944).

The proselyter's invasion of private property in violation of a statute raises different problems. In holding a city may not by ordinance, applicable to all, forbid the ringing of the door bell or otherwise summoning the inmates of any residence for the purpose of handing them a circular or handbill, the Court said this has been a common practice for centuries, and "Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community."[42] Three years later it held company-owned streets in a company-owned town are so similar in purpose and general use to public-owned streets that a Jehovah's Witness might stand quietly upon the sidewalk of the company and distribute her literature even after being told she was on private property and warned by the owner to leave.[43] If not carrying the freedom of proselyting to such an extent as to interfere with the freedom not to be converted, this decision comes so close to doing so that it probably represents the high water mark. The freedom to proselyte on private property after being told by the owner to leave will probably be held applicable only to such portions of one's property as are used generally by the public without specific permission from the owner. Of course, the owner of an apartment house cannot keep persons from passing along its hallways to visit his tenants in response to their consent or invitation,[44] but the hallways of an apartment house or hotel are not public streets, and when the tenant has signified his unwillingness to receive distributors of religious literature the owner of the building may surely exclude them.[45] The same principles would seem to apply to a proselyter going from tenant-house to tenant-house on a plantation after being ordered not to do so by the owner.[46] Surely, all but the guilty individuals would say with the Pennsylvania court

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[42]Martin v. Struthers, 319 U. S. 141, 63 Sup. Ct. 862 (1943).

[43]Marsh v. Alabama, 326 U. S. 501, 66 Sup. Ct. 276 (1946).

[44]Commonwealth v. Richardson, 313 Mass. 632, 48 N. E.2d 678 (1943).

[45]People v. Vaughan, 65 Cal. App. 844, 150 P.2d 964 (1945); Watchtower Bible & Tract Society v. Metropolitan Life Ins. Co., 188 Misc. 978, 69 N. Y. S.2d 385 (1947); *see* People v. Dale, 47 N. Y. S.2d 702 (1944). *But see* People v. Reid, 180 Misc. 289, 40 N. Y. S.2d 793 (1943).

[46]In sustaining a conviction for trespass in such case, Chief Justice O'Niell of Louisiana said, "We must remember that personal liberty ends where the rights of others begin." State v. Martin, 199 La. 39, 5 So.2d 377 (1942). This is also the view expressed by Mr. Justice Jackson as to the place at which to draw the limit of the proselyter's freedom. See his concurring opinion in Prince v. Massachusetts, 321 U. S. 158, 64 Sup. Ct. 438 (1944).

that the Jehovah's Witnesses had gone too far in descending 160 strong upon a town of 3,000 inhabitants at eight-thirty on Sunday morning and staging a parade accompanied by a sound truck causing an "unseemly racket," ringing front door bells in efforts to distribute literature and, when denied admission there, going to the back door, and replying to the remonstrance of the mayor and chief of police, "We obey no law but that of Jehovah."[47] As Presiding Justice Keller said:

> "We have here . . . the violation by the appellant and his associates of a . . . right much older than, and just as fundamental as, the right of freedom of conscience or the right of freedom of speech —the right to be secure in one's home from unwanted instrusion."

The essence of the prohibition of the free exercise of religion is putting one in a less favored class than he would be in were his religious views or practices different. This may be done by withholding privileges granted others as truly as by imprisonment. The test should be the same in either type of coercion: is there in the profession or the practice a present threat to the state or nation sufficiently clear and serious to outweigh the injury done the individual through compelling him to choose between obeying his conscience and having the penalty imposed? Clearly, membership in an organization which teaches and advocates that which is a clear and present danger to public morals or safety may be forbidden, but, in view of the Supreme Court's present tendency to regard the right to vote as being itself one of the attributes of the liberty protected by the Due Process Clause, it is doubtful that it would follow today its unanimous decision in 1890 sustaining an act of the territorial legislature of Idaho denying the right of suffrage to members of the Mormon Church.[48]

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[47]Commonwealth v. Palms, 141 Pa. Super. 430, 15 A.2d 481 (1941).

[48]Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299 (1890); *accord,* Wooley v. Watkins, 2 Idaho 555, 22 Pac. 102 (1889). *But see* Toncray v. Budge, 14 Idaho 621, 95 Pac. 26 (1908), interpreting a constitutional disqualification to hold office as applying only to one teaching bigamous earthly marriage, not to the doctrine of celestial, i. e., eternal marriage; and United States v. Korner, 56 F. Supp. 242 (S. D. Cal. 1944), dismissing denaturalization proceedings based upon mere membership in the Bund, though expulsion of an alien because he was a professed anarchist was sustained in United States *ex rel.* Taylor v. Williams, 194 U. S. 279, 24 Sup. Ct. 719 (1904), against the objection that it was an interference with both freedom of speech and freedom of religion.

Likewise, the contributions made by the Quakers to the welfare of the nation from its earliest days make it difficult to believe that one's profession of belief that war is contrary to the law of God, and his resulting unwillingness to swear that he will join the militia should some wholly hypothetical war occur in the future, constitute such a threat to national safety as to justify denial of citizenship[49] or of the privilege to practice law,[50] though five to four decisions of the Supreme Court have sustained such federal and state actions. The New York decision[51] sustaining the action of a school board in discharging a public school teacher, who, while the nation was actually at war, stated to the school board that she would not help the country in forcibly resisting an invasion nor urge her pupils to support the war by contributions to the Red Cross or the purchase of thrift stamps, would appear to meet the test since, though there is no showing of any utterance of the teacher on the subject in the schoolroom, her views would seem to be a present menace to the state's legitimate interest in the children's patriotism sufficiently important to justify her removal from the faculty of the state-supported school. Similarly, it would seem that the state's interest in minor children is such that one's religious views and affiliations might properly be considered by the court in determining whether he should be appointed guardian of their persons, but the authorities are to the contrary.[52] The state's interest in marriage is not sufficiently jeopardized by the religious views of the minister performing the ceremony to justify

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[49]MacIntosh v. United States, 283 U. S. 605, 51 Sup. Ct. 570 (1931).

[50]*In re* Summers, 325 U. S. 561, 65 Sup. Ct. 1307 (1945).

[51]McDowell v. Board of Education, 104 Misc. 564, 172 N. Y. Supp. 590 (1918); *see* also Commonwealth v. Herr, 229 Pa. 132, 78 Atl. 68 (1910), sustaining a statute forbidding a public school teacher to wear, while teaching, any dress or insignia indicating membership in any religious order or sect.

[52]Cory v. Cory, 70 Cal. App. 563, 161 P.2d 385 (1945), *second opinion*, 71 Cal. App. 309, 162 P.2d 497 (1945), reversed an order taking children from the custody of their mother, a Jehovah's Witness, and giving the custody to the father, whose intentions as to the views to be taught the children did not appear; Maxey v. Bell, 41 Ga. 183 (1870), sustained a refusal to take children from a testamentary guardian belonging to the same sect as the testator; and State *ex rel.* Baker v. Bird, 253 Mo. 569, 162 S. W. 119 (1913), ordered a writ of prohibition to issue to prevent removal of a guardian because not of the religious faith of the last surviving parent on the ground that if the statute were so construed it would be unconstitutional. On the facts of each of these cases, I agree that there was not sufficient showing that the state's interest in the children was in jeopardy. Certainly, the state should not take a child from its parent because of the parent's religious views.

limiting the authority to ministers of certain denominations.[53] The present tendency is to say that opinions as to religion cannot be held to disqualify a witness, but the older authorities were to the contrary.[54] A decision that a state may, in a trial for a capital offence, challenge for bias a juror who has conscientious scruples against capital punishment seems clearly correct.[55]

II. Requiring Action Forbidden by Conscience

There is no essential difference in the test of constitutionality between governmental action forbidding one to do what his religious views command and that requiring him to do what they forbid. Either is an interference with the free exercise of his religion, and either can be sustained if there is a clear and present danger to the public sufficient to outweigh the impairment of the individual's right. Despite many present day ministers' efforts to shift the emphasis the other way, most of us seem to regard sins of commission as more serious than those of omission, so it requires a very serious menace to the public to justify the state's compelling one to do what he believes to be contrary to the command of God. Here the Atheist is on less favorable ground than the believer, since to require one to do that which he deems merely foolish is not so serious an interference with his freedom as to require him to do what he believes contrary to Divine Law.

Perhaps the clearest case of a valid requirement of that which the individual believes wrong is found in the law requiring vaccination of children attending the public schools, which is everywhere sustained.[56] When coupled with the requirement that all children attend a public school or an approved private school, this law collides with the religious beliefs

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[53] *In re* Saunders, 37 N. Y. S.2d 341 (1943); O'Neill v. Hubbard, 180 Misc. 214, 40 N. Y. S.2d 202 (1943).

[54] State v. Levine, 109 N. J. L. 503, 162 Atl. 909 (1932), held an Atheist may not be denied the right to be sworn and to testify in his own behalf. Thurston v. Whitney, 56 Mass. 104 (1848), denied that the refusal to hear a witness who was an Atheist violated the state constitutional provision which guaranteed that no one should be hurt, molested, or restrained for his religious profession, on the ground that Atheism is not a religious but an anti-religious profession.

[55] State v. Leuch, 198 Wash. 331, 88 P.2d 440 (1939).

[56] Vonnegut v. Baun, 206 Ind. 172, 188 N. E. 677 (1934); State v. Drew, 89 N. H. 54, 192 Atl. 629 (1937); *In re* Whitmore, 47 N. Y. S.2d 143 (1944); New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S. W. 303 (1918).

and scruples of some. It will not do to say these are unreasonable beliefs, contrary to common sense and so not religious beliefs at all. The proper solution is in saying this is a religious belief but it must yield to a public interest of great importance. Whereas to require submission to medical treatment for a non-contagious and minor disorder would be an unsupportable invasion of the freedom of one believing in healing by prayer alone, the requirement of vaccination of school children against smallpox is sustained by the state's great concern that its children be educated and also be protected from epidemics of a disease often fatal.[57] As Judge Panken of the Children's Court in New York has said:[58]

> "The Founders of the Republic and the framers of the Constitution of the United States of America and the people approving the same did not intend that the law would protect a person who might conceive of a God and the worship of that conception of God in a manner which might endanger the lives of the Community in which such a person might live."

The same state interest sustains the compulsory medical examination of applicants for a marriage license.[59] A New York decision sustained the conviction of a father who wilfully, and in violation of the statute, failed to provide and refused to permit medical aid for his two year old baby so that she died from pneumonia.[60] The father contended he believed in healing by prayer and not in physicians. The majority opinion by Mr. Justice Haight sustained the conviction on the ground that this was not an act of worship and so not within the constitutional protection. The concurring opinion of Mr. Justice Cullen is clearly correct in putting the decision on the basis of the state's right as parens patriae to legislate for the protection of children. As Mr. Justice Rutledge said in sustaining the power of the state to prevent parents sending children on the streets to sell papers:[61]

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and free-

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[57]See Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358 (1905).

[58]*In re* Whitmore, 47 N. Y. S.2d 143, 146 (1944).

[59]Peterson v. Widule, 157 Wis. 641, 147 N. W. 966 (1914).

[60]People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903).

[61]Prince v. Massachusetts, 321 U. S. 158, 166, 170, 64 Sup. Ct. 438 (1944).

> dom include preparation for obligations the state can neither supply nor hinder. . . . But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full legal discretion when they can make that choice for themselves."

The defense of the nation is a matter of such vital importance that one may be compelled to serve in the armed forces and even assigned combat duties notwithstanding an objection based solely upon a completely sincere belief either that all war or that the particular war is contrary to the law of God.[62] It has long been customary to exempt conscientious objectors, but such exemption is dependent upon Congressional policy and is not a constitutional right.[63] It follows that the conscientious objector may be required to perform some non-combat work in or out of the military services and imprisoned for his failure to report for such duty notwithstanding his belief that this too is sinful since it is an act in aid of war.[64] A draft law totally exempting regular "ministers

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[62]Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159 (1918).

[63]MacIntosh v. United States, 283 U. S. 605, 51 Sup. Ct. 570 (1931); Rase v. United States, 129 F.2d 204 (C. C. A. 6th 1943).

[64]Rase v. United States, 129 F.2d 204 (C. C. A. 6th 1943); Checinski v. United States, 129 F.2d 461 (C. C. A. 6th 1943); Hopper v. United States, 142 F.2d 181 (C. C. A. 9th 1944); Roodenko v. United States, 147 F.2d 752 (C. C. A. 10th 1945), *cert. denied*, 324 U. S. 860, 65 Sup. Ct. 867 (1945); United States v. Brooks, 54 F. Supp. 995 (S. D. N. Y. 1944); United States *ex rel.* Zucker v. Osborne, 54 F. Supp. 984 (W. D. N. Y. 1944).

of religion" while classifying as conscientious objectors, subject to service in work camps, workers of a sect which has no regular ministers but regards all its members as ministers, is not an arbitrary classification and is not a law establishing a religion within the meaning of the First Amendment.[65] The threat to the national safety being perhaps even greater when one counsels others to take no part in the war effort and to refuse to comply with the draft laws than when one himself refuses to comply, such utterances may be punished, when constituting a clear and present danger, though the speaker believes it to be his religious duty to speak as he does.[66] However, it is an exercise of a power which must be watched closely by the courts to see that an overly zealous legislature and prosecutor do not combine to interfere more than necessary with freedom of speech. As Mr. Justice Alexander of Mississippi said of a Jehovah's Witness selling literature teaching that war is wrong and a salute to the flag is sinful:[67]

> "I must confess I see a greater danger to free speech from the controlling opinion than I can find to the war effort by the frail opinions of appellant whose inconsequence is attested by the revulsion awakened in his accusers. War is an emergency chiefly because our liberties are at stake. There is neither logic nor law to support the view that these liberties must be surrendered in order to be saved."

The fanatic religionist insists not only that all men must love God but also that all men must show their love for God in the way the fanatic demonstrates his. Similarly, the fanatic patriot insists not only that all men must love our country but also that they must demonstrate their affection and loyalty by going through the identical ceremonies which the fanatic finds expressive of his own patriotism. There is little to choose between the religious zealot, who consigns to Hell anyone who

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[65]United States v. Stephens, 245 Fed. 956 (D. Del. 1917), *aff'd without opinion*, 247 U. S. 504, 38 Sup. Ct. 579 (1918); Rase v. United States, 129 F.2d 204 (C. C. A. 6th 1943); Checinski v. United States, 129 F.2d 461 (C. C. A. 6th 1943).

[66]Baxley v. United States, 134 F.2d 937 (C. C. A. 4th 1943).

[67]Taylor v. State, 194 Miss. 1, 11 So.2d 663 (1943). Similarly, Judge Schwellenbach felt the dignity of his court might be better preserved by dismissing contempt charges brought against another member of the sect who for some reason felt that to serve on the jury conflicted with his religious faith. United States v. Hillyard, 52 F. Supp. 612 (E. D. Wash. 1943).

prefers to worship in some way other than through the repetition of the exact words of the zealot's creed, and the intolerant patriot, who calls "disloyal" whoever prefers to demonstrate his loyalty "to the flag of the United States of America and to the Republic for which it stands" by standing quietly with his arms at his sides and his heels separated rather than by standing with heels together and the right arm held at a certain angle. Love of country, like love of God, is worthy of a more searching test. The Constitution does not protect against the excesses of the religious or of the patriotic zealot, but it does forbid the state, or Congress, to array itself on the side of the religious fanatic by enacting a law establishing a religion. After going first in the opposite direction, the Supreme Court reversed itself four years later and now holds that the same constitutional provisions forbid either government to require an eight year old child to salute the flag on the pain of being denied an education in the public schools, the only school available to the child, despite the child's firm, though foolish, conviction that to do so is contrary to the command of God and will entail the child's spiritual death at the Battle of Armageddon, whenever and wherever that may be.[68] The

[68]In Minersville School District v. Gobitis, 310 U. S. 586, 60 Sup. Ct. 609 (1940), the Court, over a vigorous dissent by Mr. Justice Stone, sustained the expulsion from the public school of a youthful Jehovah's Witness who, while asserting her respect for the flag and love of country, said she was willing to stand quietly and respectfully while her schoolmates saluted the flag and repeated the pledge of allegiance, but that she believed for her to join in the ceremony would be a violation of the Second Commandment and would call down upon her the wrath of God, resulting in her death at the Battle of Armageddon. This was reversed in West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 Sup. Ct. 1178 (1944), on the ground that there was no clear and present danger to the state presented by the child's refusal to salute the flag. Curiously, the *Gobitis* case was in accord with all decisions on the question by the state courts of last resort rendered prior to it, but, save for Arizona, all states passing upon the question thereafter refused to follow it, even before the Barnette decision. *Pre-Gobitis*: Gabrielli v. Knickerbocker, 12 Cal.2d 385, 82 P.2d 391 (1938); Leoles v. Landers, 184 Ga. 580, 192 S. E. 218 (1937); State *ex rel.* Bleich v. Board of Public Instruction, 139 Fla. 43, 190 So. 815 (1940); Nicholls v. Mayor of Lynn, 297 Mass. 65, 7 N. E.2d 577 (1937); Hering v. State Board of Education, 117 N. J. L. 455, 189 Atl. 629 (1937); People *ex rel.* Fish v. Sandstrom, 279 N. Y. 523, 18 N. E.2d 840 (1939). *Post-Gobitis*: State v. Davis, 58 Ariz. 444, 120 P.2d 808 (1942); Zavilla v. Masse, 112 Colo. 183, 147 P.2d 823 (1944); State v. Smith, 155 Kan. 588, 127 P.2d 518 (1943); Bolling v. Superior Court, 16 Wash.2d 373, 133 P.2d 803 (1943); *see In re* Jones, 175 Misc. 451, 24 N. Y. S.2d 10 (1941).

fatal vice in the flag salute statutes is in their utter futility. Designed to promote loyalty and love of country, the compulsory flag salute law, if obeyed by such a child, makes the flag, for her, a symbol of tyranny, whereas the sight of their classmate, permitted to stand quietly, in conformity both with her respect for the flag and with her religious conviction, should make the other children see in the flag a symbol of the truth that in freedom to disagree there is strength.[69] It is difficult to believe that any clear and present danger to the nation is removed by interference with a child's religious opinion so lacking in plausibility. "The flag 'cherished by all our hearts' should not be soiled by the tears of a little child. The Constitution does not permit . . . that the flag should be so soiled and dishonored."[70]

III. Requiring Support of a Distasteful Religion

Madison's *Memorial and Remonstrance,* which paved the way for the adoption in Virginia of Jefferson's Bill for Religious Liberty, and, through that, for the adoption of the First Amendment and similar provisions in the several state constitutions, was called forth by a proposal that a tax be levied for the support of teachers of religion, that is, of ministers. This would have been, for a state accustomed to an established church, an exceedingly liberal tax statute, since it permitted the taxpayer to designate the denomination or sect whose ministers were to receive the benefit of his taxes. Madison's impressive marshalling of the consequences which inevitably accompany a state church[71] summarized the Virginians' own experiences in the then recent Colonial era when Baptists and others who dissented from the doctrines of the Church of

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[69]See Beals, J., in Bolling v. Superior Court, 16 Wash.2d 373, 133 P.2d 803 (1943).

[70]Lehman, J., concurring specially in People *ex rel.* Fish v. Sandstrom, 279 N. Y. 523, 18 N. E.2d 840 (1939). The flag salute by those in the armed services rests on the firmer ground of the need for military discipline. *See* McCord v. Page, 124 F.2d 68 (C. C. A. 5th 1942).

[71]He said the effects upon the Christian religion would include: a weakening of confidence in its innate strength; the development in the clergy of pride and indolence, in the laity of ignorance and servility, and in both of superstition, bigotry, and persecution; and a jealous lack of harmony among the several sects. The effect upon the civil government, he thought, would be that it would become increasingly tyrannical, would be supported by the Church in its tyrannies, and, becoming so, would lose citizens by emigration and cessation of immigration.

England were imprisoned for preaching,[72] and, at least in the early days of the colony, failure to attend the services of the established church three times carried the death penalty.[73] Such experiences were not, of course, peculiar to Virginia. "The history of the times is filled with instances of bigotry, intolerance, repression and persecution. The Colonists who fled from the old world to escape religious persecution brought with them none of the tolerance towards those with whom they disagreed which they demanded from those from whom they fled. The statute books of the Colonies were replete with laws by which the majority members of each Colony attempted to enforce upon others the precepts of the particular denomination or faith to which the majority adhered."[74] All along the Colonial seaboard experiments with government churches proved disastrous to religion and repressive of individual freedom. Later the same results appeared in Texas under the Mexican rule[75] and in Utah under the Mormons. In France, contemporaneously with our Colonial era, the arrogance of the established church, and its failure to speak in opposition to the abuses of the corrupt government to which it was wedded, was breeding a hostility to religion which became apparent in the excesses of the French Revolution. Partly because neither the established churches nor the governments of the colonies had become so powerful as their counterparts in France, no wholesale hostility to religion was responsible for or represented in the ratification of the First Amendment. Rather, it was the result of a generally sympathetic interest in religion and belief that it would be most flourishing when taken off its diet of tax monies and freed from the protection and supervision of its policeman nurse. There may also have been a suspicion that government too would benefit by the divorce, but the principal motive in keeping the various churches out of government was not so much a desire to shield government from

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[72]SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA, c. 3 (Rev. ed. 1894).

[73]"Every man and woman shall repair in the morning to the divine service and sermons preached upon the Sabbath Day, and in the afternoon to divine service and catechizing, upon pain for the first fault to lose their provision and the allowance for the whole week following; for the second, to lose the said allowance and also be whipped; and for the third to suffer death." Law enacted in 1610 for the governance of the Colony at the behest of the Church of England, as quoted in Lawson v. Commonwealth, 291 Ky. 437, 164 S. W.2d 972 (1943).

[74]Schwellenbach, D. J., in United States v. Hilliard, 52 F. Supp. 612 (E. D. Wash. 1943).

[75]*See* Church v. Bullock, 104 Tex. 1, 109 S. W. 115 (1908).

the influence of religion—an impossible task if its officials are individually subject to that influence—as it was a mutual, jealous distrust of each other by the various denominations and sects, and their resolve to prohibit a remarriage between government and any church lest a misguided government pick one of the other would-be brides. This interdenominational jealousy has probably been resposible for the lengths to which we have gone in keeping the camel's nose out of the tent—to shift to a more familiar metaphor.

The so-called wall of separation between religion and government is a rather porous structure. It permits a considerable amount of governmental interference with religious practices to seep through. Likewise, the mere fact that an action of government benefits religion, or accords with the belief of some sect, is not necessarily fatal to its validity. If the benefit to religion is merely incidental to some other and legitimate concern of government, sufficient of itself to support the action, such benefit does not poison the statute. In forbidding a law establishing a religion or prohibiting the free exercise thereof, the Constitution does not protect two interests, but the one fundamental freedom of the individual to worship or not worship as he, himself, thinks proper. It is within the power of government to invade that freedom, either by forbidding or requiring practices in conflict with conscience, when not to do so will expose the public health, safety, morals or welfare to a clear and present danger. It would seem to follow that governmental action, which neither presently invades that freedom of the complainant, nor contains within itself any threat of such invasion in the future through the present selection of a governmental favorite among the various religions or sects, is not only not forbidden by the First Amendment but is wholly outside its contemplation. As a matter of legislative policy, it may well be thought desirable not only to keep every camel's nose out of the tent but to drive the whole herd off to a distance. However, the First Amendment does not seem to forbid the government to speak kindly to the entire herd, including Atheists and non-Christian religions, so long as none is accorded special kindnesses.

Laws requiring cessation of labor and business pursuits on Sunday have been sustained against attacks by individuals whose religious beliefs require observance of Saturday as the Sabbath as well as by those who object to observing any day.[76] There is little doubt that in enacting

[76]Brunswick-Balke-Collander Co. v. Evans, 228 Fed. 991 (D. Ore. 1916); Frolickstein v. Mobile, 40 Ala. 725 (1867); Elliott v. State, 29 Ariz. 389, 242 Pac. 340

such laws most legislatures were motivated by sympathy for the teachings of the Christian churches, and it is unrealistic to say to the orthodox Jew that the law does not interfere with his religious freedom since he can keep his store closed on Saturday also if he wishes. The reasoning adopted by practically all the courts which have considered the question is: experience, apart from religion, has taught us that at least one day of rest in seven is necessary in the interest of the public health; therefore, it is within the police power of the state to require such rest periods; as a matter of practical enforcement of such requirement the state need not allow, as some do allow, the individual to select his own day of rest, but may require all to observe the same day; in selecting this day the state may pick the one which will cause the least disruption in the normal life of the community. That is, where there is a secular reason for the law sufficient to give it constitutionality, the state need not refrain from enacting it merely because the tenets of some religion also impose the requirements upon its adherents.

A bit closer to the line, but still within the permission of this rule, are laws designed to protect believers from interference with their worship. Illustrations are found in laws prohibiting the sale of intoxicants or the operation of places of amusement and sport on Sunday, other businesses being left to the regulation of conscience,[77] laws forbidding disturbance of public worship,[78] and laws punishing blasphemy.[79] Of

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(1926); Scoles v. State, 47 Ark. 476, 1 S. W. 769 (1886); Rosenbaum v. State, 131 Ark. 251, 199 S. W. 388 (1917); *Ex parte* Andrews, 18 Cal. 678 (1861), reversing an earlier decision to the contrary in *Ex parte* Newman, 9 Cal. 502 (1858); State v. Blair, 130 Kan. 863, 288 Pac. 729 (1930); Commonwealth v. Has, 122 Mass. 40 (1877); Hiller v. State, 124 Md. 385, 92 Atl. 842 (1914); State v. Weiss, 97 Minn. 125, 105 N. W. 1127 (1906); State v. Chi., B. & Q. R. R., 239 Mo. 196, 143 S. W. 785 (1912); Komen v. St. Louis, 316 Mo. 9, 289 S. W. 838 (1926); People v. C. Klinck Packing Co., 214 N. Y. 121, 108 N. E. 278 (1915); State v. Powell, 58 Ohio St. 324, 50 N. E. 900 (1898); Specht v. Commonwealth, 8 Pa. 312 (1848); Charleston v Benjamin, 2 Strob. Law 508 (S. C. 1846); Pirkey Bros. v. Commonwealth, 134 Va. 713, 114 S. E. 764 (1922).

[77]State v. Bett, 31 La. Ann. 663 (1879); Minden v. Silverstein, 36 La. Ann. 912 (1884); State v. Ludwig, 21 Minn. 202 (1875); State v. Ambs, 20 Mo. 214 (1854); State v. Barnes, 22 N. D. 18, 132 N. W. 215 (1911); Gabel v. Houston, 29 Tex. 335 (1867).

[78]Cline v. State, 9 Okla. Cr. Rep. 40, 130 Pac. 510 (1913).

[79]State v. Chandler, 2 Har. 553 (Del. 1837); Commonwealth v. Kneeland, 37 Mass. 206 (1838); State v. Mochus, 122 Me. 84, 113 Atl. 39 (1921).

the latter Chief Justice Shaw of Massachusetts said:[80]

> "For a man's private opinions, for his communion with his Creator, for his devotional feelings and exercises he is answerable to his God alone. When he engages in the discussion of any subject in the honest pursuit of truth, and endeavors to propagate any notions and opinions which he sincerely entertains, he is covered by the aegis of the constitution; but when he wantonly or maliciously assails the rights and privileges of others, or disturbs the public peace, he is the proper subject of punishment."

Thus, while the state may not forbid blasphemy, or desecration of the Sabbath, for the purpose of protecting God's interest therein, it may do so for the purpose of protecting the public peace from disruption by fights between the blasphemer and the church member who makes up for his lack of Christian self control by an excess of zeal in the protection of Christian institutions from insult; and it may require saloons to close on Sunday, not because to remain open then is sinful, but because on Sunday, as on election day, there is an unusual tendency for the idle to congregate there to carouse and fight. For the courts to enforce testamentary provisions tying religious strings to bequests,[81] or to protect the property rights of a church from trespass by non-believers or rebels against the church authorities,[82] is nowhere regarded as violative of such constitutional provisions, since in these instances the courts are functioning as secular agencies determining the civil rights of the disputants and are not inquiring into the validity of their respective religious opinions.

Two things are clearly forbidden by the prohibition of laws establishing a religion. One is for the government to require attendance at religious services. The other is for the government to tax for the support or aid of religious institutions. A requirement that one attend religious services is

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[80]Commonwealth v. Kneeland, 37 Mass. 206, 242 (1838).

[81]Lundquist v. First Evangelical Lutheran Church, 193 Minn. 474, 259 N. W. 9 (1935); *In re* Kempf's Will, 297 N. Y. Supp. 307, 252 App. Div. 28 (4th Dep't 1937); Glover v. Baker, 76 N. H. 393, 83 Atl. 916 (1912); *In re* Paulson's Will, 127 Wis. 612, 107 N. W. 484 (1906).

[82]Purcell v. Summers, 145 F.2d 979 (C. C. A. 4th 1945); Ashworth v. Brown, 240 Ala. 164, 198 So. 135 (1941); Stone v. Bogue, 238 Mo. App. 392, 181 S. W.2d 187 (1944).

not saved by offering him a choice among a variety of denominations, since the Atheist is protected in his freedom of irreligion.[83] The only problem here lies in determining what constitutes a religious service, and that question has arisen most frequently in connection with exercises held in public schools. Reading aloud, without comment, selections from the Bible produces conflicts between: the Atheist, who contends that to read these without comment implies the Bible's authority which he denies; the Jew, who believes the Old Testament is authoritative but the New is not; the Protestant, who prefers the King James Version; and the Catholic, who believes the King James Version is incomplete and inaccurate and only the Douay Bible should be read, and, while that is entirely authoritative, its reading should always be accompanied by the authoritative interpretation of the Catholic Church; not to mention the various sub-divisions of each group who are unwilling for certain verses to be read without being accompanied either by an explanation or the reading of other selections. Similarly, there is a great variety of opinion as to the proper content and manner of prayer. In a decision in 1854, sustaining the expulsion from the public school of a Catholic child who refused to read from a Protestant version of the Scriptures, Mr. Justice Appleton of the Maine court said:[84]

> "The truth or falsehood of the book in which the scholars were required to read, was not asserted. . . . A chapter in the Koran might be read, yet it would not be an affirmation of the truth of Mahomedanism. . . . Reading the Bible is no more an interference with religious beliefs than would reading the mythology of Greece or Rome be . . . an affirmance of the pagan creeds."

Such an argument will fail to impress the teacher who has had his favorite expositions met with, "That's not what the book says." Whatever may have been the case in the schools of ancient Athens or Rome, Homer and Virgil were never read in American schools as the ultimate authority on the nature of God, and one shudders to think what would have happened

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[83]People of Illinois v. Board of Education, 68 Sup. Ct. 461 (U. S. 1948).

[84]Donohoe v. Richards, 38 Me. 379 (1854); *accord,* Spiller v. Woburn, 94 Mass. 127 (1866), saying that to require children to stand during the prayer with bowed heads was permissible since they were not thereby required to join in the prayer; Church v. Bullock, 104 Tex. 1, 109 S. W. 115 (1908), saying that the King James Version of the Bible is not sectarian in itself.

to a teacher opening a public school in Maine in 1854 by reading without comment, a passage from the Koran, spreading a prayer rug on the floor and with her face turned toward the East invoking Allah's protection. Illinois held in 1910 that the reverent reading of a passage of Scripture, the offering of a prayer, and the singing of a hymn is a religious service which children cannot be required to attend,[85] and there would probably be no disagreement with that view anywhere today. Virginia has gone so far as to hold that sentence of a juvenile delinquent cannot be suspended on condition that he attend Sunday school each Sunday for one year.[86]

So effective was Madison's *Remonstrance* that since its publication only one attempt to levy a tax for the payment of the salary of a minister has reached a court of last resort, and it fell before the express prohibition of the New Hampshire Constitution during Jefferson's first administration.[87] That financial benefits conferred indiscriminately by government upon religious institutions are not regarded by the American people as necessarily violative of the constitutional provisions is illustrated in the widespread, perhaps universal, practice among the state legislatures of exempting church and church school property from taxation,[88] and the judicially developed rule that a charitable corporation is not liable for injuries caused by the negligence of its officers.[89] Indirect, but important, benefits are conferred upon sectarian schools through the state's furnishing free textbooks to the pupils and providing them with free transportation between home and school, and are also found in the Federal Government's aiding students attending denominational colleges either by way of paying them for work done for the college, as was the case under the program of the National Youth Administration of the 1930's, or by way of compensating them for past services to the government as is done under the G. I. Bill. The indiscriminate furnishing of free textbooks to children attending either public or state approved parochial schools has

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[85]People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910); *accord,* People v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); State v. Scheve, 65 Neb. 853, 91 N. W. 846 (1902).

[86]Jones v. Commonwealth, 185 Va. 335, 38 S. E.2d 444 (1946). *See* Miami Military Institute v. Leff, 129 Misc. 481, 220, N. Y. Supp. 799 (1926), denying the right of a private school to compel its students to attend church off the campus.

[87]Muzzy v. Wilkins, Smith 1 (N. H. 1803).

[88]Such exemption was held not a law establishing a religion in Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308, 163 N. E. 1 (1928).

[89]Glaser v. Congregation Kehillath Israel, 263 Mass. 435, 161 N. E. 619 (1928).

been sustained against the contention that this is establishing religion,[90] but it has been held that a parochial school cannot be incorporated into the public school system so as to justify the use of school funds for the payment of rent to the church for the use of its building and of salaries to the sisters, who taught in the school while wearing the official dress of their order, the celebration of Mass and the giving of religious instruction being regular parts of the school's daily program.[91]

One of the most controversial decisions of the United States Supreme Court in recent years was that in *Everson v. Board of Education of Ewing Township*.[92] The New Jersey statute provided that when any school district furnished transportation to and from public schools, transportation between points on established routes "shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." The school board authorized reimbursement to parents of money expended by them in transporting children by regular buses to and from a public or a Catholic parochial school. The attack was made by a taxpayer who relied upon both the state and federal constitutions. A five to four division in the Court sustained the school board's action. A disagreement as to the proper interpretation of the board's resolution probably explains the decision despite Mr. Justice Rutledge's disclaimer of this as the basis of his dissent. Mr. Justice Black, speaking for the majority, thought no favoritism for Catholic schools over other non-public schools was shown to be involved since there was no showing that there was any other non-public and non-profit school in the township. Therefore, he likened the school board's action to that of the policeman regulating traffic while the pupils of the Catholic school crossed the street and to that of the fire department responding to a call from a parochial school, saying:[93]

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any

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[90]Cochran v. Board of Education, 281 U. S. 370, 50 Sup. Ct. 335 (1930); Chance v. Mississippi State Textbook Bd., 190 Miss. 453, 200 So. 706 (1941). *Contra*: Smith v. Donahue, 202 App. Div. 656, 195 N. Y. Supp. 715 (3d Dep't 1932).

[91]Harfst v. Hoegen, 349 Mo. 808, 163 S. W.2d 609 (1943).

[92]330 U. S. 1, 67 Sup. Ct. 504 (1947).

[93]The quoted passage appears at page 16 of the official report. Italics are by the Court.

> church. On the other hand New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or members of any other faith, *because of their faith or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious beliefs."[94]

Mr. Justice Jackson, with whom Mr. Justice Frankfurter concurred, dissented, saying the basic fallacy in the Black opinion was that it ignored the school board's having limited reimbursement to those attending public and Catholic schools, so a true comparison would be with a fire department which, on arrival at the fire, goes to work if the building houses a Catholic school but goes home if it is one owned by the Lutherans. However, since both of these justices also concurred in the dissenting opinion of Mr. Justice Rutledge, saying that it is immaterial whether the reimbursement was to be made to all religious schools of whatever faith, it is not clear just where they would draw the line. While the majority's interpretation of the school board's resolution appears incorrect and, therefore, the decision seems erroneous, its test of constitutionality appears to be that supported by public opinion and innumerable legislative and judicial interpretations running from the inception of our government down to the present. So long as a child is furnished identical books, transportation, and school credit whether he goes to a public school or to one run by a Christian sect, a sect of some other religion, or by Atheists, it is difficult to see wherein the furnishing of such benefit is an act establishing a religion or prohibiting the free exercise thereof.

In the very recent case of *People of Illinois v. Board of Education*[95] the United States Supreme Court held the giving of religious instruction in a public school building during regular school hours is forbidden by

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[94]A statute permitting a county to provide free transportation to all non-public schools satisfying the compulsory attendance law was sustained in Nichols v. Henry, 301 Ky. 434, 191 S. W.2d 930 (1946).

[95]68 Sup. Ct. 461 (U. S. 1948).

the Fourteenth Amendment notwithstanding the fact that pupils who object, or whose parents object, are excused from the room and allowed to pursue their normal school work in other portions of the building. The plaintiff, a taxpayer and mother of a pupil in the school, contended that the action of the school board in permitting these practices was both a use of tax money for the establishment of religion and an infringement of her freedom of religion and that of her child in that the child was thereby being coerced into attending a distasteful religious service. Prior to this decision somewhat similar cases had led to diverse decisions in the courts of the states. The state courts have shown little patience with the suggestion that to allow the occasional use of the public school building, after school hours or on Sunday, for religious services is a use of taxes for the establishment of religion.[96] The day or hour of such use would appear to be unrelated to this question. The purchase of Bibles for the school library was held to be a legitimate use of tax funds in California,[97] and that state joined with Illinois in finding it neither an improper use of tax-bought time of school officials nor an impairment of pupils' freedom of conscience for the school to excuse from school duties for a brief period each week children whose parents wished them to attend religious classes conducted off the school grounds by teachers not paid from public funds,[98] a question reserved in the Supreme Court decision, while Wisconsin has determined that it is not unconstitutional to have a portion of the high school commencement exercises in a church.[99] The weight of authority among the state courts was to the effect that, so long as the child might withdraw, the reading of the Bible in the schoolroom, and as a part of the daily exercises of the school, was not unconstitutional since attendance was voluntary and the proportion of the teacher's salary or building expense attributable to this activity was so small as to make untenable the plaintiff's position that he was being taxed to support a religious institution.[100] However, Louisiana and Wisconsin were of the

[96]Nichols v. School Directors, 93 Ill. 61 (1879); State v. Dilley, 95 Neb. 527, 145 N. W. 999 (1914); Lewis v. Board of Education, 285 N. Y. Supp. 164, 157 Misc. 520 (1936) *aff'd by Appellate Division*, 247 App. Div. 106, 286 N. Y. Supp. 174 (1st Dep't 1936).

[97]Evans v. Selma School Dist., 193 Cal. 54, 222 Pac. 801 (1924).

[98]Gordon v. Board of Education, 178 P.2d 488 (Cal. App. 1947); People *ex rel.* Latimer v. Board of Education, 394 Ill. 228, 68 N. E.2d 305 (1947).

[99]State v. District Board, 162 Wis. 482, 156 N. W. 477 (1916).

[100]Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895 (1922); Moore v. Monroe, 64 Iowa 367, 20 N. W. 475 (1884); Pfeiffer v. Board of Education, 118 Mich. 560, 77

opinion that for a child to ask to be excused would so stigmatize him in the eyes of his orthodox classmates that the exercise constituted an interference with his religious freedom.[101]

The practice which the Supreme Court held to violate the Constitution was one type of the so-called "released time" programs, through which school authorities and religious groups cooperate to the end that the secular or materialistic education supplied by the school may, if the children's parents so wish, be supplemented by contemporaneous instruction in ethical and spiritual matters by a representative of the religious group preferred by the parents, and that this may be done without encroaching upon what the child regards as his free time. The instructors were paid and were selected by Jewish, Catholic or Protestant groups, subject to the approval and supervision of the superintendent of schools. Each group's classes met for thirty minutes each week in its own designated room in the school building during regular school hours, and were composed entirely of children whose parents had signed printed cards requesting the school authorities to permit their children to attend. Students whose parents did not so request were required to go to some other room in the building and there engage in regular school work. Students released from regular school work under this plan were required to attend the class in religious instruction. No religious group could so use a school room until it applied to the school superintendent and he found it "practical" for such group to teach in the school system. All books and materials were bought with private funds, and classes were scheduled so as not to interfere with regular school classes. The plaintiff's son was the only child in his school not participating. He spent the period pursuing his studies under the supervision of his regular teacher.

The fact that four opinions were written in the case indicates the difficulty in locating the line at which governmental cooperation with religion becomes a law establishing a religion. Mr. Justice Black, who wrote the opinion of the Court, said:[102]

"Pupils compelled by law to go to school for secular education

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N. W. 250 (1898); Kaplan v. Independent School District, 171 Minn. 142, 214 N. W. 18 (1927); *see* People v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); North v. Board of Trustees, 137 Ill. 296, 27 N. E. 54 (1891); State v. Scheve, 65 Neb. 853, 91 N. W. 846 (1902).

[101]Herold v. Parish Board, 136 La. 1034, 68 So. 116 (1915); State v. District Board, 76 Wis. 177, 44 N. W. 967 (1890).

[102]The passage quoted appears at pages 464, 465 of the Supreme Court Reporter.

> are released in part from their legal duty upon the condition that they attend the religious classes. . . . Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State."

He expressly rejected the argument that the First Amendment was intended to forbid only governmental preference of one religion over another, which appeared to be the basis of his opinion in the New Jersey School Bus Case. The difficulty with his position here is that the First Amendment does not use the term "separation of Church and State" but forbids only a law establishing a religion or prohibiting the free exercise thereof. To read Jefferson's metaphor, "a wall of separation," into the Fourteenth Amendment as an absolute prohibition of all state benefit to religious groups, even though indiscriminate, makes the implied restriction upon the states more severe than Jefferson and his contemporaries thought necessary to impose expressly upon Congress. The four dissenters in the *Everson* case here concurred specially in an opinion written by Mr. Justice Frankfurter, who agreed that the Fourteenth Amendment requires "separation in the field of education." Curiously, these four justices are here less strict than Mr. Justice Black in insisting upon no contact whatever between government and religion. They point out that there are many types of "released time" plans and intimate that school consent to attendance by pupils upon religion classes held in non-school buildings during what would normally be a play period might be within the Constitution. Mr. Justice Jackson, in a specially concurring opinion of his own, doubted that the embarrassment to the plaintiff's son resulting from his being alone in his refusal to attend the religion classes was sufficient to make this a law prohibiting the free exercise of his, or his mother's, Atheistic belief, and also doubted that the mother, as taxpayer, had shown any substantial injury. Consequently, he doubted the existence of any federal question giving the Court jurisdiction, and, assuming jurisdiction, he further doubted the wisdom of going so far as the Court's opinion seemed to him to go, saying:[103]

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[103]The passage quoted appears at pages 477, 478 of the Supreme Court Reporter.

> "I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. . . . One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared. . . . When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry. . . . While I agree that the religious classes involved here go beyond permissible limits, I also think the complaint demands more than plaintiff is entitled to have granted. So far as I can see this Court does not stop, nor does it set up any standards by which the State court may determine that question for itself."

Dissenting, Mr. Justice Reed was unable "to extract from any of the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional," and thought it probable that the decision precluded any classes in religion, on or off the school grounds, so long as held within the pupils' school time and the school authorities adopted regulations to facilitate attendance. Such an interpretation of the Constitution he regarded as fallacious, saying:[104]

> "The practices of the federal government offer many examples of this kind of 'aid' by the state to religion. The Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings. The armed forces have commissioned chaplains from early days. They conduct the public services in accordance with the liturgical requirements of their respective faiths, ashore and afloat, employing for the purpose property belonging to the United States and dedicated to the services of religion. . . . In the United States Naval Academy and the United States Military Academy, schools wholly supported and completely controlled by the federal government, there are a number of religious activities. Chaplains are attached to both schools. Attendance at church services on Sunday is compulsory at both the Military and Naval Academies."

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[104]The passage quoted appears at page 486 of the Supreme Court Reporter.

It might be argued in reply to Mr. Justice Reed that the reason Congress can spend taxes collected from the mother of the Illinois schoolboy to have prayers said for itself and to provide spiritual comfort for men dying on the battlefield, while Illinois cannot spend what it exacts from her to teach other people's children what their parents want them to learn, is found in the decision of *Massachusetts (Frothingham) v. Mellon.*[105] There the Court held a taxpayer has no standing to question the constitutionality of a federal expenditure since his tax is such an infinitesimal part of the national revenue that he can trace no part of his money into the appropriation to which he objects. If this be the answer then we have, by a series of judicial opinions in the past twenty-five years, arrived at the curious conclusion that though the First Amendment expressly forbids Congress to establish a reljgion it affords us no actual protection against a national church, while the Fourteenth Amendment does protect us from a state church though there was not the remotest suggestion that it was intended to do so until it had been in the Constitution for over fifty years.

In the writer's opinion the inability of the Atheist to attack the Congressional policy of employing chaplains to bury the dead and strengthen the living before or after battle is due to a weakness in the attack more fundamental than a difficulty in tracing tax monies. It is submitted that the majority of the Court erred in the *Champaign* "released time" case in reading into the First Amendment Jefferson's metaphor, "wall of separation between church and state," and that the true test of Congressional or state action should be: (1) Does the governmental action single out a sect or a religion and put it in a preferred position? (2) Does the governmental action restrict the objector's religious profession or practices, either by requiring or by forbidding action, more than is necessary in order to guard the public health, safety, morals or welfare, against a clear and present danger? If both questions be answered in the negative it is difficult to see how the action either establishes a religion or unconstitutionally prevents the free exercise thereof. The writer believes the Champaign plan was constitutionally defective for a reason not mentioned in any of the four opinions. A group seeking to give its children instruction in its views could not do so without applying for a permit and without a finding by the school superintendent that such group's participation in the plan was "practical." This

[105]262 U. S. 447, 43 Sup. Ct. 597 (1923).

seems to violate the principle of the *Lovell* case,[106] which denied the state's right to require a permit to preach on the streets so as to leave the refusal of a permit to the discretion of a government official. Whatever may have been true in Champaign, it is not difficult to imagine a school superintendent's finding it "not practical" for a Fundamentalist Mormon, a Buddhist, or an Atheist to use one of the schoolrooms in the way the three approved groups were doing. For constitutional purposes Atheism must be classed as a religion, much as its advocates may resent the classification. Clearly, the plaintiff in the *Champaign* case was entitled to use a schoolroom half an hour a week to teach her beliefs to her son and the children of any other parents who might wish to hear her views, so long as the Catholic or the Baptist is given such a privilege. Though open to this objection it would seem that the denunciation of the Champaign plan might well await a showing that some group has been denied the privilege.

Though the ridicule of one's fellows is feared by most children, and probably by most adults, far more than is the policeman, it is indeed doubtful that a state prohibits the free denial of religion by one child simply by permitting his schoolmates to leave him and go into other rooms to practice their own beliefs. At least it would seem that the little boy in the *Champaign* case had shown no such coercion in the absence of the slightest indication that his schoolmates regarded him as unusual. That the school authorities checked attendance at the religious classes so as to prevent the children from leaving the building and getting into danger or from disrupting regular school classes by undisciplined meanderings about the building while supposedly in the religion class hardly seems an infringement of their liberties, since a child aggrieved by such supervision could escape it by joining the young Atheist. This seems to leave of the justices' arguments only the one that the classes are held in a building erected with tax money. If this be sound, then the state penetentiaries are all unconstitutionally supported places of worship, since it is customary to hold services in them for such of the prisoners as care to attend. A comparison between schools and these institutions is not unheard of, but to liken them to churches seems slightly ridiculous. But, if the Champaign plan did violate the Constitution for the reason that a city school board cannot allow a religious service in a place built and maintained with taxes, on what basis is the Champaign policeman forbidden to prevent a Jehovah's Witness from preaching on the city streets,

[106]303 U. S. 444, 58 Sup. Ct. 666 (1938).

which, if Champaign be a typical city, may well represent a greater investment of tax money than does the school building?

The Atheist, like the Christian, the Jew and the Buddhist, is entitled to protection from laws putting him in an unfavorable position because of his belief, but he is not entitled to have the courts put him in a dominant position, from which he can stop the Christian or the Jew or the Buddhist from freely exercising his belief in a manner not injurious to the Atheist. History is so crowded with evil consequences of government-favored religions and church-dominated governments that it is indeed well to be vigilant in keeping the camel's nose out of the tent, but the *Champaign* case seems to license the Atheist and to slap the noses of some harmless and innocent camels.