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Freedom and/or Separation: The Constitutional Dilemma of the First Amendment†

Leo Pfeffer*

I. THE ORIGINS OF CONSTITUTIONAL PROTECTION

It is not the purpose of this Article to explore in detail the history that culminated in the first amendment's mandate against laws respecting an establishment of religion or prohibiting its free exercise. It is sufficient to note that the mandate resulted from a combination of practical considerations and ideological influences. Among the practical considerations were the adoption by Parliament of the Act of Toleration of 1689, which was generally, though not universally, assumed to apply to the colonies; the mutiplicity of Protestant sects within the colonies; the relatively substantial number of unchurched persons; the rise of commerce; and the exigencies of the Revolutionary War, which impelled the colonial governments to avoid alienating Catholics within the colonies and in Canada. The ideological influences included the religious tradition of Roger Williams and William Penn; the political and social thought of John Locke and other protagonists of the Social Contract; the Great Awakening of the eighteenth century, with its individualization of religion; and the spread of rationalism and deism during the last quarter of the eighteenth century.¹

The struggle toward free exercise was slow, painful, and uneven. Maryland's "Act concerning Religion," adopted in 1649, is generally referred to as the Toleration Act because it allowed some degree of toleration of all Christian denominations, in-

† This Article is a revision of a paper presented at a symposium entitled "From Religious Toleration to Religious Freedom: A Symposium," sponsored by the Department of Religion, Columbia University, and held at Newport, Rhode Island, on May 24-26, 1978.

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1. For a more thorough analysis of the historical and ideological influences on the first amendment, see L. PFEFFER, *CHURCH, STATE, AND FREEDOM* 71-127 (rev. ed. 1967) (chs. 3-4); A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 3-103 (rev. ed. 1964).

cluding Catholics.² The Act nevertheless imposed the penalty of death and confiscation or forfeiture of estate upon all who shall from henceforth blaspheme God, . . . or shall deny our Saviour Jesus Christ to be the sonne of God, or shall deny the holy Trinity the father sonne and holy Ghost, or the Godhead of any of the said Three persons of the Trinity or the Unity of the Godhead.³

Even more tortuous than the development of free exercise was the progress of disestablishment and the adoption of the principle later called the separation of church and state. The relationship of religion to government in the original thirteen states at the time of the adoption of the Constitution can be summarized as follows:

Two . . . , Virginia and Rhode Island, conceded full freedom;

One, New York, gave full freedom except for requiring naturalized citizens to abjure foreign allegiance and subjection in all matters ecclesiastical as well as civil;

Six, New Hampshire, Connecticut, New Jersey, Georgia, North and South Carolina, adhered to religious establishments;

Two, Delaware and Maryland, demanded Christianity;

Four, Pennsylvania, Delaware, North and South Carolina, required assent to the divine inspiration of the Bible;

Two, Pennsylvania and South Carolina, imposed a belief in heaven and hell;

Three, New York, Delaware, and South Carolina, excluded ministers from civil office;

Four, Maryland, Virginia, North Carolina, and Georgia, excluded ministers from the legislature;

Two, Pennsylvania and South Carolina, emphasized belief in one eternal God;

One, Delaware, required assent to the doctrine of the Trinity;

2. Be it therefore [enacted] that noe person or p[er]sons whatsoever within this Province, . . . professing to believe in Jesus Christ, shall from henceforth be [in any way] troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof within this Province . . . nor [in] any way compelled to the beliefe or exercise of any other Religion against his or her consent

An Act concerning Religion (Apr. 21, 1649), *reprinted in* 1 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 244, 246 (W. Browne ed. 1883). See R. BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 25 (1950); S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 376-77 (1970); A. STOKES & L. PFEFFER, *supra* note 1, at 11-12; W. SWEET, RELIGION IN COLONIAL AMERICA 33 (1965).

3. An Act concerning Religion (Apr. 21, 1649), *reprinted in* 1 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 244 (W. Browne ed. 1883). In 1654, Maryland passed an act "repealing the toleration of 1649 [declaring] that, 'None who professes the exercise of the . . . Roman Catholic Religion, can be protected in this Province.'" S. COBB, *supra* note 2, at 379.

The death penalty for heresy was not limited to Maryland; yet even in Maryland there is no record of it having ever been imposed. It appears that only in Massachusetts were persons executed for religious unorthodoxy, specifically for being Quakers. W. SWEET, *supra* note 2, at 146-47.

Five, New Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, insisted on Protestantism;

One, South Carolina, still referred to religious "toleration."⁴

In the light of this situation, it is not surprising that the comparatively short document in which we declared our independence from England, written by the deist Thomas Jefferson, contains four references to the Deity.⁵ What is surprising, however, is that the lengthier text of the Constitution, written a mere eleven years later, contains no invocation of or reference to the Deity or to religion except the negative one in the last operative article, which forbids religious tests for government office.⁶ Under that provision, persons belonging to a nonconformist religion as well as avowed atheists are eligible for election to the presidency.

By 1787 it had become the general assumption that, whatever might be the situation in the individual states, the national government was to have no jurisdiction in the arena of religion.⁷ The commitment to this principle was so widespread that the American people were not content with an implicit exclusion but insisted that the Constitution, through amendment, explicitly bar laws respecting an establishment of religion or prohibiting its free exercise.⁸

4. L. PFEFFER, *supra* note 1, at 118 (citing S. COBB, *supra* note 2, at 507).

5. When in the Course of human Events, . . . it becomes necessary . . . to assume among the Powers of the earth, the separate and equal station to which the Laws of . . . *Nature's God* entitle them, . . . a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by *their Creator* with certain inalienable *Rights*

. . . .
We, therefore, the Representatives of the United States of America, . . . appealing to the *Supreme Judge of the world* . . . , with a firm reliance on the Protection of *Divine Providence*, . . . mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

The Declaration of Independence, July 4, 1776, in 1 DOCUMENTS OF AMERICAN HISTORY, Doc. No. 66, at 100-02 (9th ed. H. Commager 1973) (quoting 1 FEDERAL AND STATE CONSTITUTIONS 3 (F. Thorpe ed. 1906)).

6. U.S. CONST. art. VI, cl. 3.

7. See L. PFEFFER, *supra* note 1, at 119-21.

8. The Convention was apparently willing to outlaw religious discrimination among federal office holders but not at this stage to prohibit religious establishments as a protection for the equal rights of conscience. But the people of several of the states were not satisfied with this partial achievement. New York, Virginia, and New Hampshire ratified the Constitution but proposed amendments for a bill of rights, specifically including religious freedom and disestablishment. North Carolina and Rhode Island would not ratify until a bill of rights, including religion, was adopted. The "public clamor" for a more thorough-going separation of church and state was so great that Madison and others could persuade several states to adopt the Constitution as

II. THE RELATIONSHIP BETWEEN SEPARATION AND FREEDOM

It is the premise of this Article that the religion clauses of the first amendment encompass a unitary guaranty of separation and freedom. Notwithstanding instances of apparent conflict, separation guarantees freedom and freedom requires separation.⁹ The draftsmen of the amendment regarded freedom of religion and establishment as incompatible. American constitutional history and tradition do not justify an apportionment of values between disestablishment and freedom. The struggle for religious liberty and for disestablishment were portions of a single evolutionary process that culminated in the first amendment. In the words of Justice Rutledge, "[e]stablishment" and "free exercise" were correlative and co-extensive ideas, representing only different facets of the single great and fundamental freedom."¹⁰

The history that leads up to the adoption of the first amendment religion clauses amply supports Justice Rutledge's conclusion. Roger Williams, for example, opposed an "enforced uniformity of religion" (freedom concept) because it "confounds the Civil and Religious" (separation concept).¹¹ Madison opposed a bill establishing a provision for teachers of the Christian religion (separation concept) because it violated the "fundamental and undeniable truth, 'that Religion . . . can be directed only by reason and conviction, not by force or violence'" (freedom concept).¹² Virginia's "Act for establishing Religious Freedom" was adopted in 1786 because of "the impi-

framed at the Convention only after promising to work for the addition of amendments that would genuinely protect civil liberties in a specific bill of rights in which freedom and equality of religious conscience played a prominent and fundamental part.

R. BUTTS, *supra* note 2, at 72.

9. [Separation and freedom] are not separate concepts or principles but really two sides of a single coin. The fathers of the First Amendment were convinced that the free exercise of religion and the separation of church and state were two ways of saying the same thing: that separation guaranteed freedom and freedom required separation.

Pfeffer, *The Case for Separation*, in *RELIGION IN AMERICA* 52, 60 (J. Cogley ed. 1958).

10. *Everson v. Board of Educ.*, 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting). Although Justice Rutledge's statement was made in a dissenting opinion, there was no disagreement with this point in the majority opinion. See notes 18-19 *infra* and accompanying text.

11. Williams, *The Bloody Tenent of Persecution for cause of Conscience, Discussed, in a Conference betweene Truth and Peace* (1644), reprinted in 3 PUBLICATIONS OF THE NARRAGANSETT CLUB 3-4 (S. Caldwell ed. 1867).

12. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (quoting Declaration of Rights, art. 16), reprinted in *Everson v. Board of*

ous presumption of legislators and rulers" who had "established and maintained false religions" (separation concept).¹³

In *Common Sense*, Thomas Paine noted the unity of the dualism: "As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith."¹⁴ The proposed versions of the first amendment, submitted to the states and considered by Congress before it adopted the final form, combined both aspects of the dual prohibition without any indication that one was superior and the other subordinate. The first version of the amendment submitted by James Madison and considered by Congress stated, "The civil rights of none shall be abridged on account of religious belief, nor shall any national religion be established, nor shall the full and equal rights of conscience in any manner be infringed."¹⁵ President Jefferson refused to proclaim days of fasting and prayer because of "the provision that no law shall be made respecting the establishment or free exercise of religion."¹⁶

In an 1878 case involving a freedom clause attack on an anti-bigamy statute, the Supreme Court explicitly stated that the first amendment was intended to erect "a wall of separation between church and State."¹⁷ Finally, the fact that all fifty states guarantee religious freedom and not one allows an establishment of religion would appear to be convincing evidence that in the American tradition, the concepts of free exercise and nonestablishment are correlative and unitary.

In *Everson v. Board of Education*,¹⁸ Justice Black, speaking for the majority of the Court, expressed the meaning of the establishment clause:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a

Educ., 330 U.S. 1, 63, 64 (1947) (appendix to dissenting opinion by Justice Rutledge).

13. *Virginia Statute of Religious Liberty, January 16, 1786*, in 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 5, Doc. No. 80, at 125 (citing 12 Statutes at Large of Virginia 84 (W. Hening ed.)).

14. A. STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 318-19 (1950) (quoting T. PAINE, COMMON SENSE (1776)).

15. 1 ANNALS OF CONG. 434 (Gales & Seaton eds. 1789).

16. 11 JEFFERSON'S WRITINGS 428-30 (Monticello ed. 1905).

17. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

18. 330 U.S. 1 (1947). In this case, a taxpayer challenged a New Jersey statute and a local board of education resolution that authorized reimbursement of transportation expenses to parents of children attending sectarian schools. Over a strong dissent, a majority of the Supreme Court held that the reimbursement plan did not violate the first amendment. *Id.* at 18.

church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."¹⁹

The barrier against laws setting up a church, preferring one religion over another, or aiding religion is generally considered to be an aspect of the antiestablishment provision; the prohibition against forcing a person to attend or remain away from church or to profess a belief or disbelief in any religion would seem to fall within the parameters of the free exercise clause. Nevertheless, the Court held that laws punishing disbelief or failure to attend church are forbidden by the establishment clause no less than by the free exercise clause.²⁰

In numerous decisions during the past decade, the Court has phrased the meaning of the establishment clause in somewhat different language. The Court has formulated a three-part test to determine whether a law will "pass muster under the Establishment Clause":²¹ first, the statute "must reflect a clearly secular legislative purpose";²² second, it "must have a primary effect that neither advances nor inhibits religion";²³ third, the statute "must avoid excessive government entanglement with religion."²⁴ Advancing religion obviously constitutes establishment, but inhibiting religion means prohibiting its free exercise, and that too, the Court has held, constitutes a violation of the establishment clause.²⁵

19. *Id.* at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

20. *See Zorach v. Clauson*, 343 U.S. 306 (1952), which stated, "The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." *Id.* at 314.

21. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973).

22. *Id.* (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

23. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (citing *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961)).

24. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

25. *See Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

This view of the unity of the religion clauses is not shared by all constitutional lawyers and historians. The legion who disagree include such notable scholars as Erwin Griswold, formerly Dean of Harvard Law School and later Solicitor General of the United States,²⁶ Edward Corwin,²⁷ Paul Kauper,²⁸ and Wilbur Katz.²⁹ Typical of their views is that expressed by Wilbur Katz:

Except for occasional flights of rhetoric, no one contends either that absolute separation of church and state is required by the first amendment or that such a rule would be desirable. Nor does the concept of separation provide its own principle of limitation. In determining the limits of constitutional separation, it is the concept of religious freedom which provides the criterion. The principle of church-state separation is an instrumental principle. Separation ordinarily promotes religious freedom; it is defensible so long as it does so, and only so long.³⁰

26. See Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to the Constitutional Questions*, 8 UTAH L. REV. 167, 169-73 (1963).

27. See E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 98-118 (1951).

28. See Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1, 7-18 (1961); Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829 (1954).

29. See Katz, *The Case for Religious Liberty*, in RELIGION IN AMERICA 95 (J. Cogley ed. 1958); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953).

30. Katz, *The Case for Religious Liberty*, *supra* note 29, at 97. An interesting variation of this approach is presented by Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). The Note suggests that the first amendment should be interpreted as securing two related but separable mandates: one against laws respecting an establishment of religion and the other against laws prohibiting the free exercise of religion. The author suggests that the first should be construed narrowly, but the second should be given a broad or expansive interpretation to ensure "strict judicial scrutiny wherever there is a departure from or erosion in the individual's right in matters of ultimate concern." *Id.* at 1082-83.

There are a number of difficulties with this approach. For example, this differentiation of values is not easily reconcilable with their relative positions in the amendment; logic would seem to require a reverse order of presentation, one that would place the free exercise clause before, not after the establishment clause. Second, the wording of the first amendment also indicates a reverse order of protection from that proposed in the Note. The amendment forbids only laws prohibiting the free exercise of religion, whereas its prohibition under the establishment clause encompasses not only laws that establish religion but also those that merely respect an establishment of religion.

Most important, however, is the fact that the first amendment does not guarantee "the free exercise of religion"; it guarantees "the free exercise thereof." It is difficult to see how "thereof" can be construed so as to arrive at a definition differing from that to which it refers. As stated in Justice Rutledge's dissenting opinion in *Everson*,

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less,

These scholars are apparently not alone in discovering a dichotomy in the religion clauses. The majority of the current Supreme Court, unlike its predecessors, appears to find such a dichotomy in the first amendment. In *Wisconsin v. Yoder*,³¹ Chief Justice Burger wrote for the majority:

The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.³²

The same apparent conflict and preference was noted by Justice Brennan in his concurring opinion in *Abington School District v. Schempp*:³³

There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be. . . .

....

The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. . . . On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood.³⁴

Those who argue for a dualistic rather than a unitary interpretation of the first amendment are faced with the task of determining which clause is superior in disposing of a situation

from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

The bifurcated definition advocated in the Note mandates a preferential order of values favoring those encompassed in the free exercise clause. The history underlying the first amendment, however, does not support this definition. See text accompanying notes 11-16 *supra*.

31. 406 U.S. 205 (1972).

32. *Id.* at 220-21. For further discussion of this case, see text accompanying notes 37-38, 58-59, 96-97 *infra*.

33. 374 U.S. 203 (1963).

34. *Id.* at 296-99 (Brennan, J., concurring).

where separation conflicts with freedom. Generally, their solution has been to allocate superiority to free exercise, a judgment that would probably receive the approval of all Americans, including members of the Supreme Court, except perhaps those who deem religion to be an enemy of the people. Nothing in the text of the first amendment, however, supports such an allocation of supposedly competing constitutional values. The amendment does not say, although it could easily have done so, that Congress shall make no law respecting an establishment of religion except when it conflicts with the free exercise thereof. Nothing in the text of the amendment supports the view of John Courtney Murray, a view shared by many others, that "separation of church and state, . . . put on its proper grounds . . . in its true relation to the free exercise of religion [is] instrumental to freedom [and is] therefore . . . a relative, not an absolute . . . right."³⁵

It must be noted, however, that history reveals concerns other than or in addition to the protection of the free exercise of religion that impelled a prohibition of laws respecting an establishment of religion. James Madison, a principal author of the first amendment, had argued only a few years prior to the adoption of the Bill of Rights that religion, and not merely restraint on religion, was exempt from the authority of society and could not be subject to the authority of legislative bodies; he asserted that the state was not a competent judge of religious truth and had no authority to employ religion as even a willing engine of civil policy.³⁶ Furthermore, nothing in Madison's other writings supports a theory of dualism or the assertion that the purpose of the amendment was to protect free exercise, and that the prohibition of establishment was no more than a dispensable means to achieve that end.

The Supreme Court has not yet been faced with the need to definitively adjudicate conflicts between free exercise and establishment. In cases in which it appeared that the Court would be forced to make a choice, it has succeeded in finding a way to avoid having to do so. Nevertheless, in *Wisconsin v. Yoder*,³⁷ the Court indicated that if it had to make a choice, free exercise would prevail over establishment.³⁸ *Yoder*, how-

35. Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23, 32 (1949).

36. See Madison, *supra* note 12, reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1974) (appendix to Justice Rutledge's dissenting opinion).

37. 406 U.S. 205 (1972).

38. See text accompanying note 32 *supra*.

ever, was not the last word the Court has spoken on the question. In *Committee for Public Education and Religious Liberty v. Nyquist*,³⁹ the Court held unconstitutional a law providing tuition grants for students attending church schools:

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment "is diminished or even denied." It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. . . . It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, . . . and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy . . . for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," . . . and . . . notwithstanding the "high social importance" of the State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly emplaced.⁴⁰

Here, too, the Court's stated preference is only dictum, since the Court has never held, nor is it likely to hold, that a state's denial of tuition grants impinges upon the free exercise of religion. Nevertheless, in accepting the premise that such an impingement exists, the opinion, reasonably read, surprisingly indicates a choice favoring not the free exercise clause but rather the establishment clause.

The *Nyquist* case is one instance in which the Court was faced with an apparent, yet not unavoidable, need to choose between the two first amendment mandates. The balance of this Article will consider in more detail other cases in which the Court was faced with the opportunity, though in no case the unavoidable necessity, of making such a choice.

III. ARENAS OF CONFLICT

A. TAX EXEMPTION

In *Walz v. Tax Commission*,⁴¹ the Court was called upon to

39. 413 U.S. 756 (1973).

40. *Id.* at 788-89 (footnotes and citations omitted).

41. 397 U.S. 664 (1970).

determine the constitutionality of exempting church properties from real estate taxation. The plaintiff claimed that exemption had both the purpose and effect of aiding religion, and thereby violated the establishment clause. With only Justice Douglas dissenting, the Court upheld the law on the ground that a major purpose of the establishment clause was to avoid excessive entanglement between church and state, and that exemption rather than taxation of church properties more effectively served that purpose.⁴² In a concurring opinion, Justice Brennan recognized that James Madison, after his retirement from the Presidency, had argued that tax exemption for houses of worship was violative of the establishment clause.⁴³ Nevertheless, the Court noted, both Congress and the states have historically exempted church properties from taxation, and all fifty states do so today—facts strongly indicating the constitutionality of tax exemption.⁴⁴

The amicus curiae brief submitted by the National Council of Churches of Christ in the *Walz* case argued that the first amendment not only permits tax exemption but, in fact, mandates it: "The Free Exercise Clause in the First Amendment forbids taxation by the Federal or State governments of houses of worship or of other religious property used exclusively for religious purposes and owned by corporations organized exclusively for religious purposes."⁴⁵ The Synagogue Council of America endorsed the claim:

[P]roperty used for religious purposes, including the house of worship, the religious sanctuary, and all that is contained therein are so intimately connected with religious exercise that to levy a direct tax upon the value of such property would constitute a tax on the exercise of re-

42. *Id.* at 674.

43. *Id.* at 684 n.5 (Brennan, J., concurring) (citing Fleet, *Madison's "Detached Memorandum,"* 3 WM. & MARY Q. (3d ser.) 534, 555-62 (1946)).

44. 397 U.S. at 676-78. The Court acknowledged that pervasive state practice would not necessitate a finding of constitutionality:

It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.

Id. at 678.

45. Brief *Amicus Curiae* by the National Council of Churches of Christ in the United States of America at 4, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). Although the argument was based on the free exercise clause, the brief concluded with a short disclaimer: "Note: This brief's discussion of the Free Exercise Clause is not intended as disagreement with or disparagement of the discussion in other defense briefs of the Establishment Clause." *Id.* at 18.

ligion, having the same effect as that tax upon the itinerate evangelist which the Court found unconstitutional in *Murdock v. Pennsylvania*.⁴⁶

The progenitor of the theory that the free exercise clause requires tax exemptions for church properties appears to be Dean Kelley, director of the Protestant National Council's department of religious liberty. The crux of the claim, set forth somewhat simplistically in Kelley's book, *Why Churches Should Not Pay Taxes*, is that the power to tax is the power to destroy.⁴⁷ Because the free exercise clause forbids the government to destroy churches, the argument continues, it similarly forbids government to tax churches or their property, at least that part used for worship and prayer.

Because the Court determined that the exemption did not violate the establishment clause, there was no need to decide whether the free exercise clause would require a finding of constitutionality even if the establishment clause were violated. Discretion being the better part of valor, the Court wisely refrained from indicating which way it would decide should there come a time when the Court could no longer avoid the troublesome question. Notwithstanding the present universality of tax exemption for church properties, that time may come sooner than most would expect. Today, more and more middle-income Americans are moving to the suburbs, where large estates are often purchased and converted to churches. Although the property is then removed from the tax rolls, the community must continue to provide costly services. Since, in the suburbs, real estate taxes are the major source of local finances, the increased burden on the homeowner can be significant. The discontent with this system is manifested not only by an increasing feeling among suburban homeowners that churches should pay property taxes,⁴⁸ but also by the refusal of some

46. Brief Amici Curiae of the Synagogue Council of America and its Constituents at 11, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). In *Murdock*, the Court held unconstitutional a state license tax on peddlers of devotional literature, stating that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

47. "If the threat of loss of tax exemption can be used as a club to keep churches 'in line,' it will work in the same direction as establishment . . . , benefitting the churches which are . . . 'loyal,' while penalizing those that are . . . 'uncooperative'" D. KELLEY, *WHY CHURCHES SHOULD NOT PAY TAXES* 131 (1977).

48. In 1968, the Columbia Broadcasting System conducted an interview with three groups described as "the Public, the Congress, and the Clergy." When asked whether sanctuaries should be subject to property tax, 60% of the public, 89% of the Congress, and 79% of the clergy responded negatively. How-

town authorities to issue zoning permits for the establishment or expansion of churches.⁴⁹

Although it is a risky business to predict what the Court will do in any particular case, it seems likely that at least a majority of the Court would uphold the constitutionality of eliminating the exemption for church property, even that part used exclusively for religious purposes. When this happens, the Court will assuredly not conclude that free exercise is subordinate to the prohibition against establishment, but only that the former does not mandate exemption.

B. AID TO PAROCHIAL SCHOOLS

The current status of constitutional law respecting government support of church-related educational institutions may be summarized as follows: there is no constitutional barrier to the supply of health, nutritional, and similar noneducational services;⁵⁰ although it is permissible to finance transportation⁵¹ and to loan secular textbooks⁵² at the elementary and secondary school levels, any other governmental supply of educational services would probably not be allowed;⁵³ and the scope of permissible governmental financing is broader at the college or university level but is by no means as well defined as that at the lower levels.⁵⁴

Advocates of more substantial aid to parochial schools have frequently argued that such aid is not only constitution-

ever, when asked "whether churches should make at least partial contributions to ease the burdens of property owners who, under present conditions must pay the entire cost of community services," the response was in the affirmative: "the public by 59%; Congress by 63%; and the clergy by 62%." M. LARSON & C. LOWELL, *THE RELIGIOUS EMPIRE: THE GROWTH AND DANGER OF TAX-EXEMPT PROPERTY IN THE UNITED STATES* 249-50 (1976).

49. See, e.g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *cert. dismissed*, 388 U.S. 805 (1950) (municipality may refuse to grant construction permit for church in an area zoned as residential).

50. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947).

51. See *id.* at 16-17.

52. See, e.g., *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

53. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947). See also *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779-80, 783-85 (1973); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 481-82 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 621-22 (1971). But cf. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 48 U.S.L.W. 4163 (1980) (upholding New York statute involving reimbursement to nonpublic schools for reporting attendance and grading state-prepared tests).

54. See, e.g., *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

ally permissible, but that it is constitutionally required.⁵⁵ That argument is based on the fact that a state law requiring attendance at *public* schools would violate the free exercise clause.⁵⁶

There are many parents and children, the argument continues, whose religious conscience forbids public school attendance and requires that the children receive their secular as well as their religious education in parochial schools. Because state compulsory school attendance laws are applicable to all children, the argument concludes, the free exercise clause requires states to make attendance at parochial schools possible by financing those schools so that the children of low-income parents can attend.

So formulated, the argument seems to present an unavoidable clash between the religion clauses. By barring aid to parochial schools and thereby precluding parochial school attendance by children of low-income families, the Supreme Court apparently decides in favor of nonestablishment and against free exercise.

The clash, however, is more apparent than real. The conflict is not between mandated governmental support of parochial schools and forbidden support, but rather between nonsupport and compulsory attendance. A true conflict of competing constitutional values would exist if the Constitution forbade the teaching of religion in public schools yet mandated attendance exclusively in those schools, even by students whose religious conscience requires that all instruction, including that generally designated as secular, be impregnated with religion. Because government support is constitutionally forbidden and compulsory attendance is purely statutory,⁵⁷ however, there is no true clash of competing constitutional values.

In *Wisconsin v. Yoder*,⁵⁸ the Supreme Court held that

55. Proponents . . . argue that so long as children are permitted to attend religious schools in fulfillment of the compulsory state attendance laws, the children have a right to all the benefits and services that are given to public school children. Otherwise, the children who attend non-public schools will be discriminated against because they exercise their rights of religious freedom guaranteed to them by the federal and state constitutions.

R. BUTTS, *supra* note 2, at 147.

56. "[A] state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973). See text accompanying note 40 *supra*.

57. The Supreme Court has held that the states are under no constitutional obligation to provide free public education. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

58. 406 U.S. 205 (1972).

Amish parents have a constitutional right under the free exercise clause not to send their children to school, even a church-related school, after they complete their elementary school education. The Court concluded that the constitutional mandate of free exercise is superior to the statutory obligation to send children to secondary schools.⁵⁹ Logically, the same argument can be made with respect to compulsory attendance at elementary schools. In either case, the conflict is not between nonestablishment and free exercise, but rather exclusively within the area of free exercise. Resolution of that conflict might require the Court to hold that compulsory school attendance laws are unconstitutional even at the elementary school level, but it would in no way require state support of parochial schools.

By the same reasoning, the constitutional barrier against religious teachings and practices in public schools does not present a conflict with the free exercise claim of those whose religious conscience impels them to pray in school. Rather, the conflict is between the constitutional mandate against prayer in public schools⁶⁰ and the statutory mandate of school attendance. In other words, parents may have a first amendment right not to send their children to public schools in which prayer is forbidden, but they do not have a right to have prayer in those schools.

C. SABBATARIAN EXEMPTIONS

In the companion cases of *Braunfeld v. Brown*⁶¹ and *Gallagher v. Crown Kosher Super Market*,⁶² the Supreme Court upheld the constitutionality of compulsory Sunday closing laws even when enforced against persons whose religious convic-

59. The Court held that the statute, to be valid, would have to survive strict scrutiny under the first amendment:

We turn . . . to the State's . . . contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Id. at 221. The Court subsequently concluded that the statute did not survive this searching examination: "The record strongly indicates that accommodating the religious objections of the Amish [will not] materially detract from the welfare of society." *Id.* at 234.

60. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

61. 366 U.S. 599 (1961).

62. 366 U.S. 617 (1961).

tions impelled them to observe a day other than Sunday as their holy day of rest. In *Sherbert v. Verner*,⁶³ decided two years later, the Court held that it was a violation of the free exercise clause to deny unemployment compensation to a Seventh-Day Adventist who would not accept an available position that would require her to work on Saturdays.

In the Civil Rights Act of 1964,⁶⁴ Congress made it an unlawful employment practice to discriminate against any person on the basis of religion.⁶⁵ Three years later, the Equal Employment Opportunity Commission, which had the responsibility of enforcing the law, issued a regulation that imposed "an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."⁶⁶ After five years of experience with this regulation, Congress was persuaded that the exemption for undue hardship was workable and, by amendment, wrote it into the Act itself.⁶⁷

The Supreme Court has been called upon to decide the constitutionality of the accommodation requirement three times in the past ten years.⁶⁸ In all three cases, the Court was unwilling or unable to decide the issue. In the first two cases, the eight members of the Court who heard the case split evenly on how it should be decided.⁶⁹ In such instances the decision of the lower court is deemed affirmed,⁷⁰ but the Supreme Court does not issue an opinion, and its disposition does not consti-

63. 374 U.S. 398 (1963).

64. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C. (1976)).

65. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

42 U.S.C. § 2000e-2(a)(1) (1976).

66. See 32 Fed. Reg. 10,298 (1967) (codified in 29 C.F.R. § 1605.1(b) (1979)).

67. "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (codified in 42 U.S.C. § 2000e(j) (1976)).

68. See *TWA v. Hardison*, 432 U.S. 63 (1977); *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976); *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971).

69. See *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976); *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971).

70. See, e.g., *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954); *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123 (1938).

tute a precedent that must be followed by lower courts or by the Supreme Court itself should the question arise again.⁷¹ Unburdened by precedent, the Court had a free hand to decide the issue in *TWA v. Hardison*.⁷²

In *TWA*, both the employer and the labor union argued that the 1967 regulation and the 1972 amendment violated the establishment clause. They contended, first, that both the purpose and the primary effect of the provision were to aid religion, and second, that enforcement would require excessive governmental entanglement with religion because "those enforcing the requirement will necessarily weigh and determine whether an individual has a religious belief, whether it is sincerely held and how that belief is manifested in the employment relationship."⁷³

No one, however, has found a means of compelling the Court to decide a constitutional question that it does not want to decide. In *TWA*, the Court, over the dissents of Justices Brennan and Marshall, held that there was no need to decide the constitutional question since the case could be decided on purely statutory grounds. Under the facts of the case, *TWA* would suffer "undue hardship" if it were required to accommodate the employee's religious needs by retaining him in employment but exempting him from the Saturday work requirement.

The validity of the establishment claim was challenged in several amicus curiae briefs,⁷⁴ but those briefs also argued that the exemption could be constitutionally justified under the free exercise clause.⁷⁵ Applied to governmental employment, the argument goes something like this: the Supreme Court upheld

71. If the [Supreme Court] judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that court can proceed to enforce its judgment. The legal effect would be the same if the appeal . . . were dismissed.

Durant v. Essex Co., 7 Wall. 107, 112 (1869), *quoted in* *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

72. 432 U.S. 63 (1977).

73. Brief for Petitioner at 42, *TWA v. Hardison*, 432 U.S. 63 (1977).

74. *See, e.g.*, Brief of Amicus Curiae State of Michigan at 20-25, *TWA v. Hardison*, 432 U.S. 63 (1977); Brief for the National Jewish Commission on Law and Public Affairs ("Colpa") as Amicus Curiae at 10-12, *TWA v. Hardison*, 432 U.S. 63 (1977).

75. [The Civil Rights Act] gives a Sabbatarian rights that compensate for the disability he suffers by not belonging to the majority faith. . . . [T]o give a minority employee the equal treatment to which he is enti-

the Civil Rights Act of 1964 as a valid exercise of the government's constitutional power to regulate commerce, a power expanded by the Constitution's authorization of laws "necessary and proper" for executing all powers vested in the government by the Constitution.⁷⁶ Because discrimination against Sabbatarians, like discrimination against blacks, impedes interstate commerce, Congress could constitutionally legislate against it.⁷⁷

The Constitution, however, includes not only the commerce and establishment clauses but also the free exercise clause. Hence, there could be little doubt that under the power to enact laws "necessary and proper" to ensure free exercise, Congress could forbid governmental discrimination against Sabbatarians. Congress, furthermore, need not stop at prohibiting discrimination by federal or state governments. It could conclude that full compliance with the free exercise clause could be accomplished only if the prohibition against discrimination also applied to private business, especially large corporations that often employ more persons than small communities do.

Congress has been urged to amend the statute to provide explicitly that the resulting added cost to large corporations cannot be deemed an "undue hardship" because the corporations can easily pass on such costs to the general public. Assuming that this would constitute a violation of the establishment clause, however, it would seem that the Court would then be faced with the necessity of weighing that clause against the free exercise clause, and deciding between them. It is safe to predict, however, that if faced with this choice, the Court would once again find a way to avoid reaching a decision.

D. ABORTION FOR THE ECONOMICALLY DISADVANTAGED

Two years before its historic decision in *Roe v. Wade*,⁷⁸ which invalidated laws that made abortion criminal, the Supreme Court upheld a District of Columbia criminal abortion

tied in fairness and justice (and, we believe, in the implementation of "free exercise values"), a law such as [this] is a necessity.

Brief for the National Jewish Commission on Law and Public Affairs ("Colpa") as Amicus Curiae, *supra* note 74, at 18-19 (footnote omitted). See Brief of Amicus Curiae State of Michigan, *supra* note 74, at 21-23.

76. U.S. CONST. art. I, § 8, cl. 18.

77. In such case, of course, there would be a conflict between the commerce clause and the establishment clause. Consideration of that conflict, however, is beyond the scope of this Article.

78. 410 U.S. 113 (1973).

statute in *United States v. Vuitch*.⁷⁹ In a dissenting opinion, Justice Douglas quoted from an article by former Supreme Court Justice Tom Clark:

Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of "ensoulment" or "personhood," i.e., the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which "ensoulment" occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, i.e., able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth.⁸⁰

In *Roe v. Wade*, the Court carefully avoided both the non-establishment and free exercise mandates of the first amendment. The Court ruled instead that a fetus is not a person and that the fifth and fourteenth amendments, which forbid government to deprive any *person* of life without due process of law, therefore do not protect the unborn.⁸¹ This, of course, indicates only that no one has the right to come into court to assert the claimed rights of the fetus. It does not mean that a legislature may not forbid destruction of the fetus. On this point, however, the Court held that within the Constitution's concept of personal liberty there exists "a right of personal privacy."⁸² "This right of privacy," the Court continued, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁸³

In 1977 the Court, to the surprise of many, upheld both the constitutionality of a federal law precluding medicaid and medicare payments for nontherapeutic abortions,⁸⁴ and the constitutionality of an order by the mayor of St. Louis forbidding abortions in municipal hospitals.⁸⁵ In upholding the St. Louis order, the Court acknowledged that the doctors and medical students serving in the hospital's obstetrics-gynecology

79. 402 U.S. 62 (1971).

80. *Id.* at 79 n.2 (Douglas, J., dissenting) (quoting Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 *LOV. L.A. L. REV.* 1, 4 (1969)).

81. 410 U.S. 113, 157-58 (1973).

82. *Id.* at 152-55.

83. *Id.* at 153.

84. *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

85. *Poelker v. Doe*, 432 U.S. 519 (1977).

clinic were drawn from the faculty and students at the St. Louis University School of Medicine, a Jesuit-operated institution opposed to abortions.⁸⁶ The Court, however, pointed out that as an elected official, the mayor was responsible to the people of the city, who could manifest their disapproval at the polls.⁸⁷ The Court did not address the issue of whether the mayor's action violated the first amendment's guarantee of church-state separation, a question raised and argued in an *amicus curiae* brief submitted on behalf of a number of Protestant and Jewish organizations affiliated with the Religious Coalition for Abortion Rights.⁸⁸

The first amendment issue is squarely presented to the United States District Court for the Eastern District of New York in the pending case of *McRae v. Califano*.⁸⁹ That action directly challenges as a violation of the establishment clause denial of payments for elective abortion procedures under federal, state, and local medicare and medicaid programs. The counter contention (in addition, of course, to a denial that the challenged laws and practices violate the establishment clause) is that although the Constitution, as interpreted by the Supreme Court, ensures the right to abortion, it would violate the free exercise clause to compel Catholics and others whose religious convictions condemn abortions to finance nontherapeutic abortions through their taxes.⁹⁰

This case appears to present an unavoidable confrontation between the nonestablishment and the free exercise guarantees. Nevertheless, it is a safe guess that however the Supreme Court resolves the issue, it will avoid deciding that the two first amendment guarantees are in conflict, that one is subordinate to the other, and that the subordinate one therefore must yield.

86. *Id.* at 520.

87. *Id.* at 521.

88. See Brief of American Jewish Congress, Board of Church and Society of the United Methodist Church, National Women's Conference of the American Ethical Union, New York State Council of Churches, Union of American Hebrew Congregations and Unitarian Universalist Women's Federation, *Amici Curiae* at 11-18, *Poelker v. Doe*, 432 U.S. 519 (1977).

89. *McRae v. Mathews*, 421 F. Supp. 533 (1976), *vacated and remanded on appeal sub nom.* *Califano v. McRae*, 433 U.S. 916 (1977).

90. The Supreme Court has held that taxpayers have standing to challenge laws that allegedly violate the establishment clause. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968). Therefore, there would seem to be no standing problem—the statute is challenged not by persons claiming to represent the rights of the unborn, but rather by taxpayers representing only themselves and other taxpayers.

E. RELIGIOUS TESTS FOR PUBLIC OFFICE

The latest Supreme Court case presenting a confrontation between the establishment and free exercise barriers, *McDaniel v. Paty*,⁹¹ involved a state provision barring clergy from public office. As noted earlier, by the time of the adoption of the Constitution, a majority of the states had enacted such provisions⁹² with the purpose of prohibiting an establishment of religion.⁹³ By 1978, however, only one of these provisions remained in effect. The Tennessee provision that prohibited clergy from holding political office⁹⁴ was the basis of a suit by a defeated candidate in a state election for delegates to a convention to revise the state constitution. The defeated candidate argued that the elected candidate was disqualified because he was an ordained minister. The Tennessee Supreme Court decided in favor of the defeated candidate, Paty,⁹⁵ and the elected candidate, McDaniel, appealed to the United States Supreme Court. Although the eight participating Justices agreed that the Tennessee provision violated the Constitution, they could agree on little else.

The crux of Chief Justice Burger's plurality opinion was that, under the Court's decision in *Wisconsin v. Yoder*,⁹⁶ "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁹⁷ Chief Justice Burger noted that, in *McDaniel*, the only overbalancing interest asserted by the state and accepted by the Tennessee court was the prevention of the establishment of a state religion, an interest of the highest order.⁹⁸ The Chief Justice argued, however, that whatever may have been the situation in the eighteenth century, there is currently no persuasive support for the fear that clergymen elected to public

91. 435 U.S. 618 (1978).

92. See text accompanying note 4 *supra*.

93. One of the most obvious characteristics of church-state union is the exercise of political power by the clergy, a fact evidenced by the history of colonial Massachusetts. See W. SWEET, *supra* note 2, at 87-89.

94. Whereas ministers of the gospel are, by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no ministers of the gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the legislature.

TENN. CONST. of 1796, art. VIII, § 1, *quoted in* *McDaniel v. Paty*, 435 U.S. 618, 621 n.1 (1978).

95. *Paty v. McDaniel*, 547 S.W.2d 897, 910 (Tenn. 1977).

96. 406 U.S. 205 (1972). See text accompanying notes 58-59 *supra*.

97. *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

98. 435 U.S. 618, 626 (1978).

office will be less careful of antiestablishment interests or less faithful to their oaths of civil office than their unordained counterparts.⁹⁹ Absent such support, he concluded, the provision barring clergy from public office cannot withstand challenge under the free exercise clause, since that clause "unquestionably encompasses the right to preach, proselyte, and . . . to be a minister."¹⁰⁰

Justice Brennan, with the concurrence of Justice Marshall, also found no conflict in the case between the free exercise and establishment clauses. Rather, Brennan concluded that the challenged statute was invalid under both clauses. With respect to the latter, he stated that the Tennessee provision "manifests patent hostility toward, not nonneutrality in respect of, religion, forces or influences a minister or priest to abandon his ministry as the price of public office, and in sum, has a primary effect which inhibits religion."¹⁰¹

Justice Stewart, in a concurring opinion, argued that the matter was settled by *Torcaso v. Watkins*,¹⁰² a case in which the Court invalidated a state law requiring public officials to take an oath that they believed in God. He noted, however, that the offense against the first amendment "lay not simply in requiring an oath,"¹⁰³ (free exercise aspect) "but in 'limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept'"¹⁰⁴ (establishment aspect).

In his concurring opinion, Justice White argued against any invocation of the first amendment.¹⁰⁵ In previous opinions, he had indicated strong disagreement with the theory that the establishment clause banned aid to parochial schools.¹⁰⁶ Similarly, Justice White argued in *McDaniel* that the free exercise

99. *See id.*

100. *Id.*

101. 435 U.S. at 636 (Brennan, J., concurring).

102. 367 U.S. 488 (1961).

103. 435 U.S. at 642 (Stewart, J., concurring).

104. *Id.* (quoting *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961)).

105. 435 U.S. at 643-46 (White, J., concurring).

106. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Justice White stated in a concurring opinion, "It is enough for me that States and the Federal Government are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion." *Id.* at 664. *See also* *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813-24 (1973) (White, J., dissenting).

clause did not invalidate the provision barring clergy from public office. He was not convinced that McDaniel would be deterred from the observance of his religious beliefs, since he was not compelled to abandon the ministry as a result of the challenged statute nor required to disavow any of his religious beliefs. Rather, Justice White concluded, he had been denied the equal protection of the laws and the provision should therefore have been invalidated on that ground, and that ground alone.¹⁰⁷

For the purposes of this Article, it is not what the Justices held, nor on what ground they invalidated the statute that is most relevant. Rather, the most significant aspect of the *McDaniel* case is what the Court did not say. As has been noted, the Chief Justice previously intimated that if the Court were faced with a factual situation requiring it to decide one way under the free exercise clause and the opposite way under the establishment clause, it would rank free exercise over establishment and would decide the case accordingly.¹⁰⁸ As has also been noted, the Court has never found it necessary to make the choice; the Justices have always been able to find under the particular facts of each case that a decision could be reached without sacrificing one clause to preserve the other.

Precisely the same thing happened in *McDaniel v. Paty*. Although basing their conclusions on different reasoning, all the Justices agreed that the Tennessee provision was unconstitutional. Furthermore, none of the Justices concluded that eliminating the provision—thereby permitting clergy to hold public office—violated the establishment clause. There was, therefore, no need for any of the Justices to indicate how they would have decided the case if it had presented an unavoidable collision between free exercise and nonestablishment.

IV. CONCLUSION

The conclusion reached from an examination of these cases is that although the Supreme Court has stated that there may be instances in which the establishment and free exercise clauses conflict with each other, the Court will continue to find ways to decide such cases without definitely adjudicating which clause is superior and which subordinate, or which must be preserved and which sacrificed. The de facto consequence is that, notwithstanding contrary assertions by scholars and

107. 435 U.S. at 646 (White, J., concurring).

108. See text accompanying note 32 *supra*.

Supreme Court Justices, Justice Rutledge was correct in stating that "establishment" and "free exercise" represent only different facets of a single freedom.¹⁰⁹

109. See text accompanying note 10 *supra*.