IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1268

PATRICIA A. HARRIS, Secretary of the Department of Health, Education, and Welfare, *Appellant,*

v.

CORA McRAE, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR AMICI CURIAE AMERICAN ETHICAL UNION; AMERICAN HUMANIST ASSOCIATION; BOARD OF CHURCH AND SOCIETY, UNITED METHODIST CHURCH; CATHOLICS FOR A FREE CHOICE; CHURCH OF THE BRETHREN; DEPARTMENT OF CHURCH WOMEN OF THE DIVISION OF HOMELAND MINISTRIES, CHRISTIAN CHURCH (DISCIPLES OF CHRIST); NATIONAL FEDERATION OF TEMPLE SISTERHOODS; NATIONAL WOMEN'S CONFERENCE OF THE AMERICAN ETHICAL UNION; UNITARIAN UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALIST WOMEN'S FEDERATION; UNION OF AMERICAN HEBREW CONGREGATIONS; YOUNG WOMEN'S CHRISTIAN ASSOCIATION

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INTEREST OF THE AMICI

The organizations joining in this brief neither favor nor oppose abortion, although among the millions of Americans who comprise their memberships there are many whose religious conscience calls for access to abortion for all women regardless of economic circumstances. All the organizations share in the belief that the decision either to undergo or forego abortion must be personal and

uncoerced by government. They further believe that the unitary principle of church-state separation and religious freedom forbids government to impose upon all the theology of one or more sects. Their religious conscience is offended by a law which makes the abortion procedure fully available to women who are fortunately able to pay for them but, realistically, denies it to the poor and underprivileged when needed to protect the health and welfare of themselves and their families. Finally, they are unable to accept, as consistent with the concept of a democratic society, a system of law under which churches whose views on the sinfulness of abortion, whether or not shared by the majority of Americans, can utilize statutory exceptions to achieve by force of poverty their theological ends among the economically disadvantaged.

For these reasons they respectfully submit this brief *amici curiae.*

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed to the single question whether consistent with the Establishment and Free Exercise Clauses of the First Amendment to the Constitution, the federal or state governments can deny Medicaid benefits for abortions where a paramount purpose of the denial is to prevent abortions by reason of the fact that they are condemned as sinful by particular religious groups.

Although the *amici* do not address themselves to the question whether such denial can be sanctioned under the Equal Protection Clause of the Fourteenth Amendment as applicable to the states and the Due Process Clause of the Fifth Amendment as applicable to the federal government, they take this opportunity to express to the Court their opi-

nion that the District Court was correct in answering that question in the negative.

SUMMARY OF ARGUMENT

Even in the absence of the First Amendment prohibitions, the spirit if not the letter of the provision in Article VI of the Constitution forbidding religious tests for public office militates against the denial of governmentally financed access to abortion procedures on the part of the economically disadvantaged solely by reason of the religious objections to the procedure on the part of one or more churches. Independent thereof, the statute challenged violates both the Establishment and Free Exercise Clauses of the First Amendment. It violates the former under the test set forth in *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947) and other cases, because it constitutes a law which prefers those religions that forbid abortion over those which do not, and injures women who do not profess a religious belief forbidding abortion by withholding from them a government benefit available to others. It further violates the Establishment Clause as defined in *Wolman* v. *Walter,* 397 U.S. 664 (1977), and many other cases, in that its purpose, as abundantly proved by its history, is religious rather than secular, and its effect is to advance religions which forbid abortions and to inhibit religions which do not. Finally, the challenged law violates the Free Exercise Clause because it imposes the inhibitions of those religions that deem abortions sinful upon persons whose religious beliefs do not exclude abortion procedures, and particularly upon those who believe, therefore that the poor must have equal access to the procedure to mitigate against the tragedies which may result from unplanned pregnancies.

I. Introductory

A. *Position of the Amici*

It is the position of the *amici* that the challenged statute, insofar as it excludes abortion procedures from its benefits, is basically a religious law and is thus not only inconsistent with American traditions and values, but is also unacceptable under a constitution that forbids laws respecting an establishment of religion or prohibiting its free exercise. The law challenged here imposed governmental sanctions, in the form of deprivation of access to the benefits of the Medicaid programs (Title XIX of the Social Security Act), for violation of a religious mandate that equates abortions, from moment of conception, and murder. Basically what the law does is to give governmental effect to the dogma and doctrine of the churches and religions which espouse that view.

The Roman Catholic Church is the largest religious denomination which forbids abortion, but it is, of course, not the only one. The voluminous record in this case and other sources indicate that there are other religious groups, such as the Missouri Synod of the Lutheran Church, the Church of Jesus Christ of the Latter Day Saints (popularly known as the Mormon Church), Orthodox Jewish congregations, and various Protestant Fundamentalist sects which share in the doctrine that forbids abortion, although perhaps not to the extreme of forbidding the procedure even where necessary to preserve the life of the woman.

The religions that oppose abortion demand its exclusion from the coverage of the Medicaid program even in respect to women who do not equate abortion with

murder, do not consider it sinful, and to the contrary, deem it an appropriate and sometimes necessary response to an unplanned and health-threatening pregnancy. It is our view that only the intervention by these religions in the law-making process realistically accounts for the exclusion of abortion procedures from the program. Were they to abrogate their theological condemnation of the procedures even if only *de facto* (as in the case of contraceptive birth control), or, without altering their position on abortion, would withdraw their opposition to Medicaid coverage, it can hardly be doubted that the governments, state and federal, would include the procedure.

We recognize, of course, that the acceptance by most faiths of abortion as a licit means to avoid the tragedies which may be caused by an unplanned pregnancy is a comparatively recent development, necessitated by the failure of contraception to achieve that purpose. To the extent that the state laws making abortion a crime reflected religious values when they were adopted, those values were Protestant no less than Catholic, and Jewish no less than Christian or Islamic. But it is the obligation of the courts to adjudge constitutionality on the basis of present, not past reality. In *McGowan* v. *Maryland* and the other Sunday law Cases, 366 U.S. 420 *et. seq.* (1961) the Court recognized that the challenged statutes reflected religious values when they were adopted but it nevertheless upheld their constitutionality on the basis of the current, rather than past, reality that their purpose had in time become secular.

What we have in the present situation is the converse. As this Court observed in *Roe* v. *Wade,* 410 U.S. 113, at 139 [1973], abortion laws like many other criminal statutes, represented, when originally enacted, secular values more so than religious ones. The record in this case establishes what is so widely known and accepted that it

could well be judicially noticed: today's opposition to abortion, including the effort to enact a constitutional amendment nullifying *Roe* v. *Wade* and the instant restriction on governmental financing of the procedure for the economically disadvantaged, reflect religious rather than secular values.

Determination of constitutionality on the basis of the realities of today rather than of yesteryear is by no means unprecedented in American constitutional history. Acceptance of racial segregation in public schools as not inconsistent with the substance of the 13th and 14th Amendments was widespread if not universal throughout the nation, even in such abolitionist states as Massachusetts. See, *Roberts* v. *City of Boston,* 59 Mass. 198 (1849); *Plessy* v.*Ferguson*, 163 U.S. 537 (1896). That fact, however, did not foreclose a unanimous decision to the contrary on the part of the Court, handed down later in *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

Capital punishment presents another example of the same proposition — that constitutionality must be determined by current rather than past values. While the Court has not as yet held the penalty unconstitutional in all cases, it has restricted it to a far greater extent than was contemplated when the Eighth Amendment was adopted. Moreover, the Fifth Amendment, by providing that no person shall "be twice put in jeopardy of life or limb" for the same crime, obviously sanctioned putting persons in jeopardy of limb *once* for a particular crime. Yet it is doubtful that any court in the United States would today uphold the constitutionality of a law providing that the hand of a convicted thief shall be cut off as punishment for this crime.

In sum, what we contend is that in applying the Establishment and Free Exercise Clauses to the issue

before the Court in the present case, the realities of today rather than of former years must be the determinant factor. Those realities, we submit, necessitate a conclusion that denial of Medicaid benefits for abortion procedures cannot be reconciled with the mandates of the Establishment and Free Exercise Clauses.

B *Decision of the District Court*

The District Court rejected the contention that the challenged statute violates the Establishment Clause of the First Amendment. It did hold, however, that in addition to the Equal Protection guaranty as implied in the Due Process Clause of the Fifth Amendment, the statute impinged upon the Free Exercise Clause when abortion is resorted to "in conformity to religious belief and teaching." The concluding paragraph of the opinion reads as follows:

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment. To deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation.

We believe that the District Court was completely correct in recognizing the conscientious nature of the abortion decision and the impermissability of restrictions in light of the deep division on this question in our society. But we believe that the Court erred in failing to recognize the Establishment clause violation and thereby limiting the applicability of the First Amendment to the challenged statute.

II. Religious Tests for Public Benefits

The complaint herein does not assert, nor did the court below pass upon any contention that the ban in Article VI of the Constitution on religious tests for public office requires the Court to invalidate the exclusion of abortion procedures from eligibility for Medicaid benefits. Such contention is not necessary for the determination of the present case. What we do suggest is that in construing and applying the First Amendment's mandates in respect to the establishment and free exercise of religion the Court may justifiably be guided by the spirit that underlies the religious test provision.

In *Common Sense* Tom Paine expressed what fifteen years later was to be the substance of the opening words of the First Amendment, that Congress was to make no law respecting an establishment of religion or prohibiting its free exercise. "As to religion," he wrote, "I hold it to be the indispensible duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith." This principle, at least as applied to the national government, had become part of the American credo by the time our constitution was formulated a decade later; so much so that there were many who believed that (with one exception, shortly to be noted) there was really no need for its restatement in the Constitution. "Why," asked Alexander Hamilton,

"declare that things shall not be done which there is no power to do?"[1] The American people, of course, were not satisfied with exclusion by implication. A bill of rights, said Thomas Jefferson, should not "rest upon inferences," a thought echoed by Patrick Henry who asserted that religious freedom and church-state separation should not rest "on the ingenuity of logical deduction."[2] Because the overwhelming concensus of American opinion agreed with Jefferson and Henry, the First Amendment was added to the Constitution in 1791.

Since it was obviously within the powers of the federal government to prescribe the conditions and requisites for governmental service, the ban on religious tests for public office was necessarily included in the text of the Constitution in accordance with the overwhelming approval of the American people. Applying the intent of that ban to abortion procedures, it would clearly be unconstitutional under it to exclude from governmental services physicians who in their private practice render abortion services. That could not be considered anything but the application of religious test for governmental office.

In *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), the Court ruled violative of the First Amendment a Maryland statute requiring notaries public, as condition to receipt of their license, to take an oath that they believed in the existence of God. The complaint therein included a cause of action based upon the Religious Test Clause in Article VI. Since the Court found the statute violative of the First Amendment, it did not find it necessary to determine whether the Article VI prohibition was applicable to the states. *Ibid,* Footnote 1.

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[1]Federalist Papers, Modern Library Edition, 1937, p. 559.

[2]J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution,* 1888, Vol.. V, p. 131.

It can hardly be doubted that had Torcaso been an applicant for notary public license in the adjoining geographical borders of the District of Columbia the denial would have been held violative of the Religious Test Clause. It is inconceivable that any court would hold that the statute did not require notaries public to believe in the existence of God but only to swear that they do; compulsion to take the oath in order to qualify would of itself violate the prohibition. (Cf *Anderson* v. *Laird,* 466 F.2d 283 [D.C. Cir. 1972], *certiorari denied,* 409 U.S. 1070 [1972], wherein compulsory chapel attendance by military cadets was held unconstitutional notwithstanding claim that they were not required to believe what they heard but only to be present.) Nor, to bring the Torcaso illustration closer to home, would the Court have decided differently if the challenged statute had provided only that a person otherwise entitled to receive governmental reimbursement for a notary public's fee in respect to governmental matters should be turned away because he had not taken the required oath of belief in the existence of God.

The women plaintiffs in this case are not holders of public office and hence the ban in Article VI on religious tests is not applicable to them. Nevertheless, we submit that in adjudging the merits of their claim to the public benefit (rather than public office), of Medicaid reimbursement and of their assertion that exclusion violates the First Amendment, the rationale we have suggested in respect to government employees is relevant and meaningful to a judicial determination of that claim. In short, the spirit if not the letter of Article VI points to the result they seek under the First Amendment, namely that governmental benefits no less than governmental office cannot constitutionally be denied on the basis of what realistically is a religious test.

III. Establishment of Religion

A. *Introductory*

In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), the Court defined the meaning of the Establishment Clause in the following words:

> 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 and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." 330 U.S. at 15.

In more recent decisions the test of constitutionality under the Establishment Clause has been worded somewhat differently. In these cases, the Court has set forth the test in the following language:

> . . . In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion. *Wolman* v. *Walter, supra,* at p. 2596.

The two tests are not inconsistent but rather supplement each other. Indeed, in *Abington Township School District* v. *Schempp,* 374 U.S. 203 (1963), in which the Court first set forth the purpose-effect (later, purpose-effect-entanglement) test, it also relied upon the *Everson* no-aid test, using both to reach the same conclusion of the unconstitutionality of Bible reading and prayer recitation in the public schools. Five years later, in *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), the Court again used both tests to invalidate a statute forbidding the teaching of evolution in public schools. In subsequent cases, the Court has frequently cited and quoted from *Everson* at the same time as it has applied the purpose-effect-entanglement test. See, e.g., *Wolman* v. *Walter, supra,* at 2596.

We submit that whether measured by the *Everson* or the purpose-effect-entanglement test, the statutory bar challenged herein cannot stand.

B. *The Everson Test*

Exclusion of abortion procedures from Medicaid coverage violates the mandate of the *Everson* decision against passing laws which "aid one religion, aid all religions, or prefer one religion over another." This Court can take judicial notice of the fact, obvious to any who read newspapers or periodicals dealing with the news, that for all practical purposes it is the normative interpretation of the dogma and doctrine of some religious groups, which is aided by the exclusion. Irrespective of this, the fact that the submitters of this brief are religious groups

representing millions of Americans is itself further and conclusive proof that the exclusionary statute prefers some religions over others. Having said that, we note that even if we were in error, and even if all the faiths in the nation shared the position of these churches in respect to abortion procedures, the *Everson* ban would still be applicable since it forbids aid to *all* religions, even if the aid be non-preferential.

We do not deem it necessary to establish that denial of Social Security benefits to Americans who resort to abortion constitutes aid to those religions which forbid abortions. Were the mandates of the churches honored by the congregants, there would be no need to exclude abortion from Medicaid coverage. In resorting to Congress and state legislatures, the churches are calling upon governments to do by compulsion that which they have themselves been unable to achieve by persuasion. If separation of church and state means anything, it means that government may not respond affirmatively to such a demand.

The quoted paragraph from *Everson* also forbids, as a violation of the Establishment Clause, participation by a state or the federal government, "in the affairs of any religious organization and vice versa." The role taken by churches in seeking to impose legislative barriers to legal access to abortion generally and to Medicaid abortion benefits in particular is a clear illustration of the "vice versa" prohibition in the *Everson* test, that is, participation by religion in governmental affairs. The law, in effect imposes on the governmental function of distributing social security benefits the religious doctrine against abortion. The Hyde Amendment effectively adds a religious censor to the administration of the welfare program.

Finally, we note in respect to the *Everson* principle, that the Court in that case interpreted the Establishment

Clause as requiring the state to be "neutral in its relations with groups of religious believers and non-believers." Exclusion of Medicaid benefits for abortion procedures, an exclusion urged for practically no reason other than their religion-based unacceptability, is manifestly not consistent with neutrality, either among the religions or between religious believers and non-believers.

C. *The Purpose-Effect-Entanglement Test*

1. Purpose

We note initially that we do not, nor can we rightfully contend that churches violate the Constitution in seeking enactment of legislation that translates into the law of the land their own particular doctrine and dogma. Next to freedom to believe, there is no constitutional right protected by the First and Fourteenth Amendments that is as close to absolute as the right to petition the government for a redress of grievances. That right encompasses petitions upon legislatures, state or federal, and upon their members to enact measures which others may consider to be unconstitutional. What we urge is only that in ascertaining whether the purpose of challenged legislation is to aid or advance religion the courts may and should consider as an evidentiary factor the role played by churches in obtaining its enactment.

In *McGowan* v. *Maryland, supra,* the Court judicially noted that Sunday laws originated as religious laws and that their historic purpose was to forbid desecration of the Christian Sabbath and to coerce compliance with Christian doctrine. It nevertheless upheld the constitutionality of the state law there assailed because it found as a historical fact that in the course of time the religiousity of the law had disappeared and its present purpose and effect

had become the secular one of assuring to all a day of rest and relaxation. However, in the closing paragraph of the Chief Justice's opinion for the Court, he was careful to note (366 U.S. at 453):

> Finally, we should make it clear that this case deals only with the constitutionality of §521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" clause if it can be demonstrated that its purpose — evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion.

Several years later, in *Epperson* v. *Arkansas, supra,* the Court found that the religious purpose of the challenged statute, which forbade the teaching of evolution in the public schools, had been adequately demonstrated.

> . . . It is clear [the Court said] that the fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's "monkey law," candidly stated its purpose was to make it unlawful "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man. (393 U.S. at 108-109).

Compulsion by withholding sorely needed funds, we respectfully suggest, is not constitutionally distinguishable from the less subtle form of duress in dismissal from employment.

Among the millions of persons who are affiliated with the religious organizations joining in this brief amici curiae there are undoubtedly many persons who adhere to a literal interpretation of the Bible and reject an evolutionary explanation of the origin of human beings. Some of them do, and are constitutionally entitled to demand that their own children be excused from attending class when the evolutionary explanation is presented. Some, finding this inadequate, support and send their children to those nonpublic schools which adhere to their own religious commitments in respect to the teaching of the origin of the human race. But all recognize that under the First Amendment they cannot rightfully demand that the public schools not teach the theory of evolution even though they themselves are compelled by law to pay taxes which are used in part to finance the operations of those schools. Indeed, the effort to restrict the teaching of evolution in *Epperson* (393 U.S., at 98 note 3, 108 note 16) was exclusively predicated on use of tax funds for that purpose.

Applying the *Epperson* decision to the case before this Court, it is obvious that the government, state or federal, could not constitutionally compel a woman either to foreforego or to undergo an abortion. Nor could it, by the same reasoning, withhold payment for attendant medical services to economically disadvantaged women who choose to resort to abortion while at the same time making such payments to women who do not elect that procedure or *vice versa*. In either case, it would be an unconstitutional law respecting an establishment of religion since it would lack a valid secular legislative purpose. A law ex-

cluding payment for abortion services from the Medicaid program can be no more justifiable under the secular-purpose aspect of the establishment test than a law barring payment from tax-raised funds of the salaries of biology teachers in public schools who include the theory of evolution in their course. The underlying purpose of the laws in both cases would be to inhibit to what the great majority of Americans is a valid, secular undertaking, and both should be declared equally unconstitutional.

2. Primary Effect

The primary effect, or at least *a* primary effect of the statute challenged herein, is to advance religions which forbid abortion and inhibit those which permit it or indeed may affirmatively counsel it in order to mitigate against the tragedies of unplanned pregnancies. This conclusion is inescapable when one views the historical background of anti-abortion laws. That background is set forth in *Roe* v. *Wade,* 410 U.S. 113, at 130-141 (1973), and will not be repeated here. The religious origin and purpose of these laws has been widely recognized by scholars and jurists alike.[3] Justice Douglas noted this in his dissenting opinion in *United States* v. *Vuitch,* 402 U.S. 62, 78-79 (1971):

> Abortion statutes [he said] deal with conduct which is heavily weighted with religious teachings and ethical concepts. Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." . . . The difficulty and

[3]See D. Callahan, Abortion: Law, Choice and Morality, Ch. 1[2] (1970); J. Noonan, Contraception (1965); Noonan, "Abortion and the Catholic Church: A Summary History," 12 National Law Forum, 85-131 (1967); R.J. Huser, The Crime of Abortion in Canon Law (1942). See also Tietze and Lewitt, "Abortion," 220 Scientific American 21 (January 1969) where opposition to abortion is traced to the rise of the Jewish and Christian religions.

> danger are compounded when religion adds another layer of prejudice. The end result is that juries condemn what they personally disapprove. (Citations omitted.)

Substituting the word "legislatures" for "juries" in the last sentence makes the quotation particularly apposite here.

Justice Douglas quoted the following from an article by former Justice Clark (at 79, n. 2):

> Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of "ensoulment" or "personhood," i.e., the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which "ensoulment" occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, i.e., able to support itself outside the women. In balancing the evils, the latter concluded that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth. Religion , Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U.S. Rev. (L.A.) 1, 4 (1969).

It is true that the arguments presented by advocates of return to anti-abortion laws are often presented in terms of morality rather than religion or theology; it could hardly be otherwise in a nation with a strong commitment to the separation of church and state. But, as the Court said in *Bigelow* v. *Virginia,* "a State cannot foreclose the exercise of constitutional rights by mere labels." 421 U.S. 809 at 826 (1975). The association of religion and morals is widely accepted, particularly among those with religious commitments. The "morality plays of Elizabethan England were religious plays. Jefferson called God "the author of all the relations of morality."[4] Clergymen and educators today commonly speak of "moral and spiritual values." The Catholic Church affirms its infallibility in teaching doctrines of "moral and spiritual values," and affirms the need to honor these values in order to be saved.[5] It is no mere concidence that positions on the morality or immorality of abortion vary among religious groups in conformity to their religious commitments. Churches whose doctrine or discipline forbids abortion hold it to be immoral; those whose doctrine or discipline permit abortion do not deem it to be immoral. It would be somewhat difficult for a legislature to charge, or a judge to determine that the religious organizations which are submitting this brief and their many millions of adherents are guilty of seeking to defend immorality.

In the present case, legislatures have sought to impose upon entire communities the religious doctrine of those to whom abortions are sinful. This unconstitutional imposition cannot be justified on the claim that abortion is immoral any more than a law banning the use of contraceptives can be so justified. *Griswold* v. *Connecticut,* 381

[4]1 A.P. Stokes, Church and State in the United States 337 (1950).

[5]Baltimore Catechism, 1949 Edition, p. 127.

U.S. 479 (1965); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972). In either case the claim of immorality is no more than an effort to compel the entire community to conform to the religious doctrines of particular groups. That is particularly true where, as in both cases, the majority of Americans do not consider the practice to be immoral.

The conclusion is inescapable that a primary effect of the exclusion of abortion procedures from Medicaid coverage is to advance the religious doctrine of those who hold abortions to violate God's law. It imposes upon those who do not share this view the theology of those who do. At its least, the establishment of religion bans imposing on all of the community the theology of some. It is immaterial whether the theology is that of a majority of the community. Nor is it material whether it is frankly designated as theology or euphemistically labelled morality. As Justice Clark said in the article from which we have already quoted:

> Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "moral predilections must not be allowed to influence our minds in settling legal distinctions." (O.W. Holmes, The Common Law)[6]

3. Entanglement With Religion

Much need not be said in respect to government entanglement in religious controversy and political divisions along religious lines, the avoidance of which was one of

[6]2 Loyola L. Rev. (L.A.) at page 6. It is significiant that Justice Clark was the author of the opinion in *Abington School District* v. *Schempp,* supra, in which the purpose-effect test was formulated. It is obvious that the author of this establishment test did not consider anti-abortion laws and regulations consistent with it.

the major purposes of the Establishment Clause. No one exposed to newspapers, periodicals and other media of public communication can be unaware of the religious acrimony and religio-political divisiveness brought on by the abortion controversy. Framing the controversy in terms of morals aggravates rather than ameliorates the conflict, for it implies that those religious groups who oppose covercive anti-abortion governmental action support or at least condone immorality.

The Court, in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), has pointed out the harm to our political system resulting from governmental entanglement with religion. It said (at p. 622):

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not

> likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

The Court's warning has stark relevancy to the situation in the present case. Few issues have rent the American people and their government so sharply along religious lines as those involved in the abortion controversy, particularly in respect to availability of abortion to the economically disadvantaged.

To sanction partisan involvement by government in such controversies would be to frustrate a major purpose of the Establishment Clause. "Torrents of blood," Madison warned in his Memorial and Remonstrance Against Religious Assessments, "have been spilt in the old world, by vain attempts of the secular arm, to extinguish religious discord by proscribing all difference in religious opinions."[7]

Interreligious tranquility cannot be achieved by governmental entanglement in religious controversy, and especially not by imposing upon all the religious commitments of some. We should not return to the Peace of Augsburg and its Erastian principle, *cujus regio, e jus religio,* whereunder the religion of a province is determined by the religion of its prince or parliament. M.E. Marty, *A Short History of Christianity,* (1959) 245.

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[7]Madison's Memorial is set forth in full as an Appendix to Justice Rutledge's dissenting opinion in *Everson,* 330 U.S. 63, 69.

IV. Free Exercise of Religion

There are instances where the dual First Amendment guarantees of church-state separation and freedom of religious exercise are or appear to be in conflict with each other, calling upon or apparently calling upon the courts to make a choice between them. See, e.g., *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) (tax exemption for churches); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) (compulsory attendance at secondary schools); *TransWorld Air Lines* v. *Hardison,* 432 U.S. 63 (1977) ("Religious Accommodation" amendment to 1964 Civil Rights Act). Whether or not these cases present real conflict is by no means certain but, in any event, if they do, they constitute the exception rather than the rule. In the overwhelming majority of cases, the dual guarantees of the Amendment support rather than conflict with each other. See, e.g., *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952); *Torcaso* v. *Watkins, supra.*

The last cited case is particularly apposite. There, as previously noted herein, the Court held violative of both guarantees in the Religion Clause of the First Amendment a state statute barring from public office any person who refused to take an oath that he believed in the existence of God. The Court reached this conclusion notwithstanding the fact that the plaintiff was an avowed atheist and therefore had no religion, at least as that term is generally understood. Just as freedom of speech guarantees equally freedom of nonspeech (*West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), so, the Court held, does freedom of religion guarantee freedom of nonreligion or, as often stated, freedom from religion.

It cannot be argued that use of tax-raised funds to finance abortion procedures for the economically under-

privileged violates the Free Exercise rights of those whose religious convictions forbid the procedures. The Court has consistently rejected contentions that use of tax-raised funds to finance flouridated water even where there is no other drinking water available in the community violates the Free Exercise Clause as it applies to persons whose religious conscience forbids drinking fluoridated water. See, *e.g.*, *Birnel* v. *Town of Firecrest,* 361 U.S. 10 (1959), dismissing for want of a substantial federal question, 53 Wash. 2d 830. Similarly, use of tax-raised funds to finance municipal hospitals which employ blood transfusion procedures does not impair the Free Exercise rights of those who deem such procedures as violating God's prohibition of drinking blood. *Cf. Application of Georgetown College,* 331 F.2d 1000, certiorari denied, 377 U.S. 585 (1964).

In these cases, and others that can be cited (e.g., religious convictions against all medical procedures in municipal hospitals, exclusion of Bible-reading or prayer from public school programs) the Court has held that the religious freedom of conscientious objectors to the practices or exclusions is not violated even though their taxes are used in part to finance them. Underlying all these decisions is the basic conclusion that it is the province of the courts, and ultimately the Supreme Court, to adjudge what is secular and what is sectarian, and in respect to the issue in the present case this Court has ruled that access to abortion procedures as to fluoridated water or medical treatment is a secular right not subject to restriction on religious grounds.

What we suggest is that the statutory exclusion of abortion procedures from Medicaid coverage violates the Free Exercise rights of those individuals whose religion counsels that abortion may be justified to protect the health and welfare of the woman and her family. We be-

lieve that this conclusion is supported by the Court's interpretation of the Clause in many cases, but with most relevancy to the instant case, in *United States* v. *Steeger,* 380 U.S. 163 (1965).

That case challenged the constitutionality under the Establishment and Free Exercise Clauses of the provision in the Universal Military and Training and Service Act, 50 U.S.C. App. 456 (j), which provided exemption from military training of persons "who, by reasons of religious training and belief [are] conscientously opposed to participation in war in any form." The statute defined religious training and belief to mean "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

The Court avoided the necessity of passing upon the constitutionality of the challenged statute by construing belief "in a relation to a Supreme Being" to encompass any "belief that is sincere and meaningful [and] occupies a placed in the life of the possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." Thus, in respect to one of the objectants in the case before it, the Court held that the statutory exemption included one who asserted that while he did not believe in a God in the traditional sense, that is "vertically, towards Godness directly," he did believe in "Godness horizontally," that is "through Mankind and the World."

It is difficult to read this interpretation into the textual language of the challenged statute. It is quite obvious, however that the Court employed the device of statutory construction to avoid passing not merely upon the constitutionality of the statute but also declaring it unconstitu-

tional. In the present case the constitutional question cannot easily be avoided through construction. One would not find it easy to interpret the relevant Medicaid provision as exempting from exclusion either women whose conscientious belief as defined in *Seeger* mandates access to abortion procedures or physicians providing the service who share in that belief. It follows, therefore, on the basis of *Seeger,* that if one can have a conscientious belief entitled to constitutional protection against participation in war, one should be entitled to the same constitutional protection if she believes that abortion is in harmony with or is mandated by her religious convictions.

As we have noted, the organizations who join in this brief include among their membership persons whose religious conscience impels access to abortion even when not required to preserve the life of the woman. To deny access on the part of economically disadvantaged women solely or principally because the procedure is contrary to the religious doctrines of some churches is, we submit, to deny her and her physicians the constitutional right to the free exercise of religion.

CONCLUSION

For the reasons stated we believe that judgment appealed from should be affirmed.

Respectfully submitted,

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