# Stewart: Concurrence

MR. JUSTICE STEWART, concurring in the judgment.

Like MR. JUSTICE BRENNAN, I believe that *Torcaso v. Watkins,* 367 U. S. 488, controls this case. There, the Court held that Maryland's refusal to commission Torcaso as a notary public because he would not declare his belief in God violated the First Amendment, as incorporated by the Fourteenth. The offense against the First and Fourteenth Amendments lay not simply in requiring an oath, but in "limiting public offices to persons who have, or perhaps, more properly, profess to have, a belief in some particular kind of religious concept." *Id.* at 367 U. S. 494. As the Court noted:

"The fact . . . that a person is not compelled to hold public office cannot possibly be **[p. 643]** an excuse for barring him from office by state-imposed criteria forbidden by the Constitution."

*Id.* at 367 U. S. 495-496. Except for the fact that Tennessee bases its disqualification not on a person's statement of belief, but on his decision to pursue a religious vocation as directed by his belief, that case is indistinguishable from this one -- and that sole distinction is without constitutional consequence. \*

\* In *Cantwell v. Connecticut,* 310 U. S. 296, 310 U. S. 303-304, this Court recognized that

"the [First] Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be."

This distinction reflects the judgment that, on the one hand, government has no business prying into people's minds or dispensing benefits according to people's religious beliefs, and, on the other, that acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired. The disability imposed on McDaniel, like the one imposed on *Torcaso,*implicates the "freedom to believe" more than the less absolute "freedom to act." As did Maryland in *Torcaso,* Tennessee here has penalized an individual for his religious status -- for what he is and believes in -- rather than for any particular act generally deemed harmful to society.