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Public Office, Religion, and the Constitution

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party,[40] if the attorney-client relation is abused by the client,[41] or if the attorney himself is the defendant.[42] Inasmuch as the ultimate test in each case remains the application of Wigmore's four basic conditions for granting the privilege, this breakdown is not all-inclusive. It is demonstrative, nonetheless, of the manner in which to date the courts have translated this analytical tool into a cognizable body of law.

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PUBLIC OFFICE, RELIGION, AND THE CONSTITUTION

May a state, without transgressing the United States Constitution, require a declaration of belief in the existence of God as a prerequisite for holding public office?

Roy R. Torcaso, the plaintiff in *Torcaso v. Watkins*,[1] applied for a commission as a notary public in Montgomery County of Maryland. The Governor duly appointed Torcaso, who then went to the clerk of the Circuit Court for the county to obtain the commission. The clerk, the defendant in the present action, requested Torcaso to take the standard oath of allegiance required of all persons elected or appointed to any state office of profit or trust.[2] He was entirely willing to take the prescribed oath, but the clerk, relying on Article 37 of the Declaration of Rights in the State Constitution,[3] also requested the plaintiff to declare his belief in the existence of God. The plaintiff refused to do so, and the defendant, therefore, denied him the notary public commission. Torcaso then filed a petition for a writ of mandamus directed at the defendant. The Circuit Court for Montgomery County upheld a demurrer to plaintiff's petition, and the Maryland Court of Appeals affirmed.[4]

Public officers and employees are generally required to take an oath in which they affirm their loyalty to the government and agree to discharge their obligations faithfully and conscientiously. Such an oath has a somber effect on most men, and an even more somber effect on those believing that they must account for their actions to a Supreme Being. A constitutional provision requiring an applicant for state public office to declare his belief in God in addition to the standard oath is not peculiar to the state of Maryland, for similar provisions may be found in the constitutions of seven other states.[5]

40. In re Richardson, supra note 24; U.S. v. Pape, supra note 4.
41. People ex rel. Vogelstein v. Warden of County Jail, supra note 4.
42. Mauch v. Commissioner of Internal Revenue, supra note 19.

1. 223 Md. 49, 162 A.2d 438 (1960), prob. jurs. noted, 81 S. Ct. 171 (1960).
2. Md. Const. art. I, § 6.
3. Article 37 of the Declaration of Rights provides:
That no religious test ought ever be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God, nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.
4. Torcaso v. Watkins, supra note 1.
5. Ark. Const. art. XIX, § 1 (1874) (No person who denies the being of a God

These provisions stem directly from the common law concept of the oath. It was felt at common law that since an oath employing the name of God would remind the affiant of divine punishment for his swearing falsely, one who did not believe in God would not feel obligated by the oath.[6] From this restrictive conception of the oath, there developed the affirmation, a solemn and formal declaration which could be substituted in place of an oath by those persons who had conscientious scruples against taking any type of oath. It was generally understood, however, that even the affirmation had to be based on a religious belief, and not on a complete want of belief.[7] In recent years, appreciably less weight has been given to the invoking of the name of God in an oath as a sanction against lying, and in a majority of jurisdictions, an affirmation, a solemn and formal declaration, may be substituted in place of an oath by those who lack the requisite belief as well as by those who have conscientious scruples against swearing by means of an oath.[8] The oath as well as the affirmation should be regarded merely as a means of binding the conscience of the individual. As long as the affiant consciously assumes, before the proper authorities, the obligations of the oath, it should make no difference whether his conscience is bound by a raising of the hand and swearing or by an invoking of a Supreme Being.[9]

The United States Constitution contains no invocation and not a single reference to God, but it does provide explicitly that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[10] Most of the delegates to the Philadelphia Convention believed that religion was a personal, non-political subject. The holding of public office, it was maintained, ought not to be conditioned on religious views any more than on opinions in physics or geometry, for such a requirement would merely deprive a citizen of privileges and advantages to which he and his fellow citizens

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shall hold office in the civil departments of the state); Miss. Const. art. XIV, § 265 (1890) (No person who denies the existence of a Supreme Being shall hold office in State); N. C. Const. art. VI, § 8 (1868) (A person who denies the being of Almighty God is disqualified for public office); Pa. Const. art. I, § 4 (1874) (Religious sentiments not to bar one from holding public office, if officer acknowledges the being of a God and a future state of rewards); S. C. Const. art. XVII, § 4 (1870) (No person who denies existence of a Supreme Being to hold office under constitution); Tenn. Const. art. IX, § 2 (1870) (No person who denies the being of God or a future state of rewards or punishments shall hold office in the civil departments of state); Tex. Const. art. I, § 4 (1876) (An acknowledgement of the existence of a Supreme Being required to hold public office in state).

6. Blocker v. Burness, 2 Ala. 354 (1841); Atwood v. Welton, 7 Conn. 66 (1828); Brock v. Milligan, 10 Ohio 121 (1840); McClure v. State, 8 Tenn. 207 (1829).

7. State v. Levine, 109 N.J.L. 503, 162 A. 909 (1932). See also Jones on Evidence § 752 (5th ed. 1958).

8. 3 Wigmore, Evidence § 1828 (1st ed. 1904).

In the present case, the Maryland Court of Appeals noted in passing that the form of oath required of Torcaso was technically incorrect, since the clerk did not afford him an option to swear or affirm as provided by the Md. Code, art. 1, § 9.

9. State v. Privitt, 327 Mo. 1194, 39 S.W.2d 755 (1957); O'Reilly v. People, 86 N.Y. 154 (1881); State v. Ruskin, 117 Ohio St. 426, 159 N.E. 568 (1927).

10. U.S. Const. art. VI, § 3.

have a natural right and would corrupt religion by forcing a mere outward acquiescence.[11] Not everyone, however, was in accord with this thesis, and some delegates, one of whom was Luther Martin of Maryland, opposed the inclusion of the religious test clause in the Constitution.[12]

The fundamental issue presented by *Torcaso v. Watkins* is whether the provision of the Maryland Constitution permitting a declaration of belief in the existence of God as a qualification for state public office contravenes the United States Constitution. The clause of the Constitution which specifically bans religious tests as a qualification for public office is restricted to Federal offices and cannot be applied to the present case.[13] However, the question exists whether the Maryland constitutional provision violates the "establishment of religion clause" of the First Amendment, the "free exercise of religion clause" of the First Amendment, the freedom of expression and belief guaranteed by the First Amendment, or the equal protection clause of the Fourteenth Amendment. The Maryland Court of Appeals held that the requiring of a declaration of belief did not violate the Federal Constitution. The right to believe, the court declared, as distinguished from the right to act on one's beliefs is absolute,[14] but the plaintiff was not compelled to believe or disbelieve under a threat of compulsion. It was admitted that unless he made the declaration of belief, he could not hold public office, but since he was not compelled to hold public office, there was no compulsion of belief. A state, the court declared, may establish qualifications for public office as long as such qualifications are not so unreasonable and improper as to be discriminatory.[15] Requiring a declaration in the belief of God is not discriminatory in a Christian nation whose basic institutions presuppose the existence of a Supreme Being.[16]

It is beyond argument that the First Amendment, which restricts Federal action, is applicable to the States by virtue of the Fourteenth Amendment.[17] The "preferred" personal rights and liberties of the First Amendment are incorporated into the due process clause as fundamental rights, and the state

11. 8 Code of Vir. § 57-1 (1950). (This section is based verbatim on an act passed by the General Assembly of Virginia on December 16, 1785.)

12. When the religious test clause was discussed before the Maryland Legislature, Luther Martin remarked:

> The part of the system which provides that no religious test shall ever be required as a qualification to any office or public trust under the United States was adopted by a great majority of the Convention and without much debate: however, there were some members so unfashionable as to think that a belief in the existence of a Deity, and of a state of future rewards and punishments would be some security for the good conduct of rulers, and that, in a Christian Country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism.

3 Farrand, Records of the Federal Convention of 1787, 227.

13. U.S. Const. art. VI, § 3.

14. See Cantwell v. Connecticut, 310 U.S. 296 (1940).

15. See Wieman v. Updegraff, 344 U.S. 183 (1952); Snowden v. Hughes, 321 U.S. 1 (1943).

16. See Zorach v. Clauson, 343 U.S. 306, 313 (1952).

17. McCollum v. Board of Education, 330 U.S. (1947); Everson v. Board of Education, 330 U.S. 1 (1947); Murdock v. Pennsylvania, 319 U.S. 105 (1942).

legislatures are as incompetent as Congress to enact any laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[18] Since the First Amendment rights occupy this "preferred" status,[19] the basic weakness in the approach of the Maryland court is the lack of discussion of the constitutional guarantees of religious freedom. If a condition for public office is found to violate the First Amendment as a "law respecting the establishment of religion, or prohibiting the free exercise thereof," there is no need to delve further and find the condition arbitrary and discriminatory.

The First Amendment provides that Congress shall make no law respecting the establishment of religion. The theory of separation of church and state as a limitation on state power is a relatively new constitutional doctrine,[20] and the scope of this limitation was discussed at considerable length by the Supreme Court in the *McCollum* and *Everson* cases.[21] The "establishment of religion" clause is interpreted as banning the state from setting up an official religion or church, and precluding it from fixing any official religious belief or disbelief and imposing disabilities or penalties on those who refuse to accept the state's position. The state is also precluded from giving preferential aid to a particular religion; authorities do not agree whether the individual states are prohibited by the First Amendment from giving non-preferential aid.[22]

Maryland has attempted to prescribe a religious belief for all those seeking to hold public office and to ban from public office those who refuse to accept that dogma. In so doing, Maryland is giving a preferred position to a particular "religion," theism, as distinguished from non-theism. The more concise issue thus presented in the present case is whether non-belief in the existence of God is protected by the First Amendment. The Supreme Court has not held to date that irreligion or non-belief lie within the protective sphere of the First Amendment. It perhaps ought to be noted that non-belief in God is not simply a doctrine espoused by atheists, but is also adhered to in several Far Eastern religions, such as Mahayana Buddism, Hinayana Buddhism, and Taoism.[23] However, Torcaso does not claim to be a member of any of these Far Eastern religions. It may, therefore, be assumed that he advocates atheism, irreligion, or non-belief.

In the *Everson* case, the Court expressly states that the "establishment clause" requires a state to occupy a neutral position not only among com-

18. Hopkins v. State, 93 Md. 489, 69 A.2d 456 (1949). See also the opinion of Justice Cardozo, joined by Justices Brandeis and Stone, concurring "to say an extra word" in Hamilton v. Regents of the University of California, 293 U.S. 245, 266 (1934).

19. N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1944); Cantwell v. Connecticut, supra note 14, at 310.

20. Kauper, Frontiers of Constitutional Liberty 107-108 (1956).

21. McCollum v. Board of Education, supra note 17, at 210-211; Everson v. Board of Education, supra note 17, at 15-16.

22. See Pfeffer, No Law Respecting an Establishment of Religion, 2 Buffalo L. Rev. 225 (1953).

23. See Spiegelberg, Living Religions of the World, Chapters 8, 10 (1956).

peting faiths, but also as between belief and non-belief.[24] It has been argued that this broad interpretation given to the "establishment clause" in the *McCollum* and *Everson* cases is pure invention. These authorities maintain that the Constitution does not guarantee freedom of non-belief, and that those who profess no religion or who repudiate religion are not protected by either the "establishment clause" nor the "free exercise clause," as they are concerned exclusively with religion and not its denial.[25] The Constitution, these authorities conclude, protects freedom of religion, not freedom from religion. This interpretation, however, appears to be much too restrictive. Thomas Jefferson stated that ". . . it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."[26] The purpose of the First Amendment was to meet in a practical manner the problems raised by a multiplicity of competing sects, to recognize all beliefs, and to place the government in a neutral position as respects all dogma.[27] If this purpose is to be fulfilled, and if the right to believe is absolute,[28] non-theism must fall within the protective sphere of the First Amendment.

Furthermore, if "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sects"[29] so that the freedom of religious belief embraces the right to maintain theories of God and the hereafter which are considered as heresy compared to those preached by orthodox faiths,[30] then the First Amendment should definitely protect minority non-theistic religions. It would seem illogical and unreasonable to distinguish atheistic belief from other non-theistic dogma and to place that dogma inside and atheism outside the protection of the First Amendment.

The case of *Zorach v. Clauson*[31] represents perhaps a slight crumbling of the impregnable wall between Church and State as developed in the *McCollum* and *Everson* cases, but the case does not stand for the proposition that non-belief lies outside the protection of the First Amendment. The Court, in upholding New York's released-time program, stated that there need not be a separation of Church and State in every and all respects, for the First Amendment carefully outlines the manner and specific ways in which separation is to be required. The government is not required by the Constitution to be hostile to religion, since such a position would be inconsistent with our country's national traditions.[32] Rather, "the government must be neutral when

24. Everson v. Board of Education, supra note 17, at 18.
25. Gordon v. Board of Education, 78 Cal. App.2d 464, 178 P.2d 488 (1947); Zorach v. Clauson, 198 Misc. 631, 99 N.Y.S.2d 339 (Sup. Ct. 1950), aff'd, 278 App. Div. 573, 102 N.Y.S.2d 27 (2nd Dep't 1951), aff'd, 303 N.Y. 161, 100 N.E.2d 463 (1951), aff'd, 343 U.S. 306 (1952).
26. Blair, Cornerstones of Religious Freedom in America 78.
27. See Pfeffer, Church, State, and Freedom 136-159 (1953).
28. See Cantwell v. Connecticut, supra note 14.
29. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871).
30. United States v. Ballard, 322 U.S. 78, 86 (1944).
31. Supra note 16.
32. McCollum v. Board of Education, supra note 17, at 211-212.

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."[33] The Court did not directly state that the Amendment requires government neutrality as between religion and irreligion, believers and disbelievers; however, no great significance ought to be placed on this omission, since the proposition that irreligion is constitutionally protected was acknowledged by dictum in the *McCollum* and *Everson* cases and not repudiated by the *Zorach* decision. In fact, the above quoted language from the majority opinion strongly supports the irreligion proposition. As Justice Jackson, dissenting in the *Zorach* case, stated, "The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power."[34] Therefore, the prescribing of this declaration of belief results in an establishment of the religion of theism contrary to the dictates of the First Amendment.

The First Amendment also precludes the government from prohibiting the free exercise of religion. The "establishment clause" and the "free exercise clause" are closely related. Thus, in the *McCollum* and *Everson* cases, the Supreme Court declared that for a state to require a person to profess a belief or disbelief in any religion would violate the "establishment clause." Naturally such a coercion of religious belief would also interfere with the free exercise of religion. Maryland, in the present action, is attempting to require applicants for public office to profess a religious belief, and such interference with the free exercise of religion appears to be constitutionally prohibited.

An argument closely related to the "free exercise of religion" proposition is that a restraint upon religious belief may also contravene the freedom of belief and thought, an absolute "preferred" right guaranteed by the First and Fourteenth Amendments.[35] In order to dismiss the "free exercise" and "freedom of belief" arguments, the Maryland court, relying on the *Cantwell* decision, stated that the right to believe, in contrast to the right to act on one's beliefs, is absolute. The statement is clearly sound, but lends no support to the imposition of the instant qualification. The basis of the *Cantwell* distinction is to prevent a person from acting upon a religious belief which interferes with state laws enacted for its preservation, safety, or welfare,[36] but in the present case a man is being excluded from public office because of what he believes, and not because he is acting upon some belief.

The Maryland Court of Appeals argued, however, that by requiring a declaration of belief in God as a prerequisite for holding public office, the state

33. Zorach v. Clauson, supra note 16, at 314.
34. Id. at 325.
35. United States v. Ballard, supra note 30; Cantwell v. Connecticut, supra note 14.
36. See Jacobson v. Massachusetts, 197 U.S. 11 (1905); Church of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Reynolds v. United States, 98 U.S. 145 (1878); People ex rel. Fish v. Sandstrom, 279 N.Y. 523, 18 N.E.2d 840 (1939).

is neither interfering with the right to believe nor coercing the profession of a belief, since no person is compelled to hold public office. Such an occupation, the court insisted, is a privilege, not a right, to which the state may attach reasonable qualifications. The court implies that only when a denial of a fundamental right is conditioned upon the holding or non-holding of a particular belief will there be an unconstitutional interference with the right of belief. There appears to be no reasonable ground why the line should be drawn at fundamental rights and not extended to protect privileges, and perhaps even the doing of any lawful thing, because requiring a man to choose between his beliefs and the exercise of a privilege is an interference with the "free exercise of religion" and the "freedom of belief." Thus, the fact that no person is compelled to hold public office has absolutely no relevance. The privilege of holding public office is given legal protection to the extent that a state may not withhold the granting of the privilege by establishing qualifications which are unreasonable or violate the Constitution.[37]

The Maryland court has buried the suppression of a belief under a somewhat convincing argument based on the valid proposition that a state may attach reasonable qualifications to the granting of a privilege. What results in imposing this qualification is an indirect, conditional abridgment of a belief, a belief which is absolutely protected by the First Amendment.[38] Censorship of unpopular ideas is usually not accomplished by direct suppression, but under the guises of regulating conduct or prescribing conditions.[39] "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control."[40]

The question yet to be determined is whether the instant qualification placed on the granting of a privilege is reasonable, for the state may place reasonable qualifications upon the granting of a privilege. The Maryland court found the qualification to be reasonable on the basis of the following propositions: "We are a Christian religious people; Our institutions presuppose a Supreme Being."[41] Furthermore, the court added, would it not be paradoxical to allow a notary public who did not believe in God to administer oaths?

Each of the above propositions appears to be unsound in the context which the court employed them. First, Americans are a religious people, but only in so far as we have escaped from an anti-religious feeling. Never has one particular religious dogma been accepted generally by all. We can remain

37. Wieman v. Updegraff, 344 U.S. 183 (1952); United Public Workers v. Mitchell, 330 U.S. 75 (1947).
38. American Communications Assn. v. Douds, 339 U.S. 382, 399 (1949).
39. Ibid.
40. Thomas v. Collins, supra note 19, at 547 (concurring opinion); but cited with approval in American Communications Assn. v. Douds, supra note 38.
41. Zorach v. Clauson, supra note 16.

a religious people without adopting laws aiding and abetting any particular religious dogma and without eradicating all those who dissent from the theistic position. Perhaps, however, it may be said that America is a Christian nation. If the phrase, "Christian nation," means that most Americans have a Christian religion, and that Christianity has occupied an important role in formulating American culture and tradition, it is an accurate description of the nation. However, if the phrase means that the political apparatus of the nation is subject to any mandate of the Christian religion, the phrase is inaccurately employed.[42]

Second, the often-quoted statement of Justice Douglas from *Zorach v. Clauson,* "Our institutions presuppose a Supreme Being",[43] is based upon the numerous verbalizations invoking God, such as in the opening statement in convening the Supreme Court, in the Declaration of Independence, in the inscription on coins, and in the preambles to many state constitutions. These cases, even though numerous, are of little importance, until they are employed as support for holdings regarding important Church-State issues. It would be impossible, impractical, and ridiculous to challenge the constitutionality of such cases because of the recognition of God in each of them; however, the fact remains that these cases should not be used as a crutch to limit religious freedom.

Third, this writer fails to see anything paradoxical in permitting a notary public who does not believe in the existence of God to administer oaths. If the liberal interpretation suggested in this note is applied to the construction of oaths and affirmations, then clearly no paradox exists. On the other hand, if the common law concept of the oath is accepted, it would indeed be formalistic to say that one who administers an oath must believe in God. Just as a writer need not believe every word which he writes, the notary public, who actually comes into very little contact with the affiant and has no reason to disclose his beliefs, need not believe in God. The purpose of the oath is to bind the conscience of the affiant, and the personal beliefs of the giver of the oath are irrelevant.

Therefore, in addition to a possible transgression of the First Amendment, it may be that in denying an applicant the privilege of holding public office on the basis of his religious convictions, Maryland has deprived the plaintiff of the equal protection of the laws as secured by the Fourteenth Amendment. States, having a valid interest in the selection of qualified personnel for public office, may prescribe qualifications for applicants, so long as these qualifications have a reasonable, rational basis and do not exclude persons on an arbitrary and capricious ground.[44] "A law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race,

42. Pfeffer, supra note 27, at 211.
43. Supra note 16.
44. Wiemann v. Updegraff, supra note 15; Snowden v. Hughes, supra note 15.

religion, or because of any other reason having no rational relation to the regulated activities" violates the equal protection clause of the Constitution.[45] In the light of the previously discussed arguments, it cannot be said that one who believes in God is more trustworthy or better qualified to carry out the duties of a notary public. The rational basis for the requiring of a declaration of belief to qualify for a notary public commission is non-existent, and therefore, such a requirement violates the equal protection clause.

Perhaps the impregnable wall of separation between Church and State has crumbled slightly since the *Zorach* decision; yet, it has not disintegrated to such an extent as to allow a state to ban a man from public office because of his religious belief. Although the Supreme Court has not as yet held specifically that irreligion is a religious belief protected by the religious guarantees of the First Amendment, the language of previous cases and the compelling arguments in favor of the proposition indicate that the Court will so hold.

> The sanctified principle of freedom of religious belief does not distinguish between believers and nonbelievers. It embraces both, and accords one as much protection and freedom as the other. A sect or tenet which is intolerant of those of a different sect or tenet is the precise antithesis of religious liberty. Freedom is negated if it does not comprehend freedom for those who believe as well as those who disbelieve. The law is astute and zealous in seeing to it that all religious beliefs and disbeliefs be given unfettered expression. . . . Authentic free thinking involves the indubitable right to believe in God, as well as the unfettered license not to believe or to disbelieve in a Deity.[46]

Therefore, to require a declaration of belief in the existence of God in order to hold public office is a violation of the First and Fourteenth Amendments.

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AMORTIZATION OF NONCONFORMING USES

Nonconforming uses have been a problem since the inception of zoning as a prime tool in systematic city planning.[1] Initially, no provisions were made for their elimination, since it was felt that such uses would be few in number and likely to be eliminated in the course of time by various restrictions on their expansion. In addition, those inaugurating these city plans doubted the validity of ordinances requiring the summary disposition of nonconforming uses.[2] Considerations of fairness and constitutional limitations (primarily the Due Process Clause of the Fourteenth Amendment) lay behind the reluctance to zone retro-

45. Kotch v. River Port Pilot Commissioners, 330 U.S. 552, 556 (1947).

46. Lewis v. Board of Education, 157 Misc. 520, 285 N.Y.S. 164 (Sup. Ct. 1935), aff'd, 247 App. Div. 106, 286 N.Y.S. 175 (1st Dep't 1936), motion for leave to appeal or for reargument denied. 247 App. Div. 873, 288 N.Y.S. 751 (1st Dep't 1936), appeal dismissed, 276 N.Y. 490, 12 N.E.2d 172 (1937).

1. 1 Yokley, Zoning Law and Practice 362 (2d ed. 1953).

2. Note, 9 U. Chi. L. Rev. 477, 481 (1942).