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An Economic Approach to Issues of Religious Freedom

Michael W. McConnell & Richard A. Posner†

The First Amendment forbids Congress to make any law respecting an establishment of religion (the "Establishment Clause") or interfering with the free exercise of religion (the "Free Exercise Clause"). Since the critical terms in the clauses are neither self-evident nor defined, and religion is a profoundly emotional subject, it is not surprising that the religion clauses have given rise to enormous controversy, both popular and academic, and to a body of case law riven by contradictions and bogged down in slogans and metaphors ("wall of separation," "entanglement," "primary effect"). There is need for a fresh approach. As one component of that approach, we propose using an economic definition of "neutrality" to determine when government action impinges impermissibly on religious choice.

The application of economics to issues of religious freedom

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may seem an eccentric response to the inadequacies of current doctrine. Religious reasoning and religious faith may seem antithetical to economic reasoning and values; religious freedom may seem unquantifiable even in principle and therefore beyond the reach of any economic or socio-scientific metric. We shall concede these points at least to the extent of taking no position, as economists or lawyers, on the truths of religion. Instead we shall apply economics to the government regulation of religious institutions. The important set of regulatory issues that religion has raised makes economic analysis pertinent to religion.¹

There are three reasons for believing that economics may be a useful tool for understanding the religion clauses. First, whatever their precise meaning, the religion clauses are plainly concerned with limiting government regulation (promotional as well as restrictive) of religious activities and institutions; and regulation is an area of central concern to economists. Second, the prevailing view of the religion clauses is that their central purpose is to prevent government from either advancing or retarding religion—or, in equivalent economic terms, from subsidizing or taxing religion—and economists are experts in discerning the existence, sometimes heavily disguised, of taxes and subsidies. Third, religious organizations compete with each other and with secular institutions, public and private, to furnish such services as education, consolation, the inculcation of moral values, and the development of a sense of community. These services may confer external benefits, meaning benefits that the provider cannot capture in the price for the services. An extensive economic literature deals with competition, with the firm (including the nonprofit firm), and with externalities in general and the external benefits of education in particular.

There are also three reasons why many readers may resist the application of economics to religious freedom. None is convincing. First is the tenacious fallacy that the proper domain of economics is confined to profit-maximizing behavior in explicitly “economic” markets. An extensive literature on the economics of nonmarket behavior refutes this view.² Second, and related, is the paucity of

¹ We are not the first to note the similarity between interference with religious freedom and regulatory intervention in economic markets. Dean Kelley, the long time executive director for religious and civil liberty at the National Council of Churches, made the point in his recent essay, *Free Enterprise in Religion, or How the Constitution Protects Religion and Religious Freedom*, in Robert A. Goldwin and Art Kaufman, eds, *How Does the Constitution Protect Religious Freedom?* 114 (AEI, 1987).

² See, for example, Gary S. Becker, *The Economic Approach to Human Behavior* (Chi-

economic studies of religion, which lends credence to the supposition that religion must lie outside the domain of economics.³ Third, a point already mentioned, is that economics, as well as being scientific and rationalistic in methodology, embodies its own system of values, which are resolutely anti-religious. Viewed normatively, economics is a form of applied utilitarianism, or at least closely related to it; and utilitarianism—the philosophy that our duty in life is to maximize the excess of pleasure over pain in the universe—is a secular faith. The questions we seek to answer in this paper, however, are unrelated to issues of faith, and economic theory does not dispute the proposition that an individual may derive pleasure or pain from religiously motivated activities, including self-sacrifice, self-denial, and obedience to religious values.

An economic analysis of the religion clauses can have either a descriptive or a normative focus. That is, the analyst can attempt either to determine whether particular government policies have been neutral toward religion and, if not, what the direction of the effect is, or to determine what policy should be adopted in order to achieve consistency with the ideal of neutrality. This paper presents examples of each form. Section I proposes an economically meaningful definition of neutrality. Section II is a normative analysis of aid to parochial schools, an issue arising under the Es-

cago, 2d ed 1976); Jack Hirshleifer, *The Expanding Domain of Economics*, 75 Am Econ Rev 53 (Dec 1985 Supp); Richard A. Posner, *The Law and Economics Movement*, 77 Am Econ Rev Papers & Proceedings 1 (May 1987).

³ There have been economic studies of religion, but most are very recent (many not yet published) and not widely known. The best known paper, Corry Azzi and Richard Ehrenberg, *Household Allocation of Time and Church Attendance*, 83 J Pol Econ 27 (1975), explores the hypothesis (for which the paper finds empirical support) that people allocate their time to religious activities in a manner rationally designed to maximize "afterlife utility" net of cost. Posner, 77 Am Econ Rev Papers & Proceedings at 9-12 (cited in note 2), contains a brief discussion of the economics of religion, with emphasis on the religion clauses; the present paper both amplifies and modifies the analysis in that paper. Several other recent papers—Gary M. Anderson, *Mr. Smith and the Preachers: The Economics of Religion in The Wealth of Nations*, 96 J Pol Econ 1066 (1988); Frederick Bold and Brooks B. Hull, *Would You Buy a Used Car From This Priest: An Economic Theory of Religion and the Church* (Battelle Pacific Northwest Labs & U Mich-Dearborn, Feb 3, 1987)(on file, University of Chicago Law Review office); Laurence R. Iannaccone, *A Formal Model of Church and Sect*, 94 Am J Soc 5241 (Supp 1988); and Fred S. McChesney, *The Efficient Organization of Religions: A Club-Theoretic Approach* (U Chi L Sch, March 1987)(on file, University of Chicago Law Review office)—contain interesting discussions of the economics of religion but do not discuss the regulation of religion, the subject of the present paper. The Posner, McChesney, Iannaccone, and Bold and Hull papers, among them, cite all of the earlier, and very sparse, economic literature on religion. Finally, Laurence R. Iannaccone, *Testing Smith's Theory of Religious Markets* (Santa Clara U, Dept Econ, Nov 1987)(on file, University of Chicago Law Review office), is an analysis similar to but more extensive than Posner's.

tablishment Clause. Section III is a normative analysis of religion-specific exemptions under the Free Exercise Clause. Section IV analyzes Supreme Court doctrines under the religion clauses to determine whether they have been neutral toward religion and what their effect on religious activity has been.

I. THEORY

A. The Nature of Religious Competition

Religious competition can be extraordinarily bitter, divisive, and destructive, especially when religion is mixed with, and used as an instrument of, political struggle. The history of religious intolerance persuaded many Enlightenment thinkers, such as David Hume, to support measures that they thought would dampen religious fervor. Yet Hume himself—surprisingly, but as we shall see not irrationally from an economic standpoint—favored an established church.⁴ At the time of independence, about half the American states were dominated by either the Congregational or the Anglican faith, about half were committed to religious pluralism, and all had numerous and assertive religious minorities that chafed under an established church. The diversity was such that no single sect could gain national preeminence; the jealousy was such that all could agree that there should be no religious establishment or preference at the federal level.⁵ Gradually, even those states with an established church abandoned the practice, and the federal courts came to interpret the religion clauses of the First Amendment as both barring governmental preference for or inhibition of any religion (or religion in general) and applying to the states equally with the federal government.⁶

Religious institutions in the United States today are nonprofit associations of persons sharing a common religious dogma with its associated rituals and ethical duties. Religious institutions provide many things: instruction about universal and transcendental truths; opportunities for ritual and worship; guidance about how to lead an ethical and satisfying life; care for the poor, the sick, the

⁴ See David Hume, *Idea of a Perfect Commonwealth*, in Eugene F. Miller, ed., *Essays: Moral, Political, and Literary* 512, 520 (Liberty Classics, 1985).

⁵ See generally Sanford H. Cobb, *The Rise of Religious Liberty in America* (Cooper Square, 1902); Thomas Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (Oxford, 1986); Michael W. McConnell, *Accommodation of Religion*, 1985 S Ct Rev 1, 20-22.

⁶ For the evolution and present state of legal doctrine, see Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St L J 409 (1986).

orphaned, and the alien; facilities for promoting fellowship and a sense of community. Church schools offer ethical and religious training and an atmosphere designed to keep the children of church members within the faith, as well as secular training designed to prepare children for civilized and productive life. Religious institutions require both money and members, and for these and other reasons (including, for some, the duty to spread the faith) compete among themselves as well as with nonreligious providers of substitute services, such as public and secular private schools.

Because religious organizations need money (as well as donated time and services) for their activities, the scope of those activities will be influenced by governmental actions that have the effect of either taxing or subsidizing religion generally or particular religious organizations. Religious believers, moreover, are not insensitive to considerations of cost.⁷ So if the state, whether through pecuniary or nonpecuniary exactions, makes it more costly to adhere to one creed than to another (including the creed of nonbelief), this may cause a shift in religious affiliations. The early history of Christianity suggests that the shift may not always be in the direction intended by the authorities. Despite this example, governmental regulation of religion will usually have effects similar to those of regulating other activities: it will expand the regulated activity if the regulation takes the form of subsidization (or, what is the same thing, taxation of substitute activities), and contract the activity if the regulation takes the form of taxation.

B. Of Baselines and Neutrality

Although evidently concerned to keep government's hands off religion in some sense, the courts have not succeeded in articulating legal standards well adapted to this aim. *Lemon v Kurtzman*⁸ teaches that to avoid condemnation under the Establishment Clause, "[f]irst, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁹ As with many multifaceted tests, the three facets of the *Lemon* test get in each

⁷ This is the principal finding of Azzi and Ehrenberg, 83 J Pol Econ at 27 (cited in note 3).

⁸ 403 US 602 (1971).

⁹ Id at 612-613 (citations omitted), quoting *Walz v Tax Commission*, 397 US 664, 674 (1970).

other's way. A challenged statute designed to remove governmental impediments to religious practice would be constitutional under the second facet because it would be removing an "inhibitor," but to describe its purpose as "secular" would be odd and should be unnecessary. A statute that fosters "excessive government entanglement with religion" would also presumably violate the second facet. The second facet of the *Lemon* test is thus the key one.

Here begins the confusion: how can we tell what effects are "primary"? Virtually every statute or other general decree of the government burdens or benefits religion to some extent—even an ordinance merely increasing or reducing the appropriation for the local police department. The Supreme Court sometimes uses the term "primary" in contradistinction to "incidental," the latter term meaning either unintended (providing free vocational education to the blind has the "incidental" effect of aiding religion if some of them train for the ministry¹⁰) or small in absolute amount. Sometimes the Court uses the term "primary effect" in contradistinction to "indirect effect"—the latter term meaning any number of things.¹¹

To determine whether religion has been "aided" or "penalized" (terms the Court has used synonymously with "advanced" and "inhibited") one needs a baseline: "aid" or "penalty" as compared to what? There are four main possibilities. The last two are susceptible of an economic interpretation, but only the last is both susceptible of such an interpretation and compatible with the general notion of religious liberty that seems to be embodied in the religion clauses.

1. *State of Nature.*

One possible baseline is the condition of churches and religious belief in the absence of any government at all. Under this approach grants to religious organizations would be unlawful whatever their purpose because they place religion in a better position than it would enjoy in the state of nature. Churches would be exempt from taxation (to tax churches would penalize them rela-

¹⁰ *Witters v Washington Department of Services for the Blind*, 474 US 481, 486-89 (1986).

¹¹ In *Grand Rapids School District v Ball*, 473 US 373, 393-94 (1985), for example, the Court used the term "indirect aid" to denote loans of textbooks and the provision of transportation to parochial school students, and the term "direct aid" to denote loans of instructional materials or provision of tuition tax deductions to parochial school students. This suggests that the terms "direct" and "indirect" have no consistent content. See Michael W. McConnell, *Political and Religious Disestablishment*, 1986 BYU L Rev 405, 424 n 62.

tive to the state of nature) and exempt from regulation as well, and would also be denied police and fire protection, use of the mails and roads, and access to the civil justice system.

The state of nature baseline is the *reductio ad absurdum* of "strict separation." It is inconsistent with any tenable conception of religious freedom. In the state of nature, religious minorities are at the mercy of the majority, making "free exercise" impossible. Dominant religious groups could use force to compel others to support their creed—a de facto establishment. The metaphor of the social contract, in which all citizens give up their right to use force against others in return for protection from a sovereign, applies no less to religious conflict than to any other. The advent of civil society is not contrary to the spirit of the religion clauses even though it benefits weak religions at the expense of the strong.

2. *Common law, circa 1789.*

But if some government actions that change the relative pre-political positions of religious groups are acceptable, there is all the greater need for a baseline against which to determine which such actions are impermissible "aid" or "penalties." One candidate is the common law system of private rights as it existed when the First Amendment was adopted. Under this approach, the government must keep hands off religion and religious institutions whenever it embarks on activities unknown to it prior to 1789. This is a better baseline than the state of nature because it allows religious institutions to share in the benefits and burdens of civil society while exempting them from the heavy hand of the welfare-regulatory state. But it would lead to startling differences in treatment between religious and nonreligious institutions.

It would exempt churches from any form of governmental interference unknown in 1789, even if there is no serious danger to religious autonomy. Zoning laws, fire and building codes, minimum wage laws, environmental laws, labor laws, and most other regulatory laws generally apply to religious organizations on the same terms as secular organizations. Exceptions are made (by statute, by administrative action, or under one or both of the religion clauses) where regulatory schemes either conflict with doctrinal tenets—laws against sex discrimination cannot be applied to the employers of Roman Catholic clergy—or intrude too deeply into organizational autonomy or privacy—labor laws prohibiting actions not undertaken in "good faith" cannot be applied to decisions predicated on theological grounds. But the general rule is that religious organizations must comply with governmental regulations. To ex-

empt religious organizations from modern regulations, where not reasonably necessary for the protection of doctrinal or organizational freedom, would be the equivalent of a "subsidy," and might be thought therefore to be an establishment of religion.

Another consequence of using a 1789 baseline would be to exclude religiously affiliated organizations from publicly funded, privately administered social welfare programs. As the government enters more and more fields such as education and care for the less fortunate that previously were private—and usually religious—religious activities will shrink under a strict hands-off policy. This has been the pattern for public aid to education. Until the 1830s and 1840s most primary and secondary education was privately funded, and religiously affiliated schools were commonly the preferred choice. After the Civil War period, education became compulsory and state supported; and while entitlement to public funding could have been tied to secular, objective criteria, most states blocked the use of public funds for parochial schools, usually by state constitutional amendment.¹² More recently, the Supreme Court has interpreted the First Amendment to bar most forms of direct aid to parochial schools.¹³ In other fields, events have taken a different course. Around the turn of the century, governments began to provide grants to private hospitals and colleges; both types of aid were greatly expanded by states and the federal government after World War II. Although challenged, the inclusion of religious hospitals and colleges in these aid programs has been upheld by the Supreme Court.¹⁴ The issue repeats itself as the government enters new areas. Day care is a current example. The 1789 baseline would suggest that religious day care centers should be excluded from any program of federal subsidies (as some versions of proposed legislation require). This would constrict rather than expand the range of choice available to parents concerning religious atmosphere and content; it would amount to a "tax" on the religious choice and a "subsidy" for secular alternatives.

3. *Efficiency.*

A third possible baseline is efficient governmental action.

¹² For a summary of state laws and constitutional provisions, see Anson Stokes and Leo Pfeffer, *Church and State in the United States* 420-25 (Harper & Row, 1964).

¹³ See section II of this paper for details.

¹⁴ *Bradfield v Roberts*, 175 US 291 (1899) (hospitals); *Tilton v Richardson*, 403 US 672 (1971) (colleges); *Hunt v McNair*, 413 US 734 (1973) (same); *Roemer v Bd. of Public Works*, 426 US 736 (1976) (same).

While in other areas government may be allowed to engage in regulation (whether directly or through taxation or subsidization) that results in capricious redistributions of wealth, this view would limit government to those forms of regulation that are justifiable in terms of neutral economic criteria. These criteria rule out rent seeking, politically motivated redistributions, and other distortions (from an efficiency standpoint) of free markets. Determining whether subsidies of religious activities or taxes on them are efficient would call upon standard economic models of public finance and expenditure.

"Efficient subsidy" may seem an oxymoron. It might appear that if government is forbidden to interfere with the free market in religious services, the subsidization of those services would be out of the question. This might well be correct if the religious sector were sealed off from the rest of the economy, but it is not. In particular, religious institutions compete head to head with nonreligious ones in providing education. If public schools are subsidized, the refusal to subsidize private (including religious) schools may result in a misallocation of resources, and specifically in an underinvestment in religious schooling from an efficiency standpoint.

In a complete economic analysis, one would have to consider such questions as the effect on the labor-leisure tradeoff, and other allocative consequences, of imposing the taxes necessary to defray the costs of subsidizing religious schools, and whether it might be more efficient to reduce or eliminate the subsidy for public education than to create a subsidy for private education. But exploring these issues might make the analysis intractable, as well as carry it into areas remote from the concerns of the First Amendment's religion clauses. We shall therefore treat the structure and level of taxes and subsidies in the nonreligious sector of the economy as fixed, and ask what adjustments in the regulation of religion are necessary, given these constraints, to make that regulation efficient.

There are two other, more fundamental objections to efficiency as the baseline for interpreting the religion clauses. The first objection is that the efficiency criterion might allow the establishment of religion (or particular faiths) as a cost-justified means to a secular end. For example, if it could be shown that inculcating public school students with the tenets of the Mormon faith would produce net social benefits, perhaps in the form of a more orderly and productive citizenry, such inculcation would be permitted. Second, it might allow the suppression of unpopular minority faiths. If the majority incurs disutility from the knowledge that Rastafarians,

say, are permitted to practice and propagate their faith, and if because there are very few Rastafarians the aggregate disutility that they would incur if their religion were suppressed would be less than the welfare gains to the majority from the suppression of Rastafarianism, the suppression would be utility maximizing.

There is no difference to an economist *qua* economist between a nuisance—say, some form of air pollution—that inflicts costs on third parties greater than the benefits to transactors, and a religion that inflicts cost on nonadherents that they would be willing to pay something, perhaps a lot, to remove. Even the proviso that the majority must be willing to pay enough to compensate the minority (whether or not compensation is actually paid) is insecure. It assumes that the members of the minority faith have, as it were, a property right in their religious beliefs, so that the majority must buy the right from the minority. But that assumption is far from certain; if the nuisance analogy is carried through unflinchingly, it may be that the minority should be regarded as imposing a cost on the majority that it must somehow compensate the majority to bear. This problem is an aspect of the much remarked indeterminacy of economics regarding the initial distribution of entitlements. Generally, the economist takes individual preferences as given.

On a strict economic view, indeed, the Establishment and Free Exercise Clauses would disappear, to be replaced by a commitment to *efficient* establishments and *efficient* interferences with the free exercise of religion. The result would be the drastic dilution of what virtually all students of the religion clauses believe to be the minimum content of those provisions. If economics is to be a tool of practical utility for analyzing the religion clauses, we must additionally constrain the analysis by assuming that the Establishment Clause forbids government to single out religion or a particular religion as an activity to be promoted, however efficient that singling out might be, and that the Free Exercise Clause forbids government to suppress a religious faith, however persuasive the showing that such suppression would increase the aggregate wealth or utility of society. Economic analysis is thereby restricted to forms of governmental regulation of religion that are not intended to promote or repress religion in general or particular religions, but that may have a promoting or repressing effect.

4. *Neutrality.*

Our constrained economic analysis points to the fourth possible baseline: the treatment meted out by government to nonreli-

gious institutions and activities, whether or not that treatment is efficient. This policy, which we shall call "neutrality," protects the values embodied in the religion clauses in two ways. First, it guards against governmental abuse: by requiring the government to act neutrally, we make it less likely that legislators and government officials will use their power, perhaps inadvertently, to promote or retard religion. Government cannot single out or exclude disfavored beliefs, or shower favors on favored beliefs, without extending similar treatment to others. Second, neutrality reduces (and in theory eliminates) the impact that governmental action has upon individual choice with respect to religion. If government treats competing activities that are secular the same way it treats religious activities, it will create neither incentives nor disincentives to engage in religious activities.

The religion clauses are not the only area of constitutional law in which a requirement of neutral treatment is used to guarantee the independence of institutions from governmental control. One example of a neutrality approach is the Free Press Clause, which guarantees a degree of independence to the press not unlike the autonomy of churches. This clause could also have been interpreted in a strict separation fashion: government may not tax or regulate the press. Instead the Supreme Court has employed a neutrality principle. The government may tax and regulate newspapers, but only to the degree that it taxes and regulates comparable businesses.¹⁵ It may not single out the press in general, or particular organs of the press, for particular burdens or benefits.¹⁶

There is, however, one important difference between the press and religion clauses: the government may grant nonpreferential subsidies to the press in general but not to religion in general. This difference may be due to the fact that even-handed subsidization does not pose a threat to press freedom comparable to the danger that the government may, through subsidies to religion, induce nonadherents to any religion to decide to join a religious organization. Individuals do not face a choice between press and "non-press" activity in the same sense in which they must choose be-

¹⁵ See *Grosjean v American Press Co.*, 297 US 233, 250 (1936) (press not subject to a discriminatory tax, but would be subject to ordinary form of taxation); *Associated Press v NLRB*, 301 US 103, 132-33 (1937) (press is subject to labor laws).

¹⁶ *Minnesota Star & Tribune Co. v Minnesota Commissioner of Revenue*, 460 US 575, 591 (1983) (state may not impose tax that applies only to certain publications); *Arkansas Writers' Project v Ragland*, 481 US 221 (1987) (state may not exempt newspapers or religious, professional, trade, and sports journals from taxation without extending a similar benefit to general interest magazines).

tween religious and nonreligious activity. The distinction supports our suggestion that neutrality is a means for protecting liberty rather than an end in itself.

Another example of the use of a neutrality approach in constitutional law is federal taxation of state governmental activities. At first the Constitution's guarantee of autonomy for state government was protected through a "strict separation" principle of complete intergovernmental immunity: the federal government could not tax state governmental activities even by a neutral tax such as an income tax on the salaries of state officials.¹⁷ For reasons not unlike those for abjuring a "strict separation" of church and state, the Supreme Court shifted to neutrality. Under current doctrine, the federal government may tax state governmental activities to the extent that it taxes comparable activities of private citizens. It may not single out state governments for special taxes and may not tax activities of state government that are so peculiarly governmental that there is no private equivalent.¹⁸ A similar approach to religious organizations could protect their independence and autonomy.

C. Implications and Extensions

Our suggestion is that churches can receive benefits from government, and be exposed to burdens, so long as the benefits and burdens have approximately neutral consequences for comparable institutions. Exemption from burdens and inclusion in benefits are indistinguishable in their economic effects. If all nonprofit institutions except churches are taxed \$10 per year, churches are being favored over other nonprofit organizations even though they do not receive a penny from the government. On the other hand, if all other nonprofit institutions receive \$10 per year in government grants but churches receive nothing, churches are being taxed \$10 for being churches (unless the difference is attributable to some other factor). Thus the exemption of church property from real estate taxation is approximately neutral because the same exemption is available to other nonprofit institutions that provide charitable

¹⁷ See, for example, *Collector v Day*, 78 US (11 Wall) 113 (1871), overruled in *Graves v New York ex rel. O'Keefe*, 306 US 466 (1939). See also *Indian Motorcycle Co. v United States*, 283 US 570 (1931) (sale of goods to state agency held immune from federal sales tax); *Pollock v Farmers' Loan & Trust Co.*, 157 US 429 (1895) (interest on state bonds held immune from federal income tax).

¹⁸ *New York v United States*, 326 US 572 (1946) (State of New York not immune from a federal tax on mineral water production). See generally *South Carolina v Baker*, 108 S Ct 1355, 1362-68 (1988), overruling *Pollock v Farmers' Loan & Trust Co.*, 157 US 429 (1895).

services, such as schools, hospitals, and museums—and importantly including propagators of anti-religious dogma (e.g., a Marxist university).¹⁹ We say “approximately” because some churches own much more real estate than other nonprofit institutions, including other churches, and also because churches along with other nonprofit institutions compete with profit-making institutions as well as with other nonprofit organizations. For example, churches compete with psychoanalysts, astrologers, and owners of proprietary schools—none of whom is tax exempt. But since profit-making and nonprofit organizations are treated differently under the tax laws and since churches are, to some extent, in competition with both, no policy can be perfectly neutral. Exempting churches gives them a competitive advantage over profit-making institutions, but taxing churches would place them at a competitive disadvantage vis-à-vis other nonprofits. Since churches’ *principal* competitors are nonprofit institutions, denial of tax exemption would have a more significant substitution effect (religious hospitals would decline relative to secular hospitals, etc.) than the exemption has.

This analysis explains why the commercial activities of churches (“commercial” meaning profit-making activities not directly related to religious functions) are subject to taxation: here the churches’ principal competitors are profit-making institutions, and neutrality demands that the churches be treated the same way.²⁰ In most contexts, a line between the non-profit and the commercial activities of churches treats churches more neutrally than would other lines (for example, religious-nonreligious). The Supreme Court’s recent *Texas Monthly* decision,²¹ invalidating (by a fractured 3-2-1-3 split) a statute exempting wholly religious magazines from sales tax, was difficult precisely because the activity involved could plausibly be viewed either way—as a commercial magazine (thus competing with other magazines) or as religious material (not competing with commercial publications).

One reason the economic approach is useful for analyzing church-state questions under the religion clauses is that the underlying normative assumptions for economic analysis and for analysis under the religion clauses are similar. The economist assumes that, in the absence of competitive distortions such as monopoly or ex-

¹⁹ See *Walz*, 397 US at 672-673.

²⁰ See 26 USC §§ 511-513 (1982) (taxation of “unrelated business income” of religious organizations); and for a sophisticated analysis of the complexities of neutral taxation, Boris I. Bittker, *Churches, Taxes, and the Constitution*, 78 Yale L J 1285 (1969).

²¹ *Texas Monthly, Inc. v Bullock*, 109 S Ct 890 (1989).

ternalities, an unregulated market will yield the most efficient allocation of resources; if there are distortions, the economist may propose forms of regulation designed to simulate the effects of competition (i.e., of free markets). The use of a free-market benchmark is important because it identifies ways in which government policy distorts (sometimes unintentionally) the pattern of economic activity, causing resources to flow from higher-valued to lower-valued uses. Similarly, the First Amendment can be understood as positing that the "market"—the realm of private choice—will reach the "best" religious results; or, more accurately, that the government has no authority to alter such results.

Neutrality so conceived does not mean treating religion just like other activities. Government generally is free to make determinations about what best promotes the public good. If government chooses to promote baseball by building a stadium at public expense, or to discourage smoking by imposing a tax, it is acting within its constitutional prerogatives. Religion is an exception. Government is not free to seek to promote or discourage it. Concretely, government must obey three rules: (1) Effects on religious practice must be minimized, and can be justified only on the basis of a demonstrable and unavoidable relation to public purposes unrelated to the effects on religion. (2) Religious institutions or activities can be subjected to different treatment only when necessary to minimize the effect of government action on religious practice or to achieve a public purpose unrelated to religion. (3) Public purposes cannot include effects (even secular effects) that follow from the adoption or rejection of a religious faith. Thus, it would be neutral to make a grant to a Mormon organization for various forms of community work if on a secular, objective basis the organization produced the best results. It would not be neutral to base such a grant on a belief that the promotion of Mormonism would produce positive results.

II. IDENTIFYING THE SUBSIDY: THE CASE OF FINANCIAL AID TO PAROCHIAL SCHOOLS

In *Everson v Board of Education*,²² the Supreme Court's first brush with the question of state funding of parochial schools (a term we use to mean a school run by any religious organization), the Court approved a program that reimbursed parents for the cost of their children's bus transportation to school, whether public or

²² 330 US 1 (1947).

parochial. The Court failed to explain its holding clearly, instead emphasizing the seemingly inconsistent proposition that the state may not "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."²³ There are three possible reasons the subsidized bus transportation in *Everson* was nevertheless held to be permissible: (1) The benefits were provided to religion on a secular, nondiscriminatory basis, as part of a broader class of beneficiaries (the neutrality approach). (2) The aid went to an aspect of the schools' operations that seemed completely separate from religious teaching (the separation-of-functions approach). Or (3) The beneficiary of the aid was the individual student (or his family) rather than the school—the real-beneficiary approach. It is important to separate these explanations, for while they converge in *Everson*, they point in different directions in other cases. At various times the Court has invoked and rejected each of these rationales, and it has never been clear about either their theoretical or their practical implications. Economics can help to clarify the issues.

A. The Neutrality Approach

According to the *Everson* decision, the Establishment Clause means "at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."²⁴ But the Free Exercise Clause, we are told in the next breath, means that no persons may be excluded "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation," and therefore the Establishment Clause must not be interpreted to prohibit a state "from extending its general state law benefits to all its citizens without regard to their religious belief."²⁵ The principle of "no aid" must be understood in light of this wider principle of equal treatment; and once understood so, it explains the result in *Everson*. If the government decides for reasons of safety to pay for bus transportation for all schoolchildren, the denial of that benefit to those who have chosen a religious school would penalize their decision.

This conclusion is consistent with the economic understanding of neutrality outlined in the first section. The decision to provide bus transportation to all schoolchildren was convincingly justified

²³ Id at 16.

²⁴ Id at 15.

²⁵ Id at 16 (emphasis in original).

on a basis unrelated to religion, namely safety. To give free bus rides only to students of nonreligious schools would create an incentive to choose nonreligious education; to extend the benefit to all school children minimizes the effect on religious practice (rule 1²⁶). There was no need to treat religious schools any differently from nonreligious ones, since the safety justification is identical in both cases (rule 2). The public purpose served had nothing to do with the merit or demerit of adopting a religious belief (rule 3).

The neutrality approach, restated in economic terms, describes well the pattern of the Supreme Court's decisions outside the field of education, and sometimes within it. Hospitals affiliated with a church are eligible to receive government grants on an equal basis with secular hospitals, churches are eligible for property tax exemptions on an equal basis with other nonprofit organizations, and religious speakers are entitled to use government property on an equal basis with other speakers.²⁷ States may allow tax deductions for tuition to parochial schools so long as they extend the same treatment to educational expenses at nonreligious schools, and they may reimburse college tuition at sectarian institutions under vocational assistance programs so long as they reimburse college tuition at nonreligious institutions.²⁸ There is no requirement that the government make sure the aid is not used for religious purposes. On the contrary, the decisions—especially *Walz* and *Witters*—make clear that religious uses are legitimate.²⁹ The reason governmental assistance is constitutional is not that the aid will be used exclusively for secular purposes but that it is distributed according to secular criteria.

The neutrality approach has usually not been followed, however, when the issue is aid to parochial schools. Is there any reason the state may constitutionally subsidize bus rides, but not provide more substantial financial assistance? Might the religious character of some private schools justify a difference in treatment? These questions require us to consider the two principal justifications for

²⁶ See Section I.C.

²⁷ *Bradfield v Roberts*, 175 US 291 (1899); *Walz v Tax Commission*, 397 US 664 (1970); *Widmar v Vincent*, 454 US 263 (1981); see also *Airport Comm'rs of Los Angeles v Jews for Jesus*, 107 S Ct 2568 (1987).

²⁸ *Mueller v Allen*, 463 US 388 (1983); *Witters v Washington Department of Services for the Blind*, 474 US 481 (1986).

²⁹ In *Walz*, the Court rejected the argument that the exemptions should be confined to charitable, nonreligious functions of the churches. See 397 US at 674; id at 688-89 (Brennan concurring). In *Witters*, tuition was to be used at the Inland Empire School of the Bible, for training for the ministry. See 474 US at 483.

public subvention of elementary and secondary education. First, universal education is widely believed to generate external benefits (a law-abiding, productive, informed citizenry sharing some minimum of common values). The external benefits are similar to those of a language; the fact that others speak our language enlarges our transactional opportunities. Indeed, language—more broadly, a common culture that facilitates social interactions—is one of the most important things that school instills in children. Moreover, education contributes importantly to the formation of “human capital,”³⁰ and since it is hard for the “owner” of that capital to realize the full social return on it, there may be underinvestment in education unless it is subsidized. (For example, an inventor, scientist, or scholar is unlikely to be able to capture his full social product in patent or copyright royalties, salary, or other forms of earning.) Second, even the private benefits of education are not fully self-financing because children cannot borrow easily against their future earnings and cannot always depend on their parents’ acting as perfect agents for them. Free public education is the equivalent of a loan to each student, to be repaid by education taxes over the rest of his life.³¹

These considerations justify *some* public subsidy for education. Whether they justify the enormous subsidies we in fact observe is a separate question, not central to our analysis, though we shall recur to it briefly. The question we examine, instead, is whether, given these subsidies, there is any economic justification for withholding them from religious schools. We think not. The positive externalities arising from elementary and secondary education are created by a “core curriculum” of training in basic skills plus education in the responsibilities of citizenship. These elements are required under state law as a condition for school certification whether the school is public or private, secular or parochial. There is no reason to believe that an admixture of religion reduces the external benefits created by the education. To the extent that

³⁰ See Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis, With Special Reference to Education* (Columbia, 2d ed 1975).

³¹ On the economic case for subsidizing education, see, for example, Mark V. Pauly, *Mixed Public and Private Financing of Education: Efficiency and Feasibility*, 57 *Am Econ Rev* 120, 121 (1967); E.G. West, *An Economic Analysis of the Law and Politics of Non-Public School “Aid”*, 19 *J Law & Econ* 79, 81-92 (1976); George E. Johnson, *Subsidies for Higher Education*, 2 *J Labor Econ* 303, 306-311 (1984); Richard A. Posner, *Economic Analysis of Law* §5.4 at 137-38 (Little, Brown, 3d ed 1986). Evidence that government expenditures on higher education are cost effective under the “lender of last resort” theory is presented in Randall G. Holcombe and Lora P. Holcombe, *The Return to the Federal Government From Investment in Higher Education*, 12 *Pub Fin Q* 365 (1984).

government financing of education can be justified by the presence of positive externalities, government is getting its money's worth from parochial schools as well as from public ones. Indeed, there is evidence that private schools are *more* efficient than public schools, especially for students in the most critical category (poor, inner-city youths).³²

A community might determine that one of the positive externalities of education is that schools are a "melting pot" in which children of different social backgrounds, races, and religions learn to live harmoniously with one another. The community might conclude that religious schools do not play this role and therefore should receive less public subvention, or none at all. If a community asserted this justification, and if on the facts it was not a sham (in some areas public schools are less diverse in terms of students' race and social background, and sometimes even religion, than parochial schools), it would deserve consideration. Yet the argument is not without problems. To the extent that the "melting-pot" policy focuses on the benefits of religious homogeneity (real as they may be), it differs only in degree from a policy of burdening or even excluding minority faiths on the ground that they impair social cohesion and stir up religious antagonisms.³³

On the alternative theory that public financing of education is justified by the inherent limitations of capital markets, there is no net government outlay at all, regardless of the public or private, religious or secular, nature of the school. No one is taxed to support the religious education of another; rather, each person pays one lifetime's worth of taxes earmarked for education and in return receives (in advance) one education. Of course things would not work out as neatly in practice as they do in this very abstract model. There would still be a subsidy from rich to poor, from long-lived to short-lived, and among those who move from one community to another to avoid taxes or to obtain a better education for their children. But there would be no systematic transfer of wealth from individuals who attend religious schools to those who do not. On the contrary, to force individuals to pay education taxes but deny them education financing because they have chosen a religious school brings about a systematic transfer of wealth from the religious to the nonreligious.

³² See, for example, Jon Sonstelie, *The Welfare Cost of Free Public Schools*, 90 J Pol Econ 794, 803-05 (1982).

³³ See Margaret A. Gibson, *Accommodation Without Assimilation* (Cornell, 1988) (study of the way in which Sikh children relate to public schooling).

A possible objection to allowing governmental aid for parochial education is the practical difficulty of policing the aid program to ensure consistency with the criterion of neutrality. Many religious groups are well organized and politically effective. They might press the legislature and relevant administrators for maximum assistance to parochial schools regardless of neutrality. It is difficult to know how serious this problem is apt to be and whether it warrants taking a harder line against aid to parochial education than our analysis suggests. Government is permitted to assist some activities of parochial schools, particularly at the college and university levels, without (so far as we are aware) significant problems being created thereby. Where government aid takes the form of a fixed amount per pupil, it should be relatively easy to prevent a covert subsidy to parochial schools. Best of all would be a voucher system, where all public aid to education would in effect go directly to the student or his parents. This would minimize most effectively the danger of undue religious pressure on the government's education bureaucracies. This may explain why the Court has viewed tuition subsidies (*Witters* and *Mueller*) more favorably than direct grants to schools (*Lemon*). The indirect nature of the aid is a reliable, administratively simple means of ensuring that the benefits of government aid to education are not skewed toward religion.

What if, however, both arguments for public subventions of education are rejected? They are far from airtight. Private financial markets may be robust enough to finance investments in human capital, and parents may be just as qualified to be agents of their children as the state is. Suppose public education is actually a capricious redistribution of wealth (to teachers and large families).³⁴ Then the analysis of aid to parochial education becomes particularly complex. On the one hand such aid will make a bad situation worse by expanding the public subsidy for education. (This assumes that dollars spent for aid to religious schools do not merely replace dollars otherwise spent for public education). On the other hand such aid may make the situation better, by creating more competition for public schools; the total subsidy for education might actually fall.³⁵ And if it makes it worse, still the result-

³⁴ Public intervention in education may be excessive as a result of the pressure of special interest groups—not only teachers, but also workers who would face more competition if young people entered the job market sooner. See Linda Nasif Edwards, *An Empirical Analysis of Compulsory Schooling Legislation, 1940-1960* 21 J Law & Econ 203-16 (1978).

³⁵ See text at note 43.

ing social cost would have to be compared with the benefit in correcting what amounts to a nonneutral burden on parochial education.³⁶ This is an example of divergence between the "efficiency" and "neutrality" baselines. If neutrality is the baseline, then even if school funding is inefficiently high, there is no justification for discriminating between schools on the basis of religion.

B. The Separation-of-Functions Approach

While neutrality explains the decision in *Everson*, a second explanation is also plausible: that the state can finance bus transportation because it is an inherently secular function. Bus transportation makes the child's attendance at school safer, but it neither adds to nor subtracts from the religiosity of the educational experience. In *Lemon v Kurtzman*,³⁷ the Supreme Court held that a different resolution is required when a state seeks to finance aspects of parochial education that are, or might be, infused with religion. Most of the Court's education decisions came to rely on this second explanation of *Everson*, thus creating a constitutional rule that the government may subsidize only the secular aspects of parochial education. But since money is fungible, support for one activity of an organization supports every other activity as well. The Court's approach thus fails to answer the question of precisely what amounts or forms of aid promote the religious components of parochial education. Economics may supply the answer.

1. Joint Costs and Ramsey Pricing.

Distinguishing between aid to the religious and nonreligious components of parochial education involves what economists call the problem of "joint costs." A joint cost is a cost incurred in the production of two or more different outputs.³⁸ Consider the production of beef and hides from the same steer, and suppose it costs

³⁶ Nonparochial private schools tend to cater to the children of the well-to-do (for whom public schools are often not attractive substitutes to private schools), and hence are harmed less than parochial schools are harmed by the subsidy for public education.

³⁷ 403 US 602, 616-17 (1971).

³⁸ See Sidney Davidson, et al, *Managerial Accounting: An Introduction to Concepts, Methods and Uses* 668-72 (Dryden, 2d ed 1985). Joint costs are often distinguished from "common costs," the former being costs incurred in the production of two or more outputs in fixed proportions through a single process, the latter being the costs of facilities or inputs that are shared by the production of two or more outputs such that an increase in one output entails a decrease in the other. See, for example, Alfred E. Kahn, 1 *The Economics of Regulation: Principles and Institutions* 78-79 (Wiley, 1970). For purposes of our analysis there is no relevant difference between "joint" and "common" costs.

\$200 to raise the steer, \$75 to tan the skin, and \$100 to butcher the carcass. The clearly separable cost of the beef is \$100, but that leaves \$200 unaccounted for. What portion of the \$200 is attributable to the hide and what part to the beef? The question is unanswerable; causal allocations of joint costs are inherently arbitrary. All one can say is that the production cost of the beef and hide together is \$375, that the cost of the beef is between \$100 and \$300, and that the cost of the hide is between \$75 and \$275.³⁹

The parochial school, like the steer, produces two outputs: nonreligious education and religious education. Although some of the school's costs are incurred solely in producing one output or the other—these are the “separable” costs, the costs that would be avoided completely if one or the other output were discontinued—many items in the parochial school budget, including buildings, most salaries, and administrative expenses, are joint costs; they are essential to both the religious and nonreligious components of the educational package that students receive.⁴⁰ If our constitutional theory demands that the joint costs of parochial education be allocated as to ensure that tax money is not used for the religious component, it is no wonder that the decisions seem arbitrary.

To answer the question of allocation we must first determine why we are asking it. The objective in regulatory economics is to bring about results as close as possible to those that perfect competition would bring about—roughly, the same levels of output that would be produced in a market not afflicted by externalities, natural monopoly, or other factors that by distorting competition may justify government intervention. So we should begin by asking how a competitive market allocates the joint costs, for example, of beef and hide. The answer is that it is allocated in accordance with the respective demands for the two goods; producers will expand output to the point where the sum of the market price for beef and the market price for hide is \$375. (We assume for simplicity that the costs incurred in producing the steer, beef, and hides are invariant to the amount produced.) Suppose that, because the demand for beef is greater, the market price of the beef of one steer at the equilibrium output is \$290, and the market price of the hide is only \$85. Then the hide is contributing “only” \$10 to the joint cost (\$85 minus the separable cost of \$75), and the beef is contributing

³⁹ Davidson, *Managerial Accounting* at 669 (cited in note 38) (“there is no theoretically correct or objective method of spreading the total cost over the various joint products”).

⁴⁰ See McConnell, 1986 BYU L Rev at 438-39 (cited in note 11).

the other \$190. This is the competitive allocation and it would be wrong from an economic standpoint to regard it as involving a subsidy from beef to hide. Indeed, a "fairer" allocation could hurt all concerned, including consumers of beef. Suppose the joint costs were divided 50-50. Then the price of beef would be \$200 and the price of hide \$175 (in each case \$100 plus separable cost). Very few people would buy hides. Suppose none did. The producer's total revenue, now only \$200, would fall far short of his total costs (\$300, if no hide is produced), and he would have to curtail his output—to zero if we adhere to our assumption that costs are invariant to output. Consumers of beef, on the other hand, would face severe shortages—if there were beef at all.

When a joint cost is fixed (e.g., assume a fixed stock of buildings usable as schools), the correct allocation of the cost—the allocation closest to that which perfect competition would bring about—is given by Ramsey pricing, which requires pricing each output inversely to the elasticity of demand for it.⁴¹ Elasticity of demand measures the responsiveness of the demand for a given product to changes in its price, and is determined by the intensity of preference that consumers feel for the product and (a related, perhaps identical, point) the availability of substitutes. The greater the intensity of consumer preference (taking into account substitutes), the less a change in price will affect demand and so the lower the elasticity of demand will be. Since the objective of the pricing scheme is to minimize the effect of cost allocation on the quantities demanded of the joint products, and thereby more closely approximate a perfectly competitive market, a greater fraction of the joint costs should be allocated to the product with the lower elasticity of demand. That is, a higher price should be charged for the product whose price matters least to consumers. The more elastic product should be priced to recover all of its separable costs and make the largest possible contribution to covering the joint costs. The contribution may be small. Precisely because the demand for this product is relatively elastic, the point will quickly be reached where raising the price further will hurt sales more than it will increase revenue. So the less elastic product will

⁴¹ For a simple introduction to Ramsey pricing see Posner, *Economic Analysis* § 12.5 at 329-33 (cited in note 31). For fuller analysis see William J. Baumol and David F. Bradford, *Optimal Departures from Marginal Cost Pricing*, 60 Am Econ Rev 264 (1970); Kahn, 1 *Economics of Regulation* at 77-84 (cited in note 38). The equivalent approach in accounting is called the "relative sales value method," Davidson, *Managerial Accounting* at 669-70 (cited in note 38).

be left to bear a higher proportion of the joint costs. As in our beef-hide example, it is easily shown that if a "fairer" allocation is attempted, all consumers may be worse off. Confronted by a higher price to cover the larger allocation of joint costs to that good, consumers of the elastic good may abandon it, making it impossible for the producer of the joint output to cover his total costs without raising his price for the product that is in inelastic demand.

Ramsey pricing could, in theory and to some extent in practice, be used to guide cost allocation in cases under the Establishment Clause. Just as regulatory economics seeks to allocate costs in the regulated environment in the way that most closely approximates the competitive outcome, the First Amendment requires government to act in such a way as to leave religious choices unaffected (neither "advanced" nor "inhibited"). Just as Ramsey pricing of, say, long distance and local telephone service (viewing the cost of the basic telephone network as a fixed cost of producing both services) will maximize the production of both services and minimize distortions in the demand for each relative to the other, so Ramsey pricing of public assistance to parochial education would maximize the production of education with minimum effect on the choice of religious over secular, or secular over religious, education.

To illustrate, suppose the total annual cost per pupil in a particular parochial school is \$1,000 per year. The separable cost of the religious component of the school's program is \$100, the separable cost of the secular component is \$200, and the joint cost is \$700. The state would pay at least \$200, the parents at least \$100, and the \$700 would be divided inversely to the relative elasticities of demand for secular and religious education. If (as seems plausible) the demand for secular education is less elastic than the demand for religious education, the state would be required to pay more (perhaps much more) than half the \$700 joint cost.

The problem lies in measuring the elasticities of demand for the two types of education. This measurement has never been attempted. Even so, it is apparent that the government could support a sizable fraction of the total costs of parochial school education without subsidizing religion in an economically meaningful sense. It could pay for all of the separable costs of secular education and a part of the joint costs.

Even though parochial schools receive a substantial subsidy from the churches with which they are affiliated (in the form of facilities and low price labor as well as charitable donations), many parochial schools have been forced to close in recent years because

of financial shortfalls. This suggests that the demand for parochial education is probably highly elastic. Moreover, much of the attraction of parochial schools, especially in the large cities, is their superior provision of secular education.⁴² To the extent that a portion of the tuition that parents are willing to pay is attributable to non-religious factors, parochial school tuition overstates the value to parents of the purely religious components of parochial education. These observations do not establish how large the government contribution to the costs of parochial education could be, but do suggest that it could be substantial.

Consider a hypothetical town that has two schools, one public, one parochial; each has 500 pupils, and in each the per pupil cost of education is \$4,000 per year. (In fact, the per pupil cost in parochial schools tends to be lower than in public schools, largely because of volunteer assistance, the use of church property for facilities, and lower wages.) All the religious parents in the town are willing to pay up to \$3,000 for parochial school tuition, but every \$100 increase in tuition above that level would induce the parents of fifty pupils to withdraw their children from the parochial school and enroll them in the public school. To prevent this from happening, the town has granted a subsidy of \$1,000 per parochial school student. The subsidy makes everyone better off. The parochial school families continue to use the parochial schools, which is their preference. At a cost of only \$500,000, the town has 500 fewer students in its public schools, thereby saving \$2 million. By spending only \$500,000 in public money, the town has induced parochial school families to spend an additional \$1.5 million on education.⁴³

Some readers may be disturbed that the use of Ramsey pricing to decide establishment questions would maximize the output not only of secular education (whether provided by public or parochial schools) but also of religious education. But consider: if by paying some of the joint costs of parochial education government enables parochial schools to flourish, their tuition will rise, and at least

⁴² Catholic schools attract many non-Catholic students; these students (or their families) tend to choose parochial education for reasons other than its religious component. See Dirk Johnson, *Catholic Schools Reach Out to Serve Poor and to Borrow*, *NY Times* 1, 12 (Sept 13, 1988).

⁴³ Any smaller subsidy would be inefficient. For example, a \$100 per pupil subsidy would cost \$5,000 and would save \$200,000 in public school expenditures (a net benefit of only \$195,000), and even a \$900 per pupil subsidy, which would cost \$405,000, and save \$1,800,000 would yield a net benefit of only \$1,395,000, compared to \$1.5 million at \$1000 per pupil. Any subsidy over \$1000 would simply reduce the amount parochial school families paid for education.

some of that income will go to pay the costs of the secular component as well, thus reducing the education expenses of the government. By encouraging parochial school education, government would be saving the taxpayer money. Even if the government is indifferent to the utility some parents get from their choice of religious education, it should provide some subsidy. Only if the provision of religious education were a public detriment—and the religion clauses preclude the government from making such a judgment—would it be rational for the government to refuse to pay a portion of the cost of parochial education regardless of the principles of efficient pricing.

Against this background we shall examine how the Supreme Court has dealt with the problem of parochial school aid.⁴⁴ Having done that we shall explore a variety of other economic approaches to the joint cost problem, inferior in coherence and neutrality to the Ramsey approach but superior to the Court's approach.

2. *The Supreme Court's Approach.*

The earliest Supreme Court cases on parochial school aid approved subsidized bus transportation and free secular textbooks for children who attended both public and private schools.⁴⁵ Then came a case striking down subsidies to the salaries of parochial school teachers.⁴⁶ Both types of decisions are relatively easy to understand. Public subsidies for bus rides and (less clearly) secular textbooks are permissible since these activities by their nature are nonreligious, without any need for continuing scrutiny to make sure they stay that way. Public subsidies for teachers' salaries are impermissible, since a teacher might at any time incorporate religious elements into his teaching.

The distinction between inherently nonsectarian aid and aid that might be diverted to religious purposes helps to explain another result: the invalidation of tuition subsidies because there was "no endeavor to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former."⁴⁷ It may also be the key to the crazy

⁴⁴ Contrasting views of the objectives of the Court's cases can be found in McConnell, 1986 BYU L Rev at 429-42 (cited in note 11); John Garvey, *Another Way of Looking at School Aid*, 1985 S Ct Rev 61; Leo Pfeffer, *God, Caesar, and the Constitution* 228-97 (Beacon, 1975).

⁴⁵ *Everson v Board of Education*, 330 US 1 (1947); *Board of Education v Allen*, 392 US 236 (1968).

⁴⁶ *Lemon v Kurtzman*, 403 US 602 (1971).

⁴⁷ *Committee for Public Education v Nyquist*, 413 US 756, 783 (1973), quoting *Lemon*

quilt set of distinctions that the Court began to make in the mid-1970's: in favor of school lunches, state prepared standardized tests, on-premises diagnostic services, off-premises therapeutic services, and off-premises remedial education; against bus rides on field trips, maps, films, laboratory equipment and other instructional materials, teacher-prepared tests, on-premises therapeutic and remedial services, and maintenance and repair of school buildings.⁴⁸ No theory of joint costs allocation is consistent with all of these results. They bear no relation to Ramsey pricing, but Ramsey pricing is not the only method found in regulatory economics for allocating joint costs. Other methods, less attractive theoretically but in some contexts easier to apply, might be applied to the problem of public aid to parochial schools. The Supreme Court's results, however, do not coincide with any of the known methods of cost allocation.

3. *Stand-Alone Pricing.*

This is the cost accounting method nearest to the approach actually used by the Supreme Court, the decisions of which suggest (but do not consistently adhere to) the proposition that the government may pay the "separable cost" of providing nonreligious education in parochial schools but none of the joint costs. Stand-alone pricing might appeal to advocates of a "no aid" view of the Establishment Clause. It would require a parochial school to bear the full cost of its religious schooling standing alone, just as if the school did no secular teaching at all. The school would have to bear the entire salary and benefits of teachers who did *any* religious teaching and the entire cost of administration, of the school building, and of teaching materials for courses with any religious content.⁴⁹

Although stand-alone pricing is the implicit theory of many of the Court's decisions, including those prohibiting the states from contributing to teachers' salaries, maintenance and repair costs, and general purpose tuition, consistent application of the stand

v. Kurtzman, 403 US 602, 613 (1971); but see *Mueller v. Allen*, 463 US 388 (1983) (upholding tax deductions for tuition and other educational expenses).

⁴⁸ For a chart of the Court's decisions in this area, with citations, see Garvey, 1985 S Ct Rev at 67 (cited in note 44).

⁴⁹ A good example of stand-alone pricing as a regulatory technique is the Tennessee Valley Authority's allocation of the costs of multipurpose river development projects. See Federal Power Commission, Report on Review of Allocations of Costs of the Multiple-Purpose Water Control System in the Tennessee River Basin 21-22 (1949); Kahn, 1 *Economics of Regulation* at 151 and n 67 (cited in note 38).

alone pricing methodology would require the Court to overrule some of its decisions. It is difficult to see, for example, why transportation to school should be treated as a separable cost of nonreligious education. In order for students to receive religious education in a parochial school, they must get to school; the cost of transportation is a joint cost of religious and nonreligious education. On the other hand, why should the government be forbidden to provide remedial English and math courses to needy school children attending parochial schools?⁵⁰ Providing such courses does not decrease the cost to the parochial school of providing religious education. For the government to provide remedial courses is no more a subsidy to the religious function than paying the cost of tanning hides is a subsidy to consumers of beef.

While stand-alone pricing would provide a consistent and coherent way for the courts to administer the *Lemon* test, it is an unsatisfactory solution. The stand alone price of parochial education approximates the true cost only under the assumption that parochial schools would be built and staffed on their current scale even if their sole output were religious schooling. Of course they would not be, just as much less hide would be sold if beef were not valued. Indeed, to assume that the output of these schools would be the same if they produced a single rather than joint output is to contradict the assumption that the schools incur joint costs to produce a joint output. To disallow government subsidy of part of the joint cost of religious and secular education is to make religious education relatively more expensive than it would be under competitive conditions.

4. *Fully Distributed Cost.*

One of the most popular regulatory methods for allocating joint costs is to divide them among the various outputs according to some convenient physical measure.⁵¹ For example, the Federal Power Commission used to allocate the drilling costs of wells that produced both petroleum and natural gas to the two commodities in proportion to the BTUs produced by each fuel.⁵² Similarly, the joint costs of mail delivery might be divided among the various

⁵⁰ See *Aguilar v Felton*, 473 US 402 (1985); *Grand Rapids School District v Ball*, 473 US 373 (1985); *Meek v Pittenger*, 421 US 349, 370-72 (1975).

⁵¹ See Charles T. Horngren, *Cost Accounting: A Managerial Emphasis* 603-604 (Prentice-Hall, 2d ed 1967); Davidson, *Managerial Accounting* at 671 (cited in note 39).

⁵² See Stephen Breyer and Paul W. MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv L Rev 941, 956 (1973).

classes of mail in proportion to their weight (or the number of pieces, or volume, or any of a number of alternative measures).⁵³ If raising cattle were a regulated activity, the joint costs of beef and hides might be allocated in proportion to the relative weights of the two outputs. Suppose that if this were done, 30 percent of the joint cost would be allocated to hides and 70 percent to beef. Then the "cost" of the hides would be \$135, the "cost" of the beef \$240, and any lower prices would be presumptively "discriminatory." This example shows the economic unsoundness of pricing according to fully distributed costs. Under our hypothetical conditions of demand, fully distributed cost pricing would result in zero sales of hides, less production of steers, and a lower output of beef, thereby inducing consumers to shift to inferior substitutes for both hides and beef. The popularity of fully distributed cost accounting, insofar as it is not merely a device for subsidizing products for which the elasticity of demand is low,⁵⁴ is due to the fact that it is much simpler to administer than Ramsey pricing.⁵⁵

The easiest way to apply fully distributed cost methodology to the parochial school problem would be by means of a survey of an average school day to determine what proportion was devoted to strictly nonreligious education (as opposed to religious or mixed religious-nonreligious training). The government would be permitted to pay up to that proportion of the joint costs (plus all separable costs of nonreligious education). If there were doubts about the accuracy of the technique, the decision makers could allow a margin for error. Thus, if the survey showed that 10 percent of the school day was devoted to religious education, it would be possible to set a generous margin for error and still permit the government to pay three quarters of the joint costs.

The Supreme Court rejected an argument along these lines in *Committee for Public Education v Nyquist*, stating that "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education."⁵⁶ The Court used an example from an earlier case in which the state had sought to pay 15 percent of the salary of teachers of secular subjects in paro-

⁵³ See *National Ass'n of Greeting Card Publishers v United States Postal Service*, 462 US 810, 816-17 (1983).

⁵⁴ See Richard A. Posner, *Taxation by Regulation*, 2 Bell J Econ & Mgmt Sci 22, 26 (1971).

⁵⁵ A recent demonstration of the utter manipulability of fully distributed cost methods, with actual examples, is William J. Baumol, et al, *How Arbitrary Is "Arbitrary"? or, Toward the Deserved Demise of Full Cost Allocation*, 120 Pub Util Fortnightly 16 (Sept 3, 1987).

⁵⁶ 413 US 756, 778 (1973).

chial schools. Common sense suggests that this is an adequate "statistical guarantee;" surely at least 15 percent of the teaching of *secular* subjects in parochial schools is secular. The Court, however, stated that "[i]t takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny."⁵⁷ This is sheer *ipse dixit*.⁵⁸

5. *Avoided-Cost Pricing.*

The theory of avoided-cost pricing is that prices should be determined on the basis not of the cost to the supplier but of the cost saved by the purchaser from not having to produce the service itself. The most prominent application in modern regulatory economics is the pricing of electric power produced by cogenerators. Under the Public Utilities Regulatory Policy Act, electric utilities are required to purchase cogenerated power at a rate equal to the utility's avoided cost—the amount it would have cost the utility to produce that amount of power.⁵⁹ The virtue of the method is that it does not require data on the cogenerator's costs, but relies on already available data on the utility's costs.

Avoided-cost pricing would allow the government to contribute to the parochial schools up to the amount it would cost the public schools to absorb the students now served by the parochial schools. No assessment of the cost structure of the parochial school would be required.

Dean Choper has proposed a similar approach:⁶⁰

⁵⁷ Id at 779.

⁵⁸ The Court also rejected two variants on the theme: (1) payment of the cost of maintenance and repair of private school buildings up to a limit of 50 percent of the cost of maintenance and repair of public school buildings or a dollar cap (id at 777-80), and (2) payment of 50 percent of the cost of secular facilities, with a 20-year restriction on religious use. As to the second variant—taken from *Tilton v Richardson*, 403 US 672 (1971)—the Court commented: "[The Court in *Tilton*] was plainly not concerned only that at least 50 percent of the facility, or 50 percent of its life, be devoted to secular activities. Had this been the test there can be little doubt that the 20-year restriction would have been adequate." 413 US at 779 n 36. Why this was not the "concern" was not explained. It is hard to see why the government has a legitimate interest, consistent with the Free Exercise Clause, in leveraging its contribution to ensure that the religious institution's share of the expenditures is not used for religious purposes.

⁵⁹ 16 USC § 824a-3 (1982); see *American Paper Institute v American Electric Power Service Corp.*, 461 US 402 (1983).

⁶⁰ Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—an Update*, 75 Cal L Rev 5, 14 (1987). For a fuller statement see Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Cal L Rev 260 (1968).

There is a secular purpose [for aid to parochial schools] as long as the amount of the government expenditure does not exceed the value of the secular services provided by the parochial schools. To put it another way, as long as the government receives secular value for its money, there is no expenditure of tax funds for religious purposes

This is a sensible observation from an economic standpoint. Economics distinguishes between a purchase (even a purchase for the benefit of a third party) and a gift or a subsidy. Although the grocer "benefits" when the customer purchases a head of lettuce, the purchaser is not thereby "subsidizing" the grocer. Parochial schools benefit when the government makes it possible for families to obtain educational services from them, but this is not a subsidy so long as the value to the "purchaser," that is, the government (measured by avoided cost) exceeds the price (i.e., the government aid).

C. Determining the Real Beneficiary

A third explanation for the result in *Everson* continues to play a major role in parochial school litigation. It is the idea that the bus transportation in *Everson* primarily benefited the parents (or the children) rather than the parochial school. This is because the school had not been paying for the transportation prior to the government's action, and thus was not relieved of any burden.⁶¹ This raises the issue of what economists call "incidence": who ultimately bears the burden, or receives the benefit, of a tax or subsidy?⁶²

In *Everson*, the benefit is received in the first instance by the parent, who receives reimbursement for the price of transportation. However, incidence analysis teaches that the immediate recipient is not necessarily the ultimate beneficiary. The subsidy for trans-

⁶¹ *Everson v Board of Education*, 330 US 1, 18 (1947). This "child benefit theory" is presented more explicitly in *Board of Education v Allen*, 392 US 236, 243-44 (1968) (upholding loans of secular textbooks to parochial school students).

⁶² For a small sampling of the extensive economic literature on incidence theory, see Richard Musgrave and Peggy B. Musgrave, *Public Finance in Theory and Practice* (McGraw-Hill, 3d ed 1980) (especially chapters 12-13, 19-21, setting forth the general theory and applying it to corporate income taxes, sales taxes, and property taxes); Robin W. Broadway, *Public Sector Economics*, ch 11 (Winthrop, 1979); Anthony B. Atkinson and Joseph E. Stiglitz, *Lectures on Public Economics*, chs 6-8 (McGraw-Hill, 1980). Compare Charles E. McLure, Jr., *Incidence Analysis and the Supreme Court: An Examination of Four Cases from the 1980 Term*, 1 S Ct Econ Rev 69 (1982) (applying incidence analysis to constitutional questions under the Commerce and Equal Protection Clauses).

portation lowers the full price to the student and his parents of attending parochial school, and thereby increases their willingness to pay for the tuition component. The school may therefore be able to raise tuition without losing students, and if it uses the additional tuition to reduce the subsidy needed from the church or to increase expenditures on religious activities, it will have appropriated for religious uses some or all of the benefit of the transportation subsidy. Another possibility is that the subsidy (if passed on) may induce parents and parochial schools to increase spending on school transportation (and hence education in a broad sense), on secular education, or on both. Thus, the ultimate beneficiaries might be: (1) the parents, (2) the church, (3) the public (if they want more spending on education), or (4) some combination of (1) through (3). If the predominant effect were (1) or (3), the program would be constitutional under the "child benefit" theory recast in economic terms. If the predominant effect were (2), it would be unconstitutional under that theory.

The evidentiary requirements of this theory (which resembles the "passing-on" approach that the Supreme Court has rejected in the antitrust area)⁶³ would be formidable. School bus transportation and schooling are complements; that is, a fall in the price of one (transportation) will increase demand for the other (schooling). Under normal cost conditions an increase in demand will result in both greater output and higher prices—here, higher tuition for parochial schooling. Parents will be better off, because the sum of the lower transportation cost and the higher tuition will be lower than before the subsidy (otherwise the demand for parochial education would not grow). Parents will also be spending more on education, and that means more on secular education because the secular component of parochial education is very large. Only if the parochial school sector cannot readily expand is the transportation subsidy likely to enure predominantly to the benefit of the churches, by translating into a tuition increase not offset by a significant expansion in educational services.

These considerations suggest that, as the Court has held, subsidizing parochial school bus transportation on the same terms as public school bus transportation is acceptably neutral. But

⁶³ The "passing-on theory" suggested that indirect purchasers might be able to recover treble damages for overcharges if they could prove "that the overcharge was passed on to them through intervening links in the distribution chain." *Illinois Brick Co. v. Illinois*, 431 US 720, 727-728 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 US 481 (1968).

whether it would be feasible in the setting of litigation actually to measure the incidence of a subsidy for purposes of applying the child benefit theory may be doubted. In any event, since the Court has shied away from "complex factual inquiries about such issues as elasticity of demand for the product and alternative sources of supply," even in more overtly economic contexts,⁶⁴ it is doubtful that it would want to make them here.

D. Summary

We have analyzed aid to parochial schools from three economic perspectives, corresponding to the three possible doctrinal explanations for the result in *Everson*. The first is general neutrality theory, patterned on the concept of tax neutrality in public finance economics. Here the question is how public support for education can be provided without distorting the relative demand for religious or nonreligious education. The second, inspired by regulatory economics, is cost allocation theory. Here the question is how government can subsidize the secular components of parochial education without subsidizing (in an economic sense) the religious components. The third is the "child benefit" theory, patterned on the economic theory of incidence. Here the question is whether the effect of financial aid to parochial education is to reduce the cost to parents, to improve the financial condition of religious schools (and thereby free up resources for religious uses), or to increase expenditures on the secular aspects of parochial education.

The three approaches yield different answers, which is not surprising, since they are directed to different questions. What is surprising, perhaps, is that all three approaches yield answers sharply different from those offered by the Supreme Court. The Supreme Court's analysis of "primary effect" appears to reflect no coherent theory at all. Thus economics both confirms the consensus of academic lawyers that the Court's parochial school decisions have been doctrinally chaotic and points to several more promising alternatives.

III. FREE EXERCISE EXCEPTIONS TO OSTENSIBLY NEUTRAL REGULATIONS

While the Establishment Clause forbids the government to use its power and fiscal resources to favor religion or religious institu-

⁶⁴ *Commonwealth Edison Co. v Montana*, 453 US 609, 619-20 n 8 (1981) (incidence of state severance tax on coal); and see cases cited in note 63.

tions, the Free Exercise Clause forbids the government to use its power and resources to disfavor religion or religious institutions. The two provisions are complementary, together protecting religious choice from government interference whether in favor of a religion (or religion in general) or against it.

Despite this seeming complementarity, the Supreme Court often describes the two clauses as in "tension."⁶⁵ However, this "tension" arises only when courts exceed the requirements of the Establishment Clause and forbid the provision of benefits to the religious sector that are not "subsidies" in any coherent sense. To deny a benefit to a religious institution when that benefit is not a subsidy is equivalent to imposing a tax on religion. The converse is also true. An overzealous interpretation of the Free Exercise Clause, under which religious observance receives government benefits or protections not needed to counterbalance measures that can fairly be said to interfere with religion, is likely to promote religious observance, in violation of the Establishment Clause. But if "benefits and burdens" (subsidies and taxes) are correctly understood, there is no tension between the prohibition of the one and the prohibition of the other. Rather, the combination creates a free market in religion.⁶⁶

The free exercise formula espoused by the Supreme Court can be seen as a specific application of the more general definition of neutrality set forth in section I. According to the Court, the government may not impose a burden on the practice of religion unless it is justified by a compelling governmental purpose, which subsumes the requirement that no means less restrictive of religious freedom would achieve that purpose.⁶⁷ Compare this to our definition of neutrality. Rule 1 is that effects of government action on religious practice must be minimized, and can be justified only on the basis of demonstrable and unavoidable relation to a public purpose unrelated to the religious effect. This is comparable to the requirement of "compelling governmental justification" and "least restrictive alternative." Rule 2 is that religious institutions or activities can be subjected to different treatment only when neces-

⁶⁵ See, for example, *Thomas v Review Board*, 450 US 707, 719 (1981); *Committee for Public Education v Nyquist*, 413 US 756, 788 (1973); *Norwood v Harrison*, 413 US 455, 469 (1973); *Tilton v Richardson*, 403 US 672, 677 (1971).

⁶⁶ This is not to say that there is no room for governmental discretion; the Establishment Clause does not forbid everything that the Free Exercise Clause does not require. See *McConnell*, 1985 S Ct Rev at 29-34 (cited in note 5).

⁶⁷ *United States v Lee*, 455 US 252, 257-258 (1982); *Thomas v Review Board*, 450 US 707, 718 (1981); *Wisconsin v Yoder*, 406 US 205, 214-15 (1972).

sary to minimize the effect of government action on religious practice or to achieve a public purpose unrelated to religion. This is fully consistent with the Court's free exercise formula; religion-specific exemptions can be justified only because of burdens on free exercise. Rule 3 is that public purposes cannot include effects (even secular effects) that follow from the adoption or rejection of a religious faith. This parallels the principle that the freedom to believe is absolute, but not the freedom to act.⁶⁸ The government may not suppress a religious faith because that faith leads to bad results; it must confine its attention to the results.

The Free Exercise Clause is thus the mirror image of the Establishment Clause. Both clauses are best interpreted from the standpoint of neutrality. Together they reconcile the broad governmental authority of the modern welfare-regulatory state with the preservation of private choice—a free market—in religion.

Under this approach, it is clear that religious institutions and religiously motivated conduct may be regulated by the state,⁶⁹ though they may not be singled out on the basis of religion in general, or any specific religion, for special regulations or burdens. Such clear-cut discrimination against religion is rare (though there have been cases of it⁷⁰), and today usually takes the form of misguided constructions of the Establishment Clause.⁷¹

More interesting, it may be impermissible to regulate churches and religiously motivated conduct, even under formally neutral criteria, in ways that have a substantially greater impact on religious exercise than on other activities. Examples of regulations that have such differential impact are regulations prohibiting polygamy, requiring as a condition of receiving unemployment benefits that the unemployed person be willing to work on Saturdays, and prohibiting the covering of one's head while playing interscholastic basketball.⁷² These regulations do not single out religious persons or

⁶⁸ *Cantwell v Connecticut*, 310 US 296, 303-04 (1940).

⁶⁹ See generally Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash & Lee L Rev 347 (1984).

⁷⁰ See, for example, *Larson v Valente*, 456 US 228 (1982); *Davis v Beason*, 133 US 333 (1890); *Niemotko v State*, 194 Md 247, 71 A2d 9 (1950), reversed in *Niemotko v Maryland*, 340 US 268 (1951).

⁷¹ See, for example, *Witters v State*, 102 Wash 2d 624, 689 P2d 53 (1984), rev'd in *Witters v Washington Department of Services for the Blind*, 474 US 481 (1986); *Chess v Widmar*, 480 F Supp 907 (W D Mo 1979), remanded in *Chess v Widmar*, 635 F2d 1310 (8th Cir 1980), aff'd in *Widmar v Vincent*, 454 US 263 (1981).

⁷² See *Reynolds v United States*, 98 US 145 (1878); *Sherbert v Verner*, 374 US 398 (1963); *Menora v Illinois High School Ass'n*, 683 F2d 1030 (7th Cir 1982). A troublesome group of cases that we will not discuss involves prison regulations that bear hard against

members of particular denominations for harsher treatment than the rest of the population, and generally are not motivated by hostility to the groups that are burdened (prohibiting polygamy may be an exception). But a regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities.

Thus, if prohibiting polygamy imposes a disutility equal to \$2X on Mormons due solely to their religious beliefs, while allowing them to practice polygamy would impose costs of \$X on the rest of society, the prohibition is unreasonable (and the holding in *Reynolds* erroneous). Reverse the figures, and the prohibition is as neutral as possible when all relevant costs are taken into account. But an important qualification should be noted. If the only disutility from polygamy consists of the aversion that the majority feels toward the alien practices of a minority faith, the prohibition could not be justified by the economic definition of neutrality employed in this article. For it is a limited analysis, which rules out of bounds costs consisting solely of aversions toward religion or particular faiths. Just as we would not think that the value that bigoted whites attach to discrimination against blacks would count toward justifying such discrimination under the Equal Protection Clause of the Fourteenth Amendment, so dislike of the Mormon religion should not have weighed in the balance in the *Reynolds* case.

The questions that concern us here are (1) whether from an economic standpoint the Court's current free exercise doctrine, which requires exceptions from regulation that burdens the practice of religion in the absence of a compelling justification, violates the Establishment Clause; (2) when it can be said that religion is "burdened" by government action; and (3) what justifications for government regulations are "compelling."

A. Are Free Exercise Exceptions Establishments?

The paradigmatic case of a free exercise exception to a regulation of general applicability is *Sherbert v Verner*.⁷³ A textile worker in Spartanburg, South Carolina, was a member of the Seventh Day Adventist Church, which observes a strict sabbath on

religious inmates. See, for example, *O'Lone v Estate of Shabazz*, 482 US 342 (1987); *Azeez v Fairman*, 795 F2d 1296 (7th Cir 1986); *Reed v Faulkner*, 842 F2d 960 (7th Cir 1988).

⁷³ 374 US 398 (1963).

Saturday. When her employer went to a six day week (remaining closed on Sunday), Mrs. Sherbert was forced to choose between violating a tenet of her faith and losing her job. To make matters worse, the other textile mills in Spartanburg went on the same six day schedule, making it impossible for Mrs. Sherbert to obtain a job in her craft in Spartanburg without violating a tenet of her religion. Under South Carolina law, an unemployed person who "has failed, without good cause . . . to accept available suitable work when offered" cannot receive unemployment benefits.⁷⁴ The Supreme Court held that the state could not deny Mrs. Sherbert unemployment benefits on the ground that she had not made herself "available" for work; denying the benefits imposed a "fine" for her obedience to religious principles.⁷⁵

Assuming that the denial of unemployment benefits is equivalent to a "fine" on the practice of religion—a proposition we examine below—the question remains whether the Court's ruling unconstitutionally favors religion. Religious scruples are not the only reason someone might be unavailable for work. There might be reasons of political conviction (not wanting to work for a military contractor), of moral obligation (needing to take care of an elderly parent on weekends), or of personal preference (not wanting to miss the Saturday ball game). If denying benefits to Mrs. Sherbert was a "fine" for practicing religion, denial of benefits in these other cases would be a "fine" for pacifism, caring for dependents, or watching sports. Why should religion be the only area of individual choice immunized from governmental pressures? As Justice Harlan said, "What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions."⁷⁶

⁷⁴ Id at 401, quoting the South Carolina Unemployment Compensation Act, 68 SC Code §§ 68-114(3)(a).

⁷⁵ Id at 404.

⁷⁶ Id at 420 (dissenting opinion) (emphasis in original). Justice Harlan did not therefore conclude that it would be unconstitutional to extend unemployment benefits to persons whose unavailability for work was attributable to religious reasons without extending it to others. He said that would be an "accommodation of religion" permitted by the Establishment Clause, but not required by the Free Exercise Clause. Id at 422. "The constitutional obligation of 'neutrality' [citation omitted] is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." Id. He subsequently modified his position, holding in *Welsh v United States*, 398 US 333, 356 (1970) (Harlan concurring), that it is unconstitutional to exempt religious conscientious objectors from military service without also exempting others whose objection is based on nonreligious reasons.

As with the issue of "aid" under the Establishment Clause, the question is baseline. What is the proper reference point for determining whether a denial of benefits or alternatively a grant of benefits is neutral in its impact on religion? The majority opinion implicitly adopts the view that the reference point is the range of choices faced by the individual affected by the action. This approach might be called "incentive neutrality." The purpose of the Free Exercise Clause, in this view, is to remove governmental disincentives to religious choice. Denial of benefits "forces [Mrs. Sherbert] to choose" between following her religion and being eligible for unemployment compensation.⁷⁷ An exception is justified because Mrs. Sherbert faced an economic incentive to violate her religion that she would not have faced if there were no unemployment compensation system.

Justice Harlan's position, on the other hand, takes as its reference point the full range of motivations for conduct. It might be called "category neutrality." The purpose of the constitutional provision, in this view, is to ensure that the government treats religious choices the same way it treats other categories of belief, preference, and motivation. If religious choice is protected, category neutrality requires that other choices—based on nonreligious reasons—must be given similar protection.⁷⁸

It is impossible to achieve *both* incentive neutrality and category neutrality. Incentive neutrality presupposes that government action bearing on religion must be treated differently from government action bearing on other categories of belief, motivation, or preference, while category neutrality leaves the government with the same authority to create incentives or disincentives to religious exercise that it has with respect to other choices, provided, of course, that it does not single out religion.⁷⁹ As a practical matter,

⁷⁷ 374 US at 404 (majority opinion).

⁷⁸ Id at 422-23 (Harlan dissenting); *Welsh v United States*, 398 US 333, 356-59 (1970). Even accepting Justice Harlan's approach of category neutrality, the Court's result in *Sherbert* might be defended as follows. State law entitles unemployed workers to reject "unsuitable" work based on a wide range of characteristics specific to the individual. The result in *Sherbert* can therefore be said to treat religion no differently from the way it treats other, nonreligious, factors relevant to "suitability." Justice Stevens, the Court's most consistent advocate of category neutrality in free exercise cases, concurred on this ground in a rerun of *Sherbert*. *Hobbie v Unemployment Appeals Comm'n of Florida*, 480 US 136, 148 (1987) (Stevens concurring).

⁷⁹ For a similar argument in the area of race, see David A. Strauss, *The Myth of Colorblindness*, 1986 S Ct Rev 99, arguing that a requirement of colorblindness (the equivalent to incentive neutrality) singles out the category of race for special treatment. Strauss's argument is different from ours because, having shown that colorblindness is not category neutral, he concludes, in effect, that equal protection must not be about neutrality at all.

attempting to pursue both incentive neutrality and category neutrality straitjackets the government's ability to differentiate between people on grounds clearly relevant to public policy. In the unemployment compensation case, it would require the government to treat religious choice neither more nor less favorably than other forms of individual choice, from indolence to ball games to family responsibilities. The state would be unable to restrict unemployment benefits to those willing to work: incentive neutrality would require an exception for religious reasons while category neutrality would preclude greater solicitude for religious than for other excuses, including a preference for leisure over work.

Economics cannot tell us which of these baselines to choose. The choice requires consideration of such legal authorities as text, history, and precedent.⁸⁰ If, however, incentive neutrality is a legitimate perspective,⁸¹ a religious exemption would not violate the Establishment Clause merely because it protected the exercise of religion more than other choices. Neutrality toward religion need not imply neutrality toward religious freedom.

B. What is a "Burden on Religion?"

Not every government action that makes it more difficult to practice religion is a "burden on religion" in an economically meaningful sense. A uniform head tax would reduce the believer's disposable income and thus make him less willing to donate his time to religious volunteer work, but the effect would be far different from that of a tax of comparable size on singing in the church choir. There are three plausible distinctions between these examples, of which two have economic interpretations.

1. The burden imposed on religion by the head tax is shared broadly by all other nonremunerative activities, including leisure. The tax creates no incentive to choose nonreligious over religious activities. In economic parlance the tax has an income effect but not a substitution effect. Since the Free Exercise Clause is concerned with government action that creates a disincentive to reli-

⁸⁰ Contrast *Estate of Thornton v Caldor, Inc.*, 472 US 703, 710 n 9 (1985); id at 711 (O'Connor concurring) (law "singles out Sabbath observers for special . . . protection without according similar accommodation to ethical and religious beliefs and practices of other private employees"), with *Corporation of Presiding Bishop v Amos*, 107 S Ct 2862, 2869 (1987) ("[w]here . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities").

⁸¹ As argued in McConnell, 1985 S Ct Rev at 1-3, 11-13, 14-24 (cited in note 5); and Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw U L Rev 146 (1986).

gious practice, a broad-based burden like a head tax is unproblematic. In contrast, a tax on singing in the church choir would make a particular religious activity more costly in relation to other uses of time and would therefore be an impermissible burden on religion.

2. The head tax should be viewed in connection with the public services for which it pays. Since religious persons are taxed under it no more than anyone else, and since they receive a proportionate share of government services (except schools!), there is no systematic redistribution of wealth from the religious to the nonreligious or vice versa. In contrast, a tax on singing in the church choir (unless imposed to pay for the marginal social costs of that very activity) would require those who participate in a religious activity to bear a disproportionate share of the overall burden of paying for public services.

These two distinctions suggest an economic test for free exercise violations. The two effects—substitution and disproportionate burden—work together to create a burden on free exercise. The government practice creates an incentive for the believer to “substitute away” from the religious alternative toward a competing secular activity. If he substitutes away, he can avoid some or (more likely) all of the disproportionate burden. By refusing to sing in the church choir, he is spared the special assessment. If, however, the believer holds firm and exercises the religious alternative (singing in the church choir), then he suffers imposition of the disproportionate burden (the tax). A burden on free exercise thus takes the form: either renounce your religious practices or bear a burden heavier than other members of society are required to bear. In the extreme case of absolute coercion, the believer is prevented from practicing his religion altogether; he has no choice and bears no disproportionate burden, other than the prohibition of his free exercise.

3. The head tax makes no explicit or intentional reference to religion, while the tax on singing in a church choir does (given the definition of “church” as a religious body). Professor Kurland suggests that the religion clauses be “read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion”⁸² This position, we believe, is too limiting. To prohibit

⁸² Philip B. Kurland, *Religion and the Law* 18 (Aldine, 1962); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill L Rev 3, 24 (1978).

members of the military from wearing hats is to bar Orthodox Jews from the military as surely as to bar them by name.⁸³ The critical question from an economic standpoint is not whether the government policy uses neutral terminology but whether it imposes unjustifiable costs on the exercise of religion.

This is not to deny that a regulation that explicitly subjects a religious faith to a disability is worse than one that does not; hostility is worse than insensitivity. A regulation that forbade Orthodox Jews to pilot military aircraft would harm Orthodox Judaism more than the hat regulation, even if fewer individuals were affected, because of the greater symbolic significance of the former regulation. But our focus is on regulations that do not purport to single out religion, or particular religious sects, for disadvantageous treatment, for it is here that the interesting economic questions are found.

The regulation struck down in *Sherbert* can plausibly be seen as both having a substitution effect and (much less clearly) imposing a disproportionate burden on religion and thus (probably) flunking the economic test for a violation of the Free Exercise Clause. The choices open to Mrs. Sherbert were two: declare her "availability" for work on Saturdays and receive benefits, or refuse and be denied them.⁸⁴ The substitution effect is plain. That the state would also have denied benefits if she had been unavailable because of nonreligious reasons is irrelevant, since she was not choosing between observing her sabbath practices and becoming unavailable for nonreligious reasons.

The question of disproportionate impact can be argued either way. While she was working, Mrs. Sherbert paid money (in the form of foregone wages) to the unemployment compensation fund, in return for which she was insured against involuntary unemployment. However, the terms of the "insurance policy" made it worthless to her, since as a condition to receiving the benefit she would have had to be willing to accept a job on Saturday. She and her co-religionists were taxed for a benefit they could not enjoy. A similar, but clearer, example is *United States v Lee*,⁸⁵ in which the Supreme Court held—seemingly contrary to its holding in *Sher-*

⁸³ See *Goldman v Weinberger*, 475 US 503 (1986).

⁸⁴ We assume that Mrs. Sherbert's original job was no longer open and that her ineligibility for benefits was due to her refusal to be "available" for Saturday work that presented itself. If she agreed to work on Saturday and then got her old job back, she would have no further need for benefits.

⁸⁵ 455 US 252 (1982). More on *Lee* shortly.

bert—that the Amish can be required to pay social security taxes even though they are precluded by their faith from accepting social security benefits.

Perhaps, however, allowing Mrs. Sherbert to receive unemployment benefits would force other workers to bear a disproportionate share of the burden of the social security system. All workers pay the same implicit “premium” for unemployment insurance, and all workers, religious as well as nonreligious,⁸⁶ are insured against the risk of unemployment due to economic causes, like recessions or relocations. Under *Sherbert*, religious workers are insured against an additional risk, not borne by nonreligious workers: the risk that their work may become unsuitable for religious reasons. Mrs. Sherbert, for example, became unemployed when her employer shifted to a six day work schedule. Requiring the state to pay benefits to Mrs. Sherbert is a bit like requiring an insurer to include smokers in a health insurance program at no additional premium. The state’s solution was to exclude religious “risks” from coverage, arguably averting a disproportionate impact based on religion by giving equal coverage to all workers. An alternative—albeit an unpalatable one—would have been to charge a premium to employers of Saturday sabbatarians.

*Braunfeld v Brown*⁸⁷ is another case in which the question of disproportionate impact is ambiguous. Mr. Braunfeld was an Orthodox Jewish merchant whose religious faith required that he close his store on Saturday. The state, for what the Supreme Court concluded were secular reasons, required that all stores be closed on Sunday. Was the Sunday closing law a burden on Mr. Braunfeld’s exercise of religion? As in *Sherbert*, we must compare the choices facing him if there were no such law. Under the latter assumption Mr. Braunfeld would keep his store open six days a week, while his competitors would keep their stores open seven days a week.⁸⁸ Assuming equal business each day of the week, he would make 6/7 of the sales of his competitors. Under the Sunday closing law, Mr. Braunfeld could keep his store open only five days

⁸⁶ We are using the term “religious workers” loosely here to mean those who are likely to have religious scruples that may interfere with their work. We also are assuming (possibly contrary to fact) that except for the problem of religious scruples, religious and nonreligious workers are equally likely to suffer unemployment.

⁸⁷ 366 US 599 (1961).

⁸⁸ The analysis is changed if we assume that other shopkeepers would, for religious or other reasons, keep their stores closed on Sunday even without the Sunday closing law. Under this assumption, the only persons affected by the law would be those who observe the sabbath on days other than Sunday—clearly a disproportionate burden.

a week, and his competitors six. He therefore made only 5/6 of the sales of his competitors. (If we assume that weekends are especially busy sales days, the effects will be greater; if we assume they are less busy, the effects will be less. This point was not addressed in the *Braunfeld* opinions.) The law thus increased the pressure on him to violate his sabbath, but only by a small amount—the difference between 6/7 and 5/6. Most of the economic pressure on Mr. Braunfeld existed whether or not there was a Sunday closing law.

Compare this burden with the benefit if Saturday sabbatarians are exempted from the Sunday closing law. Mr. Braunfeld will remain open six days a week, the same number of days as his competitors, but, as the Court pointed out,⁸⁹ will gain a competitive advantage. Since most stores are open on Saturday and closed on Sunday, a store open on Sunday will get a larger share of the business than one open on Saturday. Thus, giving Saturday sabbatarians a free exercise exemption will make them better off than they would be in the absence of a Sunday closing law. If the constitutional rule is that religious exemptions can be given only to the extent necessary to relieve external burdens on religion, and not to give believers an advantage over nonbelievers, then the facts in *Braunfeld* fall between the two halves of the rule. Perhaps that is why the Court decided to leave the decision to legislative discretion.⁹⁰

Not all free exercise cases present the ambiguities of *Sherbert* and *Braunfeld*. The most common case is one in which because of religious doctrines, a burden that is imposed on everyone in society is particularly costly to the religious person. For example, in *Menora v Illinois High School Athletic Ass'n*,⁹¹ high school basketball players were forbidden, for safety reasons, to wear headgear during interscholastic games. This was a relatively trivial imposition on most players, amply outweighed by the rule's safety benefits (limited though they were—the main concern was that headgear would fall off during play and players would slip on it). To an Orthodox

⁸⁹ *Braunfeld*, 366 US at 608-09.

⁹⁰ *Id.*; *Arlan's Department Store, Inc. v Kentucky*, 371 US 218 (1962). A wholly neutral solution would be to require all shopkeepers to close on one of the weekend days, leaving them to choose which one. Saturday Sabbatarians would close on Saturday; Sunday Sabbatarians would close on Sunday; and those deciding on secular grounds would equalize the marginal gains from being open on the two days. If there are shopkeepers in the community who observe a sabbath on a weekday, as do the Muslims, additional modifications would be required.

⁹¹ 683 F2d 1030 (7th Cir 1982). One of the authors of this article wrote the opinion for the court in *Menora*.

Jew, however, not covering the (male) head is an affront to God; he would rather not play basketball than play with his head bared. The rule created a burden on religion in both the senses discussed above: it created a disincentive to follow the religious practices (if the Orthodox student agreed to do without his skullcap he would be permitted to play interscholastic basketball), and it bore disproportionately on the religious, in effect making them pay more for safety than the other players. All players are required to forgo headgear, but for most the cost of compliance with this rule is trivial. For the Orthodox students, the cost is high. In such a case, the outcome will depend on the strength of the governmental interest. In *Menora*, however, the competing interests could be accommodated readily by requiring the Orthodox Jewish players to wear a securely fastened head covering, which both complied with religious law and obviated safety concerns. The case was eventually settled on that basis.

Sometimes the burden on free exercise is produced through government control over the necessities of religious practice rather than through legal regulation. For example, for a prisoner to celebrate mass the government must supply the priest and the chapel. The same is true for military stationed in distant lands. In these circumstances, the failure of the government to undertake affirmative steps to make religious exercise possible will be the functional equivalent of absolute coercion: the believer will be forced to "substitute away" from the religious practice, and will not have the alternative of bearing a disproportionate burden.⁹² Similarly, if the government has taken possession of the sole holy sites of a religion, it comes under an obligation (balanced, as always, against its other interests) to administer the property in a way that will permit religious exercise to continue at those sites. It is no answer—contrary to the Supreme Court—to say that the Free Exercise Clause does not "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."⁹³ The issue is not whether the government's conduct of its "internal affairs" comports with anyone's beliefs, but whether the government's actions (internal or otherwise) have an impact on the

⁹² See *Cruz v Beto*, 405 US 319 (1972) (per curiam) (noting that prisons provide Catholic, Jewish, and Protestant chaplains and religious services); *Katcoff v Marsh*, 755 F2d 223 (2d Cir 1985) (stating that the religion clauses require the military to provide chaplains).

⁹³ *Lyng v Northwest Indian Cemetery Protective Ass'n*, 108 S Ct 1319, 1325 (1988). The governmental interest in the *Lyng* case is discussed below. For a recent discussion of *Lyng* and its relationship to burdens on free exercise, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv L Rev 933 (1989).

believer's own exercise of religion. Where government action has precluded private citizens from maintaining their religious practices without government cooperation, the government cannot then claim that a refusal to cooperate is "neutral."

*Bowen v Roy*⁹⁴ is arguably on the other side of the line, though it is not an easy case. In *Roy*, the plaintiffs, adherents to a religious faith inspired by Abenaki Indian tradition, believed that the government's use of their Social Security number for welfare fraud detection would rob their spirits of spiritual power. The Supreme Court's rejection of their claim was probably correct under the substitution test. Since the government policy complained of in *Roy* was unrelated to the plaintiff's own conduct—inducing them neither to act nor to refrain from acting—it had no first order substitution effect. The plaintiffs were spiritually aggrieved, but their conduct—their exercise of religion—was not directly affected. (One might analogize *Roy* to the case of a person who is spiritually aggrieved by his nation's conduct in war, or treatment of refugees, or failure to protect unborn children.) The case appears hard because the government's Social Security number policy imposed a disproportionate burden on the plaintiffs on account of their religious beliefs. To most of us, the government's use of our Social Security numbers is a matter of utter indifference; to the plaintiffs in *Roy* (assuming they were sincere)⁹⁵ it was a matter of spiritual concern.

Some free exercise cases involve religious institutions rather than individual religiously motivated conduct, but the principle involved is the same.⁹⁶ Regulations peculiarly disruptive to religious organizations may induce the organizations to alter their conduct or structure and will in any event impose costs on religion disproportionate to those imposed on other regulated activities. The issue of religious authority serves as an example. For many religious institutions, the hierarchical structure governing officials, agents, and employees is distinct from the ordinary relation of employer to employee. Application of particular regulatory schemes can sever

⁹⁴ 476 US 693 (1986).

⁹⁵ The plaintiffs modified their account of their religious views during trial for what might be seen as tactical advantage. See *id.* at 696-97. This is an example of a point made below: that novel or idiosyncratic religious beliefs do not carry the credibility of beliefs for which persons other than a plaintiff in a free exercise case have sacrificed in the past. See text at note 115.

⁹⁶ See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Church Labor Relations and the Right of Church Autonomy*, 81 Colum L Rev 1373 (1981); McConnell, 81 Nw L Rev at 158-61 (cited in note 81); for a contrary view, see Ira C. Lupu, *Free Exercise and Religious Institutions: The Case of Employment Discrimination*, 67 BU L Rev 39 (1987).

that authority and give lower ranking church agents rights and duties inconsistent with the religious structure. The Catholic schools in *NLRB v Catholic Bishop*,⁹⁷ for example, were under the spiritual authority of the Bishop. Unionization, with mandatory collective bargaining over a wide range of topics relating to the conduct of the schools and the teachers, would undercut the Bishop's authority. Application of the National Labor Relations Act to these institutions might⁹⁸ therefore subject the schools to a regime inconsistent with the hierarchical structure of the church. To make matters worse, the Act would give a governmental body—the Labor Board—the authority to determine whether the Bishop's decisions were a good faith discharge of his religious responsibilities rather than an unfair labor practice.

For a similar example from a different religious tradition, the fundamentalist schools in *Ohio Civil Rights Comm'n v Dayton Christian Schools*⁹⁹ believed that Christians who have a dispute with the religious institution have a religious obligation to follow the "Biblical chain of command" in raising their grievances; agreement to follow this procedure was made a condition of employment. Ohio civil rights laws, which prohibit employers from disciplining workers for lodging a grievance with the civil rights commission, would, if applied, interfere with a religiously determined employment practice.¹⁰⁰ Whether the government's interest was sufficiently compelling in these two cases to override the free exercise claims (the Supreme Court avoided this decision by interpreting the labor laws as exempting the schools in *Catholic Bishop* and by holding the claim of the Dayton Christian Schools premature), the claim of a burden on free exercise seems in both instances straightforward.

C. What is a Compelling Governmental Interest?

Once a burden on religious exercise is identified, the question becomes whether the interest behind the regulation is greater than

⁹⁷ 440 US 490 (1979).

⁹⁸ Might, not would, because no union might succeed in winning the support of the church's workers.

⁹⁹ 477 US 619 (1986).

¹⁰⁰ The Dayton Christian Schools also believe that a mother of small children has a religious duty to stay at home to care for them, if it is possible to do so. See *Dayton Christian Schools v Ohio Civil Rights Com'n* 766 F2d 932, 938-39 (6th Cir 1985), reversed in 477 US 619 (1986). Application of Ohio's laws against sex discrimination would make it illegal for the schools to remain faithful to this perceived religious duty. Secular employers face no such conflict.

the burden. The economist calls comparing benefits and burdens "cost-benefit analysis." As this is the economist's favorite tool for analyzing questions of public policy, it may seem that the application of economics to this branch of the free exercise inquiry would be unproblematic.

The difficulty is that the economist cannot put a price tag on the various dimensions of religious liberty that inform the religion clauses of the First Amendment. Even so, economics can provide a useful perspective. These economic insights take two forms: analysis of the different types of government interest and their corresponding strength as compared to free exercise, and principles for conducting the balancing.

1. *Government interests.*

Most government interests fall into one (or more) of four categories: (1) prevention of negative externalities; (2) provision of public goods; (3) paternalism; and (4) enforcement of morality. The balance between free exercise and government interest is different in each of these categories.

A negative externality is a cost that one person, firm, or group imposes on others without their consent. If I burn leaves in my back yard, the smoke wafted to my neighbor's land is a negative externality. At least for purposes of free exercise balancing, the prevention of negative externalities is the strongest of government interests. (Remember in Part I we excluded from consideration the psychic externality that others may be displeased by the knowledge that believers are practicing an "offensive" religion.) The government is justified in preventing imposition of a negative externality¹⁰¹ on outsiders to the religious community, even if this will impose a much greater burden on the exercise of religion. I have no right to walk across my neighbor's land without permission, no matter how vital it may be to my religion or how minor an imposition it may be on my neighbor. The free exercise clause does not allow believers to shift the cost of their religious practices onto others.¹⁰²

¹⁰¹ *De minimis* externalities are disregarded, as is the usual case under tort and nuisance law. *Bamford v Turnley*, 3 B & S 66, 122 Eng Rep 27 (1862); see Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J of Leg Stud 49, 82-87 (1979).

¹⁰² When the government is permitted under the Establishment Clause to accommodate religious exercise by imposing burdens on outsiders is a different issue. See McConnell, 1985 Sup Ct Rev at 53-55 (cited in note 5).

A public good is a good the enjoyment of which is not limited to those who buy from the producer; education is an example discussed earlier in the article. The opposite of a negative externality, it is sometimes called a "positive externality," because it confers a benefit on persons who do not pay for it. One of the functions of government is the provision or subsidization of public goods, which, since the producer cannot be compensated for their full value, will be underproduced in the absence of government intervention. Sometimes the production of a public good will involve a burden on free exercise. For example, national defense, a classic public good, requires a military, and military life may in some respects be inconsistent with the way of life dictated by religion. *Goldman v Weinberger*¹⁰³ was such a case: military uniform regulations precluded an Orthodox Jew from wearing the yarmulke required by his faith.

In public goods cases the balance that is required under the free exercise clause should not be presumptively weighted in either direction. Religious people, like everyone else, can be required to sacrifice for the public good, although the burden should be no greater than is necessary for achievement of that good and may not be imposed disproportionately on the religious. In *Goldman*, seven of the nine Justices concluded¹⁰⁴ that an exception for unobtrusive headwear, like a skullcap, would have virtually no deleterious impact on military morale or readiness. If one accepts their conclusion, it follows that Captain Goldman's claim should have been honored, since a serious burden is balanced against (almost) nothing. The best defense of the result in *Goldman* is that, notwithstanding the view of the seven Justices, judges should defer to the professional judgments of those in charge of institutions like the military or prisons, where the stakes are high and the insights and experience of judges more than usually limited. This posture of deference was the basis of Justice Rehnquist's opinion—though not of Justice Stevens's opinion for the other three members of the plurality.

Any standard higher than an even balance in public goods cases must find its justification elsewhere than economics, perhaps in the institutional concern that without a presumption in favor of minority religious practices they will not be given equal weight.

¹⁰³ 475 US 503 (1986).

¹⁰⁴ Id at 511 (Stevens, joined by White and Powell, concurring); id at 517 (Brennan, joined by Marshall, dissenting); id at 526 (Blackmun dissenting); id at 532 (O'Connor, joined by Marshall, dissenting).

While this even balance may seem a linguistic matter to diminish the protection accorded to free exercise under the Supreme Court's "compelling interest" test, in fact the Court has tended to treat almost any governmental interest, beyond mere administrative convenience, as sufficient to outweigh free exercise claims. A proper balancing of costs and benefits may prove more hospitable to free exercise claims than the largely rhetorical support they receive from the Supreme Court.

The public goods question is posed nicely in *Lyng v Northwest Indian Cemetary Protective Ass'n*.¹⁰⁵ The issue was one of competing uses of national forest land. Members of several Indian tribes in the area used a portion of the land, "the high country," for silent religious devotions. Lumber companies wished to log the area, and needed a logging road through the high country in order to bring lumber to market; other citizens would be able to use the road for other purposes as well. The road was incompatible with the Indians' religious devotions; protection of the Indians' holy sites was incompatible with the road. Even after concluding that building the road would effectively destroy the Indians' religion, the Forest Service decided to build it. As noted above, the Supreme Court avoided balancing in *Lyng* by refusing to agree that the government's use of public land could constitute a burden on free exercise. Had it recognized the burden, it would have been required to strike the balance. In public goods cases (unlike negative externality cases) the balance should be even: the point is to ensure that the Indians' religious claims are given weight commensurate with the secular claims of others. While the proper result in *Lyng* is not obvious, the injury to the Indians' religious interest appears unusually severe (destruction of their religion), while the secular interests seem relatively slight.¹⁰⁶

Paternalism is government action taken for the regulated party's own good. For purposes of the free exercise balance, this is the weakest government interest and should not be allowed to trump a free exercise claim, except possibly in the most extreme circumstances.¹⁰⁷ If a believer wishes to subordinate even his own

¹⁰⁵ 108 S Ct 1319 (1988).

¹⁰⁶ The lower courts had made factual findings that construction of the road "would virtually destroy the . . . Indians' ability to practice their religion" (795 F2d 688, 693), and that the benefits of the road were marginal (id at 695; 565 F Supp 586, 595-96).

¹⁰⁷ For possible examples, see *Mayock v Martin*, 157 Conn 56, 245 A2d 574 (1968) (rejecting free exercise claim to release from confinement made by person who removed his right eye and right hand for religious reasons, and who would cut off his foot if required by a revelation from God); *Tennessee ex rel Swann v Pack*, 527 SW2d 99 (Tenn 1975) (re-

self-interest (understood in secular terms) to the greater glory of God, who are the secular authorities to say that he is being injured or exploited? An illuminating recent example is *Tony & Susan Alamo Foundation v Donovan*.¹⁰⁸ The case involved application of the federal minimum wage law to a religious community in which the members lived and worked communally and regarded the acceptance of wages as spiritually grievous. Under our analysis, the principal avowed purpose of the minimum wage law—to protect the worker from exploitation by the employer—should be given no weight. If a believer wishes to serve the Lord in this way, the government has no legitimate interest in imposing itself between the believer and the church. The only plausible (though dubious) basis for upholding the statute would have been to protect the Alamo Foundation's business competitors from "unfair" price cutting made possible by the low wages (arguably a negative externality). Since the evidence in the case did not show any price cutting, that argument should have been rejected on the facts.

The fourth governmental interest is enforcement of public morality. (This category may be seen as a combination of the first three, but for analytical purposes we will treat it as distinct.) However extensive the government's authority may be to enforce majoritarian moral principles in most circumstances (obviously a controversial proposition), that authority should not extend to the internal activities of religious communities, where they do not inflict negative externalities. The moral structure of a religious community should be treated as an island of autonomy. This follows from the principles discussed in Part I: allowing outsiders to suppress religious practices simply on the ground that they "offend" is incompatible with any serious notion of freedom of religion. Thus, Orthodox Jews should not be required to seat women and men together in their synagogues, even though most people may regard segregated worship as offensive to the moral norm of equality between the sexes. Fundamentalist schools should not be required to

jecting free exercise claims by a pastor and church elder who were enjoined from handling poisonous snakes as part of a religious service). Even these examples, extreme as they are, are difficult to reconcile with the right of free exercise. In less extreme circumstances, believers are and should be permitted to risk life and health for their religion. See *Baumgartner v First Church of Christ Scientist*, 141 Ill App 3d 898, 490 NE2d 1319 (1986) (rejecting tort claims based on perceived inadequacy of Christian Science healing on the ground that the deceased had a right to choose that form of healing).

¹⁰⁸ 471 US 290 (1985). Readers should be aware that one of the authors, McConnell, was principal author of the brief for the government in this case, although the analysis here is quite different from the government's position.

hire teachers who violate their religious precepts;¹⁰⁹ Catholic orphanages should not be required to teach their charges about artificial contraception or abortion; in another era, a Christian college should not have been required to comply with Kentucky's Jim Crow laws.¹¹⁰ And the issue in the polygamy cases should have been whether polygamy harms the children of polygamous marriage or other persons, not simply whether it offends majority sensibilities.

The boundaries between these categories are sometimes indistinct. Religious fraud cases and tort suits against cults or deprogrammers often turn on whether the individual truly "consented" to induction into (or deprogramming out of) the religious community. If he did, then any "injury" received was a result of free choice and is of no concern to the government; if he did not, then he suffered injury (a negative externality) at the hands of the religious community without his consent, a matter of concern to the government.

A particularly difficult borderline case is that of children, who through their parents are "insiders" in the religious community but who cannot be said to have "consented" to that status. "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."¹¹¹ But the Court has also upheld the right of parents to control their children's education, even though it might "injure" the child's prospects for life, seen in secular terms. For most purposes, even outside the field of religious concerns, parents are deemed to "consent" on behalf of their children, on the theory that in most cases they will have their children's best interests at heart and that, even if they do not, there is no reason to suppose that the government would be much of an improvement. For decisions that affect religion, this presumption in favor of parental control is strengthened by the institutional consideration that decentralized decisionmaking about religion is vital to the survival of religious pluralism. Government interference may lead to religious homogenization.¹¹²

¹⁰⁹ *Ohio Civil Rights Comm'n v Dayton Christian Schools*, 477 US 619 (1986).

¹¹⁰ *Berea College v Kentucky*, 211 US 45 (1908).

¹¹¹ *Prince v Massachusetts*, 321 US 158, 170 (1944).

¹¹² Compare John H. Garvey, *Child, Parent, State and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S Cal L Rev 769 (1978); and Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 BU L Rev 971 (1987).

The issue in *Wisconsin v Yoder*¹¹³ was whether Amish parents could refuse to send their children to school after age 14 (two years below the age at which compulsory school attendance in Wisconsin ends). At first blush, the government's interest seems compelling: every state makes education compulsory, the total governmental expenditure on primary and secondary education—\$147 billion per year¹¹⁴—is the largest single item in the budget of local governments, and from this and other signs it is obvious that education is considered one of the most important of all government interests. But the compulsory schooling laws serve two purposes: production of a public good (an educated, productive citizenry) and paternalism (schooling is good for the children). The latter interest is offset, wholly or partly, by the parent's consent (strengthened by the contribution to religious pluralism); and at least some of the public good was achieved through the Amish system of informal education, which included cooperative endeavor and instruction in useful arts. With the state interests thus diminished, the balance may have weighed in favor of the free exercise claim, as the Court concluded.

2. *How to conduct the cost benefit test.*

The greatest difficulty with cost benefit tests is that the costs and the benefits cannot always be quantified in terms of a single metric. This is especially true of religious liberty. How can its value be measured? It is also true of the governmental interests in many cases, which often cannot be precisely quantified. But the difficulty of weighing nonpecuniary interests should not be exaggerated. Some interests can be weighed roughly even if they cannot be counted. And there is room for empirical work that would help quantify many governmental interests, such as safety, that do not have a direct price tag.¹¹⁵

The difficulty of quantifying the liberty side of the balance, while probably insuperable, is in part an artifact of free exercise jurisprudence itself. Were it not for the Free Exercise Clause, it would be possible to estimate the value that believers place on religious exercise. We know with reasonable confidence that Mrs.

¹¹³ 406 US 205 (1972).

¹¹⁴ *Public Elementary and Secondary Revenues and Current Expenditures*, Fiscal Year 1987 Final Tabulation, 1986 Revised Tabulation 10, Table 3 (National Center for Education Statistics, 1988).

¹¹⁵ See references in Posner, *Economic Analysis of Law* § 6.12 at 183 n 5 (cited in note 31).

Sherbert valued her religious conviction enough to sacrifice her job, and that many conscientious objectors value their religious convictions enough to go to jail. Armed with these implicit valuations or "shadow prices," (but notice that they are *minimum* estimates), we are in a much better position to compare the cost of denying an exemption from regulation to the benefits of such denial. In some cases, the question becomes easy: if we know that a particular conscientious objector will go to jail (however harsh the sentence) rather than fight, there is no point in jailing him. It is better for all concerned to give him alternative service.

Of course, knowledge of such counterfactuals may be hard to come by. A more interesting and important point is that once the free exercise exception has been announced, the "shadow prices" disappear. The cost to future Mrs. Sherberts of losing their jobs is cushioned by the availability of unemployment benefits; the conscientious objector knows he will not go to jail. The earliest claimants for a free exercise exemption will typically present an appealing case because the shadow price of claiming the exemption is evidence of the strength of their convictions. We cannot be so confident about subsequent claimants.

This is another reason free exercise claims are and should be more likely to prevail if they merely reduce the sacrifice required of the believer, as in Mrs. Sherbert's case, than if they make the believer better off than nonbelievers, as in Mr. Braunfeld's case. The sacrifice (Mrs. Sherbert lost her job) is evidence of the strength and sincerity of the plaintiff's convictions. Free exercise claims are also more likely to succeed if the claimant seeks a benefit of meager value to nonbelievers, as in *Menora*. Unlike the conscientious objector cases, there is little risk of ulterior motive for a claim to be allowed to wear a skullcap while playing basketball. This observation about shadow prices also explains why the courts often give greater credence to religious claims advanced by members of long standing, well established religious groups. It is not just a bias in favor of the familiar, though bias cannot be wholly discounted. If we know from history that adherents of a particular faith are willing to undergo great sacrifice rather than forswear a tenet of their faith, we can use this historically validated shadow price to estimate (very crudely of course) the burden to their current day successors. A novel claim by an individual not affiliated with a traditional denomination carries with it no historical

shadow price to lend credence to its strength and sincerity.¹¹⁶

A more common pitfall in judicial use of cost benefit analysis is to consider the two sides of the balance at different levels of generality. Not infrequently, courts weigh the particular burden on free exercise in the individual case against a powerful but abstract governmental interest that makes the free exercise claim appear insignificant. It is important to weigh the *marginal* impact on religious freedom against the *marginal* impact on the government's purposes. This insight does not produce an answer, but it frames the inquiry correctly.

*United States v Lee*¹¹⁷ (the case, already discussed, about requiring the Amish to pay social security taxes) illustrates the pitfalls of balancing marginal against total. The Court acknowledged that requiring the Amish to pay social security taxes would violate their religious beliefs,¹¹⁸ but rejected the free exercise claim because of the compelling nature of the governmental interest. The Court began its analysis by talking of the necessity of mandatory participation to "a comprehensive national social security system,"¹¹⁹ disregarding the fact that over the years Congress had created many other exceptions to mandatory social security coverage, including one for self-employed Amish.¹²⁰ These exceptions suggest that the shadow price of universal mandatory participation is not as high as the Court assumed. The Court then upped the ante by treating the claim as one for exemption from any tax where there is a religious objection to its use, giving the example of defense expenditures.¹²¹ This extension of reasoning was not apt. Unlike social security, in which nonparticipation results in a decrease in outlays as well as revenues, defense is a public good. The amount needed for defense does not decrease when some citizens want to opt out. By the end, the claim of "several" Amish farmers was balanced against "the broad public interest in maintaining a sound tax system."¹²²

The case looks quite different from the standpoint of marginal

¹¹⁶ Contrast *People v Woody*, 40 Cal Rptr 69, 394 P2d 813 (1964) (adherents to traditional Indian religion permitted to use peyote) with *Leary v United States*, 383 F2d 851 (5th Cir 1967), reversed on other grounds, 395 US 6 (1969) (academic with loosely-defined religious affiliation forbidden to use narcotics).

¹¹⁷ 455 US 252 (1982).

¹¹⁸ *Id* at 257.

¹¹⁹ *Id* at 258.

¹²⁰ *Id* at 260.

¹²¹ *Id* at 260.

¹²² *Id* at 254, 260.

analysis. The government's interest in social security is to ensure that each worker will be provided for in his old age.¹²³ Since the Amish will not accept social security benefits, and since their religious community has a well established tradition of providing for its own elderly, the only governmental interest advanced by imposition of the social security program on the Amish is the interest in maximizing the receipts of the social security system—an interest both purely redistributive, and trivial in the context of forcing the tiny population of Amish to pay social security taxes.¹²⁴

Although mindful of the pitfalls in using cost benefit analysis to resolve free exercise cases, we reject the suggestion in some free exercise decisions that there should be *no* balancing of benefits and burdens. These cases suggest the following decision making procedure: determine whether there is a burden on religion; if so, determine whether the interest in imposing that burden is compelling; if it is, the government wins, and if it is not, the plaintiff wins. But surely the relative strength of the two interests should not be totally disregarded. A stronger governmental interest should be required in order to overcome an onerous burden on religious freedom than in order to overcome a trivial one, and vice versa.

IV. THE EFFECT OF NEUTRALITY ON RELIGION

The question for "positive," or descriptive, economics—one exceedingly difficult to answer—is the consequence for religion of enforcement of the religion clauses. Does it help or hinder religion as a whole? Does it change the structure of the religion "industry" by favoring some denominations at the expense of others?

It is not entirely true, as it might appear to be, that subsidizing religion must help religion and taxing it must hurt it. David Hume, as noted in section I, favored an established church even though he was hostile to religion. He thought that clergymen on

¹²³ There is also a significant, but largely disguised, redistributive element (from upper to lower middle class) to social security. Given this element, the government, consistent with our analysis, could impose a tax on nonparticipants in social security equal to the anticipated redistributive portion of their social security contributions. Since Amish farmers are probably at the lower end of the wage scale, as measured in cash, this element is probably not significant in relation to them, and so could not justify the *Lee* decision.

¹²⁴ A better argument for the result in *Lee* would be that to exclude Amish from the social security system would intensify the economic pressure on them to remain within the Amish community, and thus constrain their free exercise right to change religions. Of course, as soon as a person leaves the community he begins accruing social security eligibility, a fact that relieves some of the economic pressure. Moreover, few will be tempted to leave the community once they reach retirement age—irrespective of social security benefits—having spent their whole life in the community.

government payrolls, like other civil servants, would lose their zeal. The opposition to mandatory church contributions in this country arose in part from a similar perception. Public opinion polls show a far higher intensity of religious belief in the United States than in any country in Western Europe (except Ireland, both north and south¹²⁵—and Ireland may be a special case with its long political history of intertwined religious, ethnic, sectional, and political rivalries), even though most western European countries have established churches. Although an established church might, by reducing religious diversity, quell the religious doubts that such diversity promotes—this may explain the long history of efforts to eliminate religious schisms by force—an offsetting effect seems dominant in the modern world: establishment reduces religious “product variety,” and in turn the demand for religion. In the United States, where no church is allowed to enlist the aid of government against other churches, diversity of religious beliefs and practices flourishes, enabling religion to appeal to a larger fraction of the population.

The free exercise cases work in the same direction. By taking into account the special costs that practitioners of minority faiths incur (minority faiths because laws generally reflect majority preferences—e.g., for which day businesses shall be required to close), these cases reduce the cost of practicing such faiths and by doing so tend to increase the variety of faiths, which in turn enables more people to find a set of religious practices and beliefs they can share.¹²⁶

If cases in the Supreme Court are any indication, regulation of religious activities in the public schools is probably the most significant application of the religion clauses. Often these decisions are

¹²⁵ See *The Gallup Report 236: Religion in America* 53 (Gallup, 1985). Iannaccone, *Testing Smith's Theory* (cited in note 3), regresses this data on measures of religious establishment, yielding the conclusion that among Protestants establishment indeed reduces religiosity, measured according to church attendance, belief in God, and the perceived importance of religion. On the religious establishments of Western Europe, see sources cited in Posner, 77 *Am Econ Rev Papers and Proceedings* at 12 n 19 (cited in note 2).

¹²⁶ It has been argued that the free exercise decisions of recent decades have strongly favored marginal religious sects. See Frank Way and Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 *Am Pol Sci Rev* 652 (1983). It may not be an accident that these nonmainline denominations have grown fastest during this period. See *Gallup Report* at 3, 11 (cited in note 125) (noting increase in evangelical, and decline in mainline, church membership in the United States). Nonlegal factors, such as the mainline churches' emphasis on social action, as opposed to spirituality, and demographics have contributed to the change. See Andrew Greeley and Michael Hout, *Musical Chairs: Patterns of Denominational Change*, 72 *Sociology and Social Research* 75 (1988); Dean M. Kelly, *Why Conservative Churches Are Growing* (Harper & Row, 1977).

viewed as hostile to religion, sparking demands for a school prayer amendment or similar overruling. Economic analysis indicates that the effect of these decisions is far more ambivalent than popular opinion suggests:

1. Compulsory school attendance laws, although they do not require parents to send their child to a public school, do require them to send their child to *some* school; and since public schools charge no tuition they have a competitive advantage over private schools, including parochial ones. The financial incentive to attend a public school is such that if the absence from such schools of prayer, Bible reading, etc., communicates a message that the school is hostile to religious values, the government could be thought to be subsidizing a secular point of view and hence "establishing" an ideology of secularism or nonbelief. The danger is especially great if the curriculum, rather than merely ignoring religion, emphasizes theories or values that contradict religious teaching.¹²⁷

2. There is another side to this coin: the secular thrust of public school education increases the demand for parochial education. (So, indeed, do compulsory school laws, which expand the demand for education whether public or private.) For religious persons, public schools that are perceived as secularizing institutions cease to be attractive substitutes for parochial schools; enrollments and revenues of parochial schools may therefore rise.

3. Since there is not one religious perspective but many, it is difficult and may be impossible to formulate a single public school curriculum that will be acceptable to all. Moreover, distaste for hearing the propagation of others' religion may outweigh the utility of hearing one's own propagated—making a secular public school system the powerful second choice of virtually everyone.

4. Some argue that school prayer, Bible reading, moments of silence, and so forth are justifiable as methods of reinforcing standards of morality and good conduct. The argument implies that public school religious exercises should be allowed because they generate external benefits (more education, less crime, etc.). In addition to objections based on point (3)—and, more fundamentally, on our disavowal (in the first section) of arguments for explicitly promoting religion for secular ends—the premise of the argument is questionable. A minor injection of religious values in public schools is unlikely to have much effect in inculcating children with moral norms, and the promotion of one religion may undermine

¹²⁷ See George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S Cal L Rev 864 (1988).

the religious and moral norms of children brought up in other faiths (including ethical secularism); the net external benefits may be zero, or even negative. Moreover, the school authorities would have to determine which religious beliefs have the best prospect of improving student behavior. The only course conceivably acceptable would be to include all religious persuasions, and comparable secular ethical systems, on a neutral basis. This would be exceedingly difficult to do. Even if it could be done, the effect would be to create an impression of religious relativism. If all religious beliefs are treated as equally worthy, the message is that none can be authoritative.

5. One might think that if parents, religious organizations, or other volunteers offered to pick up the full tab for religious activities in a public school, the element of subsidization would be removed. However, the use of public property for religious activities selected by government gives advantages (including the advantage of a captive audience) to these activities over others—including the alternative of no religion. Hence religious activities sponsored by the school itself must be distinguished from student initiated activities in which a broad spectrum of groups has access to (unoccupied) classrooms, the auditorium (when not in use), bulletin boards, etc., as part of a menu of competing activities from which students can choose.¹²⁸

A final group of cases invites attention even though they do not arise under the religion clauses. These are cases involving abortion, contraception, obscenity, illegitimacy, sodomy, and other practices or conditions that tend to offend religious people more than nonreligious people. Many of the judicial decisions in these areas invalidate on constitutional grounds (though generally not under the religion clauses) efforts by government to discourage the practices in question. Such decisions have a complicated impact on religions that disapprove of the practice in question. In part the decisions operate as a tax on those religions. Alternatively, they could be regarded as the elimination of a subsidy, especially if the government prohibitions had been designed to reinforce religious values. But this distinction is not important to the present discussion, which is about effects, rather than evaluation. By widening the gap between the demands of the religious code and the choices available to citizens at large, the decisions make obedience to religious precepts more costly. If contraceptives are illegal, a Catholic

¹²⁸ Compare Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw U L Rev 1, 53-54 (1986).

will experience little incremental cost from obeying the Church's teaching against birth control, but once they are legalized the Catholic will face a temptation to stray from the Church's teaching and ultimately to dissociate himself from the authority of the Church. On the other hand, the decisions also increase the value of religions to their adherents. If there is satisfaction to be derived from voluntary compliance with moral principles, the believer may be better off in a world with no civil sanctions for immoral behavior. By widening the differences between social practice and the religious life, these decisions give religious authorities a more prominent and distinctive role in the moral sphere. They are a spur to redoubled endeavors by the religious. They assist in "product differentiation."

The morality decisions probably affect different religions differently depending on the religions' intensity, including the degree to which they regard themselves as separate from the world. To a group that views the outside world with suspicion and its own separateness as evidence of holiness, such decisions may intensify its religious passion by sharpening the contrast between its holiness and the sinfulness of the world. The effect on less intense believers—those more inclined to live in spiritual harmony with the world around them—is more likely to be to dampen enthusiasm. So moderate churches are likely to lose influence relative to more enthusiastic sects. In the extreme case, where the costs of religious practice are greatly increased by persecution, one can expect to find fewer but more intensely committed believers. Maybe there is economic logic to the traditional belief that the church is nourished by the blood of martyrs.

A related point is that, by reducing the role of government as a shaper of moral conduct and so increasing the demand for such services from the churches, the morality decisions help those churches whose relationship with the government is competitive rather than complementary. Churches closely identified with the political "establishment" (used in its nonreligious sense), such as the mainline Protestant churches, have trouble distancing themselves from the public schools and other government institutions with which they have for so long been entwined. When those schools and institutions turn secular, as they have in recent decades—in part under judicial prodding—the position of the mainline churches is eroded. Since the non-mainline denominations tend also to attract the more intense believers, the effect of the morality decisions on competition within the religious sector seems clear and is consistent with the growth of these denominations in

recent years.¹²⁹

Here is our tentative, summary assessment of the effects of the modern judicial decisions on religion:

1. *Competition among religious institutions.* The Establishment Clause decisions, the accommodation decisions, and the "morality" decisions have hurt the mainline Protestant churches by undermining institutions with which they are allied and by reducing the costs of their rivals, the fundamentalist and evangelical denominations (along with Mormons, Jehovah's Witnesses, and similar sects). The courts may therefore have played a role in the precipitous decline of the mainline Protestant churches in recent decades.

The courts have helped the Catholic Church by upholding the property tax exemption, by shielding it from certain "entanglements" that might have hurt it,¹³⁰ and by increasing the demand for parochial education, which the courts have done (we conjecture) by taking the public schools, and government generally, out of the business of promoting religious and moral values. But the courts have hurt the Catholic Church by forcing it to bear a greater share of the cost of parochial education than it would bear under a neutral system of financing public education (e.g., through vouchers).

2. *Competition between religious and secular organizations.* Here the analysis is particularly complex, because of the ambivalent effect of the morality and establishment cases on religious belief—undermining it on the one hand but increasing the demand for the services of the institutions that inculcate it (the churches) on the other hand. Overall, however, the courts may well have increased the demand for religion by increasing the amount of religious "product variety."

V. CONCLUSION

Positive economics is a science of means and not of ends. It does not tell us what to value, but it can tell us the most efficient way to obtain what we value. This nation's commitment to freedom of religion is a value we take for granted, for purposes of this study, just as we take for granted the variety of religious beliefs and forms of religious organization in the nation. Our object has been to explore ways in which economics can show how the na-

¹²⁹ See note 125.

¹³⁰ As in *NLRB v Catholic Bishop*, 440 US 490 (1979), discussed earlier.

tional commitment to freedom of religion can best be accomplished.

Freedom of religion can be understood as a constitutionally prescribed free market for religious belief, and this makes economic understanding of the workings of free markets and the effects of government intervention (whether regulation or subsidy) pertinent to interpretation of religious cases. Since religion is a market (albeit a "deregulated" one) with close and unbreakable connections to many other markets in which government intervention is commonplace, absolute separation—the religious equivalent of the libertarian dream of the nightwatchman state—is therefore not a serious alternative. A comprehensive form of neutrality—of identifying and eliminating subsidies and taxes, disproportionate burdens and benefits—is the more promising route for protecting religious freedom, and economics a helpful guide.