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NOTES

FREEDOM OF RELIGION—THE DYNAMICS OF SEPARATION

I. INTRODUCTION

The conduct of a citizen is measured by adherence to secular ethics, and only to the extent that it corresponds to religious tenets is spiritual behavior deemed a characteristic of membership in the state. Separatists conceive an inviolable wall existing between governmental and sectarian authority. This would seemingly reduce any question of church-state relations to a mechanical approach of whether or not the wall has been breached. Thomas Jefferson's conclusion that there exists "a wall of separation" assimilated into the first amendment, is, however, only a graphic metaphor that has camouflaged the complexities of the relationship of law to religion in a democratic society dominated by a religious majority.

The theory of the United States Constitution may be stated as a reconciliation of democratic rule and certain basic individual rights. The Bill of Rights comprehends a group of human values which are made impervious to the majority will on the assumption that men inately possess certain rights which exist independently of the State. At the same time if one accepts the proposition that the will of the majority predominates one must also agree that the first amendment cannot in fact be absolute, and that there exists an area of competency within which the state can act. This would then reduce the theory of an inviolable wall of separation to spectral quality. An initial in-

2. Man inately possesses natural rights that exist independent of civil authority. Before man may establish civil authority he must submit such natural rights as are necessary to form the bonds of society. However, there do exist such natural rights that man has not submitted; neither could he if he is to exist as a free individual, one being freedom of conscience. But while opinion and belief have not been submitted and are in fact absolute, conduct cannot be absolute if society is to protect itself from dissolution. See Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). As was said by Jefferson: "[O]ur rulers can have authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God."  C. Patterson, The Constitutional Principles of Thomas Jefferson 182 (1953).
quiry into the history surrounding the adoption of the Bill of Rights, in particular the first amendment, clearly shows, however, that there exists a realm within which the majority may not subordinate individual liberties to the will of the populace. Thus, the first amendment conspicuously begins with the negation of any government action to establish religion or to infringe upon the free exercise of religious conscience.

Jefferson’s conclusion that the language of the religion clauses created a wall of separation is supportable by the recognition that there can be no established state church. However, aside from this limitation and that on freedom of conscience, the inviolable wall becomes a pragmatic fiction, without a foundation in the area in which the values of church and state overlap and intermingle.

It is the purpose of this article to examine “the wall” in the context of a larger discussion centered on the rights of the minority in a democratic society and the conflict between spiritual ethic and secular enactments. While the subtleties of constitutional and institutional problems are beyond the scope of this article, it is hoped that by elaborating upon the problems that accompanied the development of a constitutional theory of the freedom of religion guarantee, some light may be shed upon the church-state relationship. Additionally, the problematical application of a constitutional standard of a “wholesome separation of a concordant nature” will be explored.

II. Society and Ethic

As a general proposition, it may be stated at the outset that citizenship is secular; that is, conceptually it may exist totally disassociated from any consideration of religion. Where it is assumed, however, that “[w]e are a religious people whose institutions presuppose a Supreme Being” it is readily apparent that though citizenship may be secular, the citizen is not. Moreover, it may be assumed that every religious belief has a secular

3. Freedom of conscience may be separated into two component, yet independent concepts. First, there exists the freedom of belief. Second, there is conduct which may be an active or passive manifestation of belief characterized by response. If the response is merely expression of opinion or proselyting of a belief it is free from governmental restraint. But once carried beyond this point, compelling interests of legitimate character may permit state regulation, not of the belief but of the conduct.


extension, which manifests itself in social conduct, and is thus brought within the scope of legislative control.

The affairs of society may be bisected into secular and religious divisions. If the citizen were singularly secular or singularly religious there would perhaps be a clear line of demarcation between the two. Beginning with extremes, it is simple to point out the division between the church’s interest in holy days and the state’s interest in good roads. These affairs are distinct, but when the interests of each become common, such as education and welfare, the line of demarcation vanishes, and “the wall” becomes twisted and warped. The initial conclusion is that there is not total separation of the affairs of church and state.

The mere fact that a state regulation coincides with a religious tenet does not make operative the proscription of the first amendment. The phrase “secular legislative purpose” has come to represent the test which any legislation suspect of violating the first amendment must pass. However, aware of the ostensible duplication of church and state purposes, it is not surprising to find a wide area of interaction between the two. The more obvious example is the reappearance of parts of the Decalogue in the civil Code. Thus, “[t]hou shalt not kill” becomes “[w]hoever is guilty of murder shall suffer the punishment of death.” This is reflective of the fact that western thought, religious and secular, has produced a monolithic ethic, to the extent that police power legislation is supported without any consideration of origin.

III. DEVELOPMENT OF RELIGIOUS LIBERTY

The first amendment provides that Congress shall make no law respecting the establishment of religion or prohibit its free exercise. Development of theoretical limitations of religious and governmental interaction, within the limits of the prohibition, however, has been less than sufficient. Clearly government may not establish a national church; neither may it by compulsion restrain the dictates of conscience or compel adoption of a particular sect. Thus, as in the area of speech, government may not inhibit belief or mere opinion.

8. U.S. Const. amend. I.
In United States v. O'Brien the Supreme Court upheld the constitutionality of § 462(b)(3) of the Universal Military Training and Service Act, prohibiting the knowing destruction of draft cards. Rejecting an argument premised on the existence of symbolic speech, the Court said that when speech and non-speech elements are combined, incidental limitations on free speech freedom are permissible if there exists a legitimate state interest in regulating the non-speech element. Utilizing the "legitimate state interest" approach, it may likewise justify incidental interaction with respect to religion. This is questionable, however, particularly in light of the sterile interpretation placed upon the first amendment by the Court. This interpretation is further complicated by the question of whether an overly excessive separatist approach is in accord with the concept of democracy.

That religious freedom has been used as a weapon to secure a preferred place for sectarian as well as nonsectarian belief is borne true by a review of the historical setting in which the first amendment was fashioned. The early proponents of religious toleration, after escaping the persecution of minority sects in England and on the European continent, upon reaching this country strangely re-established support of churches by public funds and enforced adherence to orthodox religious

10. Id. at 376-77.
The constitutional inhibition on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Id. at 303-04.

A compelling state interest justifying infringement of the protected freedom has been posited on the protection of democratic institutions, the welfare and safety of the citizenry, and the right to promote public morals. Reynolds v. United States, 98 U.S. 145 (1878); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); see People v. Woody, 61 Cal. 2d 889, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); People v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952). See also Sherbert v. Verner, 374 U.S. 398 (1963).
beliefs. Anglicanism became the established religion in several of the colonies, and gained a particular stronghold in Virginia.\textsuperscript{12} Those who sought to escape intolerance soon realized that the singular religious-civil authority which they sought to escape, had been replanted in America. Puritanism in New England required that civil government's first responsibility be to support the "true religion."\textsuperscript{13} The unorthodox were denied equal rights, taxes were levied to support the church and its clergy, and compulsory worship in the "reformed Anglican church" was enforced.\textsuperscript{14}

Pronouncement of freedom of conscience was slow in arriving, but by the advent of the American Revolution a movement was established towards a separation of church and state. Multiple establishment existed whereby several religious sects were officially sanctioned; but while toleration increased, the practice of financial and legal support to religious groups continued. The belief grew that government should guarantee religious freedom to all persons, regardless of sect, with no distinctions.\textsuperscript{15} Although intolerance continued for a greater period in the southern colonies than in the north,\textsuperscript{16} it was in Virginia that the seeds of religious freedom were first sown. Toleration evolved into a recognition that freedom of conscience is a natural right—an inherent right of the individual. Religious liberty, it was felt, could be achieved best under a system of government which had no power to "interfere with the benefits of any religious individual or group."\textsuperscript{17}

Jefferson and James Madison were the most ardent proponents of the struggle to establish freedom of religion. In 1779 Jefferson wrote "An Act for Establishing Religious Freedom" in which he proclaimed that civil rights were not dependent on religious beliefs and

\[\text{[t]hat no man shall be compelled to frequent or support any religious worship . . . nor shall otherwise}\]

\textsuperscript{12} Butts, \textit{The American Tradition in Religion and Education} in RELIGION AND POLITICS 11, 12 (P. Odegard ed. 1960).
\textsuperscript{13} Id. at 12.
\textsuperscript{14} Id. at 13.
\textsuperscript{15} Id. at 16.
\textsuperscript{16} C. PATTERSON, \textit{THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON} 180 (1953).
\textsuperscript{17} \textit{Everson v. Board of Educ.}, 330 U.S. 1, 11 (1947); see Corwin, \textit{The Supreme Court as National School Board}, 14 LAW & CONTEMP. PROBS. 1, 3 (1949).
suffer an account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in nowise diminish, enlarge or affect their civil capacities.\(^\text{18}\)

The movement toward religious freedom reached a climax in 1784. A bill to establish a provision for teachers of the Christian religion was presented for reaffirmation in the Virginia legislature. This influenced Madison to write "A Memorial and Remonstrance on the Religious Rights of Man." Therein, he vigorously espoused the belief that religion was outside the cognizance of the state and he championed the "equal right of every citizen to the free exercise of his religion, according to the dictates of conscience."\(^\text{19}\) In the Memorial and Remonstrance Madison treated the Virginia bill as one of nondiscriminatory support for all religion, yet condemned it as inconsistent with the nature of religion; its effect being deleterious to both church and state. Establishment of all religion, establishment of one religion—both he believed in 1784 to be inconsistent with the principle of religious liberty.

But in the constitutional debates when a bill, which eventually became reflected in the first amendment, was introduced and debated, Madison, one of its proponents, made no reference to aid to religion which had prompted his vigorous and successful protest in the Virginia legislature. The draft merely guaranteed that no religion be established by law, neither should rights of conscience be infringed.\(^\text{20}\) In giving meaning to the words, Madison said Congress could not establish a religion and enforce legal observation of it by law; neither could Congress compel men to worship God in any manner contrary to their conscience.\(^\text{21}\)

The language of the first amendment prohibits Congress from making any law respecting the establishment of religion. The Supreme Court, however, has interpreted the words to mean

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21. *Id.*
that Congress shall make no law respecting religion—respecting meaning a favoring or disfavoring. Absent the criteria upon which Madison conditioned his protest of the Virginia levy, as clearly indicated by his interpretation of the proposed amendment, it is difficult to reach the excessive tightening of the amendment as understood by the Court. At least one eminent authority asserts that the core of the amendment is preference, and that legislation favorable to religion in general cannot, without manifest falsification of history, be brought within the prohibition of the language.22 Indeed, strenuous criticism has been made of the first amendment, likening it to a weapon by which those who profess no sectarian belief, but are avowed nonbelievers, have secured a privileged place for no religion.23 Additionally, although the religious majority may appear the politically persuasive element, argument can be made for the proposition that the first amendment has armed minority sects to embattle the majority and gain a preferred status, thus violating the establishment clause in its pristine form—the prohibiting of preference. It is here where the interplay of democracy and individual liberties threaten each other. It is here where the free exercise clause and the establishment clause collide.

IV. THE QUEST OF A MORE COMPREHENSIVE THEORY

A. Constitutional

The federal government is one of delegated powers. Within the first amendment limitations it may neither give preference to one religion nor effectuate compulsion of conscience as respects its free exercise; the language prohibits nothing more. Yet the Supreme Court has continually reaffirmed that the language means more, rejecting unequivocally any assertion that the establishment clause forbids only governmental preference of one religion over another. But by rejecting the contrary contention that the establishment clause prohibits merely governmental preference as untenable and having only academic

value, the Court unconsciously subverts recognition of the fact that constitutional law can change.  

The wooden interpretation given the establishment clause, along with the inconsistent mechanistic application of the free exercise clause, has not resulted in what the Court asserts to be the fundamental principle of the first amendment—absolute separation. If absolute separation is the sole constitutional principle, by insulating church and state in respective spheres of jurisdiction, the establishment clause, as presently interpreted, is satisfied. But the no establishment language would be virtually useless without incorporating the attendant free exercise provision. Absolute separation as to both would not only result in practical and theoretical difficulties, but would act to restrain freedom of religion. Rather the dynamics of separation must be found in the precept of a single constitutional principle encompassing the two clauses in order to achieve religious liberty. 

Separation and religious freedom are not mutually exclusive; together they create a single precept of liberty. This concept does not necessarily preclude governmental action to avoid restraints upon its free exercise, even though religion may incidentally (as opposed to directly) be the standard for action. Therefore, if free exercise is viewed as a means to attain religious liberty, until government acts partially the establishment prohibition is not violated. By subordinating the establishment language within a single precept, leaving to its original intendment that no one national religion be endowed with legal privilege for its beliefs, positive protection of religious liberty for religious and nonreligious sects may be enjoyed in an atmosphere of neutrality.

While there exists uncertainty as to what constitutes public purpose and what is essentially a private purpose, the scope of governmental action need not be so narrow as to preclude legislation which has a primarily secular purpose, but which incidentally affects religion. Theoretically law and religious

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morality are severable, but to require that government be "religion-blind" would necessitate establishing an impractical distinction that would result in hostility to both religious and nonreligious sects.

B. Functional

Functional application of a "secular legislative purpose test" is devoid of precise definitional standards. First, public interest and purpose relates only to the totality of legislation in that it necessarily affects public purpose as a whole. Second, public purpose has a resultant effect on private interests in that legislation designed to serve exclusively public purpose is merely a manifestation of singularly individual desires.

Bus transportation combined with a government initiated program of tax reimbursement, seemingly secular, by logical extension serves to satisfy private individual desires. Parents have a private interest in the safety of their children; an assurance that is provided by legislation grounded in the scheme of comprehensive public purpose legislation. Likewise, parents have a private interest in seeing that their children are oriented religiously in adherence to their chosen religion, and that they receive religious instruction compatible with their beliefs. But the values of religious instruction, educationally, as well as the private infusion of religious beliefs, are not solely private.

While religious morality may be cleaved from the commands of law in one sense, in the practical affairs of life there remains a wide scope of the law which touches upon religious sensibilities. Religious dogma may be singularly private, but the infusion of spiritual morality is equally public as well as private.

The Court has not utilized the two religion clauses in conjunction, and while applying a purely secular purpose and primary effect test, supportive of separation respecting the establishment clause, interaction of legislative prohibitions and sectarian interests apparently negates any requirement of separation necessary to effectuate the commands of the free exercise

28. See Meiklejohn, Educational Cooperation Between Church and State, 14 Law & Contemp. Prob. 61, 68 (1949).
clause. If legislative action is struck down as inhibiting or coercing an individual’s exercise of religious belief, the suggested effect is not neutrality but preferential recognition of religious activity in direct contravention of the establishment clause.

Given that there cannot be a standard for governmental classification in terms of religion, a classification based on a state interest divorced from primary religious considerations supports a position of neutrality despite incidental effects it may have upon religious activity. Case rationales, however, have required that exemptions be carved out of enactments that may incidentally affect religious belief, the strange result (one that conflicts with the Court’s conception of the establishment clause) being that classifications based on sectarian beliefs are permitted. Rather than utilizing complete separation, supportive of the establishment clause, and mechanical divisions and exclusions that create a conflict between the establishment and free exercise clauses, by positing impartial recognition of religious liberty on a concept of accommodating neutrality and reading the two clauses in conjunction, government may act in an even handed manner so as not to impose arbitrary classifications that violate religious freedom.

V. THE “IMPREGNABLE WALL”—A DIDACTIC EXPERIENCE

The constitutional principle of religious liberty is devoid of any exacting precision unless the scope of the first amendment is purposely intended to include separate constitutional principles: (1) that there must be separation under the establishment clause; and, (2) that there is no constitutional requirement of separation under the free exercise clause.29 Thus, discriminatory or nondiscriminatory financial aid is prohibited by the establishment clause, but is permitted by the free exercise clause if to deny such aid acts as a coercive force up on the exercise of one’s religious beliefs. While the majority of the cases thus far litigated are judicially and constitutionally sound, if adherence to a separatist precept is recognized, marked inconsistencies appear where nondiscriminatory legislative classifications, primarily secular, have been held constitutionally

deficient for denying to individuals the benefits of state aid due to an incidental conflict with a religious tenet.

Legislation passed under the banner of governmental authority, consonant with the state’s police power or those powers delegated to the federal government, primarily secular in nature, should not “permit individuals to be excused from compliance with the law solely on the basis of religious beliefs.” However, government must be cognizant of religion, and to allow religious liberty should be permitted, in a spirit of neutral accommodation, voluntarily to provide legislative relief to those individuals whose religious beliefs would be seriously endangered by otherwise constitutionally unassailable legislation. But to require that sectarian exemptions be carved out under the prohibitive language of the free exercise clause is not merely suspect of breaching the wall. It is a clear departure from the intendment of the language invoking state action as a means of aiding a particular sect. Thus, it becomes patently clear that to achieve religious liberty a position of stark neutrality may become an invitation to the suppression of minority beliefs. Yet, a compelling state interest that incidentally affects religious belief, having been carried to a particular mode of conduct, is not destructive of religious liberty.

A. Judicial Antipathy to Sectarian Belief

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that acts of the whole American people which declared that their Legislature should “make no law respecting an establishment of religion or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State.31

The adoption of Jefferson’s language that the first amendment builds a wall of separation between church and state first occurred in Reynolds v. United States.82 Determining that religious belief may not justify the translation of that belief into

32. 98 U.S. 145 (1878).
action in contravention of a constitutionally permissible regulato-
ry [criminal] statute, the Court adhered to the Jeffersonian
announced belief-action dichotomy. As an accepted doctrine of
the Mormon Church it was the male's duty, circumstances per-
mitting, to practice polygamy, a practice violative of a federal
criminal statute. The Court upheld the prohibitory criminal
statute as a valid exercise concomitant with government's
power to regulate obligations springing from the contractual
marital relationship. The Court said that while government
could not interfere with religious belief, it was competent to
proscribe this particular action by legislation.

Additionally noteworthy is the fact that the Court, subsequent
to its determination that the statute was not constitutionally
infirm, refused to immunize those who entertained the religious
activity of polygamy from operation of the law on the basis of
religious belief. The statute, however, while based on a secular
purpose presupposing that "evil consequences" flowed from the
practice of polygamy, had an attendant incidental effect on the
free exercise of religious belief.

While the belief-action dichotomy has been criticized, it does
provide a basis for permitting governmental recognition of
religion. It does not, however, result in a divisive influence
prohibited by the terms of the first amendment. By applying
free speech criteria, the belief-action standard could function-
ally serve as a means to realize religious liberty while per-
mitting governmental interaction. Action standing alone must
be analyzed in light of its attendant results. Thus, proselyting
of religious belief would be without the scope of legislative in-
terference unless there exists a compelling state interest in regu-
lating particular modes of conduct such as dissemination of
religious material and seeking public solicitations.

33. Id. at 160.
34. Id. at 165.
35. Id. at 165-66.
36. Kurland, Of Church and State and the Supreme Court, 29 U. CHR. L.
Rev. 1, 7 (1961). The author states that such a belief-action dichotomy is
incapable of aiding the resolution of difficult questions because a statute aimed
at prohibiting preaching [assumedly proselyting] by a particular sect, while
aimed at action violates the first amendment. But see Cantwell v. Connecticut,
310 U.S. 296 (1940); note 3 supra.
37. Prince v. Massachusetts, 321 U.S. 158 (1944). Although a claim of
religious immunity from statutory regulation of religious activity was set forth,
the Court upheld the constitutionality of a statute prohibiting the selling of
material by a boy under twelve or a girl under eighteen as applied to Jehovah's
Witnesses.
historically without social approval could be similarly regulated as a valid exercise of governmental police or public welfare power.

In Davis v. Beason the Court upheld as a valid measure of punitive legislation an Idaho statute requiring the swearing of an oath, prerequisite to the exercise of the voting franchise, that embodied antipathy to those religions requiring polygamous practices. Rather than striking down the statute as one requiring a religious test, prohibited by article VI of the Constitution, the Court subordinated the free exercise clause to criminal sanctions—seemingly a valid exercise of governmental authority. While basing its decision upon the Reynolds rationale of a belief-action test, the distinction was misconstrued because mere membership in a particular sect was deemed a sufficient basis upon which to fix punitive legislation, absent action in furtherance of a religious belief.

State courts have similarly rejected claims of immunity based on religious activities from governmental regulation. In Lawson v. Commonwealth a conviction for violating an enactment prohibiting the handling or use of snakes in religious rites was sustained on the basis of the state's interest in securing the lives, health, welfare and safety of its citizenry, including the religious participants. Although snake handling was part of the appellants' belief and practice, religious freedom was not penalized by the state's interest in enacting nondiscriminatory legislation limiting a particular mode of conduct. The statute,

38. 133 U.S. 333 (1890).
39. U.S. Const. art. VI provides in part: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."
40. Professor Kurland cites the case as being reflective of the enmity of the Court Justices towards the Mormon faith. Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 10 (1961).
41. 291 Ky. 437, 164 S.W.2d 972 (1942).
42. The appellants were convicted of violating Ch. 60 of the 1940 Acts of the Kentucky General Assembly, § 1267 a-1 that provided:
No person shall display, handle or use any kind of snake or reptile in connection with any religious service or gathering.
(a) Any person violating the provisions of this Act shall be guilty of a misdemeanor . . . .

The trial court refused to permit the reading of scriptural passages to the jury upon which the appellants based their claim of immunization under the cloak of religious activities. The purpose of handling snakes in religious ceremonies was to demonstrate the participant's immunity through faith to the possible fatal result of being bitten by a poisonous snake that would otherwise occur if the immunity was not possessed.
while it had incidental effects upon the exercise of a religious belief, did not regulate the belief itself and was therefore not an abridgment of the free exercise clause.\textsuperscript{43}

In \textit{People v. Labrenz}\textsuperscript{44} the parents of a child suffering from an RH blood condition had refused, on account of religious belief, to permit a transfusion of blood. The issue had been mooted by prior appointment of a guardian who had authorized the blood transfusion, but the Illinois court dispensed with procedural requirements that would have resulted in dismissal, believing the case to be within that highly sensitive area in which government action comes into direct contact with religious beliefs.\textsuperscript{45} The court recognized that both freedom of religion and the parental right to the care and training of children are to be accorded the highest respect. Nevertheless, neither were said to be beyond limitation,\textsuperscript{46} and the state could intervene to safeguard its general interest in the well-being of its children.\textsuperscript{47}

B. \textbf{Government Aid to Education—Everson v. Board of Education: A Source of Clarity and Confusion}

Direct and indirect aid under a government supported program affecting sectarian institutions has been the subject of recurrent controversy. While direct aid to a particular sectarian institution is clearly prohibited, a nondiscriminatory program of aid may not be so clearly challenged as involving no public purpose or being inconsistent with religious liberty. In \textit{Cochran v. Louisiana State Board of Education}\textsuperscript{48} the Court rejected a challenge that no public purpose was involved in a state's expenditure of funds to provide textbooks for pupils attending private and parochial schools. Absent an attack based on the establishment clause of the first amendment the Court said that the legislation, designed to facilitate educational opportunity by means of comprehensive legislation, clearly exhibited a public

\textsuperscript{43} A state may also limit the absolute right to proselyte religious views by means of a carefully drawn nondiscriminatory statute regulating times, places and manner without invading protected religious freedoms (and freedom of speech likewise). \textit{See Cantwell v. Connecticut}, 310 U.S. 296 (1940).

\textsuperscript{44} 411 Ill. 618, 104 N.E.2d 769 (1952).

\textsuperscript{45} \textit{Id.} at 622, 104 N.E.2d at 772.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{See} \textit{Prince v. Massachusetts}, 321 U.S. 158 (1944). The Court said that parents may make themselves martyrs, but not their children before they have attained their majority and can decide for themselves. \textit{Id.} at 170.

\textsuperscript{48} 281 U.S. 370 (1930).
purpose. Board of Education v. Allen⁴⁹ presented just such a challenge. Therein, a New York program of lending textbooks free of charge to all students, including those attending parochial and private schools, was challenged as an exercise of governmental power inconsistent with the prohibitive language of the first amendment. Sustaining the legislation, the Court viewed the program as being nonsectarian in furtherance of the educational opportunities made available to children. Justice White, writing for the majority, posited the decision on the public purpose-private interest distinction utilized in Everson v Board of Education.⁵⁰ He reasoned that the law had a secular legislative purpose of providing the benefits of a general program of lending textbooks free of charge, and a primary effect that neither advanced nor inhibited religion.⁵¹

While state neutrality to religion and state aid to religion are not marked by a clear line of division, in a concurring opinion Justice Harlan envisioned a more simplistically adaptable functional approach, devoid of any mechanical tests of inclusion and exclusion, that allows religious liberty in an atmosphere of governmental neutrality. The rationale would be

where the contested governmental activity is calculated to achieve nonreligious purposes within the competence of the State, and where the activity does not involve the State “so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom” it is not forbidden by the religious clauses of the First Amendment.⁵²

Much of the recurrent controversy over aid to education has at its core the language used by Justice Black in Everson v. Board of Education.⁵³ Therein, a statutory program of using tax-raised funds to reimburse parents for bus transportation of their children to public and parochial schools was challenged as a use of state power inconsistent with the establishment clause of the first amendment and the New Jersey state constitution. The Court sustained the program as being a proper exercise of legislative power to implement a program of general public

⁵². Id. at 242 (concurring opinion).
welfare. The mere fact that a state law, passed to satisfy public needs, coincided with the personal desires of those persons most directly affected, provided no basis for denying to all citizens, without regard to their religious belief, the benefits of public welfare legislation.  

The challenges were framed in grounds supporting two possible avenues of attack. The argument was made that the payments constituted a taking of private property of some individuals by taxation and giving to others for their own private purposes in contravention of the due process clause of the fourteenth amendment. As a second avenue of attack the statute was challenged as an alleged use of state power to support church schools. Justice Black disposed of the due process challenge on the basis of Cochrane, stating that "[i]t is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." It is no less true of legislation to reimburse needy parents or all parents, for payment of the fares of their children so that they can ride in public buses to and from schools rather than run the risk of traffic and other hazards incident to walking or hitchhiking . . . .

In disposing the establishment challenge the Court considered the New Jersey statute in light of what the establishment clause means. By way of dicta, Justice Black said, in part, the clause means at least this:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . .

With this as a premise, it was reasoned that while New Jersey could not, consistent with the first amendment, contribute tax-

54. Id. at 6.
55. Id. at 5.
56. Id.
57. Id. at 7.
58. Id.
59. Id. at 15-16 (emphasis added). Although this is dictum in Everson, the reasoning was later adopted in McCollum.
raised funds to the support of a sectarian institution, likewise it was prohibited from exhibiting hostility by hampering its citizens in the exercise of their religion. The statute was geared to confer benefits on all citizens without regard to religious belief. To exclude persons of the Roman Catholic faith or any person because of religious belief or disbelief, would have of itself been violative of the first amendment. The first amendment "requires [that] the state . . . be . . . neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." 60

It has been suggested that perhaps the Court reached the "outer limits of federal aid" 61 in Everson. However, in light of Board of Education v. Allen a different conclusion is required. In addition, there are numerous "aids" to religion in the various levels of government that have not been the source of litigious proceedings, although proponents of absolute separation have indicated the future may prove different. 62

Of the numerous "aids", veterans receive benefits under the "G.I." Bill, payments allowedly made by the federal government to denominational institutions. There are provisions for chaplains in the armed forces, and service academies have compulsory chapel service. Additionally, religious organizations enjoy specific exemptions from the burden of federal income tax, and invocational prayers are read in state and federal houses of government. However, these are merely illustrative of the fact that the first amendment requires neutral accommodation rather than hostility towards or no recognition of religion. 63

Proponents of aid, state or federally granted, however, must remain concerned in light of the statement in Everson that neither the federal nor the state government may pass laws that "aid one religion, aid all religions." 64 Those encouraging

60. Id. at 18.
62. Time, March 14, 1968, at 31. One opponent, Madalyn Murry O'hair, alleging to be as she put it "the leader of a valid movement," said: "I will separate church and state, by God."
64. 330 U.S. at 15.
federal aid originally found succor in *Bradfield v. Roberts*,\(^6\) the first case based on the establishment clause decided by the Court. Similarly, state proponents of aid have advanced the Cochran rationale and will now have *Allen* for additional support, although the Court was divided, particularly over the intendment of *Everson*.

Were it not for the holding in *Everson*, the question of government supported financial aid would be a closed issue. However, the ever increasing hue and cry for government authored financial aid will test the ingenuity of legislative architects to couch programs in terms of purely public welfare legislation. Seemingly, a statute is constitutional if it is germane to and framed so as to accord public need, not representative of a classification in terms of religion, and is regulated permissibly within the scope of a specifically delegated federal power, or the state's general police powers. Moreover, there will be no violation of the religion clauses whether they are read individually as a separation clause and a freedom clause, or together to create a single precept of religious liberty. Legislation, particularly in the field of education, might also be deemed valid even though it can be said to benefit discriminatorily certain religious groups, if there exists no alternative method of effectuating educational policies. This may be so although the appli-

\(^6\) 175 U.S. 291 (1899). The Court sustained federal aid appropriated for the construction of a public ward to be a part of a hospital, incorporated in the District of Columbia under a Congressional act of incorporation, and operated by Sisters of the Roman Catholic Church. Bradfield, a taxpayer, seeking to restrain the payment of moneys by the Secretary of the Treasury, premised his challenge on an erroneous construction of the establishment clause. The challenge alleged that the appropriation was "respecting religious establishment." The Court pointed out that such phrase was not synonymous with the first amendment phrase "respecting [an] establishment of religion" and said that merely because the hospital was administered by Roman Catholics, religious influence cannot convert a corporation, secular as constituted by its act of incorporation, into a sectarian body. Legal powers and duties are determined by reference to the act of incorporation, and the purpose of the corporation was to provide a hospital in the District of Columbia for the care of persons placing themselves under the care and treatment of that corporation. See *Quick Bear v. Leupp*, 210 U.S. 50 (1908).

Interestingly, in *Bradfield*, the standing of the taxpayer, as to whether there existed a justiciable controversy as required by article III, § 2 of the Constitution with regard to any question of establishment, was of no consequence in the eyes of the Court. In light of *Frothingham v. Mellon*, 262 U.S. 447 (1923), plaintiff taxpayers could not in their individual capacity as a federal taxpayer satisfy the requirement of standing, their interest being too minute or indeterminate. However, *Flast v. Cohen*, 392 U.S. 83 (1968), while not specifically overruling *Frothingham*, indicates that a federal taxpayer does have standing if he can point to the abridgment of a specific constitutional guarantee.
cation of the statute has an attendant incidental effect upon individuals who profess no religious belief. While to make accommodation between a religious action and an exercise of governmental authority is an extremely delicate task, if there exists a primary secular purpose such as educational opportunity, and no applicable alternative, there must be a necessary accommodation.

C. The Released Time Programs: The "Soft Euphemism of Co-operation"

A state may not consistent with the first and fourteenth amendments provide direct financial aid to a particular denominated sectarian group nor enact legislation utilizing religion as a basis for classification. Does the first amendment, however, preclude a program of co-operation with religious groups by tax supported public school systems?

In *McCollum v. Board of Education* an Illinois "released time program" conducted under the auspices of a tax supported public school system was struck down as being a "utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith" falling squarely

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66. Resolution in favor of the government results in the choice to the individual affected thereby of either abandoning his religious principle or facing criminal prosecution. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). But "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Id.* at 606 (emphasis added).

67. "If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden . . . ." *Id.* at 607 (emphasis added).


70. *Id.* at 210. While the Court framed the purpose of the first amendment, based on *Everson*, upon terms that both religion and government best achieve their goals if each is left free to exercise authority in its own sphere, that sectarian groups were significantly aided in spreading their faith should have been clarified. Proselyting was not an independent consideration in and of itself. Indeed, proselyting is specifically protected, although more specifically within the umbrella of free speech. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In *Murdock* the Court held that the "spreading [of] one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." 319 U.S. at 110. Rather, merely teaching of religious views was involved in *McCollum*, the students participating
within the prohibition of the first amendment as interpreted in *Everson*. But in *Zorach v. Clauson*, a decision handed down four years later, the Court sustained a New York "released time program," distinguishing it from *McCollum* on the fact that the children excused for the purposes of religious instruction attended the instructional classes off the public school premises and there was no expenditure of public funds in aid of religion.

A comparison of the rationales of the released time program of *Zorach* and *McCollum* reveals that the Supreme Court's distinction may have been unwarranted. Both operated by means of state machinery of compulsory education, facilitating the parental desire of having religious instruction provided for their children. While the pupil was being brought into school by statutorily provided compulsory education laws, the school would release the student from secular education, conditioned upon the student's using that time released to him for sectarian religious instruction. Each program was a "conscientious attempt to accommodate the allowable functions of Government and the special concerns of the Church." While the determination of a coercive element was vital to the *McCollum* decision, the nonrecognition of coercion was equally vital to validation of the program in *Zorach*, despite the infusion of New York's already having been committed to a particular faith by parental "coercion", and the use of tax-supported institutions in furtherance of instruction.

The appellant in *McCollum* offered in support of the position asserted, the case of *King v. Board of Educ.*, 245 Ill. 334, 92 N.E. 251 (1910). Therein a writ of mandamus was sought to compel discontinuance of Bible reading (King James version; Roman Catholics used the Douay version), singing of religious hymns, and recitation of the Lord's Prayer. The court said that one of the purposes of the state constitution was to protect minority groups against the compulsory wishes of the majority.


72. *Illinois had a compulsory education law providing punitive misdemeanor status for violation. Under the program religious instructors, employed at no cost to the public school system, yet subject to approval and supervision by school authorities, conducted religious instructional classes in the classrooms of the public schools. Pupils receiving parental permission were released for specified periods of time from secular classroom duties to receive religious training. Those students who chose not to take the religious instruction were required to leave their classrooms and pursue their secular studies elsewhere in the school building, but were not released from school duties. Those students having obtained parental consent were required to be present at the religious class. McCollum v. Board of Educ., 333 U.S. 203 (1948). The New York City program was conducted in the same fashion as that in *McCollum* except that the religious instruction or devotional exercises were conducted off the public school premises.

compulsory education law into the substitution of secular educational activity for sectarian religious instruction. Thus, each program laid bare evidenced as the pith of their mechanics, that without state accommodation and school co-operation neither program would have succeeded.

The impregnable wall, masoned higher in McCollum, requiring public education to be singularly secular, was successfully breached in Zorach. Or was there merely a gate? If individual interests are aided only as the common interest is safeguarded,74 can there be an accommodation of state and nondivisive sectarian influence, without resultant practical difficulty? Decisions turn on how the church and state may be kept apart. It is suggested that practice should dictate that, being "a religious people", determinations should seek to resolve how sects, religious and nonreligious, can work together with government to promote the general welfare,76 and yet leave government and religion free to act in their respective spheres.76

D. Religion—An Unwelcome Teacher?

There is no better place to develop religion than in the home, at the church and in the Sunday School. In my day it was the job of the parents and the preachers and Sunday School teachers to inculcate and develop a religious atmosphere among children. What we need is more people doing this and fewer passing the buck on to the public schools. One fledgling prayer leader in

75. Meiklejohn, Educational Cooperation Between Church and State, 14 Law & Contemp. Probs. 61, 71 (1949).
76. The state, by enacting compulsory education laws, may act as a coercive force in derogation of the parental right to guide the education of their children. See Pierce v. Society of Sisters, 268 U.S. 510 (1925). By removing the child from parental protection can it be gainsaid that the state may not, acting as parens patriae, attempt to provide, with parental consent, further instillation of moral fiber in the child as part of the educational processes, in keeping with the dynamics of religious liberty through free exercise. This by no means would be in derogation of the belief that "if mankind were left in the quiet possession of their unalienable religious privileges, . . . [religion] . . . would . . . flourish . . . by its own native excellence, and under the all-disposing providence of God." Howe, Cases on Church and State in the United States 5 (1952) cited in Clark, Religion and the Law, 15 S.C.L. Rev. 855, 866 (1963). Rather it would be an accommodation of state and church, generated by state non-religious purposes [the fulfillment of parental responsibility], and not involve the state so significantly as to give rise to divisive sectarian influences. See Board of Educ. v. Allen, 392 U.S. 236, 249 (1968).
the home is worth a dozen parroters in the school-house.\textsuperscript{77}

Specifically embraced within the concept of liberty, as found in the fourteenth amendment, is the parental right to guide the educational processes of their children.\textsuperscript{78} Yet, once having exercised the initial selective right to send their children to a public or a sectarian school, the word "liberty" does not include the right to seek state accommodation to religious belief by means of official sponsorship of a religious exercise. The state, acting as a coercive force,\textsuperscript{79} may not permissibly become so directly involved in sectarian purposes that the first amendment is violated.

While moral considerations are within state competence, is morality capable of severance from religious overtones so as to be without state cognizance? A distinction, not indicated by case decision, exists between state accommodation of religion and prayer. Religion, while a manifestation of individual desire, is of public concern; yet prayer is between man and God, and needs no intermediary—the state. Thus, state intrusion in the exercise of prayer exerts a coercive force, violating one's right of free exercise.

In \textit{Engel v. Vitale}\textsuperscript{80} a state composed prayer\textsuperscript{81} to be read aloud at the beginning of the school day was attacked by the parents of ten children as being in violation of the establishment clause.\textsuperscript{82} Although participation in the denominationally neutral program

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\item \textsuperscript{77} Clark, Religion and the Law, 15 S.C.L. Rev. 855, 866 (1963).
\item \textsuperscript{78} Pierce v. Society of Sisters, 268 U.S. 510 (1925).
\item \textsuperscript{79} The fact that the state is the only coercive force raises the question whether the distinction between the establishment clause and the free exercise clause, the latter predicated on the existence of coercion while the former is absent such, is indeed valid. More pointedly, a state law enacted so as to provide compulsory prayer or Bible reading would involve a question of free exercise of religion, the individual affected being prohibited from freely exercising his religious or nonreligious beliefs. While such an interpretation might seemingly reduce substantially the proposition that the two clauses are co-equal in that each guarantees religious liberty, the case decisions have conversely subordinated the free exercise clause to the establishment clause, in contravention of the intent of the framers.
\item \textsuperscript{80} 370 U.S. 421 (1962).
\item \textsuperscript{81} The prayer was: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." \textit{Id.} at 422.
\item \textsuperscript{82} The New York Court of Appeals sustained the trial court's upholding of the prayer's use on the basis that no pupil was required to recite the prayer over his own or his parents' objections.
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was on a voluntary basis, the prayer was deemed an establishment of religion, impermissibly uniting government and religion in contravention of the first amendment.

Interestingly was the conflict as expressed by Justice Douglas, concurring, with the earlier decision in Everson.

My problem today would be uncomplicated but for [Everson]. . . . The Everson case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children.

Yet, Engel was not out of line with the Everson rationale. The prayer was not representative of a permissible accommodation of state and religion by releasing students to receive religious instruction outside the school facilities, compatible with their beliefs. Neither was it representative of legislation designed as part of a program of general welfare that incidentally satisfied private interests as well as a public purpose. It was not a law where government sought to achieve nonreligious purposes, yet concurrently affecting religious sensibilities. Rather it was a studious attempt incisively to introduce a program incompatible with the concept of religious liberty. The mere realization of religious liberty and neutral accommodation was absent; in its place was direct state involvement that was calculated singularly to achieve a religious purpose.

One year later, in Abington School District v. Schempp, the Court held that the first amendment prohibits the selection and

83. The nondenominational character of the prayer coupled with voluntary observance was said not to free the prayer from the limitations of the establishment clause as it might from the free exercise clause. Justice Black, writing for the Court, characterized the difference between the two clauses, stating the establishment clause need not require a showing of direct governmental compulsion; yet when prestige of government is placed behind a religious belief, the indirect coercive pressure upon religious minorities to conform to an officially approved plan is clear.

Inferentially, at least, there seems to be no difference. The coercive element is present, be it direct or indirect. Rather than considering this to be an establishment, because no preference is indicated as to a particular religious belief, it is suggested that the case decision could have been posited on the free exercise clause.

84. 370 U.S. at 443. Compare Justice Douglas' statement with Justice Brennan's concurrence in Abington School Dist. v. Schempp, 374 U.S. 203 (1963) wherein he stated: "The Framers were not concerned with the effects of certain incidental aids to individual worshippers which come about as by-products of general and nondiscriminatory welfare programs." Id. at 302.

reading of verses from the Bible and the recitation of the Lord's Prayer at the beginning of the school day by pupils. The first amendment, containing the words "respecting an establishment of religion," has been interpreted to prohibit state programs that are religious "exercises." Thus, the establishment language, the intention of the framers as concerned preference, has been equated by interpretation to mean a religious exercise. It is through this interpretation placed upon the first amendment that the Court has ultimately concluded that any notions of mere preference have been unequivocally rejected. Further, by case decision the establishment clause has foreclosed state legislation respecting sectarian belief, making public education the "embodiment" of the wall of separation.

The Congressional response to the Engel and Schempp cases was mixed. In 1964 numerous constitutional amendments were proposed. Representative Becker, a New York congressman, appeared before the House Judiciary Committee for the purpose of speaking in favor of an amendment for the allowance of prayer and biblical recitation in public schools and other public places. The resolution offered was designed to make it constitutional to refer to and rely upon God in all matters related to our existence as a nation. However, President Kennedy, speaking of the decision in Engel, proffered that parents should, as a result, intensify their efforts at home, making the home a more accommodating place to recite prayer.

E. Free Exercise—No Requirement of Separation?

The Court, in applying the secular purpose and effect test in support of the separation it deems required by the establishment clause, has conversely negated any requirement of separation to achieve religious liberty as respects the free exercise language. Thus, while the state may not by legislative efforts or state coerced action seek to unite religion and government in a manner that raises divisive influences, likewise it must predi-

86. Id. at 217.
88. 11 members of the House introduced bills substantially consistent with H.J. Res. 693 (the Becker Amendment) to amend the constitution, and 58 members introduced identical resolutions. The Becker Amendment was the most widely discussed proposal. H.J. Res. 693, 88th Cong., 2d Sess. (1964).
cate action so as not to invade liberties protected under the fourteenth amendment. While recognition was given to relevant political and societal concerns,90 certain subjects were to be withdrawn "from the vicissitudes of political controversy, to place them beyond the reach of majorities."91 The wall of separation, whatever its shape and form as relates to the establishment problem, creates practical difficulties when assimilation into the free exercise language is attempted.

A law that clearly and markedly renders benefits to a particular religion, more properly burdens the free exercise of religion of other religious groups and inhibits those possessing nonreligious beliefs, rather than being an establishment. Under the establishment language it might be said that, incorporating preferential treatment as a test, there can be no compelling state interest that permits governmental intrusion into the religious order. Yet, under the free exercise language a compelling state interest, as indicated earlier in Reynolds, can override any religious conduct. The crucial distinction then becomes religious conduct as apart from manifestation of religious belief. The power of the state to act, however, in regulating conduct must not be exercised so as to burden impermissibly the exercise of religious liberty.92

When religious belief is burdened by state legislation and there exists no form of conduct prompted by religious principles, absent incidental burden in effectuating a compelling state interest, the legislation is a subject which the state may regulate without violating the first amendment. But in Sherbert v. Verner,93 wherein a Seventh Day Adventist was disqualified from receiving unemployment benefits because she would not work on Saturday, her faith's Sabbath Day, the Court found that the legislation imposed an impermissible burden on the exercise of her religion and was not justified as a compelling interest of the state. In determining what constitutes a compelling state interest the Court said a rational relationship was insufficient; "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."94 The result

94. Id. at 406.
of the statute was to force a choice between the precepts of religious belief or the nonreceipt of unemployment benefits.95

_Sherbert_ resulted in positive protection of religious liberty, representing the permissible neutral accommodation of government and religion. To require that government not be cognizant of religion would have the effect of cleaving law and religion, and a state acting pursuant to majority desires could effectively stifle minority religious belief.

VI. Conclusion

The inquiry, focused upon the existence and practicality of recognizing that there is a wall of separation between church and state, if not merely an academic exercise, may merely be a reflection of antiquarian concepts. Yet, constitutional standards require some degree of clarity, particularly in the area of religion. This is not merely so for the benefit of informing government what it cannot permissibly do, if there be any effect upon religious sensibilities. Government need be informed what it may achieve without running afoul of the first amendment. While there will be attendant difficulties, a working balance which would include those not subscribing to a religious belief, as well as those adhering to particular religious principles, need be considered.

Thus, religious liberty is postulated as the principle of the first amendment, not stark separation. Mechanical application of a slogan, "a wall of separation," will not achieve what the framers perceived to be the real intendment of the first amendment. Utilizing the dynamics of separation as but a means of achieving religious freedom, coupled with allowance of a state to act so as to achieve a public secular purpose, although incidentally a mere extension of private desires, despite permissible incidental effects upon religion will seek to accommodate the principles of a democratic society and the principle of religious liberty as expressed in the language of the first amendment.

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95. _Id._ at 404. The Court specifically negated the idea that it was fostering the establishment of a religion. The Court stated that it only held that a state "may not constitutionally apply the eligibility provisions [of unemployment benefits] so as to constrain a worker to abandon his religious convictions respecting the day of rest." _Id._ at 410 (emphasis added). Compare this language with the Court's opinion in _Braunfeld v. Brown_, 366 U.S. 599 (1961) and the concurring opinion of Justice Stewart and the dissenting opinion of Justice Harlan in _Sherbert_.

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