Notes

Toward a Uniform Valuation of the Religion Guarantees

> We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.[1]

In addressing the modern problems of church and state relations, the Supreme Court maintains a false view regarding the relative strictness of the religion guarantees.[2] By its view, state aid to religion, challenged on establishment grounds, merits greater tolerance than state restraint of religion, challenged on free exercise grounds.[3] This varied treatment is proper, the Court implies, since establishment is merely a "public" wrong,[4] visiting uncertain injury upon the individual[5] and upon those freedoms historically designated as "preferred."[6]

1. Justice Rutledge dissenting, Everson v. Board of Education, 330 U.S. 1, 63 (1947). *See* note 53 *infra.*

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

3. Chief Justice Burger, in the Court's latest establishment decision, gives strong expression to this idea:

> The limits of permissible state accommodation of religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself.

Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970). The Court proceeded to uphold the validity of tax exemptions accorded ecclesiastical property in the state of New York. For an account of differential scrutiny by the Court, see pp. 78-80 *infra.*

4. The "public injury" theory links state aid to religion with an abasement of civil authority, social harmony, and the respectability of religion itself. Its focus is transpersonal. The evils which it predicates are institutional. This theory pervades the opinion of the Court in Engel v. Vitale, 370 U.S. 421 (1962). In invalidating a state law authorizing prayers in the public schools, Justice Black stated:

> Its first and most immediate purpose [the establishment clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion. This history of governmentally established religion, both in England and this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect, and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.

Id. at 431. For further discussion of this theory, see note 102 *infra.*

5. The establishment clause, unlike the free exercise clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.

Id. at 430.

6. *See* pp. 81-84 *infra.*

It is proposed that this split view arises from a failure to probe the impact of state action in the establishment and free exercise cases, and to assess, comparatively, the individual liberties there at stake. By such examination, this Note will exhibit the identical threat posed to religious liberty in its successive phases—the *free adoption, observance,* and *propagation* of belief—by the agencies of aid and restraint, as complained of in the separate categories of suit. From a comparison of aid and restraint, in terms of the threat which they pose to the same paramount freedoms, the logic of adopting a standard of uniform strictness in the establishment and free exercise cases will emerge.[2] Finally, by use of this standard, the question of parochial school subvention shall receive a new analysis.

I. The Dual Standard: Its Nature and History

The Court's unequal treatment of state action challenged under the separate guarantees may be illustrated by a pair of companion cases decided in 1961. These cases—*McGowan v. Maryland*[8] and *Braunfeld v. Brown*[9]—examined identical laws, the former from the establishment and the latter from the free exercise perspective. The statutes in question prohibited the Sunday operation of certain businesses in designated areas within the states of Maryland and Pennsylvania. Plaintiff in *Braunfeld,* an Orthodox Jewish merchant, charged that such legislation placed unconstitutional burdens upon his Saturday worship. By force of law, he closed shop twice a week, on Sunday and his Sabbath, while his non-Jewish competitors, worshipping on the legal day of rest, closed only once. The Court subjected the Pennsylvania law to a two phase analysis. It determined first that the "purpose" and "effect" of the law were secular, that is, that the law promoted "directly" a secular goal—a general day of rest—and only "indirectly" restrained complainant's worship. Joined to the "secular purpose" and "effect" analysis, however, was the following strict proviso:

> But if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the

7. The methodology here employed, of defining the freedoms (or values) indwelling in the religion guarantees, was suggested by Professor Schwartz's study, *No Imposition: The Establishment Clause Value,* 77 YALE L.J. 692 (1967). The values predicated herein, however, differ markedly from those predicated by Professor Schwartz. In Schwartz's view, the establishment clause protects exclusively what is here termed "free adoption." All other values are rejected as spurious. *See* note 36 *infra.*

8. 366 U.S. 420 (1961).

9. 366 U.S. 599 (1961).

> state's secular goals, the statute is valid despite the indirect burden on religious observance *unless the state may accomplish its purpose by means which do not impose such burdens.*[10]

The statute survived this second phase of analysis, since the Court recognized no alternative means to implement Pennsylvania's legislative goal.[11]

The *McGowan* case, on the other hand, examined the Sunday closing law not as an impediment to worship but as a means of its furtherance. The law intended, plaintiff charged, to "facilitate and encourage church attendance," and to "aid the conduct of church services."[12] In upholding the law against establishment clause challenge, the Court employed the "secular purpose" and "effect" analysis prescribed in *Braunfeld. Braunfeld*'s second phase of analysis—the examination of the law in light of alternative means entailing no "indirect" religious effects—was judged, however, to lack "relevance."[13] The alternative means rule was therefore limited, by *McGowan*'s precedent, to the disposition of free exercise disputes.

The differential standards employed in *Braunfeld* and *McGowan* appear clearly in the Court's later decisions. The current establishment test, announced in *School District v. Schempp*, requires that the "purpose" of the contested law, as well as its "primary effect," be secular in character.[14] The alternative means doctrine is not applied.

10. *Id.* at 607 (emphasis added). The two step test in *Braunfeld* may be summarized as follows. *Either* a "purpose" *or* "effect" which is religious invalidates the law. A merely "indirect" religious effect, however, does not invalidate the law, *unless* the state can attain its secular goal through alternative means which do not entail the indirect effect.

11. The Court determined this point upon judicial notice:

> Thus, reason and experience teach that to permit the exemption [from the closing requirement] might well undermine the State's goal of providing a day, that, as best possible, eliminates the atmosphere of commercial noise and activity.

Id. at 608. The alternative means doctrine will be discussed in detail at pp. 98-101 *infra.*

12. 366 U.S. at 431. Plaintiff tendered also a general free exercise claim, which the Court rejected in one paragraph, finding no restraint of personal "religious freedoms." Unlike *Braunfeld*, he adduced no restraint of non-Sunday worship. Neither McGowan nor the Court could particularize any other theory of coercion. *Id.* at 429. In Board of Education v. Allen, 392 U.S. 236 (1968), the Court likewise rejected plaintiff's claim that state aid to religion impaired his free exercise. *See* note 24, *infra.*

13. 366 U.S. at 450. Having impeached the "relevance" of the alternative means doctrine, the Court explored *arguendo* the possibility of alternative arrangements. The irrelevant doctrine, it concluded, would have made, in any event, no difference in the outcome of the case. The Court reaffirmed, however, in its final paragraph, that the doctrine formed no part of its establishment test. *Id.* at 453. Professor Choper agrees with this reading of the case: "a majority of the Court has never employed the alternative means rationale in an establishment clause case" (citing *McGowan*). Choper, *Aid to Parochial Schools*, 56 CAL. L. REV. 260, 309, n.330 (1968).

14. 374 U.S. 203 (1963). *Schempp* enjoined ceremonial Bible readings in the public schools. In *Schempp*, Justice Clark rephrased the establishment clause standard found in *McGowan*. Under *McGowan*, a law would fall if its "purpose" or "effect" were the ad-

Sherbert v. Verner affirms,[15] on the other hand, that despite its secular purpose and primary effect,[16] a law may not impose a secondary restraint upon free exercise *unless* the state advances cogent reasons—reasons weightier than the free exercise interest at stake—for not adopting alternative measures free of such restraint.[17]

It is clear, hence, that the one-step test applied in establishment disputes will frequently approve "secondary" effects upon religion, which the two-step test, applied in free exercise disputes, must disapprove. Under the establishment test, the secondary advancement of religion is justified, if a law's purpose and primary effect are secular. Under the free exercise test, the secondary restraint of religion is justified, if a law's purpose and primary effect are secular, *and if* the state's interest in declining alternative means, entailing no secondary restraints, outweighs the worshipper's interest in their adoption. These tests therefore premise, by their differential treatment, the greater harm of secondary restraint, *vis-a-vis* secondary advancement, of religion's various activities.[18]

vancement of religion. It would not fall if its "indirect effect" were the advancement of religion. Under *Schempp*, a law will fall if its "purpose" or "primary effect" is the advancement of religion. It will not fall if its "secondary effect" is the advancement of religion. 374 U.S. at 222.

15. 374 U.S. 398 (1963). *Sherbert* held that Saturday worshippers, unwilling to work on their holy day, could not be denied unemployment compensation along with others refusing to take available work. Claimants declining "suitable work when offered" received no benefits under the contested statute.

16. Here "purpose and primary effect" is substituted for "purpose and effect" as it stands in *Sherbert*. While linguistic differences between the two formulations may be real enough, the Court regards them as identical. The purpose and effect language originates in *Braunfeld* and *McGowan*. In these cases, "effect" was equated with "operative" (366 U.S. 447, 453) effect, and was contrasted with "incidental" (366 U.S. 450) or "indirect" (366 U.S. 606) or "remote" (366 U.S. 608) effect. *Schempp* sought to "state" or summarize this ambiguous language in arriving at the "purpose and primary effect" phraseology. Since, therefore, *Sherbert* quotes from *Braunfeld* and *McGowan*, and since *Schempp* paraphrases *Braunfeld* and *McGowan*, the *Schempp* language may be interlineated within *Sherbert*. *See* Gellhorn and Greenawalt, *Public Support and the Sectarian University*, 38 FORDHAM L. REV. 400 (1970).

17. 374 U.S. at 407:

> An incidental burden on the free exercise of religion may be justified by a compelling interest in the regulation of a subject within the state's constitutional power to regulate . . . [but] . . . it would plainly be incumbent upon [the state] to demonstrate that no alternative forms of regulation would combat such abuses [fraud, etc.] without infringing First Amendment rights.

Professor Galanter clarifies the Court's meaning in *Religious Freedoms in the U.S.*, 1966 WIS. L. REV. 217 (1966):

> The test as actually applied in *Braunfeld, Sherbert* and *Woody*, is whether the state has a compelling interest in *not* having an alternative arrangement. It must have a compelling interest in the marginal difference—not in the whole regulation.

Id. at 280.

18. Only two concurrences have implied, contrary to this differential view, the "relevance" of the alternative means doctrine to both establishment and free exercise disputes. In McGowan v. Maryland, 366 U.S. at 466-67, Justice Frankfurter reasoned:

> If a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—*where the same secular ends could equally*

To examine the veiled logic of this differential treatment, it is necessary to return to the origin in First Amendment theory of the doctrine of alternative means. According to Martin Shapiro, the doctrine emerged as a device to effectuate the "preferred freedoms" raised to preeminence by the Court of Chief Justice Stone.[19] Stone named as preferred, in *Carolene Products v. United States*, those freedoms assigned in the *Bill of Rights*, those related to the interests of *minority groups*, and those basic to the workings of the *democratic system*.[20]

be attained by means which do not have the consequences for the promotion of religion—the statute cannot stand. (Emphasis added.)

And in School District v. Schempp, 374 U.S. at 231, Justice Brennan reasoned:

> The constitution enjoins those involvements of religious with secular institutions which . . . *use essentially religious means to serve governmental ends where secular means would suffice.* (Emphasis added.)

However, any hopes raised (*see, e.g.*, Van Alstyne, *Constitutional Separation of Church and State*, 57 AM. POL. SCI. REV. 865, 877 (1963)) by the Brennan and Frankfurter concurrences—as to the future addition of the alternative means doctrine to the majority's establishment test—have necessarily waned after Board of Education v. Allen, 392 U.S. 236, which, in its five opinions, omitted all mention of the doctrine. Modern scholarship, moreover, inclines to the differential view, minimizing the doctrine's "relevance" by urging that the "core religion clause values," solicited in the free exercise cases, would not profit by its application to establishment disputes. *See* Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 308-11 (1968).

19. M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW, 59 (1966). *See also* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 301 and *in passim* (1964):

> When a preferred position is assigned to a constitutional right, two results follow. The presumption of constitutionality will no longer suffice to validate a statute which invades such right . . . [and] moreover, as a second consequence, the preferred position test requires the use of the reasonable alternative, a statute "narrowly drawn to prevent the supposed evil."

20. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). The "preferred" tag signified merely that the Court would accord extra scrutiny to state action impairing the freedoms to which the tag was attached. Although the tag "preferred" has had varying currency—*see, e.g.*, the concurrence of Justice Frankfurter in Kovacs v. Cooper, 336 U.S. 77, 90-94 (1949) attacking the vague and uncritical nature of the term—the concept of special scrutiny is modern enough. It may be advanced, in fact, that the areas of special scrutiny mapped out in *Carolene* have retained much of their original vitality. In *Carolene*, the Chief Justice stated that there may be a narrower scope for the customary presumption in favor of legislation, where such legislation impairs Bill of Rights liberties, liberties essential to minority group welfare, or liberties basic to our system of self-government. Although the rules of special scrutiny are various in these three areas, and although the exact boundaries of these areas are quite uncertain, examples of special scrutiny within them are numerous. Laws discriminating racially (and impinging upon *minority interests*) are immediately "suspect." *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944). The "alternative means rule" limits state power to trammel the travel of Americans (and restrain a *Bill of Rights* liberty). *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 512 (1964). The state must prove conditions of extraordinary and imminent peril before a speaker may be silenced (and *democratic process* impaired). *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). In short, the clear and present danger test, the alternatvie means rule, and negative presumptions—devices of extraordinary scrutiny—attest to the viability of the concept of "preference" in modern constitutional theory. In this Note, no attempt will be made to assess the appropriateness of the alternative means rule as a device of special scrutiny in cases involving freedom of conscience. This application will be accepted as a "given" of the situation. Nor will this Note seek to define the outer limits of the concept of "preference." Rather, it will contend simply for a uniform application of the particular rule of scrutiny selected by the Court for the preservation of free conscience (the alternative

Regulations bearing upon these freedoms, in contrast to those confined in impact to the economic sector, Stone subjected to close scrutiny, "weighing the government restriction in light of alternative means, and substituting his view of what was necessary and proper."[21]

The early free exercise cases received analysis by use of the alternative means rule; they involved those interests described in the *Carolene* case and were treated by the Court as implicating "preferred freedoms" issues. Arising under the *Bill of Rights*, these cases concerned the *minority interests* of small proselytizing sects whose sallies into the unconverted world frequently infringed local police ordinances. The free exercise defense raised in *Cantwell v. Connecticut*[22] by a Jehovah's Witness arrested for preaching against prevailing local faiths suggests the conflict between police power and minority religion central to these early cases. Such cases, clearly, fell also within the third *Carolene* category, since, implicit in them, existed claims of speech abridgement, the bane of *democratic process*. Speech in support of "religious faith," according to the *Cantwell* opinion, like speech in support of "political belief," is "essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[23]

In sharp contrast, the preferred freedoms concept, and its corollary, the alternative means rule, appeared in none of the early establishment opinions. This again may be explained, it is proposed, by reference to the *Carolene* categories. First, the establishment opinions often stated that violations of the establishment guarantee—*unlike violations of the other guarantees embodied in the Bill of Rights*—visited only speculative injury upon the individual.[24] Establishment, in this view, appeared as an erosion of principle, a wrong without injury, or an

means rule) regardless of the context (establishment or free exercise) in which the issue of free conscience takes its rise.

21. L. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 263 (1945). *See also* Mason, *The Core of Free Government*, 65 YALE L.J. 597, 625-28 (1956). And *see generally* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

22. Cantwell's invectives, directed at Catholics and others, were alleged to constitute a breach of the peace. 310 U.S. 296 (1940). *Also cf.*, Board of Education v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follet v. McCormick, 321 U.S. 573 (1944).

23. 310 U.S. at 310.

24. In School District v. Schempp, 374 U.S. 203, 223 (1963), Justice Clark stated for the majority:

> [I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two classes is apparent—a violation of the free exercise clause is predicated on coercion while the establishment clause violation need not be so attended.

See also the cases cited in note 5 *supra*. Most recently, in Board of Education v. Allen, 392 U.S. at 248, 249, the Court ruled that "coercion against individuals in the practice of their religion" was essential to a free exercise action; it predicated no such element, however, in the distinct class of establishment cases.

infraction technical and abstract in character. Judicial doubt arose, hence, in establishment suits only, whether a Bill of Rights infraction presented a "case or controversy" in which some party had standing to protest. In *McCollom v. Illinois*, for example, Justice Jackson queried whether religious instruction conducted in the public schools affected any individual with sufficient force to confer the standing upon him requisite to Federal jurisdiction.[25] Similarly, in *Doremus v. Board of Education*,[26] a "citizen and tax-payer" who contributed to the maintenance of the public schools—in which prayers were chanted daily—was found to lack standing to seek declaratory relief. Unlike the free exercise cases, further, the establishment cases presented no stark picture of the *minority group* victim surrounded by hostile laws and public antagonism. The workings of the *democratic process*, finally, found no mention in the establishment opinions. The Court had therefore no occasion to view the establishment of religion as an impairment of a preferred freedom; no link had been forged between establishment and individual liberty, minority interests, or the democratic process. By consequence, it may be inferred, the Court did not apply to establishment litigation the corollary of the preferred freedoms concept, the doctrine of alternative means.

Nor has today's Court been lax in preserving the distinct standards of tolerance evolved in the above decisions. Modern establishment and free exercise cases are strictly segregated. Once a case is placed in one or the other class, the degree of relevant tolerance is settled; "aid," the Court teaches, without obvious "coercion," presents an establishment, not a free exercise issue.[27] It is safer, therefore, from judicial correction.

25. 333 U.S. 203, 232 (1948) (Justice Jackson concurring):

> [C]omplainant's son may join religion classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the constitution, which, of course protects the right to dissent, can be construed also to protect one from the embarrassment which always attends non-conformity, whether in religion, politics, behavior, or dress . . . . [N]o legal coercion is applied to complainant's son.

The majority in *McCollom* had banned religion classes in the public schools.

26. 342 U.S. 429, 434 (1952):

> It is apparent that the grievance which it is sought to litigate here is not a direct dollars and cents injury but is a religious difference.

27. The following are "establishment" cases, involving state aid to religion, which the Court refused to view in the "free exercise" context, for want of apparent restraint: Board of Education v. Allen, 392 U.S. 236, 248-49; McGowan v. Maryland, 366 U.S. 420, 429; School District v. Schempp, 372 U.S. 203, 222-23; *Also cf.*, Flast v. Cohen, 392 U.S. 83, 104 n.25 (1968). *See also* Lemon v. Kurtzman, 310 F. Supp 35 (E.D. Pa. 1969). In these cases, the wedge between "aid" and "restraint" has been forcibly driven. The Court has not perceived the falsity of the dichotomy.

II. The Logic of Uniform Treatment

The vice of the dichotomous approach, as described above, is that it segregates cases for varied treatment where identical values are at stake. These are the values of free conscience, in its successive phases. Both aid and restraint—the historic concerns of the separate guarantees—trench upon the individual citizen, it will be shown, in the *adoption, observance,* and *propagation* of his belief.[28] And in so doing, both aid and restraint threaten the welfare of minority groups and the integrity of the democratic process. While seemingly discrepant and suitable to varied treatment, then, "aid" and "restraint" are, in the clearer view, different menaces to identical values, values which have traditionally received "preferred" treatment by the Court. In the following discussion, the values of free conscience, impaired by aid, will be compared with the values of free conscience, impaired by restraint. Subsequently, the broader social values threatened by each agency will likewise be compared. The emergent correspondence will argue the necessity of a uniform legal standard to protect identical values as they exist in the establishment and free exercise cases.[29]

A. *Individual Conscience: The Cognate Values of the Religion Guarantees*

1. *The Free Adoption of Religion*

That the free exercise clause secures the right to adopt or reject religion, its ceremonials included, has twice been stated by the Supreme Court. In both cases, compulsory oaths have stimulated free exercise complaints. In *Board of Education v. Barnette,*[30] the Court enjoined the expulsion of a Jehovah's Witness child who had refused at school, upon religious scruple, to salute the national flag.[31] Justice Jackson con-

28. In the pages following, judicial, historical, and critical materials will be employed to identify the values at stake in the establishment and free exercise cases. It would be less than candid to imply, however, that much of what is advanced stands upon grounds firmer than inference or extrapolation. The emergent conclusion will be that a single set of values—the values of free conscience, as well as the values in the broader social order which depend upon free conscience—are threatened equally by aid and restraint, the separate provinces of the religion guarantees. It will be argued, finally, that the establishment clause, like the free exercise clause, defends no value beyond these values. *See* note 102 *infra.*

29. This is the alternative means standard, set out fully in Section III *infra.*

30. 319 U.S. 624 (1943).

31. According to Murray Stedman, the pledge here required amounted to an idolatrous form of worship, in the view of the Jehovah's Witness sect. "All organized religion and all organized government," he writes, "are believed by the sect to be the works of Satan." M. STEDMAN, RELIGION AND POLITICS IN AMERICA, 74 (1964). *See also* EXODUS, Chapter 20,

cluded that to "compel affirmance of a belief," repugnant to religious sects, "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our constitution to reserve from all official control."[32] The majority, reasoning thus, rejected the view of the dissent, that "no actual inroads are made upon the exercise of the religion of the minority."[33] In *Torcaso v. Watkins*,[34] similarly, rituals of religious affirmation, required of public servants, were found to impair the free adoption value.[35]

The courts have recognized, however, that the free adoption of religion, and its free rejection, may be thwarted as well by state aid to majority faiths—a stereotypic establishment problem—as by state compulsion of dissenters through the device of pious or patriotic oaths.[36]

In the establishment cases, the threat to free adoption is *inducement*, rather than *enforcement*, as seen in the free exercise cases discussed above. State sanctioning of religion occasions such inducement. Sanctioning occurs through partnerships, tacit and overt, which unite church and state authority, lending a character of orthodoxy and acceptability to those churches preferred. By this sanctioning, conscience is seduced both from irreligion and the teachings of rival groups. *Engel v. Vitale*,[37] a school prayer case, emphasizes this point:

> When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to prevailing official approved religions is plain.[38]

This inducement results, it is proposed, whenever the state and church

Verses 4 and 5: "thou shalt not make unto thee any graven images . . . . Thou shalt not bow down thyself to them, nor serve them." The law does not always accept, of course, the contention that public duties are themselves idolatrous rituals, and may not be enforced upon the individual. Taxes, for example, may not be evaded on the theory that they constitute tribute to the "bitch goddess" of the American secular establishment. *See* Freund, *Public Aid to Parochial Schools*, 74 CASE & COM. 3, 12 (1969). The pledge of allegiance, however, belongs to a genre of spiritual witness, distinct from duties of this latter kind. It involves a declaration of conscience, an affirmation of loyalty to one nation, which subsists—at present—"under God."

32. 319 U.S. at 638.

33. 319 U.S. at 662 (Justice Frankfurter dissenting).

34. 367 U.S. 488 (1961). Appellant Torcaso was denied Notary Public status for declining to affirm his belief in the existence of God.

35. By requiring Torcaso to adopt a religious ritual, the state denied his "freedom of belief and religion." *Id.* at 496.

36. The abridgement of "free adoption" through aid is often styled "imposition." For a collection of cases and articles treating of "imposition," *see* Schwartz, *No Imposition: The Establishment Clause Value*, 77 YALE L.J. 692 (1967).

37. 370 U.S. 421 (1962). *See also* Justice Goldberg's concurrence in School District v. Schempp, 374 U.S. 203, 307 (1963), warning against "utilizing the prestige, power, and influence of the state to bring religion into the lives of its citizens."

38. 370 U.S. at 431.

unite, before the public eye, in a tacit preference of sect over sect or religion over irreligion. The establishment clause case law provides numerous examples. A sectarian symbol, placed upon public property, may project such partnership.[39] State services, offered through church instrumentalities, affect the public similarly.[40] Laws tailored to suit sectarian groups, generally speaking, magnify their stature and prepare for them a place of influence and preeminence in the public order.[41] Non-preferred groups have an interest in checking these combinations that they may live, and raise their children, free from civil inducements to sectarian conformity.[42]

A most powerful inducement to orthodox belief, and an overt impediment to free adoption, is the practice, now discredited, of conducting religious exercises in the public schools. These exercises trade, with great effectiveness, upon the pressures and anxieties of peer group conformism to maximize student participation.[43] While Justice Jackson's dictum that no "legal coercion"[44] here exists may technically be correct, the inducement to conformity, implicit in such exercise, has evaded few observers.[45] Such inducement stems from the choice between alternatives which the state program frames:

> The state gives the student an alternative—he may either stay in attendance, or take affirmative action, by presenting a paper signed by his parent, thus marking himself and his parent publicly as nonconformists, and by going to another room, there to await the

39. City of Eugene v. Loewe, 463 P.2d 360, ___ Ore. ___ (1969), *cert. denied*, 397 U.S. 1042 (1970). The case is discussed in *Recent Developments*, 31 OHIO ST. L.J. 396 (1970).

40. *See* Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951), concerning the discharge of teachers propounding religious doctrine in the public schools; Knowlton v. Baumhoven, 182 Iowa 691, 166 N.W. 202 (1918), concerning the use of religious garb by teachers in the public schools; Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1942), concerning the incorporation of parochial schools and teachers within the public school system; New Haven v. Torrington, 132 Conn. 194, 43 A.2d 455 (1945), concerning the use of Catholic orphanages for public school classrooms.

41. *See* Epperson v. Arkansas, 394 U.S. 97 (1968), striking down a state law proscribing discussions of evolution in the public schools. The law was tailored to suit the Fundamentalist sect; as such, it cast a "pall of orthodoxy" over the classroom, and expanded the sphere of influence of the sponsor. *Id.* at 98 and 105.

42. On the right to raise children free from state solicitation of their spiritual preferences, *see generally*, Schwartz, *No Imposition: The Establishment Clause Value*, 77 YALE L.J. 692 (1967). *See also* Black, *Religion, "Standing" and The Supreme Court's Role* 13 J. PUB. L. 459, 463 (1964).

43. *See* Justice Brennan's concurrence, School District v. Schempp, 374 U.S. 203, 289 (1963):

> [B]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least non-conformity, the procedure may well deter those children who do not wish to participate for any reason based on the dictates of conscience.

44. *See* note 25 *supra*.

45. *See, e.g.*, Black, *Religion, "Standing," and The Supreme Court's Role*, *supra* note 42, at 459.

> completion of religious exercises. Attendance at the prayer may not, strictly, be coerced, but choice between these alternatives is coerced.[46]

The school stages a testimonial, in which piety and virtue are assessed by majoritarian standards, and in which the glare of hostile attention reduces all dissent; the child, ultimately sensitive to the badge of "otherness," will either testify or suffer banishment to the hall for the course of the instruction. The establishment clause, upon two occasions, has preserved the free adoption value in face of such naked manipulation.[47]

2. *The Free Observance of Religion*

The subsequent observance of religion, like its adoption and rejection, is sheltered equally by the two religion clauses. The cases support this proposition. Recent litigation has settled that the free exercise clause shelters the observance of religion and its attendant life styles from overreaching policies of regulation. In *Sherbert v. Verner*,[48] for example, an unemployment law—denying benefits to those refusing Saturday work—was invalidated, as applied to Saturday worshippers. In *In re Jennison*,[49] Seventh Day Adventists, committed to universal forgiveness, and opposed to judging their fellows, were exempted from traditional jury service. In *People v. Woody*,[50] the peyote cultism, practiced by Indian sects, was spared the incidence of local narcotics law. And in the celebrated holding of *United States v. Sisson*,[51] the defendant's commitment to pacifism, arising from philosophic speculation, entitled him to non-combatant status in the Vietnam war.

Lesser notice has been taken, however, of the role of the establishment clause in preserving religion from regulation and in promoting the value of free observance. To be sure, oblique reference to this role may be found. In *Engel v. Vitale,* Justice Black asserted:

> [T]he establishment clause . . . rested on the belief that a union of government and religion tends to destroy government and degrade religion . . . .[52]

46. *Id.* at 462.
47. Engel v. Vitale, 370 U.S. 421 (1962); School District v. Schempp, 374 U.S. 203 (1963).
48. 374 U.S. 398 (1963).
49. *In re* Jennison, 265 Minn. 96, 120 N.W.2d 515 (1963), *vacated and remanded* in light of Sherbert v. Verner, 375 U.S. 14 (1963); *on remand* 267 Minn. 136, 125 N.W.2d 588 (1963).
50. 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).
51. 297 F. Supp. 902 (Mass. 1969), *appeal dismissed,* 399 U.S. 267 (1970).
52. 370 U.S. 421, 431 (1962).

And in *Everson v. Board,* he specified the agency of "degradation":

> Neither a state nor the federal government can, openly or secretly, participate in the affairs of a religious organization or group . . . .[53]

These dicta do not, however, probe the nature of "participation"—its operations and sources—leaving the ban of the establishment clause obscure. The forbidden participation, according to some scholars, inheres in the funding of church activities. The power to grant aid, they urge, entails the power to dictate its terms and conditions: supervision of the use of grants in aid, in fact, follows predictably from the ordinary dictates of responsible government.[54] Supervision, of course, menaces the undisturbed observance of religion. Others argue, however, that such danger is chimerical, since supervision and spending are correlative neither in logic nor experience.[55]

Recent investigation weakens the latter view. The loan of secular text books—screened by state authorities—to the students of parochial schools, bears at present the approval of our highest court.[56] One study,[57] following *Board of Education v. Allen,* investigated through empirical techniques the content of these putatively "secular" texts. The screening program was found to be faulty. Parochial schools in fact obtained books of substantial religious content at the public's expense. The study referred, further, to a kind of tug-of-war, involving state and church authorities. A continuous pressure for evading the spirit of the law resulted, reportedly, in an insinuation of sectarian books within the sphere of approved texts.[58] The wrongdoers in this drama were identified by the study as sectarian pressure groups. This account, it is submitted, takes scant note of a distinct kind of wrong. That is the wrong of state "participation," keenly felt by the parochial schools, jealous of curricular autonomy, which yet were led, by economic need, to haggle

53. 330 U.S. 1, 15 (1947). *Everson* upheld, against establishment clause challenge, a state law extending bus fare reimbursement to the parents of parochial as well as public school children.

54. This is the view of Leo Pfeffer:

> Schools can remain private only if they are privately financed. Once compulsory taxation replaces voluntary support, the schools have no right to call themselves private. Perhaps more important, the public will sooner or later refuse to consider them private, and will impose upon them the same regulation and control to which other publicly financed agencies are and must be subject.

Federal Funds for Parochial Schools? No., 37 NOTRE DAME LAWYER 309, 322 (1962).

55. *See, e.g.,* Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 CAL. L. REV. 260, 326-29 (1968).

56. Board of Education v. Allen, 392 U.S. 236 (1968).

57. Note, *Sectarian Books, The Supreme Court and the Establishment Clause,* 79 YALE L.J. 111 (1969).

58. *Id.* at 131-37.

and compromise over the materials appropriate for their children. Justice Douglas alone dissented against this consequence:

> [T]he result of tying parochial school text books to public funds would be to put non-sectarian books into religious schools, which in the long view would tend towards state domination of the church.[59]

In this view, agreeable with that of Madison,[60] the establishment clause, like the free exercise clause, serves a vital function in securing the free observance of religion. Here is recognition that "participation" by the state in the selection of books and the structuring of curricula effects a present degradation of parochial education.[61]

3. *The Free Propagation of Religion*

Exercises of the police power hurtful to the propagation of religious thought have frequently been restrained upon free exercise grounds.[62] That the propagation of belief by recording, speech, and pamphlet enjoys protected status, immune from the sanction of broadly phrased penal laws, was recognized in the *Cantwell* case,[63] a decision founded on the free exercise guarantee. And in *Murdock v. Pennsylvania,*[64] decided three years later, the free exercise clause was held to preclude taxation of religious tracts.

The danger posed to free propagation by state support of religion, however, has yet to receive judicial exposition. The role of the establishment clause, hence, in securing the free propagation value, remains at present undeveloped. In order to assess that danger—and to develop a responsive role for the establishment clause—it will be helpful to cite a debate now current in the legal journals. The terms of this debate will furnish outline to the succeeding discussion.

59. 392 U.S. at 266. (Justice Douglas here paraphrased the dissent of Judge Van Voorhis of the New York Court of Appeals).

60. Madison's reproof of state participation in religion may be found in MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, section 5, as reproduced in II THE WRITINGS OF JAMES MADISON 183-91 (G. Hunt, ed. 1901).

61. In arguing that gifts to religious societies with strings attached offend the value of *free observance,* it is not suggested that a mere removal of the strings would make donation acceptable. By removing the strings the state would succeed in protecting the recipient. The taxpayer, however, may well be injured by the unconditional gift, as the next section contends. For a method of extending aid to parochial schools, free of injury to any party, see section III *infra.*

62. The free speech clause has supported identical holdings. *See,* Schneider v. Irvington, 308 U.S. 147 (1939); Martin v. Struthers, 319 U.S. 141 (1943); and Terminello v. City of Chicago, 337 U.S. 1 (1949).

63. 310 U.S. 296 (1940).

64. 319 U.S. 105 (1943). *See also,* Jones v. Opelika, 319 U.S. 103 (1943); *and see* Follet v. McCormick, 321 U.S. 573 (1944).

Is voluntary funding of religion, as distinguished from state funding, a central mandate of the establishment clause? Professor Gianella, answering in the affirmative, stresses the "Darwinian" character of mankind's religious history, a type of natural selection, or competitive evolution, moving under teleological impulse, which state subsidies would disturb.[65] Professor Schwartz, answering in the negative, challenges the state's aloofness to the withering of religions, and approves taxation for the sects where voluntary contributions will not sustain them.[66] Supreme Court dicta,[67] and relevant historical materials,[68] agree with Gianella's view. None of this authority provides concrete reasons, however, for adopting Gianella's view, and rejecting that of Schwartz. This debate—over the need for preserving competition among the sects free from the distortions arising from state funding—has opened a serious gap in establishment clause theory.

As a highly general starting point in resolving this puzzle, we may turn to a recent free speech case arising in the field of labor law. In *I.A.M. v. Street*,[69] the Court considered the propriety of employing dues paid by members of involuntary associations (union shop workers) to further political advocacy repugnant to their views. The issue was resolved on statutory grounds. Justice Black, however, in his concurrence, provided this broad dictum:

> Compelling a man by law to pay his money to elect candidates or

65. *Religious Liberty, Non-Establishment, and Doctrinal Development, Part II. The Non-Establishment Principle*, 81 HARV. L. REV. 513 (1967). Having advanced this theory, however, Gianella ultimately concludes that tax support does *not* offend the establishment clause, since, in modern America, tax support of the myriad enterprises of national life—unknown in 1789—has given them an artificial competitive edge on religion. Hence, the natural Darwinian balance may be restored by such aid.

66. Schwartz, *supra* note 36, at 692. *See also* Schwartz, *An Answer to Professor Gianella*, 81 HARV. L. REV. 1466 (1967). Schwartz, however, forbids tax support where it would augment the recipient sect's effective powers of advocacy. Such would constitute forbidden "imposition" upon the auditors of the religious advocate. Tax funds, however, may properly be used, in "deepening" or "implementing" belief within the congregation, and in securing it from the destructive forces of natural competition. Imposing nothing upon the unconverted, the state has offended no establishment clause value, as posited by Professor Schwartz.

67. In *Everson v. Board of Education*, the first of the modern establishment decisions, Justice Black cited the following abuse, written large in our history, which the establishment clause intended to forever prevent:

> All of these dissenters were compelled to pay tithes and taxes to support government sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred for the dissenters.

330 U.S. at 10.

68. *See* THOMAS JEFFERSON, THE VIRGINIA STATUTE OF RELIGIOUS LIBERTY (1786), *codified in*, STATUTES AT LARGE OF VIRGINIA, vol. XII (ed. W. Henning, 1823):

> [T]o compell a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical . . . .

See also MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 60, at Section 3.

69. 367 U.S. 740 (1961).

> advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against . . . . The First Amendment, fairly construed, deprives the government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against whether economic, scientific, political, religious, or any other.[70]

Without pondering the range of application of this principle (which is, needless to say, troublesome in many contexts), it will suffice to elaborate from it the following concrete objections to state support of religion through the use of tax revenues. First, such taxation and expenditure deprive the religious (or irreligious) advocate of funds, and turn those funds to the use of rival groups, groups propagating doctrine which he is bound, by the deepest commitment, to oppose and correct. In a very real sense, compelled support of religion contracts the taxpayer's effective speech, since it enjoins self-refutation upon him. By paying his taxes, he diminishes his power to impart the truth and amplifies hated heresies. Secondly, from a broader point of view—which prescinds from the issue of pocketbook loss—tax support harms the advocate by fixing the public against him, through the expense of thousands of dollars in the enforcement of the precepts of his rival. His "talk power" is thus diminished, not by a "three pence" *exaction*, but by the sum total of the state's *expense*. Even if the financial loss of the taxpayer, then, is styled *de minimis*,[71] the skewing of debate to the advantage of one view by enlarging its resource of speech amounts to a subversion of opposing cause which the First Amendment must forbid out of fairness to the partisans.[72] At issue, in truth, whether the advocate pays taxes or not, is the power to elicit that response natural to the merit of his doctrine and the zeal of his delivery in face of the massive augmentation, by the state, of the message of his rival. Harm to the advocate must be reckoned not in fractions of his tax bill, but in members lost to his sect and viability lost to his cause.

If Justice Black's argument applies, hence, to the union member,

70. *Id.* at 791.

71. The argument that the percentage of the citizen's tax bill applied to religious expenditures is *de minimis*, relative to the percentage of the union worker's dues applied to political advocacy, would seem untenable after Flast v. Cohen, 392 U.S. 83 (1968). *Flast* accorded standing to taxpayers protesting the expense of Federal funds for the support of sectarian education. *See id.* at 105, 115.

72. *See* Justice Douglas' majority opinion in Zorach v. Clauson, 343 U.S. 306 (1952):

> We sponsor an attitude on the part of government . . . [which] lets each [faith] flourish according to the zeal of its adherents and the appeal of its dogma.

Id. at 313.

whose complaint rests solely upon free speech grounds, then it applies *a fortiori* to the taxpayer, whose complaint rests both upon the free speech guarantee and the specific title of disestablishment. These provisions, jointly considered, display a complementary force and concurrent purpose in opposing the compelled support of proselytizing sects.[73]

It may be concluded from this survey of the values of *free adoption, free observance,* and *free propagation* that the establishment clause, like the free exercise clause, secures freedom of conscience to the individual citizen. The two guarantees insulate the successive phases of religious life—the adoption, observance, and propagation of belief—from the agencies of state disturbance. The establishment clause frees these delicate processes from the disturbance attending state aid to religion. The free exercise clause frees them from the disturbance attending state restraint of religion. They cooperate, however, to one result:

> The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.[74]

Once the equal scope of the guarantees is fully recognized, the logic of assessing their abridgement by a unitary standard becomes immediate.

B. *Social Order: The Cognate Values of The Religion Guarantees*

The Supreme Court has stressed that restraints of religion, hurtful to the values of free conscience, pose a substantial threat to *minority groups* and to the *democratic process.* These weighty social interests contribute to the need for strict scrutiny under the free exercise clause. It will presently be shown that state aid to religion, hurtful to the values of free conscience, poses an equivalent threat to those aspects of the

73. Nor may compelled support be approved, as Professor Schwartz proposes, *supra* note 36, at 692, in cases where it causes no "imposition" upon the unconverted—*i.e.*, where it causes no augmentation of the recipient sect's powers of advocacy—but merely "deepens" or "implements" conviction, already attained to, within select parishes of the faithful. Such support nonetheless subverts the advocacy of the unwilling taxpayer. Denied the right to decline "deepening" a belief which he detests, the taxpayer is, *pro tanto* denied the right to attempt converting its adherent. Justice Douglas warns of such distortion of the natural religious dialogue in his *Schempp* concurrence (374 U.S. at 228): "the vice of tax support . . . is that the state is lending its assistance to a church's efforts to gain and *keep* adherents" (emphasis added). In sum, Schwartz fails to recognize that state nullification of religious advocacy, through shielding its auditor against its natural persuasive effect, is entirely as manipulative as state intensification of advocacy, which involves the feared "imposition" upon the auditor.

74. School District v. Schempp, 374 U.S. 203, 305 (1963) (Justice Goldberg concurring).

social order deemed especially significant in the free exercise cases. This survey will strengthen the conclusion that both clauses be construed with a strictness appropriate to the paramount values involved in disputes over aid and restraint.

1. *Minority Groups*

In the free exercise cases, it was early remarked that the restraint of religion threatened the welfare of minorities. Minorities, it was recognized, were the predictable victims of popular prejudice, as expressed in overbearing regulations. The free exercise clause encircled minority belief, however, with a zone of safety:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, and to place them beyond the reach of majorities . . . [these] depend upon the outcome of no elections.[75]

The establishment clause, it will be shown, performs an identical function. It does so by prohibiting state aid inimical to the values of free conscience.

As observed by Justice Black in the school prayer cases, state sanctioning of religion, inimical to the *free adoption* value, affects most violently the choice of conscience within minority groups. When the "power" and "prestige" of state stand behind a belief, he charged, the "indirect coercive pressure upon religious minorities" is unmistakable.[76] It is these small sects, lacking the power of larger groups in political constituencies, which can least court the benevolence of government, and which are simultaneously most influenced by the eligible appearance of the select "American" religions prospering under the moral sanction of the state.[77] Since legislation registers majority opinion, alliances between the church and state include our larger churches only. School prayers, for example, purportedly ecumenical, have accommodated at best our three major faiths.[78]

State participation in religion, inimical to *free observance*, likewise threatens minorities with over-bearing orthodoxies. The federal Elementary and Secondary Education Act, for instance, authorizes the

75. West Virginia Board v. Barnette, 319 U.S. 624, 638.
76. 370 U.S. at 431.
77. *See* Dunsford, *The Establishment Syndrome And Religious Liberty*, 2 DUQUESNE U.L. REV. 139, 205 (1964).
78. The putative "nonsectarian" Bible readings at issue in the *Schempp* case, for instance, were regarded as "practically blasphemous" by some groups in the community. 374 U.S. at 209.

loan of textbooks to parochial school children.[79] These books, however, must be "approved for use by public school authority in the state."[80] The Act envisages the formation of a single "public depository" from which "all elementary and secondary school children and teachers" may check out library resources.[81] Majority choice of appropriate texts overrules minority choice. Economic need, of course, enforces that choice. The program thus occasions, through inflexibility, an encroaching conformism, a monolithic public school perspective. This offends the rule of the *Pierce* case[82] that parochial school autonomy enjoys the constitution's protection. If benefits are to be extended, less intrusive means must be fashioned.

State funding of select sects, inimical to the *free propagation* value, threatens disproportionate injury to minorities. Professor Schwartz's proposal that select faiths be deepened by state subsidy and that others be denied such benefit presents a case in point.[83] Such "deepening," procured through the normal means of numerical politics, would inure to the benefit of the larger sects by shielding them from the proselytizing efforts of the smaller. *Pro tanto*, the persuasive powers of the unpopular advocate—e.g. the Black Muslim or the Atheist—would be diminished. Proselytes would be obtained freely from their ranks, while their own powers of proselytization would be defeated. The minority, then, by its own tax contribution, would be inhibited in imparting its faith and surviving in the competitive process.

2. *Democratic Process*

A restraint of democratic process, the Supreme Court early ruled, inheres in the restraint of religion. The free exercise clause was styled, therefore, the guardian of self-government, as well as personal liberty:

> In the realm of religious faith as in that of political belief, sharp differences arise . . . . But the people of this nation have ordained, in light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlight-

79. Pub. L. 89-10 (1965). *Codified in* 20 U.S.C. 821-85 *et seq.* The Book Loan provisions are contained in Title II, Section 203(a)(2); 20 U.S.C. 823(a)(2).

80. *See U.S. Code, Cong. & Ad. News*, 89th Cong., 1st Sess. 1468.

81. *Id.*

82. Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Court struck down, on due process grounds, a state requirement that all children attend the public schools. It identified a "constitutional right" to maintain parochial schools. State control, it held, could not transcend those minimal precautions of "inspection" and "examination" etc. requisite to the public welfare.

83. Professor Schwartz denies any duty of "equal deepening." *No Imposition: The Establishment Clause Value, supra* note 36, at 723.

ened opinion and right conduct on the part of the citizens of a democracy.[84]

By prohibiting aid hurtful to the values of free conscience, the establishment clause plays a parallel role in the effectuation of democracy. To develop this parallel, it will be necessary first to trace the connection between free conscience and self-government.

Paul Kauper has observed that the "separation principle does not mean that religion is irrelevant to political life and law," and that the churches have "much to say in defining the ethos of our democratic order."[85] Today's church, committed to causes such as civil rights, crime abatement, black power, and pacifism has emerged as an influential political arbiter, marshaling public opinion by its criticisms and annexing the force of the ballot to its vision of rectitude. If American religion was ever other-worldly in emphasis, it stands today, with sixty-six per cent of the population belonging to its churches, as an outspoken political sponsor.[86]

According to Murray Stedman, church groups influence the democratic process in three ways.[87] First, they inculcate distinct norms regarding *social change.* Even within the Protestant sects, for example, belief on the one hand exists that reform is a moral imperative, and, on the other, that it is a waste of time, or a determinate danger. To some, the revival of our institutions presupposes the revival of our spirits, placing reform in the nation's millenial future.[88] To others, the status quo stands as a bulwark of morality, threatened as much by meliorism as by irreligion itself.[89] Other Protestant groups, needless to say, man the vanguard of social activism.[90] Secondly, the pulpit exercises a vigorous *judgmental function* regarding the transactions of state. These range from the monthly pronouncements of the National Council of Churches on public policy[91] to the dramatic witness of those

84. Cantwell v. Connecticut, 310 U.S. at 296.

85. P. KAUPER, RELIGION AND THE CONSTITUTION, 84 (1964).

86. *See* L. PFEFFER, CHURCH, STATE AND FREEDOM, 85 (1967). *See also,* M. STEDMAN, RELIGION AND POLITICS IN AMERICA 5 (1964), for further data on church membership.

87. STEDMAN, *supra* note 86, at 144-46 and *in passim.*

88. *Id.* at 10.

89. There is a marked religious intolerance in fundamentalism that very often carries over into other aspects of life, including political life. Mostly, in short, the same people tend to be at once nativist, racist, and Chauvinistic. *Id.* at 129.

90. The National Council of Churches (containing the Episcopalians, Methodists, and two main Presbyterian bodies), which engages in many activities as the agent of its members, is the main social action agency of cooperative American Protestantism. *Id.* at 9. *And see, in passim.* Professor Stedman, of course, does not here enumerate all of the members of the N.C.C.

91. Pronouncements and other specific actions on aspects of war and peace are

groups refusing participation in the nation's wars.[92] Thirdly, the pulpit seeks the *consolidation of voters* behind political schemes deemed essential to the nation's moral welfare. Here we may number the Abolition and Prohibition movements in the past, along with the Tri-Faith campaign for civil rights legislation and the drive for minority opportunities of the Southern Christian Leadership Conference in recent history.[93]

State sanctioning of religion, inimical to *free adoption*, disturbs the pulpit's judgmental function. By allying itself publicly with select groups—by raising artificially their position in the public order—the state casts a pall of orthodoxy over moral debate. By magnifying the image of one judge, the state legitimates its views and accustoms the community to deference. In outlawing, for example, the discussion of evolution in its schools, the state lends civil authority to the moral authority of the fundamentalist sect, a highly conservative judge in all arenas of public life.[94]

State participation in religion, inimical to *free observance*, disturbs the pulpit's inculcation of social norms. Gifts to parochial schools, as an example, might include textbooks of a political or philosophical bias which undermine (or fail to embody) the views of the donee, but which are accepted out of economic necessity. Justice Douglas identified this vice in *Allen v. Board of Education*.[95] In *Pierce v. Society of Sisters*, the Court declared the right of parents to maintain parochial schools—in which the American experience could be interpreted to their children by light of their own conscience—provided that they submit to

numerous, and include recommendations on disarmament, nuclear testing, and the role of the United Nations. There are also frequent recommendations on problems of economic adjustments, including automation, unemployment, and pockets of persistent poverty.

Id. at 140. The latest such pronouncement occurred subsequent to President Nixon's invasion of Cambodia, which the N.C.C. openly reproved over the national media.

92. For a history of conscientious objection in America, see United States v. MacIntosh, 283 U.S. 605, 633 (1931), Justice Hughes dissenting.

93. STEDMAN, *supra* note 86, at 104, 131.

94. Epperson v. Arkansas, 393 U.S. 97 (1968), invalidated an Arkansas statute making it a penal offense to teach in state schools "the theory that man ascended or descended from a lower order of animals." Justice Fortas, writing for the majority, found that the statute was a product of "the upsurge of 'fundamentalist' religious fervor of the twenties," *id.* at 98. He argued that such laws "cast a pall of orthodoxy" over the classroom when tailored to enforce the doctrines of a preferred sect, *id.* at 105. The body thus publicly preferred by the state has been described as follows by Professor Stedman:

> The psychological and economic bases of the radical right—the feelings of dispossession, of rootlessness, of economic insecurity—have been analyzed extensively elsewhere, and it will suffice here to draw attention to two related phenomena of the radical right: the close allegiance it has with religious fundamentalism, and the sizeable percentage of its leaders who are ordained ministers.

RELIGION AND POLITICS IN AMERICA, *supra* note 86, at 129.

95. *See* p. 89 *supra*.

regulations of a minimal kind.[96] Increased regulation, Leo Pfeffer teaches, must follow public funding, since the beneficiary is responsible to the public for the use of funds received.[97] When standardized teaching results from such regulation, the advantages of independent perspective are lost.

State funding of religion, inimical to *free propagation,* disturbs the pulpit's consolidation of the vote. According to Professor Stedman, changes in church membership of given regions imply with some certainty changes in their political complexion.[98] Since religion is an "independent factor"—among other cultural factors—in influencing political choice, changes in religion adumbrate changes in attitude among voters. For example, Stedman sees the present competition among the Pentecostal, Holiness, and Southern Baptist sects on the one hand, and the Episcopalian, Methodist, and Presbyterian groups on the other, as a competition between those Southern faiths "historically opposed to social action," and those whose teachings incline them to programs of immediate reform, a competition tending distinctly in favor of the conservative groups.[99] By spending tax funds, then, to aid the efforts of one such group to seek and keep adherents, the state will impede or accelerate the reported trend, and manipulate the balance of church power to consolidate support for conservative or liberal political policies.[100]

96. *See* note 82 *supra.*

97. *See* note 54 *supra.*

98. In fact, changes in religious affiliation take place gradually and over extended periods of time. Nonetheless, changes do take place, and they may be expected to have some effect on attitudes toward politics. We can project with some accuracy future political attitudes: when we know the rates of growth of individual denominations and their historic attitudes for or against social action, we can correlate the two factors.

STEDMAN, *supra* note 86, at 8.

The theoretical problem—as has now become evident—is whether religion is a force by itself in determining party preference or whether it simply reflects the pull of socio-economic or ethnic forces or both. Is religion an independent variable or a dependent one in helping to determine the party preference of voters? The dominant opinion of the researchers—from Paul Lazarsfield to Gerhard Lenski—is that religious affiliation is—in Lenski's words—'an important factor in influencing the party affiliation of present day Americans.' In short, while religion is associated with other factors in the question of party choice, it stands out consistently enough so that it can be identified in its own right.

Id. at 119.

99. What can be hazarded as a prediction—if present trends and conditions continue—is that those Protestant churches that have historically opposed social action will become more prominent, while the social action oriented denominations become less influential; the latter will probably face a period of relative decline in numbers. If sustained, these trends could mean increased Protestant political support for the status quo and thus a diminution in the over all effectiveness of the Protestant churches as social critics.

Id. at 9.

100. For brevity, the impairment of particular values has been linked with the distortion

In summary, it is evident that the establishment of religion, like the impairment of free exercise, jeopardizes important social values as well as important personal values. The discovery of these values in the free exercise cases has provided cogent justification for strict judicial scrutiny. Since these values are involved likewise in the establishment cases, it follows that the rule of judicial scrutiny employed in the free exercise cases should be adopted in the establishment context.

III. The Uniform Test Applied[101]

A. *The Test Stated*

Building upon the preceding, we may identify religious effects, cognizable as "establishments" of religion, as well as impairments of "free exercise," in the following manner:

> State action abridging the individual's freedom to adopt, observe, or propagate his religion (or irreligion) through programs of assistance, or systems of regulation, exercises a religious effect.[102]

of particular functions of the pulpit. This is not to imply, however, that one type of impairment injures one type of function only. A complete analysis would demonstrate how the impairment of each value injured each such function. It is believed, however, that the impairment of *free adoption, observance,* and *propagation* may be linked most directly with the impairment of the *judgmental, inculcative,* and *consolidative* functions respectively.

101. No claim of originality is made for proposing a "uniform" test in the establishment and free exercise contexts. Several proposals for *devaluating* both clauses—*for adopting a uniformly lax standard of scrutiny under each*—have appeared to date. *See* note 103 *infra.* From such approach, however, this Note departs. In the pages following, a uniform *valuation* of the religion guarantees is prescribed, which would apply in their respective provinces the strict rules of scrutiny developed by the Court in the free exercise cases. The justification for this uniform strictness is a comparative value analysis original in nature. *See* pp. 84-97 *supra.*

102. As previously stated, the establishment clause consults the values of free adoption, practice, and propagation—along with those values which are, in the social order, their simple extrapolations. At this juncture, however, something further is asserted. Not only does the establishment clause consult these values, *but it consults no others. "Religious effects," cognizable as "establishments" of religion, are defined exclusively by the impairment of these values.* Supreme Court dicta dissonant with this conclusion exist. Here and there, the Court has referred to evils—beyond the personal and social evils predicated above—which the establishment clause should repress. In *Engel v. Vitale,* Justice Black cited a pervasive hatred by the people for any government committed to sectarian subvention. *See* note 4 *supra.* Subvention, then, in the Justice's view, is the precursor of rebellion, naked strife among the people. But from what does this hatred derive, when the state lacks power to impose religion, to tax generally in its favor, or to work a "perversion" of its nature through "unhallowed" civil controls? "Hatred," clearly, is the measure and degree of the abuses identified above. Justice Black referred likewise to a "disrespect" for that religion which depends for its maintenance upon the state. But what grounds for disrespect would propose themselves to a cynical populace if the state did not impose religion upon the unconverted, tax rival religions for its support, or participate in its affairs? The contention, then, in McGowan v. Maryland, 366 U.S. at 430—that the establishment clause consults values beyond the values of free conscience and the social order values depending upon free conscience—seems to be ill considered. Shorn of the power to abridge the above assigned values, what "tyranny" will the state's aid to religion occasion?

Whether the First Amendment tolerates such effects depends upon the following inquiry:

1. Are the purpose and primary effect of the law secular?[103]
2. Does the state have a compelling interest in declining alternative legislative measures involving no secondary religious effects?[104]

If, on its face, the statute manifests a purpose or necessary primary effect which is religious, a presumption of unconstitutionality attaches

If these values are secure, what harm results from state subvention? And yet it may be further questioned whether aid to religion—apart from its impact upon the personal and social values here defined—will engage the pulpit which seeks financial aid in political controversies improper to it. *See* Justice Harlan's separate opinion in Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970). *See also* Freund, *Public Aid to Parochial Schools*, 74.6 CASE & COM. 8 (1969). This threatens a "subversion" of state through wrongful "participation." As urged previously, however, political debate is an activity appropriate to the pulpit, and one of signal importance to the nation. *See* STEDMAN, *supra* note 86, at 137-46. Having rejected these proposed values as spurious, we may judge the establishment clause irrelevant to programs of aid not harmful to free conscience, and to the social order erected upon free conscience. *See* pp. 102-106 *infra*.

103. At this point it may be well to address the theory that state action affecting religion does not offend the religion guarantees, unless it is actuated by a purpose of advancing or inhibiting religion. Such theory tolerates religious effects, where unintentional, regardless of their magnitude. Professor Kurland advanced this theory in 1961. *See* RELIGION AND THE LAW, 111-12. Professor Ely now presses it forward for reconsideration. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1313 (1970). This Note opposes that view. It proposes that the "purpose" analysis is a makeshift device, useful only in those areas of constitutional law where a more sensitive analysis is impossible. The Supreme Court presently employs this test in the "racial gerrymandering" and "jury selection" cases. In these cases, no constitutional ideal is available by which the "impact" of state action may be assessed. There is no ideal racial composition—in juries or voting districts—which state action may be said to disturb. Is the ideal voting district, for example, 70% White, 20% Black, and 10% Puerto Rican? Adam Clayton Powell would surely dispute an affirmative answer. Wanting an "ideal" district, the Court is forced to resort to the intention of the legislature in drawing district lines. The constitutionality of the design admits of no other test. District lines drawn with the purpose of including or excluding racial groups are unconstitutional under present law. *See, e.g.*, Wright v. Rockefeller, 376 U.S. 52 (1964). This analysis bears no proper application in First Amendment cases. Here we recognize three determinate "ideals"—*free adoption, observance*, and *propagation*. Toward these ideals the state is not "neutral." *Compare* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1281-82 (1970). Rather, these are freedoms to which the Court has historically accorded special protection. In truth, the Court enforces a "neutral" attitude of state between religion and irreligion, and between the sects themselves, *in a vigorous and affimative effort to safeguard these freedoms*. This being so, it is insufficient to probe the purpose of the state, where its action injures such freedoms. An innocent purpose cannot justify an injury of the clearly defined ideal. Sensitivity to this injury—intentional or unintentional—must be maintained. And where injury is discerned, it is merely common sense to insist that the state adopt available alternatives, free of injury, to restore the ideal condition. To adopt the narrow "purpose" analysis is to invite legislative clumsiness in an area of fragile rights; it is to wink at palpably harmful side-effects, even where the legislature has ready means of avoiding them.

104. It is clear that no effort has been made in this Note to modify or improve the "purpose" and "primary effect" language. Such a project—perhaps worthwhile, considering the inherent ambiguity of these terms—is beyond the scope of the present Note. Here the attempt has simply been to append the "alternative means" test to the "purpose and primary effect" test in the establishment context, as it is done in the free exercise context. This victory will somewhat mitigate the continuing ambiguity of the preceding language. Under the proposed two part test, the establishment plaintiff may still prevail even though the Court finds no "primary religious effect." A Judge's somewhat mysterious determination that a religious effect is merely "secondary" will no longer be fatal to the plaintiff.

to it, and the burden of rebutting devolves upon the government.[105] Likewise, if the plaintiff demonstrates *prima facie* that, in its specific application, a law's primary effect is religious, the burden of rebutting shifts to the state.[106]

If the plaintiff tenders *prima facie* proof of a secondary religious effect, without alleging a religious purpose or primary religious effect, the government must rebut the inference of the secondary effect, *or prove that it has considered alternative means free of such effects and that it has over-bearing reasons for not adopting them.*[107]

Application of the alternative means doctrine is not a simple task.[108] The Court must sometimes rule that alternative arrangements are feasible, in face of legislative judgments that they are not. We mistake this function, however, if we conceive it as a legislative function. The Court does not propose alternative methods. This would be an advisory role inconsistent with its Article III commission. Rather, it assesses the arguments advanced by the state concerning the impracticability of alternative measures.

First, the Court must determine whether the state has considered alternative, less restrictive, methods. If, as in *Sherbert*, the state has not, it will not sustain the burden that none exist, and the contested law will fall.[109] Second, the Court must judge whether feasible alternatives are implicit in the contested act itself. Omnibus aid programs, for

105. This rule devolves from United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1937):

> There may be a narrower scope for the operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the constitution.

See note 106 *infra*.

106. In their concurrence to United States v. C.I.O., 335 U.S. 106, 140 (1947) Justices Black, Douglas, Rutledge, and Murphy declared:

> The presumption is against rather than in favor of the validity of legislation which *on its face or in its specific application* restricts the rights of *conscience*, expression, and assembly, protected by the First Amendment. (Emphasis added.)

107. *See* Sherbert v. Verner, 374 U.S. 398, 406-08. *See also* People v. Woody, 394 P.2d. 813, 40 CAL. RPTR. 69 (1964), where the California Supreme Court invalidated a narcotics control statute which restricted the freedom of worship of the Native Church of America, an Indian peyote cult. Notwithstanding its secular purpose and primary effect, the statute fell, since the state proved no "compelling interest" in enforcing it against the Indian group (*i.e.*, in not excepting them from its coverage) and imposing the secondary burden thereby:

> The state's showing of 'compelling interest' cannot lie in untested assertions that recognition of the religious immunity will interfere with the enforcement of the state statute.

See also Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 474 n.52 (1969).

108. The issue of how far the Court actually evaluates the state's arguments regarding the infeasibility of alternative means, and how far it uses the doctrine as a mere conclusory label, is considered in Note, *Less Drastic Means and the First Amendment*, *supra* note 107.

109. *See* note 107 *supra*.

example, contain several measures to remedy a single ill. In this case, the argument for strengthening the acceptable and abandoning the unacceptable measures will be strong indeed.[110] Third, it will frequently be appropriate for the Court to take judicial notice of the availablity of workable alternatives. This response is proper, in cases like *Schneider v. Irvington*,[111] where present problems are amenable to solution by means successfully employed in analogous situations in the past.

When the state has considered a comprehensive range of alternatives, and when it has selected one only, and when no others may be judicially noticed, the Court's job becomes more difficult. In cases such as these, the state will have chosen a particular method because it judged the others to be excessively inefficient or costly.[112] Factual issues underlying this choice—e.g. the quantum of inefficiency—will rarely be disputed, since investigations, conducted by the assembly, will resolve them most reliably. These issues being settled, the Court must assign a value to the increase in cost or inefficiency and weigh it against the First Amendment value at stake. By this weighing, the Court will determine whether the state has a "subordinating interest" in declining the alternative—and in imposing the secondary religious effect. This process of value assignment, of course, is not genuinely analytic. The weighing metaphor cannot obscure that fact. It is a baseline normative decision as to what length the state must go to safeguard First Amendment rights. Here, however, the Court acts within its own province. Here it acts by its constitutional "commission," rather than by an analytic "competency" peculiar to it.[113]

110. The Elementary and Secondary Education Act of 1965, *supra* note 79, presents an example. Although some of its provisions have evaded dispute, others seem suspect:

> A combination of political pressures and poor drafting, however, have resulted in certain provisions, which if not amended or administered strictly, may irrevocably damage the principle of separation of Church and State.

A.C.L.U. PAMPHLET: THE CHURCH AND STATE PROBLEM HAS BEEN HANDED TO YOU. June, 1967.

111. 308 U.S. 147 (1939). Here the Court judicially noticed the availability of traditional police methods as alternatives to banning the dissemination of handbills:

> Frauds may be denounced as offenses and punished by law. Trespasses may be similarly forbidden. If it is said that these means are less convenient or efficient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this kind do not empower a municipality to abridge freedom of speech.

Id. at 164.

112. *See* Galanter, *Religious Freedoms in the U.S.*, 1966 WIS. L. REV. 217, 281 (1966).

113. In Board of Education v. Barnette, 319 U.S. 624 (1942), which considered the free speech and exercise claims of an individual compelled to salute the flag, Justice Jackson denied that the issue lay within the exclusive competency of a different branch of government:

> Nor does our duty depend upon our possession of marked competence in the field

B. *An Application*

The proposed test will serve generally in treating the problems of church and state relations. It is both precise and sensitive. It is not triggered by contacts of state and religion vaguely clouded with the prescriptive notion of "wrongfulness." Rather, it takes effect when articulated values are found to be in jeopardy. And when they are in jeopardy, it demands solicitude for the means of their preservation. For sake of illustration, the proposed test will be applied to the establishment issue of parochial school subvention, an issue of paramount importance, and prolonged vexatiousness. The two Supreme Court decisions treating this issue have stimulated multi-member dissents,[114] Each of them, further, has suggested a tentativeness of determining principle.[115] Each, finally, has released a welter of scholarly dispute.[116] To sense the importance of the underlying issue, it is necessary only to refer to the local periodicals recounting the closing of parochial schools, and the inundation of the public schools, in consequence of the deficient finances of the former.[117]

The specific problem to be addressed is the propriety of local funding of parochial secondary schools. Can this funding be justified in light of the foregoing analysis of the religion guarantees? If carefully conceived, with sensitivity to the values of free conscience, such program may stand. The following will serve to outline a funding program which complies with the mandates of the First Amendment. Northfield, a residential community of 50,000, contains one Roman Catholic parochial school, one private school, and six public schools. The community receives $15,000,000 annually in property taxes. Ten per cent of these

where the invasion of rights occurs . . . We act in these matters not by authority of our competence, but by force of our commissions. *Id.* at 639-40.

114. Justices Jackson, Frankfurter, Rutledge and Burton dissented against the Court's opinion in Everson v. Board, 330 U.S. 1, 18, 28 (1947), which upheld a state law extending bus fare reimbursement to the parents of parochial school students. Board of Education v. Allen, 392, U.S. 236, 250, 254, 269 (1968), upholding the constitutionality of textbook loans to parochial school students, occasioned the dissents of Justices Black, Douglas, and Fortas.

115. In *Everson*, Justice Black spoke opaquely of the "verge of [constitutional] power" which the statute under scrutiny approached. 330 U.S. at 16. And in *Allen*, Justice White suggested the possibility of a different outcome, if a fuller factual record had been developed; "the record contains no suggestion that religious texts have been loaned." 392 U.S. at 245.

116. For a sampling of the discrepant opinion on parochial school aid, *see*: Freund, *Public Aid to Parochial Schools*, 74.6 CASE & COM. 3 (1969); Pfeffer, *Federal Funds for Parochial Schools? No.*, 37 N.D. LAW. 309 (1962); and Note, *Sectarian Books, The Supreme Court and The Establishment Clause*, 79 YALE L.J. 111 (1969). *See also*, Schwartz, *No Imposition: The Establishment Clause Value*, 77 YALE L.J. 692 (1967); Gellhorn & Greenawalt, *Public Support and The Sectarian University*, 38 FORD. L. REV. 395 (1970); and Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260 (1968).

117. *See, e.g., Private School Controversy*, WINNETKA TALK, March 26, 1970 at 82.

funds are traced through tax form statements—confidential in nature —to parents of children in the parochial school. Five per cent are traced to parents of children in the private school. Northfield appropriates $10,000,000 from the property tax fund for the support of primary and secondary education. Since all of the parents of the children in the parochial school (i.e. those contributing 10% of the education appropriation) so request on their tax statements—Northfield pays $1,000,000, pursuant to a local rebate plan, to the parochial school. $500,000 is also disbursed to the private school. A taxpayer subsequently sues in the state court to enjoin the $1,000,000 expenditure, alleging it to be an unconstitutional establishment of religion.

Since the Supreme Court has recognized that accredited parochial schools advance secular education, Northfield will have no problem in proving that its *purpose* in subsidizing the school was secular.[118] It will be able to prove, likewise, that no *religious effects*, primary or secondary, accompany the subsidy. Religious effects, as defined above, result from the abridgement of the values underlying the establishment clause. Within its sphere of application, the establishment clause must be construed strictly to shelter freedom of conscience; when no injury to this freedom arises, however, the establishment clause bears no application.[119] Northfield's program offends none of the establishment clause values.[120]

The program, clearly, threatens no injury to *free observance*. Unlike the textbook loan program, it admits to no "participation" by the state. Northfield's expenditure is unconditional—no strings are attached, no qualifications are prescribed.[121]

118. Board of Education v. Allen, 392 U.S. 236, 248 (1968).

119. *See* note 102 *supra*.

120. To say, however, that proportional rebates to the parochial schools do not offend the First Amendment, is not to say that all such programs are socially desirable. Assume, for example, that 51% of the voters in an independent school system pay 80% of the property taxes. This numerical majority could therefore implement a rebate program, diverting 80% of the tax revenues from the public schools. Such evil, however, has legislative remedies. The state may subsidize the public schools. Congress, further, has passed legislation to subsidize sub-standard secondary education. *See* the Elementary and Secondary Education Act, *codified in* 20 U.S.C. 821-85 *et seq*. In other words, there are political remedies to the problems potentially attending the rebate system. But without the rebate system—and the constitutional theory proposed herein—there is *no* adequate remedy for failing education in the parochial sector. Finally, it must be acknowledged that most assemblies will have the sense to rebate less than all of the funds which could constitutionally be rebated, where a total pro rata rebate would impoverish the public school system. The mounting concern for the quality of parochial education in this country—where a prevalency of selfish motives would negate such concern—indicates an understanding among us that each has a vital stake in the basic education of his co-citizens.

121. Nor by use of the tax form request from beneficiary groups has Northfield "attached strings" to its expenditure, or threatend *free observance*. This result is prevented by the complete confidentiality of the request—which entails no disturbance in the

The program consists, likewise, with the value of *free adoption*. It exhibits no individious partnership, and elevates no group. The program applies equally to all groups. All accredited schools—Catholic, Jewish, Protestant, and secular—may receive the pro-rated subsidy.[122] Those that decline to form private schools, like those that do form them, choose that blend of religious and secular influence most desirable in the education of their children. The program facilitates, thus, the choice of all groups in finding the educative climate most suitable to them. Northfield creates, furthermore, no financial inducement to attend the parochial school. All groups now enjoy the benefit of their own tax dollar; the only special benefit involved is that enjoyed by students in the public schools which receive subsidies from the state and other sources. Northfield has merely minimized the inducement to attend public school, by reducing the deterrent to parochial school attendance.

Nor does Northfield's program impair the *free propagation* value. It effects no redistribution of resources among the several competing advocates. No advocate pays to support the efforts of another to seek and keep adherents. Catholic dollars now fund Catholic education. No religious community is drawn upon to propagate hostile doctrine. Rather, the Catholic community is allowed to stand upon its own feet, using all its available resources to promote religious ideology. Although Catholic advocacy may rise in intensity, such rise depends exclusively upon the funds and energies of the sect. Nor are other communities drawn upon indirectly, by paying for secular services which the Catholic community enjoys. Since the Catholic does not contribute to the expense of maintaining the public school, he cannot be faulted for shirking his fair share of the burden. A line must be drawn between allowing a religious community to propagandize within its own revenue limits—providing that it pay its share, along with other taxpayers, of the secular services which it enjoys—and allowing a religious community to propagandize with funds drawn from its rivals. No advocate can complain of a rival group's mustering the best propaganda effort possible to it within its own financial capacity. Speech is manipulated, however, when the

religious sphere. An expenditure with no strings attached, of course, does not in itself satisfy the test prescribed herein. While such expenditure would not offend *free observance*, it might well offend *free adoption* or *free propagation*. Northfield's program must therefore be considered next under these headings.

122. It is clear that Northfield's program must include all schools (parochial and secular) in its private school rebate program. If it excluded secular schools, it would jeopardize the value of free adoption. Its program would unite state and religion as against irreligion, in the view of the general public.

state intervenes within the natural competition, depriving some groups of funds, and investing these in the propaganda efforts of rival groups.[123] But so long as the state compels no support of sectarian education, and so long as it extends no free service to the sect which others must support, its action is political, free from constitutional impediment.[124]

The case would be altered, of course, if Northfield extended more than $1,000,000 to the parochial school. Here again its purpose might be secular, but its subsidy would involve a secondary religious effect. Religious and irreligious groups other than Catholics would be compelled to support the teachings of a rival group. In this case, the Court would need to examine the state's arguments as to the insufficiency of alternative measures—i.e. limiting the subsidy to $1,000,000—and weigh the state's interest in declining the alternative against the establishment clause value here at stake.[125]

123. It might be urged that the above analysis raises the following difficulties. If, among similarly sized religious groups (A, B, and C) in the community, C is especially penurious, its members pay less in local taxes than do the members of the other groups. C, nonetheless, enjoys the same police and fire protection that A and B enjoy. It is therefore clear that B and A are paying for part of the service which C enjoys. This is true since all three receive the same service, despite their unequal contribution. The community, then, has redistributed resources among religious groups. It has indirectly subsidized group C at the expense of groups A and B. And since B and A have advanced C's security and well being, it may be predicted that C is better able to engage in religious advocacy. The plaintiff making this argument would have an uphill battle. He would *first* have to prove a substantial disproportion in the contributions of the three groups. He would *secondly* have to prove that giving group C a larger share of service than its dollar contribution strictly warranted did in fact have the effect of amplifying C's advocacy relative to what it would have been had C received no more service than its tax contribution alone could purchase. In other words, plaintiff would have to prove that this indirect subsidy in fact altered the effective speech of C. This is the gravamen of plaintiff's *free propagation* complaint. *Finally*—if the plaintiff did succeed in showing amplified advocacy through state taxation and expenditure—he would meet the argument that the state had a compelling reason for adopting the arrangement which it did, for declining alternatives, and for imposing the secondary religious effect. That is, the only way to protect life and limb is to provide full police and fire protection to all community members regardless of the tax contribution of their sect.

124. Under Northfield's system, childless families—of all religions—may be compelled to support education, public or parochial at their election. But since no compulsion to support religious advocacy is involved, they have no *free propagation* complaint. Clearly, they are discriminated against. But it is a discrimination between childless families of all religions, and families of all religions that have children. This discrimination is nothing new. It is the same discrimination that existed under the old tax program. Now, however, the childless family selects the school which receives its support.

125. If the Court found that the compelled aid (*i.e.*, the revenue coming from non-parochial sources) advanced religion more than it advanced secular education, the subsidy would exercise a "primary" religious effect, and would fall automatically under the *Schempp* rule. For a discussion of the *Schempp* rule, as applied to parochial school subsidies, see Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260 (1968). Professor Choper would allow aid to parochial schools roughly proportioned to the amount of secular education which the school provided. It would therefore be unimportant, under Choper's theory, that some of the funds extended to the parochial school derived from non-Catholic sources. Using, for example, Jewish dollars to fund Catholic education (which takes place in a sectarian millieu, and which is "permeated" with sectarian ideology) is acceptable, since the *purpose* and *primary effect* of the program is secular. The alternative means doctrine should not be applied, according to Choper, since

the "core religion clause values" are not at stake in such a funding program. *See* note 13 *supra*.

The *Schempp* test determined the outcome of Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969), a recent decision handed down by a three judge District Court in Pennsylvania. At issue there was the propriety of the Non-Public Elementary Education Act of 1968, providing for the purchase of "secular educational services" by the state from non-public schools in the fields of mathematics, foreign languages, physical science and physical education. The funds disbursed under the Act derived exclusively from the state's admission tax on horse racing. Finding a secular purpose and primary effect, the District Court upheld Pennsylvania's program. The Supreme Court has noted probable jurisdiction. C.C.H. Supreme Court Bulletin, 1969-70, Docket Number 1189. Under the standard proposed herein, the *Kurtzman* plaintiff might make the following general argument. The Pennsylvania program diverts public revenues for the use of sects which maintain parochial school systems. The net impact of this diversion is the heightening of effective advocacy by the recipient school: the program releases funds within the school, adding thereby to its total educational capacity; the program renders the school more attractive to potential students, widening thereby its ambit of influence; the program interjects secular instruction within a sectarian millieu, "permeating" thereby the putative "secular" subject matter of instruction. In sum, the program augments the power of the recipient to inculcate religious ideology. This augmentation is funded by the general public, through an excise upon its amusements. The program draws upon the public to enforce doctrines which members of the public strive by religious commitment and principle to oppose and correct. Unlike Northfield's carefully designed program, the Pennsylvania program does not assure that the religious sect itself financially supports its own advocacy. Pennsylvania's expenditure cannot be compared with a pro rata refund to the sect of contributions made by it for the support of services which it does not use and to the expense of which it does not contribute. Within the natural religious debate, in which ideas are promoted by the zeal and funds of their sponsors, Pennsylvania intervenes by adding collectively derived resources to the efforts of a handful of beneficiaries. Pennsylvania injures every advocate who would contend against the ideology advanced by the beneficiaries. Every such advocate (religious and irreligious) has standing to protest. Having made prima facie proof of a secondary religious effect (the denial of *free propagation*), the plaintiff would be entitled to a directed verdict, unless the state rebutted the inference of redistribution of resource among advocates, or proved a compelling interest in declining alternative means free of such redistribution. *See* p. 100.