Military Chaplains - A Constitutionally Permissible Accommodation Between Church and State

M. Albert Figinski

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Constitutional Law Commons

Recommended Citation

M. A. Figinski, Military Chaplains - A Constitutionally Permissible Accommodation Between Church and State, 24 Md. L. Rev. 377 (1964)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol24/iss4/2

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
MILITARY CHAPLAINS — A CONSTITUTIONALLY PERMISSIBLE ACCOMMODATION BETWEEN CHURCH AND STATE

By M. ALBERT FIGINSKI*

I. ENGEL; SCHEMPP-MURRAY; JUSTICE BRENNAN TAKE A STAND

When the Supreme Court held unconstitutional, in Engel v. Vitale,1 a local New York school board requirement that each school day be opened with the recitation of a prayer, authored by the State Board of Regents, by students who, if they had taken affirmative action, could have been excused from this ritual, vehement disapproval and harsh accusations were heard throughout the country.2 As time progressed and tempers soothed, disagreement, as well as approval, flowed forth from the more usual commentators on constitutional decisions.3 The sources of disapproval, whether reasoned or flamboyant, expressed fears that the language and approach used by Justice Black in Engel and the willingness of the Court to intercede in these matters would have the pervasive effect of eliminating many religious references and practices which theretofore had been long sanctioned by American governments on both the state and Federal level.

The only balm the Court had offered in Engel was footnote 21, which appeared as an appendage to what seem-

* B.A., 1959, Johns Hopkins University, 1959 (political science); LL.B., 1962, University of Maryland School of Law, 1962; Casenote Editor, Maryland Law Review, 1961-62; Member, Maryland Bar.


2 A catalogue of the attacks voiced is found in Editorial, Religion Sponsored by the State, 4 J. CHURCH & STATE 141, 142 (1962). See also N.Y.L.J., April 16, 1964, p. 1, col. 4.

3 The Engel case was widely reviewed by the legal periodicals. Perhaps the most bitter intellectual criticism was Griswold, Absolute Is in the Dark — A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167 (1963). See also Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . .", 1962 Sup. Ct. Rev. 1. Pfeffer, The New York Regents' Prayer Case, 4 J. Church & State 150, 158 (1962) is an ardent argument in favor of the Engel decision.
ingly was an attempt by the Court to answer any assertion that its decision was anti-religious. Footnote 21 rejected the assertion that the ruling necessarily forbade classroom recitation of historical documents or our National Anthem when they contained references to a Deity or a Supreme Being.

If this footnote was the only verbiage that soothed fears of a pervasive sweep of religion out of our public life, there were several causes for alarm. Foremost was the factual context of the case, i.e., the non-denominational content of the prayer and the non-compulsory attendance at the recitation. Secondly, the entire presentation of the Court implied an absolutist approach which displayed a judicial fear that any concession to religion or the religious character of our people was tantamount to sanctioning a small leak in a large dam, which confined a restlessness to break forth on a rampage of European-style Establishment of a Church.

A third cause for alarm was Justice Douglas' concurring opinion which saw as the true constitutional evil, not the governmental writing of a prayer, but the financial aid the state rendered a religious exercise by allowing the praying to be led by a person on the public payroll.

With its performance in *Engel* and the reaction thereto serving as recent history, the Court was faced in its next Term with the practice of Bible-reading in the opening exercises of the public schools of Baltimore City and Pennsylvania. Again, non-conforming students could be excused from attendance at the exercises. However, the Court held

---

4 Engel v. Vitale, 370 U.S. 421, 435 (1962): "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

5 Id. at 435, n. 21.


7 The *Engel* opinion of Justice Black can also be read narrowly as strictly limited to the issue in the case. This being so, one wonders whether much of the uproar that followed the announcement of the decision would have resulted if the opinion had stopped at p. 425.

8 This was the essence of the constitutional evil according to the majority. Engel v. Vitale, 370 U.S. 421, 425, 429 (1962).

9 Cf. an opinion by the Attorney General of the State of Maryland indicating no Federal constitutional bar to a county allowing a local Catholic parochial school, at its own expense, to tie into the closed circuit educational television system maintained for the county's public school system. The essence of the opinion was: "The arrangement... would do no more than provide secular educational opportunities for school children, and *without the expenditure of any additional money* by either the State or the County." (Emphasis added.) The opinion is reported in Daily Record (Baltimore), Apr. 8, 1964, p. 4, col. 2.

in Abington School Dist. v. Schempp and Murray v. Curlett\(^\text{11}\) that the practice was unconstitutional on the basis of a test that looked to the "purpose and primary effect"\(^\text{12}\) of the legislatively sanctioned ritual and found that the exercises were of a religious character and thus in violation of the non-establishment of religion provision of the First Amendment.

In so holding, Justice Clark, writing for the majority, followed a style of presentation completely different than Justice Black had demonstrated in Engel. Stressing former opinions of the Court rather than writing a history of Church-State relations throughout the centuries, Justice Clark gave some salve to those who would not have all religious manifestations in public life erased. The opinion specifically referred to the oaths of public officials, the practice of Congressional chaplins, the cry of the Court, and military manifestations of religion.\(^\text{13}\) A footnote specifically excluded the last-mentioned connection of Church and State from the scope of the opinion.\(^\text{14}\)

If this were not soothing enough, Justice Brennan, perhaps in response to the legal reaction to the breadth seen by many in Engel, wrote a lengthy concurring opinion which sought to define permissible and impermissible types of "interdependence between religious and other public institutions."\(^\text{15}\) Justice Brennan suggested that "religious exercises in the public school [presented] a unique problem,"\(^\text{16}\) and the decisions rendered in cases involving religion in the public schools are not reliable forecasts for other areas of Church-State contact. Rejecting the absolutist pose, Justice Brennan stated, "... not every involvement of religion in public life ... violates the Establishment Clause."\(^\text{17}\) For Brennan, that Clause proscribed only:

"... those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or


\(^{12}\) Id. at 222.

\(^{13}\) 374 U.S. at 213. Of course, mere mention does not imply approval.

\(^{14}\) 374 U.S. at 226, n. 10. However, see Pfeffer, The Schempp-Murray Decision on School Prayers and Bible Reading, 5 J. CHURCH & STATE 165, 173-74 (1963), which recognized the Court's attempt to restrict Schempp-Murray but argued for a pervasive interpretation.

\(^{15}\) 374 U.S. at 294.

\(^{16}\) Ibid.

\(^{17}\) 374 U.S. at 292. This in itself can be viewed as a different approach than that which had been criticized for use in Engel v. Vitale, 370 U.S. 421 (1962).
There were, however, "forms of accommodation" consistent with a "strict neutrality in matters of religion" which were not proscribed; indeed, to prohibit them would amount to "official hostility toward religion."\(^\text{19}\)

The first and foremost form of accommodation, for purposes of discussion of the constitutionality of military chaplains, was said to arise from a conflict between the Establishment and Free Exercise Clauses of the First Amendment wherein a strict reading of the former would "seriously interfere" with the protections accorded by the latter. Justice Brennan recognized that the Establishment Clause standing alone is "conceivably\(^\text{20}\) violated by the practice of providing chaplains to the military. However, this assumption did not foreclose discussion. It was argued that providing chaplains had constitutional basis as "necessary to secure to the members of the Armed Forces . . . those rights of worship guaranteed under the Free Exercise Clause."\(^\text{21}\) Impediments to this theory raised by the Court's decisions in the religion in school cases were distinguished away. The lack of coercive attendance, the adults involved, and the lack of religious opportunity otherwise were the basis for the distinction. Therefore, to refuse to allow Congress to provide for military chaplains or the states to provide for chaplains in the prisons would be hostility, not neutrality, toward religion.\(^\text{22}\)

Justice Brennan's thesis can be viewed as an answer to those who felt the Court was wrongly headed toward eliminating every aspect of accommodation between Church and State. The thesis of giving the Free Exercise Clause precedence over the Establishment Clause and justifying state action on that basis is not a completely unique one. In fact, it had been argued to and rejected by the Court in Schempp. Justice Clark wrote:

". . . we cannot accept that the concept of neutrality, which does not permit a State to require a religious

\(^\text{18}\) 374 U.S. at 295.
\(^\text{19}\) Ibid.
\(^\text{20}\) 374 U.S. at 296.
\(^\text{21}\) Ibid.
\(^\text{22}\) 374 U.S. at 297.
\(^\text{23}\) 374 U.S. at 299. Other areas of accommodation between church and state said to be allowable by Justice Brennan were legislative chaplains, non-devotional use of the Bible in public schools, uniform tax exemptions incidentally available to religious institutions, activities which though religious in origin have ceased to have religious meaning and religious considerations in public welfare programs. 374 U.S. at 299-304.
exercise even with the consent of those . . . affected, collides with the majority's right to free exercise. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs."

However, in footnoting this passage the Court noted it was not faced with and thus did not pass upon the military chaplaincy question. At least, then, the majority of the Court remained neutral on this question, but rejected any wide-ranging use, under normal conditions, by a popular majority of the Free Exercise Clause to sanction state-supported religious exercises.

Use of the Free Exercise command to sanction state action in areas where a "doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause" was the thesis of Justice Stewart's dissent which urged remand for further evidence of the effect, if any, official coercion had on non-participants in the exercises. Justice Stewart saw a substantial "free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible."

Thus Stewart's claim for the Free Exercise Clause is broader than that put forth by Brennan's first permissible area of accommodation which seems to be a permissible area only when government has "cut off" those desiring to worship from the normal civilian opportunities to do so. Moreover, it is Stewart's position that was rebuked by Clark's words cited above.

Justice Goldberg, speaking also for Justice Harlan, saw chaplains as allowable under "present and past cases" and displayed a readiness to find constitutional accommodations to religion, but not in the context of the Schempp case.

Justice Douglas concurred in the Schempp decision but again argued that the use of public funds to promote a religious exercise was the crux of the constitutional evil. His opinion, though short, is the only one of those presented in Schempp that does not in some way refer to the military chaplaincy, but the tone of his remarks displays hostility to that practice.

---

25 374 U.S. at 300.
26 374 U.S. at 312.
27 374 U.S. at 299.
28 374 U.S. at 306.
29 374 U.S. at 307.
In light of Justice Brennan's thesis and the remarks of the other Justices, it is appropriate to pose several questions, which are perhaps crucial in determining the constitutionality of the military chaplaincy. First, how far is Brennan's thesis supported by prior Court pronouncements, recognizing that his thesis assumes that the public school cases would not be controlling? Second, how does this thesis square with the major non-judicial writings and promptings in this area? Third, what is the actual position of the chaplaincy in the scheme of things military?

II. THE MILITARY CHAPLAINCY

Before turning to the Court decisions and the extra-judicial writings, we pause to consider the history and role of the military chaplain.

At the outset it should be noted that chaplains are a tradition in the American military extending back to Revolutionary days. This is in contrast to the less lengthy history of some of the practices present in public schools which have been put to constitutional challenge. Indeed, chaplains were not unknown to the units the American colonists supplied in the pre-Revolutionary French and Indian War. The Revolutionary militia units were commonly augmented by a chaplain, often the town clergymen from the area supplying the troops, but always of the faith of the majority of the troops he served.

By 1838 Congress had enacted legislation providing for chaplains at many regular Army posts. For some time thereafter the role of chaplain was a "political plum" handed out to a local civilian who retained his civilian status and occupation which did not necessarily include ministerial duties. However, at the onset of the Civil War, Congress provided for regimental chaplains who were

---

80 The issue has not been handled on its merits by any court of law, since the legal obligation of standing to sue has thwarted attack on the military chaplaincy. Elliott v. White, 23 F. 2d 997 (D.C. Cir. 1928).

81 The Regents' Prayer, of course, was of recent vintage. Although Bible reading or more properly the teaching of reading through use of the Bible has roots in the Puritan school, the recently-condemned ritual is traceable to the Protestant influence on education after the Civil War. See BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS, ch. 1 (1961). Release-time programs developed at the turn of the century. McCoUum v. Board of Education, 330 U.S. 203, 222-25 (1948).

82 PRESIDENT'S COMMITTEE ON RELIGION AND WELFARE IN THE ARMED FORCES, THE MILITARY CHAPLAINCY 5 (1950) [hereinafter cited as PRESIDENT'S COMMITTEE].

83 Ibid. Only two Roman Catholics served as chaplains in the Revolutionary Army, and no Jew served.

84 Ibid.

85 PRESIDENT'S COMMITTEE, op. cit. supra note 32, at 6.
required to be "regularly ordained ministers of some Christian denomination." While chaplains remained a part of the uniformed services thereafter, their numbers were small, only 74 Regular Army Chaplains being on duty at the time of the entry of the United States into World War I. The numbers, of course, rose with the expansion of the military to war-time strength and fell upon return to "normalcy".

A chapel building program was begun in 1925 and regular chapels replaced the search for proper areas to hold services which had resulted in a procuring of facilities on a catch-as-catch-can basis.

World War II saw the ranks of Army chaplains swell above the eight thousand figure, and called nearly three thousand clergymen to Navy service.

Provision for chaplains of minority faiths has been a problem to the services. This problem is perhaps best illustrated by noting that the Navy did not commission its first Roman Catholic chaplain until 1883, and its first Jewish chaplain until 1917. Today, the inability to provide a chaplain even of every major faith at all posts or installations leads to the provision for the procurement of "auxiliary chaplains" on a fee basis where adequate coverage by active duty chaplains is not available.

Seeing to the availability of services for communicants of minority faiths is but one of the tasks of the military chaplain. His primary task, of course, is administering to the spiritual needs of the service man in a manner not

---

56 Ibid.
57 President's Committee, op. cit. supra note 32, at 7.
58 Id. at 8.
59 Id. at 8-9.
60 Id. at 4.
61 Id. at 9. The problem can also be illustrated by the story of how the first Jewish chaplain came into the service. At the outbreak of the Civil War a young Hebrew teacher joined the 65th Regiment of the 5th Pennsylvania Calvary as its elected chaplain. The Commanding Officer of this unit and many of the officers were Jewish. This chaplain was forced to resign after serving four months on the ground he was neither an ordained clergyman nor a Christian. This episode was magnified and finally President Lincoln proposed legislation which abolished the former requirement that a chaplain be Christian, and a rabbi received a commission under the new legislation in September, 1862. For a detailed account of this episode see Barish (ed.), Rabbis in Uniform 3-4 (1902).
62 Army Reg. 165-35, "Religious Activities — Employment of Auxiliary Chaplains" (1956). This regulation establishes the fees for such auxiliary chaplains as $18.75 for Sundays or Sabbath, major religious holidays or weekday services in lieu of Sunday or Sabbath; $12.50 for each additional weekday; and $6.25 for emergency ministrations.
unlike the civilian clergyman.\textsuperscript{43} This clerical role is protected by regulations which provide that a chaplain "will not" be assigned duties "unrelated" to their role as clergymen "except on a temporary basis in cases of military emergency."\textsuperscript{44} Religious proficiency of the military chaplain is insured by requiring him to be duly ordained, licensed or certified as a clergyman by a "recognized civilian ecclesiastical agency".\textsuperscript{45}

In ministering to the spiritual needs of the serviceman, the Protestant chaplain is placed in a position unlike his Jewish or Roman Catholic brethren. He is expected to conduct a general, rather than a denominational, Protestant service to, in effect, provide for a wider denominational coverage than would be possible if he merely performed a service in denominational manner.\textsuperscript{46} However, Federal statute instructs all chaplains to:

\begin{quote}
"... when practicable, hold appropriate religious services at least once on each Sunday for the command to which he is assigned, and ... perform appropriate religious burial services for members of the Army who die while in that command."\textsuperscript{47}
\end{quote}

To free military personnel to attend religious services, Sunday is a day of reduced duty and labor to the point of "strict necessity" and athletic and recreational activities on Sunday are scheduled to present no conflict to worship.\textsuperscript{48} Sabbatarians are given consideration also in regard to excuse from military duties to worship.\textsuperscript{49}

\begin{footnotes}
\begin{enumerate}
\item Army Reg. 165-15, op. cit. supra note 43, at 7-8:
"Commanders will not detail or assign chaplains to duties unrelated to their duties as clergymen except on a temporary basis in cases of military emergency. Commanders will not—
(1) Detail chaplains as exchange, athletic, recreation, graves registration, welfare, morale, mess, personal affairs, information, education or special services officers.
(2) Assign chaplains for trial counsel of a court-martial, investigating officer, defense counsel, law officer or as a member of the court."
\item President's Committee, op. cit. supra note 32, at 3. For the Army, the Secretary of the Army establishes denominational quotas, Army Reg. 165-15, op. cit. supra note 42, at 2.
\item President's Committee, op. cit. supra note 32, at 11, 12; Army Reg. 165-15, op. cit. supra note 43, at 3.
\item Ibid.
\end{enumerate}
\end{footnotes}
Ecclesiastical rules are further respected to the extent of specifically freeing a chaplain from performing joint services of several denominations where their denominational or ecclesiastical tenets prohibit such services, and from performing marriage or other religious ceremonies between or for military personnel who have not complied with denominational requirements of the chaplain's church.\footnote{Army Reg. 165-15, op. cit. supra note 43, at 3.}

In addition to his status as clergyman, the chaplain is also considered a staff officer\footnote{Id. at 1. A chaplain is always addressed as “Chaplain” regardless of rank. \textit{Ibid.}} and in this role, as well as in a dual role of both clergyman and staff officer, certain duties and responsibilities fall to the chaplain. Throughout the military, the chaplain is looked upon as a counselor or personal advisor to the troops.\footnote{President’s Committee, \textit{op. cit. supra} note 32, at 12.} In this role he provides a ready ear for a wide variety of problems that plague the serviceman,\footnote{Army Pamphlet 20-145, “Troop Topics,” pp. 12-13 (1962): “Sometimes a soldier will be troubled by a religious or spiritual matter. Or perhaps he has a personal problem that he doesn’t feel like discussing with his officers or noncoms. * * * Perhaps he just feels like talking to someone to ‘get it off his chest.’ “The best advice you can give such a soldier is to see his chaplain and talk over the difficulties. Chaplains often help soldiers with problems that no other person or agency in the Army can solve. And the soldier can be sure that his problem will be treated in the same confidential manner by his chaplain as they would be by his own minister, priest or rabbi.”} from debts to unfair treatment, from marital difficulties to homeless families.\footnote{Army Pamphlet 608-2, \textit{op. cit. supra} note 43, at 22.}

To protect this role as a man to whom troubles can be told, words spoken to a chaplain as clergyman or confidant are protected as privileged communications.\footnote{United States v. Kidd, 20 C.M.R. 713, 718-19 (1955); Army Reg. 165-15, \textit{op. cit. supra} note 43, at 2.} By this role, the chaplain becomes a channel for presentation of grievances to the commander,\footnote{President’s Committee, \textit{op. cit. supra} note 32, at 18.} and a source of information on the morale of a command.

Purely as a staff officer, the chaplain becomes a coordinator of religious programs, the fund estimator for such programs, the advisor to the commander on religious, moral, and morale matters, and liaison with local clergymen in the same matters.\footnote{Army Reg. 165-15, \textit{op. cit. supra} note 43, at 5.}
In the Army and Air Force the chaplain has responsibility for the character guidance program within a command. This program is designed to promote:

"... healthy mental, moral and social attitudes in the personnel. ... By this program the Army endeavors to maintain the wholesome influences of family, community and cultural heritage. ... Generally, the Character Guidance Program is designed to encourage high standards of personal conduct among members of the Army. It aims to strengthen in the individual those basic moral, spiritual and historical truths which motivate the patriot and undergird the Code of Conduct." \[59\]

At Departmental level, the Chief of Chaplains develops policy for the program and prepares instructional material to support it. \[60\]

In reviewing the history, role and duties of the military chaplain a closing note must emphasize that, while worship opportunity is provided on a wide scale, attendance at worship services is on a voluntary basis. This voluntary aspect is significant for it negates the vision of marching the troops in formation to religious services. Compulsory worship is foreign to the chaplaincy program which can be seen as a far-reaching effort to provide worship opportunity for the service man. The opportunity is financed by the Federal government. Chapels are built with Federal funds and chaplains receive the compensation which goes with their commissions.

From the review of the chaplaincy presented there can be little doubt that this scheme causes involvement of the Federal Government with religion and religious observance. In short, the closed society of men at arms is provided its religious opportunity from within its own ranks by members brought into the society who have certain religious credentials. And the purpose of this scheme is to enhance the morale and welfare of the serviceman and make effective his desire for religious worship. However,

\[58\] President's Committee, op. cit. supra note 32, at 13.
\[60\] Id. at 4.
\[61\] President's Committee, op. cit. supra note 32, at 19.
\[64\] President's Committee, op. cit. supra note 32, at 1-3.
there can also be little doubt that the scheme serves also, purposefully or not, to assist the church to retain its communicants.

III. PRIOR ESTABLISHMENT CLAUSE DECISIONS AND HOW THEY SQUARE WITH BRENNAN'S THESIS

The interpretation offered by Justice Brennan in effect would withhold a strict application of the Establishment Clause when individuals, under some governmentally imposed disability, would be seriously hampered in their right to free exercise. A review of the prior judicial pronouncements of the Court in the establishment area is in order to discover whether Brennan's thesis has any prior judicial support. One must, however, recognize that Brennan's thesis was specifically designed to meet future problems that might be presented, rather than as an attempt to delineate a policy from prior pronouncement.

It is readily recognized that Everson v. Board of Education was the first decision of the Court to clearly come to grips with the Establishment Clause. The opinion of the Court's majority, written by Justice Black, has been a source of varying interpretation since its pronouncement due to the paradox of the opinion; on the one hand, it used absolute language to define the Establishment Clause as prohibiting aid to religion, while, on the other hand, it gave constitutional approval to a New Jersey statute which

---

66 Id. at 29 (Justice Rutledge, dissenting); KURLAND, RELIGION AND THE LAW 50 (1962).
68 Since a state statute was drawn in question, and the First Amendment applies by its terms only to Congressional action, some vehicle was needed to make the provisions of the First Amendment applicable to the states. That vehicle was found in the Due Process Clause of the Fourteenth Amendment. In this instance the non-establishment provisions of the First Amendment were made applicable to the states and another chapter was added to the First Amendment carryover which began in Gitlow v. New York, 269 U.S. 652, 666 (1925).

In Everson the Court did not explain how the non-establishment clause came to apply to the states but merely said that it did. Everson v. Board of Education, 330 U.S. 1, 8 (1947). This dearth of explanation has never been remedied and there are several examples of the Justices groping for an explanation or pondering an explanation. The most recent example is provided by Justice Stewart who at a loss for an explanation, noted his acceptance of "the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause. . . ." Abington School Dist. v. Schempp, 374 U.S. 203, 310 (1963). Another example was provided from the Bench during the argument of the Sunday Closing Law cases. During
allowed reimbursement to parents of funds expended in providing bus transportation for their children to parochial schools.

Justice Black's opinion, in so far as it establishes an absolute doctrine prohibiting any aid to one religion or all

argument, Justice Frankfurter challenged counsel's assertion that the Fourteenth Amendment "incorporated" the First Amendment's proscription against the establishment of religion. In aid of harried counsel, Justice Douglas asserted: "I think the members of this Court could furnish [examples supporting counsel's position]." In reply, Justice Frankfurter said: "I do not think you will find any cases in which a majority of this Court said the specific proscriptions of the First Amendment were made applicable to the states." Not silenced, Justice Douglas asserted: "I can give you a good list of them." 29 U.S.L. Week 3175 (Dec. 13, 1960).

Arguments against applying the non-establishment clause to the states assert that the Fourteenth Amendment restrains only state invasion of "liberty", and, whereas the "free exercise" of religion is clearly a liberty which is properly protected against state action, an "establishment of religion" is not necessarily a deprivation of liberty, but primarily a regulation of governmental relations. Drinker, Some Observations on the Four Freedoms of the First Amendment, 57 B.U.L. Rev. 1, 55, 67 (1953). Furthermore, the argument goes, the Bill of Rights has a federalism aspect which in the case of the non-establishment provision meant to leave the aspect of church-state relations to the states while prohibiting Federal intrusion, and the liberty of the Fourteenth Amendment in no way raised as high a barrier against state governments as must be recognized against the Federal government. Howe, The Constitutional Question, in Fund for the Republic (ed.), Religion and the Free Society 51, 55-56, 61 (1958); Snee, Religious Disestablishment and the Fourteenth Amendment, 1 Catholic Law. 301, 303, 317 (1955). The most candid exploration of this problem of applying the non-establishment provisions against the states is found in Corwin, The Supreme Court as National School Board, 14 Law & Contemp. Prob. 3, 14 (1949). As a matter of history there is some evidence which specifically points to the incorrectness of the application of the non-establishment clause to the states. Not only were there established churches in the states at the time of the ratification of the Bill of Rights, Greene, Religion and the State 82-93 (1941; paperback, 1959), but, as well, the attempt to enact the "Blaine Amendment" indicates that Senators did not believe the Fourteenth Amendment would have the effect that judicial interpretation has given it. See Meyer, The Blaine Amendment and the Bill of Rights, 64 Harv. L. Rev. 933, 942 (1951).

Also, Justices Holmes and Brandeis seemed to accept a less rigorous application of First Amendment rights when applied against the States through the "libery" of the Fourteenth Amendment than they would when Congressional action was drawn in question. Gitlow v. New York, 268 U.S. 652, 672 (1925). It is also interesting to note that an eminent law professor writing at the time of Gitlow foresaw the expansion of the Fourteenth Amendment's Due Process Clause, and even predicted the eventual application of the Free Exercise Clause against the states, but made no reference to the non-establishment provision as of conceivable application to the states. Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 458 (1926).

Thus it hardly seems inevitable that the non-establishment provisions would be applied to the states. Freund, The Supreme Court of the United States 58 (1961).

Yet the Court has reaffirmed often the principle that the non-establishment clause is made applicable to the states by the Fourteenth Amendment. See Abington School Dist. v. Schempp, 374 U.S. 203, 215 (1963).
military chaplains gives little succor to the Brennan thesis. Surely, an absolute prohibition of aid to religion would not allow for the flexibility Brennan would accept. A doctrine which included a prohibition against a tax to support "any religious activities and institutions" would presumably negate the governmental payment of salaries to chaplains and the construction of chapels from public funds, even if otherwise men in military service would lose the opportunity to worship.

However, Justice Black did not merely declare a doctrine in Everson; he construed a statute to avoid the effect of that doctrine. The basis for this construction apparently was a desire to insure that the courts:

"... [did] not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief."

In essence, he refused to force the state to cut off aid to anyone "because of their faith or lack of it." This opinion then rejects classification on the basis of religion as constitutionally permissible under the First Amendment.

Yet, this holding, relying as it does on the general nature of the law before the Court, does not presage the Brennan thesis which essentially allows a non-general or special exception or classification in order to provide those wishing to worship the opportunity to do so. Expenditures for chaplains who perform a primarily religious mission is hardly classification not on the basis of religion.

Justice Jackson, dissenting in Everson, also stressed the absoluteness of the prohibition he saw in the First Amendment, but his opinion stressed that children were in-

---

69 Everson v. Board of Education, 330 U.S. 1, 15-16 (1947):

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

70 Id. at 16. (Emphasis added.)

71 Ibid.

72 The opinion provides ammunition for the thesis propounded by Kurland, op. cit. supra note 66, at 82.

volved, that the only school children assisted were those of Catholic parents, and that the Roman Catholic Church relied on "indelible indoctrination in the faith and order of the Church" by its schools to make its young into good Catholic adults. The stress on these factors, not present in the military chaplain situation, are distinguishing factors, as Brennan noted when he put aside the school cases.

If some support, even if only growing out of a basis for distinction, can be drawn for Brennan's thesis from Justice Jackson's dissent, there is no support flowing from Justice Rutledge's dissent, which vigorously espouses an absolute separation of Church and State, fearing even the slightest breach in the wall of separation. That the protection accorded by the Free Exercise Clause would have any influence on an Establishment Clause case was apparently not contemplated by Rutledge, for he wrote:

"Our constitutional policy ... does not deny the value or the necessity for religious training, teaching or observance. ... But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two-fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private."

The Everson opinions were followed in a few years by McCollum v. Board of Education and Zorach v. Clauson. In McCollum the Court, by 8 to 1 vote, held unconstitutional a plan whereby representatives of the various religious faiths were allowed to enter public school buildings to conduct weekly religious classes to which children, with parental consent, were sent and their attendance checked, while those children not wishing religious instruction were sent off to pursue their secular studies. Justice Black, in a

---

74 Kurland, op. cit. supra note 66, at 83, indicates this interpretation, not any conflict in doctrinal attitude, is reason for Justice Jackson's split with Justice Black.
77 Everson v. Board of Education, 330 U.S. 1, 28 (1947); Kurland, op. cit. supra note 66, at 84.
78 Everson v. Board of Education, supra note 77, at 52. (Emphasis added.)
relatively short opinion, seemed to stress that the close cooperation between Church and State to promote religious ends was the constitutional evil.

"The... facts... show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon condition that they attend the religious classes. This is beyond all question a utilization of a tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment..."81

After refusing to turn away from the doctrine of separation of Church and State as defined by Everson and rejecting any nullification of the holding there that the Fourteenth Amendment made the First Amendment's Establishment Clause applicable to the states,82 Justice Black closed his opinion for the Court by stressing the "invaluable aid" sectarian groups acquired when the compulsory public school system was the vehicle for their religious classes.83

Black's opinion in McCollum, especially his denunciation of the use of tax supported school-systems to aid religion indicates the need for Brennan’s thesis for those favoring preservation of the military chaplaincy. Brennan's thesis can, of course, gain no vitality from McCollum for it, in essence, stands for a proposition found abhorrent there. Brennan, in effect, says there are times when close cooperation between church and state and the use of taxes to assist religion and aid in promoting sectarian doctrine are not constitutionally dispositive.

Justices Frankfurter and Jackson concurred in the decision in McCollum but presented their own opinions. Frankfurter opened by stressing that the separation doctrine was not ultimately definitive and would require a case by case analysis to determine "what the wall separates."84 Frankfurter then delivered a history of public education

82 Id. at 211. The Court also denied it was being hostile to religion by its decision.
83 333 U.S. at 212.
84 333 U.S. at 213.
showing the influence of religion upon it, and the desire of Americans to prohibit the comingling of secular and sectarian instruction in public schools. The "inherent pressure" upon the child by the public school system to attend religious instruction, and the inculcation in any dissenter of a "feeling of separatism" were:

"... precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in ... destructive religious conflicts. ...

"... [Furthermore] the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart."

This emphasis on the character of the public school and its place in society at least serves to point out that Brennan's basis for distinguishing these cases is readily discoverable.

Concurring in McCollum, Justice Jackson wrote candidly in criticizing what he believed was the Court's acceptance of the "role of a super board of education for every school district in the nation" when he pointed out that in the matter of determining when the secular ends and the sectarian begins the Court "can find no law but [its] own prepossessions."

If Frankfurter stressed the psychological impact of the plan before the Court, and Jackson urged caution in proceeding in this area of church and state relations, Justice Reed also added an important element to McCollum by being the first Justice to stray from the absolute separation principle. He directed attention to the many accommodations between Church and State in America, including the

83 333 U.S. at 227. Cf. Griswold, Absolute Is In the Dark — A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 UTAH L. REV. 167, 177 (1963), which, in effect, argues that a non-conforming child can learn about his differences in as painless a way possible in the public schools.
85 Id. at 231.
88 Id. at 238.
military and Academy chaplains, and rejected history as an accurate guide for an absolute approach in this area. Showing "great respect" for the traditions and customs of the American people, Justice Reed concluded:

"Whatever may be the wisdom of the arrangement . . . it is clear . . . that past practice shows such cooperation . . . is not forbidden by the First Amendment. . . . The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provisions of the First Amendment — free speech and free press — are absolutes. If abuses occur . . . I have no doubt . . . that [the state] will promptly correct them. . . . This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience. . . . Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people."

Reed, dismissing the fear that one step toward accommodation necessarily leads to an unacceptable form of establishment, thus rejected the absolutist approach. He also showed a tendency to respect, as constitutionally valid, practices which though aiding religion, had become traditional objects of state support. Unfortunately for one seeking to find support for Brennan's thesis, Reed spoke in dissent.

However, Reed's dissent was vindicated a mere four years later in Zorach. Justice Douglas, speaking for a six-member majority, distinguished away McCollum, and held that a "release time plan" was constitutional when the public school allowed children desiring religious instruction to be excused from attendance at the public school so that they could leave the school area and proceed to religious centers for religious instruction or devotion. Yet the scope of that decision has been limited to citation for the obvious, i.e., "We are a religious people whose institutions presuppose a Supreme Being." Moreover, the author of that opinion, now is an ardent foe of "accommodation".
especially if it means the use of salaried officials in any way.85 Nevertheless, Zorach did allow an accommodation of religious practices.

In filing separate dissents to Zorach, Justices Black, Frankfurter and Jackson each stressed McCollum and their inability to see a constitutional distinction between that case and the case before them,86 as well as stressing the nature of the public school system and the inherent compulsion to young students involved in this plan.87 If, as Justice Jackson feared, the Court started "down a rough road when we mix compulsory public education with compulsory godliness,"88 it established its own stop sign and detour by denouncing as unconstitutional the Regent Prayer and Bible Reading in the public school. Perhaps, this own brake of the Court is evidence enough that the "one step means all is lost" approach fears a bogey man.

Everson, McCollum and Zorach, the early battleground of the Establishment Clause, were all cases related to state aids to religion in which education was the focal point of the accommodation attacked. These cases remained the sum total of the discourse in the Establishment area until 1961, when the Court decided the Blue Law cases,89 which were an intervening step between the early school related cases and Engle and Schempp. In fact, the Blue Law decisions are the only non-education related decisions precisely decided upon the Establishment Clause.100 Significantly for Brennan's thesis that the school-related cases and their doctrine of complete separation must be confined to that area of accommodation, the Blue Laws were found constitutionally permissible.

Unlike leopards which reputedly do not change their spots, the Sunday Laws were found to have outgrown their original religious basis and were justified, against challenge on an Establishment basis, as a public welfare measure which set one day apart as a "day of rest, repose, recreation and tranquility."101 The challenge to the Sunday Laws on

---

85 Justice Douglas' current reliance upon the fact that the actor involved in the religious exercise was on the public payroll to decide the recent cases may be an attempt to reject the practices before the Court while maintaining the validity of his opinion in Zorach v. Clauson, 343 U.S. 306 (1952).
87 Id. at 318, 321, 324.
88 343 U.S. at 325.
90 Torcaso v. Watkins, 367 U.S. 488 (1961), on its face, does not refer to the Establishment Clause, although that seems to underpin its rationale.
Establishment grounds was refuted by an 8-1 vote. In presenting his opinion denying the Establishment claim, Chief Justice Warren, speaking for himself and five Justices, related the evolution of Sunday laws and then proceeded to a consideration of the "standards" against which the statutes would be evaluated.

"[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. . . .

"In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion. . . ."\(^{102}\)

Thus, from the Warren opinion, comes an approach which allows for accommodation of Church and State when religious motives are sublimated and secular motive can justify the state action. In effect, the religious motivations for the Sunday Laws were read out of the case. It is to be noted, however, that there must be basis for the enactment "wholly apart from any religious considerations." This separate secular motivation is not easily assumed, since the Court apparently rejected, in Schempp,\(^{103}\) the argument for school opening exercises on the basis of calming the children at the outset of the school day so that they could leave the raucousness of the playground and accept the contemplation of school work.

While this aspect of the Warren opinion does not negate out of hand the absolutist pose of McCollum and, to a lesser extent because of its holding, Everson, it does show a way

\(^{102}\) Id. at 442-44. (Emphasis added.)

around the absolute prohibition — by reading the religious character of the accommodation out of the case. However, there seems to be no semantic gymnastics\textsuperscript{104} that can dissolve the religious character of the military chaplaincy. The reasons for providing chaplains may include enhancing morale and maintaining continuity with civilian life.\textsuperscript{105} But the services of the chaplain, if they are to enhance morale, etc., are essentially religious in their nature, purpose and effect.

Two other aspects of the Warren opinion are noteworthy. First, while establishing the standards to guide the Court, Warren, adding emphasis, footnoted a comment made by Justice Rutledge, dissenting in \textit{Everson}, in which the former Law School Dean noted that the "only serious surviving threat" to the separation of Church and State demanded by the First Amendment, aside from efforts to inject sectarian exercises into public schools, came "through the use of taxing power to support religion."\textsuperscript{106} It is conceivable that both author and quoter had in mind the use of tax funds to support military chaplains. Second, in distinguishing \textit{McCollum}, Warren noted the lack of "direct" cooperation between Church and State and the broader scope of alternatives opened to those facing Blue Law prosecution. Thus, the degree of Church-State integration and the alternative means of accomplishing the state's objective or avoiding the state's prosecution were specifically made constitutionally relevant in a non-school case.

In concurring in rejecting the Establishment claim by those prosecuted under Sunday Closing Laws, Justices Frankfurter and Harlan excluded the absolutist approach and sought to define a weighing or balancing approach deemed relevant in Establishment Clause cases.\textsuperscript{107} In this area stress also was placed on the "primary end"\textsuperscript{108} of the statute drawn into question and the "alternative means"\textsuperscript{109} of accomplishing the desired end. Amplifying this approach, Frankfurter and Harlan wrote:

"The purpose of the Establishment Clause was to assure that the national legislature would not exert


\textsuperscript{105} \textit{President's Committee on Religion and Welfare in the Armed Forces, The Military Chaplains} 1-3 (1950).


\textsuperscript{107} Id. at 462.

\textsuperscript{108} 366 U.S. at 466.

\textsuperscript{109} 366 U.S. at 462.
its power in the service of any purely religious end.

..."110

"With regulations which have other objectives, the Establishment Clause, and the fundamental separationist concept which it expresses, are not concerned. ... [O]nce it is determined that a challenged statute is supportable as implementing other substantial interest than the promotion of belief, the guarantee prohibiting religious establishment is satisfied.

"To ask what interest, what objective, legislation serves ... is not to psycholanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine — primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion — the regulation is beyond the power of the state. This was the case in McCollum. Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular end alone — where the secular end could equally be attained by means which do not have consequences for the promotion of religion — the statute cannot stand. A State may not endow a church although that church might inculcate in its parishoners moral concepts deemed to make them better citizens, because of the very raison d'etre of a church ... is the predication of a religious doctrine."111

Several comments may be made concerning this position. First, unlike Warren, Frankfurter and Harlan believed that the religious motive need not be completely read out of the motivation for the statue. But where there are religious motives, there must be a secular end which can be perpetuated only by means which give succor to both the sectarian and secular objectives. Second, the comment disclaiming any endowments to a church is high velocity ammunition for those claiming the military chaplaincy breaches constitutional principle. Also it is to be noted that the Brennan, unlike the Frankfurter, approach in Schempp exalts the end or object of the legislation which is seen as the promotion of free exercise.

110 366 U.S. at 465. (Emphasis added.)
111 366 U.S. at 466-67. (Emphasis added.)
The lone dissenter on the Establishment aspect of the Sunday Closing Law cases was Justice Douglas who refused to believe that a statute, religiously-motivated in conception, could alter its basis through historical development. Rejecting the balancing approach, the Justice said:

"... if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the government."

In two of the four Sunday Closing Law cases, the Court went beyond the Establishment issue and reached a challenge to the statutes on free exercise grounds put forth by Orthodox Jews, who claimed that, since they closed for religious purposes on Saturday and were required to close by law on Sunday, their religious observance caused an economic penalty not forced upon the Christian majority who closed on only one day a week, their Sabbath. There was no majority opinion denying this contention, but, since Chief Justice Warren had three Justices join in his opinion and Justices Frankfurter and Harlan concurred in the decision on separate grounds, the statutes withstood the Free Exercise challenge. Significantly, in light of his thesis in Schempp, Justice Brennan dissented on this point and filed an opinion which demonstrated his willingness to give the widest scope possible to the free exercise of religion.

In dissenting, Justice Brennan wrote:

"... The values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals."

From this position, the Justice posed the question, "whether a State may put an individual to a choice between his business and his religion." In answering this question, Brennan looked at Justice Jackson's words in West Virginia State Board of Education v. Barnette for an applicable standard, which allowed restriction on the freedom of wor-

---

112 366 U.S. at 572-73.
113 366 U.S. at 575.
114 366 U.S. at 563.
117 Id. at 611. The question in a chaplaincy case might be put analogously: May a soldier be put to a choice of serving his nation with no assurance that his desire for worship will be preserved?
118 319 U.S. 624, 639 (1943).
ship only "to prevent grave and immediate danger to interests which the State may lawfully protect."\textsuperscript{119} He believed that the effect of the Sunday Closing Laws was:

"... that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen."\textsuperscript{120}

Brennan found no balancing factor to outweigh "this state-imposed burden on Orthodox Judaism,"\textsuperscript{121} rejecting out of hand the need for one day set aside for rest as a "mere convenience".\textsuperscript{122}

Of Brennan's performance in the Sunday Closing Law cases, this much can be said: in joining the Chief Justice in finding no Establishment violation, Brennan accepted the secular motivation of the statutes and found no Establishment when religious tenets happened to coincide with secular motives; in arguing for overturning the statute on free exercise grounds, he found no counter balancing need that allowed the State to force the Orthodox Jew to choose between his religion and effective economic competition.\textsuperscript{123} In short then, Brennan displayed a propensity to vigorously apply the Free Exercise Clause to prevent burdens upon worship, but was willing to look closely at a statute challenged on Establishment grounds to discover whether the motives and effects of the enactment were incompatible with the Constitutional mandate.

Three weeks after the Sunday Closing Law decisions the Court struck down a Maryland requirement that a notary public swear to belief in God as a prerequisite to obtaining his commission.\textsuperscript{124} Justice Black, writing for the Court,\textsuperscript{125} did not clearly indicate whether he was resting his opinion on the Establishment or Free Exercise Clause. However, the effect of the Maryland requirement was to prefer those willing to express a belief in God\textsuperscript{126} and thus can be said to have created an establishment situation. Black reiterated the \textit{Everson} and \textit{McCollum} principles, and \textit{Zorach} was said to give no comfort to the State's position

\begin{footnotesize}
\begin{enumerate}
\item Braunfeld v. Brown, \textit{supra} note 117, at 613.
\item \textit{Ibid.}
\item 366 U.S. at 614.
\item A different view was taken by the Chief Justice who believed that to allow Orthodox Jews to remain open on Sunday might give them an economic advantage. 366 U.S. at 608-09.
\item Justices Frankfurter and Harlan merely concurred in the result.
\end{enumerate}
\end{footnotesize}
here. The element of non-compulsion to hold public office was brushed aside as constitutionally irrelevant.

From this review of the Court's decisions and reasoning in cases decided upon Establishment grounds, Brennan's thesis finds little solid support. The most that can be claimed by supporters of his thesis is that there exists in the school cases adequate factual grounds for distinguishing the chaplain's situation and that the Sunday Closing Law cases announced a standard of adjudication not wholly at odds with support of the chaplaincy. By providing alternative means of accomplishing a desirable and constitutional end, the Court allows supporters of the chaplaincy to argue that the justifiable end is promoting the free exercise of religion and that there are no practical alternative means of accomplishing this end in the military situation which takes men to far corners of the world where opportunities are unavailable for continued worship in a manner normal to American civilians.

IV. FREE EXERCISE CASES: SUPPORT FOR SUBSIDY TO RELIGION?

While the Establishment cases are generally of little advantage to one favoring Brennan's thesis and supporting military chaplains, there are two or three decisions on Free Exercise grounds in which the dissenters claimed that a subsidy to religion was sanctioned by the majority.

In Murdock v. Pennsylvania the Court, per Justice Douglas, held a city ordinance requiring the purchase by itinerant solicitors of a license prior to soliciting orders for merchandise of any kind unconstitutional as applied to a member of the Jehovah's Witnesses sect who went from door to door soliciting the purchase of, and distributing, religious literature. The religious colporteurs involved were found to be doing more than merely distributing religious literature or preaching. Their activity was:

"... a combination of both. ... This form of religious activity occupies the same high estate under the

127 Cf. Kurland, Religion and the Law 57-74 (1962). The Professor seeks to include Sala v. New York, 334 U.S. 558 (1948), as a case in which religious proselytizing may have been the reason for the nullification of a conviction for using a sound truck without the license required by state law. The Professor points to Kovacs v. Cooper, 336 U.S. 77 (1949), where a contrary result was rendered and indicates that the difference in decision may have resulted from the fact that in Kovacs no religious proselytizing was involved. Kurland, op. cit. supra, at 72. Yet it must be noted that Sala speaks only in regard to freedom of speech and makes no mention of standing on the religious nature of the words spoken.

128 319 U.S. 105 (1943).
First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion."^{129}

Justice Frankfurter, in dissent, argued that to allow the Jehovah's Witnesses here to be absolved from the license tax was, in effect, giving them, a religious sect, a subsidy and thus offended the "separation of church and state."^{130}

Apparently in reply to this dissent Justice Douglas wrote:

"We do not mean to say that religious groups and the press are free from all financial burdens of government. . . . It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon."^{131}

Once the majority's premise that the activity of the defendant was a religious exercise is accepted, it is difficult to fault the opinion on the grounds put forth by Justice Frankfurter. A parallel would be appropriate in explanation. If a city placed a tax on the speaking of Latin, could it be applied to exact revenue from a priest desiring to celebrate Mass?^{132} The answer would appear to be an obvious no.

A very similar situation was presented to the Court in *Follett v. Town of McCormick*,^{133} which arose out of the conviction of a pamphlet-selling and distributing Jehovah's Witness of breaching a township ordinance requiring a license for the sale of books by persons engaged in that business in the town.

Justice Douglas again spoke for the majority in ruling the statute unconstitutional. "A preacher has no less a claim . . . when he is not itinerant."^{134} The Court refused

^{129} Id. at 109.
^{130} 319 U.S. at 140.
^{131} 319 U.S. at 112.
^{132} The question of whether this analogy is valid depends on whether one would view a tax on the speaking of Latin as unlike a license fee in that it would have, arguably, a special rather than a general effect. See City of Baltimore v. A. S. Abell Co., 218 Md. 273, 145 A. 2d 111, 119 (1958), where a tax which looked for 90-95% of its intended revenue from television and radio stations was held unconstitutional although there was no desire to punish the news media. The effect of burdening freedom of press was controlling.

^{133} 321 U.S. 573 (1944).
^{134} Id. at 577.
to see their action as a subsidy to religion, but merely believed it the striking down of a statute requiring the payment of a tax so that one might enjoy his right of free exercise of religion.\(^{135}\)

Justices Roberts, Frankfurter and Jackson again urged the general nature of the taxation involved, and that to absolve one from the payment of the tax on the majority's grounds was a "subsidy for his religion."\(^{136}\) The Justices said, further:

"We cannot ignore what this decision involves. If the First Amendment grants immunity from taxation to the exercise of religion, it must equally grant a similar exemption to those who speak and to the press. ... The Amendment's prohibitions are equally sweeping."\(^{137}\)

The disquieting feature of these words is that there is no prohibition against an "establishment" of speech and press. Yet, if the words of three Justices are not merely the exaggerations of an outvoted triumvirate, and truly gauge the import of the decisions, there would perhaps be precedent for a "subsidy" to military chaplains. However, nowhere in Brennan's lengthy opinion are these cases mentioned.

Their most recent citation came in *Sherbert v. Verner*\(^{138}\) which is the Court's most recent discussion of the Free Exercise Clause and a decision which prompted a dissenting Justice,\(^{139}\) like the dissenters in *Murdock* and *Follett*, to imply that the Court was sanctioning a violation of the Establishment Clause. The Court in *Sherbert*, through Justice Brennan, held a South Carolina statute unconstitutional when applied to withhold unemployment benefits from a Seventh Day Adventist who refused to accept Saturday employment and consequently was labelled as refusing to accept suitable work when offered.

In so holding, Justice Brennan again displayed an affinity for a broad interpretation of the Free Exercise Clause.\(^{140}\) Writing the same day the *Schempp* decision was announced, he found that the disqualification for benefits imposed a burden on the free exercise of appellant's reli-

---

\(^{135}\) 321 U.S. at 577-78.
\(^{136}\) 321 U.S. at 581.
\(^{137}\) 321 U.S. at 581-82.
\(^{139}\) Id. at 422.
\(^{140}\) Cf. note 120 supra.
The burden arose from "unmistakable" pressure to forego beliefs. Moreover, there was no "compelling state interest," as in the Sunday Closing cases, that justified the infringement of appellant's First Amendment rights of free exercise.

Although he concurred in the result, Justice Stewart did take advantage of this decision to chide the majority on its previous Establishment Clause decisions and argued that this decision created an establishment inconsistent with the previous decisions. For Stewart, the Court would not have granted relief from the effect of the statute if the appellant refused work on "secular grounds" such as inability to get a babysitter, and, thus, by protecting the belief of the Seventh Day Adventist here, required the State to "prefer a religious ground over a secular ground for being unavailable for work — that state financial support of the appellant's religion is constitutionally required. . . ." Stewart would have the Court reconsider its Establishment Clause position on the basis of the Free Exercise Clause. He believed:

". . . that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom — not only for a minority, however small — not only for the majority, however large — but for each of us."

This demand for an affirmative fostering of religious freedom by government distinguished the views of Justices Stewart and Brennan in Schempp and again here. Dissenting, Justices Harlan and White rebuked the Court for compelling a state to carve out an exception for those unavailable for work due to their religious scruples. This dissent was in the tradition of those expressed in Follett and Murdock. However, Justice Harlan, as author

---

142 Id. at 404.
143 374 U.S. at 406-09.
144 See note 99 supra.
146 Id. at 416.
147 374 U.S. at 415-16. (Emphasis added.)
148 The remarks of Justices Roberts, Frankfurter and Jackson were not labelled a dissent by the Justices but were so categorized by the reporter. Follett v. Town of McCormick, 321 U.S. 573, 579 (1944).
of the dissent, recognized, as he had concurring in *Schempp*, that there were permissible accommodations which a state might accord religion. Since Justice White agreed with this dissent, a member of the Court, not writing in *Schempp*, tacitly accepted the proposition that there may be areas of permissible accommodation between Church and State. Indeed, the dissenters would have found a permissible accommodation present if South Carolina had done legislatively what the Court did by judicial fiat.\(^{149}\)

In answer to the views of Justices Stewart, Harlan and White, Brennan's opinion for the Court argued that the decision did not have the effect of "fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina."\(^{150}\) Rather, a person, on the basis of *Everson*,\(^{151}\) cannot, by lack of faith or because of his faith, be deprived of the benefits of public welfare legislation.\(^{152}\) This position for the majority was nothing more than an elaboration of one of Brennan's areas of permissible accommodation put forward in his concurring opinion in *Schempp*.\(^{153}\) This is, perhaps, the most significant feature of the *Sherbert* decision for one who would seek to support the military chaplaincy on constitutional grounds. There can be hope that Brennan's area of accommodation for chaplains will be accepted in future litigation of that issue, since the Court has accepted another area of accommodation put forth by Brennan. One speculating could even go so far as to say that, since *Sherbert*'s acceptance was announced on the same day as *Schempp*'s possible accommodations were put forth, the Court was tacitly announcing its willingness to find permissible areas of accommodation or, stated another way, its willingness to avoid the absoluteness of prior Establishment pronouncements on the basis of a broad Free Exercise approach.

If the *Murdock*, *Follett*, and *Sherbert* decisions did, in effect, grant a subsidy to religion in the name of free exercise as the dissenters claimed, can they serve as precedent for Brennan's thesis, that since in some instances the Establishment Clause is put aside in order to give full effect to the Free Exercise Clause, military chaplains are acceptable constitutionally? The Court in the three cases noted was apparently willing to ignore the minor relief

\(^{150}\) *Id.* at 409.
these decisions gave to the religiously motivated from con- forming to general regulations established for the community. These minor aids were tolerated in the name of granting freedom of religious exercise to appellants in those cases. Yet consideration must be given to the factual distinction between the relief these cases granted and the accommodation involved in supporting military chaplains. In providing chaplains and chapels there is more involved than granting relief from a burden placed on one's exercise of religion; in this situation positive measures are taken to avoid what might, and probably would, otherwise create a burden, i.e., military restrictions involving freedom of movement and areas where men are stationed impede normal opportunity for worship. In the Murdock, Follett, and Sherbert cases the Free Exercise Clause merely allows one to avoid a criminal penalty or civil burden which others, not religiously motivated, face; in the chaplaincy situation, affirmative action is taken to provide opportunity for free exercise where otherwise a burden might be present. Legislation constructing the chaplaincy, then, grants direct assistance to the worshipper and his religion; Murdock, Follett and Sherbert grant indirect assistance by allowing the worshipper to avoid a general regulation.

The Court has upheld grants of positive financial aid to individuals which have indirectly assisted the Church in propogating its faith. However, to sustain the military chaplaincy the Court must accept the actual underwriting of religious worship, not merely the providing of transportation costs or books to school children attending parochial schools. The Court must, in effect, take a step beyond former positions into an area not charted by any specific decision. Brennan would sanction such underwriting on the basis that otherwise men, placed at a disadvantage by Government in so far as access to normal opportunities of worship are concerned, would have their right to worship nullified by governmental action. Such underwriting has found support in the literature of the First Amendment on grounds accepted by Brennan and may be supported on the basis of other writings which dwelled on the meaning of that Amendment.

Support for the military chaplaincy is provided by a number of legal writers who peripherally treated the subject of chaplains as they commented on the First Amendment.\[^{155}\]

The first necessary step in any justification requires repudiation of an absolute separation standard for the Establishment Clause. This first step is, of course, necessary for without it an opposite conclusion presumably is reached. If the "no law" phraseology of the First Amendment means absolutely no aid in any form,\[^{156}\] then assistance for chaplains is logically barred.\[^{157}\] Condemnation of this absolutist approach in regard to the Establishment Clause is not difficult to discern. It is condemned as a sterile approach\[^{158}\] which myopically relies too heavily on the mere words of the First Amendment while avoiding the more difficult judicial task of comprehensive analysis of not only the words of the Amendment, but also of the conditions and purposes of it and the background and motivations of the governmental action called into question.\[^{159}\]

Moreover, the commentators just cannot bring themselves to accept the logical imperatives of a strict separation formula.\[^{160}\]

In delimiting the notion that the Free Exercise Clause at times calls for an avoidance of a strict reading of the Establishment Clause and citing the military chaplaincy as an area calling for such a doctrine, Justice Brennan made reference\[^{161}\] to the writings of Professors Katz and Kauper. The former, writing in response to the Zorach


\[^{157}\] Griswold, supra note 155, at 173.


\[^{159}\] Griswold, supra note 155, at 172-73; 77 Harv. L. Rev. 1553, 1557 (1964).


decision, argued, as Brennan similarly did in *Schempp*, that:

"... the limits of the separation doctrine are to be found by reference to the constitutional principle of religious liberty..."162

Thus, the separation principle of the Establishment Clause took a subordinate status to a religious freedom proposition when "the state takes over the ordering of the lives of groups of citizens, as in the armed forces."163 In such a case the state may, at its discretion, provide opportunity for "effective freedom of religion"164 by providing the means of religious worship even if to do so erases the complete insulation of government from religion.

The relevance of the governmental restraint on the life of the serviceman in supporting the governmental assistance to religion was also cited by Professor Kauper to justify the chaplaincy.165 However, Kauper went a step further and argued that providing chaplains was:

"... related to the government's interest in maintaining the morale and well-being of its soldiers. In other words the government does have a proper and valid interest here that warrants the expenditure of funds for this kind of religious ministry."166

Kauper was writing after the Sunday Closing Law decisions, but his thesis went beyond those cases. He saw the key to those decisions as being that:

"... Legislation identifiable with religious views and practices is constitutional if it can be supported by adequate considerations of a secular or civil nature relevant to the exercise of governmental power."167

This doctrine appears to sanction legislation in this area based on less compelling demands than contemplated by the words used in those opinions. Chief Justice Warren, it will be recalled, talked in terms of supporting legislation which was motivated by considerations "wholly apart from any religious considerations."168 The Kauper doc-

---

163 *Id.* at 429.
165 KAUPER, op. cit. *supra* note 155, at 35.
167 *Id.* at 32-33. (Emphasis added.)
168 See note 102 *supra*, at 442.
trine keyed rather on the Frankfurter-Harlan concurrence.  

There are, however, supports for the chaplaincy aside from the specifics offered by Professors Katz and Kauper.  

A somewhat different approach, also apparently derived from an analysis of the Sunday Closing Laws cases, can also be read to support the chaplaincy though the author did not speak directly to that subject.  

Seeing the decisions of the Court in regard to the First Amendment as calling upon government to refrain from burdening the free exercise of religion, but not allowing it to act to benefit religion, the argument is put forth that the "net effect", "real purpose" and alternative non-religious oriented means are to be gauged so that:  

"... in the fulfillment of its proper functions, government should choose from among feasible alternatives, if any, those means which result in the least advantages and disadvantages to religion."  

It surely is a proper governmental function to maintain the armed forces. As a necessary concomittant, providing for the morale and welfare of the members of that armed force is justified. Given the religious nature of our people, opportunity for religious worship can be considered to enhance morale and welfare of the troops. Religious worship also maintains a tie for the serviceman with civilian status and consequently has been said to weaken the possibility of a slide into a militaristic tradition which would undermine this country's traditional subordination of the military to civilian authority.  

Furthermore, the provisions for chaplains can be ascribed the purpose of fulfilling the serviceman's right of free exercise of religion rather than as a device to assist the sect in controlling or converting souls.  

Having argued this much, and thus seeking to meet the fulfillment of a proper governmental function and "real

169 See notes 167-111 supra and accompanying text.  
170 Van Alstyne, supra note 160.  
171 Id. at 882.  
172 President's Committee on Religion and Welfare in the Armed Forces, The Military Chaplaincy 2 (1950).  
173 Kauper, op. cit. supra note 155, at 35; Katz, supra note 155.  
174 Contra, O'Brien, Justice Reed and the First Amendment 146 (1958): "The chaplains appointed for Congress, those for the armed forces... are all provided 'purposefully,' i.e., with direct intention of aiding churches 'doing religious work of such a character as may fairly be said to be performing ecclesiastical functions.'"
purpose" criteria set down above, and noting further that the "net effect" of the chaplaincy has not been to cause any significant church-state friction, we must still come to grips with the alternative means criteria to satisfy this approach. Assuming that one aspect of morale is the opportunity for religious worship, there is no alternative means for providing this aspect of morale other than allowing worship. But the alternative means criteria here would seem to call for consideration of whether worship may be allowed for by means other than a government subsidized ministry. Could the governmental interest be satisfied merely by allowing free time for the serviceman to seek non-military worship or by merely giving the religious orders the right to come into the military environment, at their own expense, to provide the opportunity for worship? Either alternative seems a poor substitute for the present system and fraught with possibility for adverse effects upon the military, aside from the fact that there are places on this globe where the military is required to be where non-military opportunity for worship would be non-existent. To allow merely free-time and off-post worship, even where available, would allow the serviceman seeking worship to be flung far and wide, making emergency re-call to duty more difficult and troublesome. Moreover, this means could conceivably place an unforeseen burden on civilian areas of worship that might be resented by the civilians, and increase the possibility of military-civilian friction. Furthermore, in overseas areas the language barrier to effective worship would be considerable. The alternative means of relying on the religious orders of the United States to provide, at their own expense, chaplains is less easily put aside. Three objections can be made. First, if the orders failed to provide chaplains, the military man would be left without effective opportunity for worship. Second, the availability of services would not be as readily available. One can easily conceive of a death situation where the distance the civilian clergyman would need to travel would render his service all but unattainable. The problems of civilian chaplains would be magnified in areas where hostilities were being carried on. Third, if the chaplain were not an officer, the military would not have control over his non-religious life to the extent that it could assure a suitable (in the sense of a non-debt ridden, or, even non-subversive) ministry.

In addition to justifying the provision of chaplains on the basis of effective free exercise, and no suitable alterna-
tive means, other supports for the chaplaincy are available in the literature of the First Amendment.

One such support is found in the long-standing tradition that is the chaplaincy. Although it has been sagely observed that the heat generated by a debate of the church-state issues dims the prospect of fair handling of historical “evidence” in attempts to establish the meaning of the First Amendment, an established tradition or customary mode of action on the Federal level, however, is constitutionally relevant. Since the First Amendment is drafted in terms of a prohibition against Congressional legislation the Amendment has presumably always applied with equal force against the Federal government. Yet, in face of this constant command, the chaplaincy has been sanctioned by Congressional action for the American armed forces consistently ever since there has been an American armed force. The significance of a long standing tradition has been recognized as constitutionally relevant and warning to proceed with caution in such areas has been given. Indeed, the Sunday Closing Law cases have been seen as perhaps underpinned by a desire to avoid “the displacement of customs and a way of life ingrained in American society.”

In regard to this reliance upon tradition or custom in support for the chaplaincy, it may be relevant to note that in defining constitutional due process, “old process” is granted what may amount to a presumption of propriety which, of course, may be put aside when advances in civilization make the old mode of action incompatible with contemporary advances.

---

175 Katz, supra note 155, at 434. See also Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression 235-37 (1960; paperback 1963), which treats another freedom guaranteed by the First Amendment and indicates that a clear intent as to the meaning of the Amendment was not even existent with the Framers.

176 Note 32 supra.

177 Griswold, supra note 155, at 173; cf. Rice, op. cit. supra note 155.

178 77 Harv. L. Rev. 1353, 1356 (1964). The fact of long acceptance of the chaplaincy has a second relevant aspect. Judges are not the only governmental figures sworn to support the Constitution. Indeed all Federal officials take oaths requiring them to act in a manner consistent with the Constitution. It may at least be argued then that a long line of Congresses have found no constitutional bar to allocating funds for support of the chaplaincy and that this tradition of accepted constitutionality is legally relevant.

179 See Twining v. New Jersey, 211 U.S. 78, 100-01 (1908). The respect for tradition was once noted by Judge Cardozo when he opined: “Not lightly to be vacated is the verdict of quiescent years.” Coler v. Corn Exchange Bank, 250 N.Y. 156, 164 N.E. 882, 884 (1928).
At times being contemporary has been a judicial motivation. It is certainly true that as experience expands, and perspectives lengthen language and principles may take on new meanings to meet new challenges. The Supreme Court has especially been watchful when issues of Church and State are presented to avoid first experiments with traditional liberties. However, in any litigation the chaplaincy would stand as a time-honored tradition which has stood beside the tradition of the First Amendment for the extent of its life. Being contemporary here would hardly appear to call for repudiation of the chaplaincy tradition. There is no new challenge or first experiment with First Amendment protections. Being contemporary in regard to the question of the chaplaincy would be to recognize that support for chaplains does not threaten to disrupt the peace granted by the First Amendment in religious matters nor, over its long history, has not tied the state so closely to religion as to pose any threat to a take over of the churches by the state or the state by the churches. Indeed, church-state interaction is restricted, by the nature of the chaplaincy, to the military environment. Support for chaplains, rather, has preserved the right of the serviceman to worship and this opportunity has been a beneficial morale factor, especially at times when men are faced with the possibility of impending death in the service of their nation.

A further support for the chaplaincy may also be found in the writings of Professor Kurland, who has presented the most exhaustive analysis of First Amendment decisions in support of his thesis that the two clauses of that Amendment must be read together to create a doctrine which states that religion may not be used as a basis for classification for purposes of governmental action.

Repudiation of religion as a standard for action or inaction would appear at first blush to call for an antagonistic position in regard to the chaplaincy. However, if expenditures for chaplains can be accepted as an aspect of a large morale and welfare program of the armed forces

182 Murray, We Hold These Truths 49 (1960) : "[The First Amendment guarantees] are not articles of faith but articles of peace. . . ." These guarantees "came into being under the pressure of their necessity for the public peace." Id. at 58.
183 For documentation of this morale factor, see Barish (ed.), Rabbis in Uniform (1963).
which includes expenditures for a wide variety of activities including recreation, athletics and entertainment, then the classification on basis of religion would be eliminated. Under this view of the Kurland thesis the classification would be on the basis of morale and welfare, and provision for religious activity as an attribute of morale and welfare would not be precluded. Here the chaplaincy's religious character is accepted but related to a morale and welfare classification for which expenditure of funds is allocated.  

VI. ACCEPTING CHAPLAINS WITHOUT TOPPLING THE "WALL OF SEPARATION"

It must be recognized that arguments for the constitutionality of the chaplaincy rest primarily upon the free exercise argument endorsed by Justice Brennan and Professors Katz and Kauper. Reliance upon long-standing tradition and classification of the chaplaincy as part of a morale and welfare program is tenuous; these justifications serve best as make-weight arguments buttressing the main support. The chaplaincy would hardly stand on firm ground without reliance upon the free exercise argument. Escape from whatever impediments are caused by forcing an affirmative content upon the Free Exercise Clause by using it to justify expenditures which assist worshippers is possible due to the peculiar factual setting of the expenditure.

When the United States disrupts millions of lives and places men under arms for the common defense, it surrenders the neutral role it normally has in ordering the day-to-day, minute-to-minute movements of its citizens. For the civilian the Government is policeman and protector when emergency, need or other special circumstance occurs. For the soldier, the Government is much more; it is the source of all rights, privileges, restrictions, comforts, hardships, necessities and luxuries. The military regulates human conduct to a higher degree than any institution, other than penal, known to man. It is the only employer from whom to leave a place of duty is to commit a crime. It is the only employer who punishes as a crime insults to "management". It is the only employer who treats as a

186 "It is perhaps a sign of the changing 'social philosophy' of our day that religion is now looked on only as an element of welfare." Religion and Custody, 95 Sol. J. 325 (1951).
crime actions prejudicing its good order and reputation. These consummate restrictions are justifiable as military necessities; they are also most confining.

Given such lack of neutrality in ordering the movements of the members of the armed services, provisions for less than strict neutrality in seeing that their religious inclinations are satisfied seem surely justified. And the choice of alternative means of achieving this satisfaction is a choice that stands within the traditional prerogatives of the legislature.

As a statement of doctrine supporting the chaplaincy, the following is offered:

When the government has placed, for its own purposes and/or benefit, persons in a position where they are unable to act as freely as citizens generally in regard to the exercise of their religion, attempts by the government to provide those persons with the opportunity and ability to exercise their religion are not unconstitutional even if this results in the expenditure of governmental funds, provided the government's actions do not infringe anyone's right of conscience and/or religion and do not create a clear danger to the neutrality of government in religious matters outside the area where the government has surrendered its neutrality in the minute ordering of the daily lives of its individual citizens.

The caveat rejecting infringement upon rights of conscience and religion is necessary to insure that the Free Exercise Clause is not used to justify a system which, in effect, violates someone's free exercise rights.

This narrowly drawn doctrine would not justify reversal of any prior decisions. The school cases would not have present the ordering of personal lives to the extent that students would be disabled from worshipping. The restrictions of the public school are so minute when viewed against the restrictions on the military that the same claim of hampering one's free exercise rights would be easily distinguished.

Nor would this narrowly drawn doctrine open the flood gates to state support for religion. The high and impregnable wall of separation would be vaulted in the name of free exercise using a special set of facts as a springboard; the wall would not be torn down.

To illustrate the narrowness of the doctrine espoused, let us see how it would apply to another area where the state and religion are comingled.

VII. THE DOCTRINE DOES NOT JUSTIFY COMPULSORY SERVICE ACADEMY CHAPEL, THOUGH IT WOULD ALLOW PROVISIONS FOR CHAPLAINS ON THE SAME BASIS AS IN THE REGULAR MILITARY ESTABLISHMENT

If a doctrine based on the Free Exercise Clause justifies military chaplains, is the use made of them in the service academies also justified? The only substantial distinction from the military-wide chaplaincy program made in these schools is that attendance at services is not voluntary, but compulsory. Attendance at religious services is a weekly requirement, although the actual verbiage of the individual academy regulations varies.¹⁰⁰

When this mandatory attendance at religious worship is challenged, spokesmen for the academies justify the requirement on a number of bases — from lack of cadet protest to preservation of religious heritage; from a part of military discipline to a part of a leadership program. Given the military discipline of these institutions, the lack of protest is understandable; to protest would be "insubordination", or worse.¹⁰¹

Something of the constitutional naivete and down-right stubbornness of the "academy mind" on this matter can be seen in the reported comments of the Superintendent of the Naval Academy.¹⁰² He not only asserted that in his "personal opinion, no officer should be given a commission if he is a professed atheist, or even an agnostic,"¹⁰³ but he went on to speak of the mandatory attendance policy in these terms:

"It is a little bit odd that it is necessary to defend this practice, since the church is a force for the good. [Furthermore, the attendance at church services] is a part of the moral atmosphere of the Academy."

Of course, this statement is based on a constitutionally irrelevant premise.

¹⁰² Baltimore Sun, Mar. 20, 1964, p. 40, col. 5.
¹⁰³ Contra, Torres v. Watkins, 367 U.S. 488, 495 (1961); BLAU (ed.), CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 15 (1949); KURLAND, RELIGION AND THE LAW 40-41 (1962): "There is little doubt . . . that the Government could not refuse commissions in the military service to all members of specific religious sects."
The compulsion attending the Academy chapel program is sufficient to put it outside the doctrine delineated. The compulsion is peculiarly within the caveat that government action to assist free exercise should not inhibit free exercise rights of anyone.\textsuperscript{194}

Compulsory ritual has been condemned as invading the "sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."\textsuperscript{195} The Court has greatly respected the right of an American to be free of compulsory religious ritual.\textsuperscript{196} Commanding worship from a person seems to inherently be the type of evil the refuge to the New World was designed to prevent. The Academy compulsion goes much farther than the indirect coercion seen as a constitutional evil in the public school cases.\textsuperscript{197}

\textbf{VIII. Closing Remarks}

Over a century ago a New York legislative committee ruled that placing chaplains in the legislative chambers was inconsistent with the separation of Church and State and should be discontinued.\textsuperscript{198} This action must be considered noteworthy and unusual in light of the pontificating prevalent among current politicians. Their action displayed a vigilance for the protection of constitutional rights and an attentiveness to betrayal of those rights. Such a watch dog role these days has apparently fallen to the courts in the area of Church-State affairs.

Given this role, one may wonder whether however narrowly drawn is support for the chaplaincy, it might merely be the first of a number of narrow distinctions which, when totalled, emasculate the Establishment Clause which, along with its companion and overlapping\textsuperscript{199} free exercise command, has given this nation a history of Church-State relations unknown in the world's history.

\textsuperscript{194} See Editorial, \textit{Liberty of Conscience}, 5 J. CHURCH & STATE 157, 159 (1963):

"Religious freedom, or liberty of conscience, requires along with non-interference on the part of the state, recognition of the right to believe or not to believe religious dogmas; to worship one God or many or not to worship; to be a member of a religious association or of none. . . ."

\textsuperscript{195} Board of Education v. Barnette, 319 U.S. 624, 642 (1943).


before the American experiment began. The preceding section illustrates that this doctrine will not propagate other "accommodations" not factually similar. This, however, will not ease the minds of those who fear the approach, i.e., a willingness to vault or breach the wall of separation, more than the results argued for.

To these questioning minds we offer the realization that the Court is its own best brake on any tendency to emasculate First Amendment freedoms by progressive "distinctions." Making distinctions where they are demanded by compelling considerations, and refusing them where they are pusillanimous, or based on unsubstantial rationale, has been the traditional role of the judiciary in the Anglo-American legal tradition. The task seems a normal judicial one.

Essentially what must be put aside is the notion that the first breach, however justifiable in light of contemporary events, means the entire wall shall topple. To those who ask, "where will you stop", these words uttered in another, but related context (arguing for censorship of pornographic matter) are offered:

"The assumption behind the question is that if any principle is breached it must be totally abandoned. This is an axiom in the fanatic's creed and can only be intelligently held if there is only one absolute value — for which all other values must in case of conflict be sacrificed. . . . We can answer the question as to where we will stop, whenever we make a justifiable exception to a reasonable rule, by saying: We will stop where our intelligence, our sense of proportion . . . tells us to stop. . . .

"It is the spirit of absolutism that is the greatest enemy of a liberal civilization."200