1964

The Meaning of "Religion" in the School Prayer Cases

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The Supreme Court has read into the establishment clause of the First Amendment a definition of the word "religion" which is proper only to the free exercise clause of that amendment, the author asserts. In employing this improper definition under the establishment clause in the school prayer cases, the Court has tended to institutionalize agnosticism as the official public religion.

by **Charles E. Rice** • ***Associate Professor, Fordham University School of Law***

IN THE CONTROVERSY over the school prayer decisions, both sides have virtually ignored the incongruity of the Supreme Court's definition of religion. For, in fact, the Court has read into the establishment clause of the First Amendment a definition of the word which is proper only to the free exercise clause of that amendment. The effect of this quiet mutation is far-reaching indeed.

That part of the First Amendment which deals with religion reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .". The original meaning of the first clause is clear. Said Judge Thomas Cooley: "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others."[1] The amendment was prompted by the circumstance that, in the words of James Madison during the debate in Congress over its adoption, "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."[2] It was the purpose of the establishment clause, then, to prevent the prescription by Congress of "a national faith", that is, a nationally established official church.[3]

It has been asserted, and incorrectly so, that the establishment clause ordained a governmental abstention from all matters of religion, a neutrality, as it were, between those who believe in God and those who do not. An examination of the history of the clause, however, will not sustain that analysis. Its end was neutrality, but only of a sort. It commanded impartiality on the part of government as among the various sects of theistic religions, that is, religions that profess a belief in God. But, as between theistic religions and those nontheistic creeds that do not acknowledge God, the precept of neutrality under the establishment clause did not obtain. Government, conformably to the establishment clause, could generate an affirmative atmosphere of hospitality toward theistic religion, so long as no substantial partiality was shown toward any particular theistic sect or combination of sects.

Historical Meaning of the First Amendment

Justice Joseph Story, who served on the Supreme Court from 1811 to 1845 and who was a leading Unitarian, confirmed the plain historical meaning of the First Amendment:

> Probably at the time of the adoption of the Constitution, and of the first amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
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1. COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 224 (1898).
2. 1 ANNALS OF CONG. 731 (1789).
3. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 11-12 (1949).

> The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[4]

Logically, this means that for purposes of the establishment clause nontheistic beliefs were not considered to be religions. Otherwise, an affirmation by government that there is a God would be a governmental preference, through the assertion of the essential truth of theism, of a combination of religious sects, *i.e.*, those that believe in God, to the disparagement of those other religions which do not profess such a belief. On the contrary, rather than regarding theism and nontheism as merely variant religious sects within a broadly defined category of "religion", the establishment clause regarded theism as the common denominator of all religions, and nontheism it considered not to be a religion at all. Government itself could profess a belief in God, and, so long as a practical neutrality was maintained among theistic sects, the neutrality command of the establishment clause would not be breached.

That it was not a purpose of the establishment clause to forbid such a profession by government of the truth of theism, or to forbid all official governmental sanction of public prayer, is shown by the fact that on September 24, 1789, the very same day that it approved the First Amendment, Congress called on the President to proclaim a national day of thanksgiving and prayer, in the following resolution:

> That a joint committee of both Houses be directed to wait upon the President of the United States to request that he would recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness.[5]

President Washington issued the thanksgiving proclamation on October 3, 1789, and every President, except Thomas Jefferson and Andrew Jackson, has followed suit.

Would it not have been extraordinary for Congress to request a public day of prayer to be observed by "the people of the United States" and on the very same day to propose a constitutional amendment to prohibit that very type of prayer? Indeed, the specific religious issue was raised by Representative Thomas Tucker of South Carolina in the debate preceding the adoption of the resolution. Mr. Tucker objected that calling on the President to proclaim a day of prayer "is a business with which Congress have nothing to do; it is a religious matter, and, as such, is proscribed to us."[6] Congress, however, passed the resolution.

If the question of Congress's competence in religious matters had not been raised, it could possibly be said that it had never occurred to the members and therefore the action of Congress ought not to be conclusive on the point. When, however, the issue was squarely joined, the First Congress deliberately overrode the same objections we hear so often today and voted to offer public prayer to God.

Definitions of Religion Are Given by the Court

The history and informed logic of the establishment clause, therefore, lead to the conclusion that its definition of religion was similar to that used by Chief Justice Hughes in his dissenting opinion in a 1931 case involving the eligibility of a pacifist for naturalization:

> . . . The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation . . . . One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.[7]

For many years, it was assumed that the same definition of religion applied to the free exercise clause of the First Amendment, so that the clause, it could be argued, protected only theistic beliefs against governmental prohibition. Thus, in *Davis* v. *Beason*, 133 U. S. 333 at 342 (1890), the Supreme Court said, "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." In the *Davis* case, the Court held that the federal law prohibiting polygamy was not an infringement upon the religious freedom of the defendant.

It is obvious, however, that believers in nontheistic creeds, such as atheists and agnostics, should be protected in the free exercise of their religion as fully as are Baptists and Presbyterians. And it ought not to be inferred, from the theistic definition of religion employed by the Court in the *Davis* case that, if the issue were presented to it, the Supreme Court would not have accorded the protection of the free exercise clause to atheists and agnostics even at the time when the Court was formulating its theistic definition of religion. The equity and reason of the matter are plain. Moreover, as Mr. Justice Brennan properly acknowledged in his concurring opinion in the *Schempp* case:

> [O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.[8]

It is correct beyond dispute that the settled protections of the free exercise clause ought to be extended today to such nontheistic creeds as atheism and agnosticism. This conclusion, apparently, determined the decision in *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), in which the Court invalidated a provision of the Constitution of Maryland requiring a state employee to declare his belief in God. The test, said Justice Black for the Court, unconstitutionally invaded the employee's "freedom of belief and religion". The re-

4. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874 and 1877 (1891).
5. 1 ANNALS OF CONG. 949 (1789).
6. 1 ANNALS OF CONG. 950 (1789).
7. *United States* v. *Macintosh*, 283 U. S. 605, 633-634 (1931).
8. *Abington School District* v. *Schempp*, 374 U. S. 203, 240 (1963).

quirement was invalid because "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of God'." The Court went on to spell out the entitlement of nontheistic beliefs to protection as religions:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess his belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, *and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.*[9] [Emphasis added.]

Appended to the last quoted clause was a footnote specifying that: "Among religions in this country which do not teach what would commonly be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

The Court's reliance on Mr. Torcaso's "freedom of belief and religion" leaves some doubt as to whether the decision rests on establishment clause or free exercise clause grounds. However, it probably did rest on the latter, and the decision is supportable in that sense, because the free exercise clause ought to interdict states (assuming, as the Court has held, that the First Amendment is applied fully to the states through the due process clause of the Fourteenth Amendment) from barring nonbelievers in God from general state employment.

Two Types of Religions Are Now Protected

In view of the holding in *Torcaso*, it may now be said that there are two general types of religions entitled to the protections of the First Amendment.

On the one hand are those which profess a belief in God. For purposes of discussion, let us call them theistic, and for analysis we shall include therein both deistic and theistic beliefs in God with their variant interpretations of the nature of God and His providence.

On the other hand are those nontheistic religions described in Justice Black's footnote in the *Torcaso* case. Of the four nontheistic religions mentioned by him, the two most important in contemporary terms are Ethical Culture and Secular Humanism, which are nontheistic in that they do not affirm the existence of God. It is reasonable also to include unorganized atheism and agnosticism within the *Torcaso* definition of nontheistic religion. While atheism flatly rejects a belief in the existence of God, agnosticism is: "The doctrine that neither the existence nor the nature of God, nor the ultimate origin of the universe, is known or knowable . . .".[10] Atheism and agnosticism are both compatible with Ethical Culture and Secular Humanism; they are as much entitled to constitutional treatment as religions as are those latter beliefs.

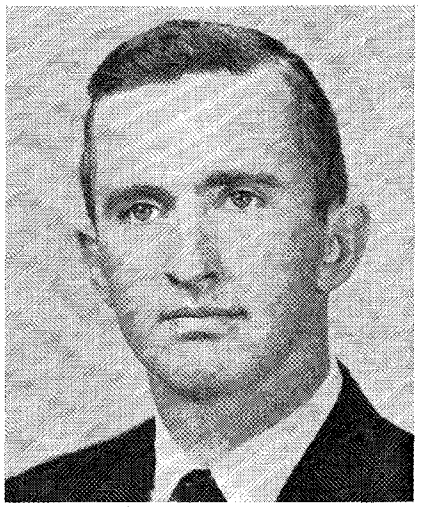
The vice of the *Torcaso* case is that the Court did not spell out the grounds of the ruling and did not limit its new and broader definition of religion to the area of free exercise rather than that of establishment. Regrettably, the Supreme Court has now taken its *Torcaso* definition of religion and applied it without apparent reservation to the establishment clause.

In the first of the school prayer decisions,[11] the Court did not cite any cases in support of its determination. The ruling seemed to rest on an assumed incapacity of government, under the First Amendment, to write or sanction "official prayers" of any type, at least in public schools. The Court did not dwell on the reason for the incapacity, but it was intimated by Justice Black, speaking for the majority, when he noted in passing: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing *officially approved religion* is plain" (emphasis added). What Justice Black hinted at here was the same concept of neutrality explicitly found controlling one year later in the *Schempp* case.

There Justice Clark rested his opinion for the Court on "the concept of neutrality", which operates to prevent a situation where the "official support of the state or Federal Government would be placed behind the tenets of one or of all orthodoxies". *Engel* and *Schempp*, of course, were decided solely as establishment clause cases. And, to emphasize the content of the neutrality which it now finds in the establishment clause, the majority opinion in *Schempp* quoted in support an extract from *Torcaso* explicitly adopting the broad definition of religion:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which *aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.*[12] [Emphasis added.]

In view of the increased variety in our religious composition, it is quite proper for the Court to construe the



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9. 367 U. S. at 495.
10. WEBSTER'S NEW INTERNATIONAL DICTIONARY, UNABRIDGED (Second Edition).
11. *Engel* v. *Vitale*, 370 U. S. 421 (1962).
12. 374 U. S. at 220, citing from opinion of Justice Black for the Court in *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961).

establishment clause to bar a law respecting a real "establishment", in the limited historical sense of the word, of either a theistic or nontheistic sect. But the Court has gone much further and is construing the clause, with its newly incorporated definition of religion, in absolutist terms, affirming that our "constitutional policy" denies, when "religious training, teaching or observance" are concerned, "that the state can undertake or sustain them in any form or degree".[13]

In his seventy-four page concurring opinion in *Schempp*, Justice Brennan probed the deeper meaning of the Court's ruling and strained to demonstrate that the decision was not a precursor of further extreme rulings. Yet the best he could do on the words "under God" in the pledge of allegiance was to say that: "The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God'."

The pledge, in Justice Brennan's view, is merely one of "the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning".[14]

Justice Brennan has supplied the key the Court is likely to use to decide if an exercise is "religious" or merely a harmless "patriotic or ceremonial" one. That is, if it is to be taken seriously, it is therefore at least in part a "religious exercise", and as such it is prohibited by the First Amendment. Only if it is a mere affirmation of the historical fact that the founders believed in the overlordship of God, or that some Americans now so believe, and only if it scrupulously avoids any affirmation of the truth or falsity of that belief in God, can the observance be insulated from constitutional attack.

This rationale necessarily would prevent an affirmation by a teacher or other government official that, *in fact*, the Declaration of Independence is true when it asserts that men are endowed "by their Creator" with unalienable rights or when it asserts the existence of "the laws of nature and of nature's God", a "Supreme Judge of the world" and "Divine Providence".

In the nature of things, governmental neutrality on the question of God's existence is unattainable. A governmental assertion that God does in fact exist is a preferential affirmation of the truth of theism; an assertion that God does not exist is a preference of atheism; and a perpetual suspension of judgment by government on the question is an adoption of the agnostic, nontheistic position through the implicit assertion that, as a matter of state policy, the existence of God is unknown or unknowable. In the school prayer cases the Court appears to have adopted an agnostic approach which is incompatible, in its treatment of the basic question of God's existence, with the basic theistic affirmation which was theretofore embedded in our law and tradition.

It is not my purpose here to discuss the possible extensions of the school prayer decisions. Rather, I am concerned only with the thought that the unqualified incorporation of the broad definition of religion into the establishment clause is perhaps the root fallacy in the Court's reasoning. In order to avoid an institutionalization of agnosticism as the official public religion of this country, the Court ought to acknowledge that nontheistic religions are not entitled to such unqualified recognition under the establishment clause as to bar even a simple governmental affirmation that in fact the Declaration of Independence is true when it states the existence of God.

13. *Abington School District* v. *Schempp*, 374 U. S. 203, 218 (1963), quoting from dissenting opinion of Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, in *Everson* v. *Board of Education*, 330 U. S. 1, 52 (1947).
14. Quotations from 374 U. S. 303, 304.