



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 13 | Number 4

Article 4

9-1-1980

Village of Schaumburg v. Citizens for a Better Environment and Religious Solicitation: Freedom of Speech and Freedom of Religion Converge

William P. Marshall

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

William P. Marshall, *Village of Schaumburg v. Citizens for a Better Environment and Religious Solicitation: Freedom of Speech and Freedom of Religion Converge*, 13 Loy. L.A. L. Rev. 953 (1980).

Available at: <https://digitalcommons.lmu.edu/llr/vol13/iss4/4>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

**VILLAGE OF SCHAUMBURG V. CITIZENS FOR
A BETTER ENVIRONMENT AND RELIGIOUS
SOLICITATION: FREEDOM OF SPEECH
AND FREEDOM OF RELIGION
CONVERGE**

*By William P. Marshall**

INTRODUCTION

For more than forty years, the canvassing and soliciting activities of religious groups have been recognized as protected activities under the first amendment. The efforts of the Jehovah's Witnesses in attacking governmental regulation of this activity have resulted in "a full chapter of constitutional law"¹ by the Supreme Court.

The first amendment doctrines that have been developed in this chapter are as important as they are diverse. Examples of these doctrines include the expansion of the public forum,² the limitation of state discretion in licensing laws,³ the concept of "fighting words,"⁴ and, perhaps most importantly, the understanding that the door-to-door dissemination of ideas and information is one of the most vital methods of exercising first amendment rights.⁵

The most controversial holding of the door-to-door solicitation cases was announced in *Murdock v. Pennsylvania*.⁶ In a five to four decision, the Court ruled that, not only was the dissemination of religious information and the distribution of religious literature a protected activity,⁷ but the organization's appeal for funds was presumed to be protected as well.⁸ *Murdock* thus marked the first time the Court

* J.D. 1977, University of Chicago.

1. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 1.

2. See, e.g., *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Schneider v. State*, 308 U.S. 147 (1939).

3. See, e.g., *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

4. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

5. *Martin v. Struthers*, 319 U.S. 141, 145 (1943).

6. 319 U.S. 105 (1943).

7. *Id.* at 117.

8. The *Murdock* court did not directly state that the Jehovah's Witnesses' solicitation of

held that there was positive first amendment value in an appeal for funds.

One of the questions left unanswered in *Murdock* was whether a secular organization, or a religious group which had no religiously-mandated requirement to solicit (as did the Witnesses), could claim that their fund raising practices were entitled to first amendment protection as well. Thirty-seven years later, the question was answered in *Village of Schaumburg v. Citizens for a Better Environment*.⁹ In that case, the Court held that the solicitation of funds for charitable purposes by a nonreligious organization was "within the protections of the first amendment."¹⁰ Since *Murdock*, the Court had concluded in *Virginia Pharmacy Board v. Virginia Consumer Council*¹¹ that even commercial speech was entitled to some first amendment protection, albeit to a lesser degree than the core of noncommercial speech found at issue in *Murdock*. Therefore, the *Schaumburg* decision would not have been significant had the Court relied on *Virginia Pharmacy*, thus avoiding the *Murdock* issues. The Court, however, made it clear that the charitable appeal for funds was more than simply commercial speech; it was characterized as core first amendment activity.¹² Particularly noteworthy is the fact that the Court reached this decision with no more than passing reference to *Murdock*, again leaving unsettled the possibility that *Murdock* was solely a religious, and not a speech case.

The *Schaumburg* opinion comes at a time when the lower courts are dealing with a flurry of cases concerning the constitutionality of regulations affecting solicitation by religious organizations.¹³ Although

funds was protected under the first amendment, but this proposition can be inferred from the Court's holding. *See id.* at 111.

9. 444 U.S. 620 (1980).

10. *Id.* at 632.

11. 425 U.S. 748 (1976).

12. 444 U.S. at 632.

13. *E.g.*, *ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *ISKCON v. Bowen*, 600 F.2d 667 (7th Cir. 1979), *cert. denied*, 444 U.S. 963 (1980); *ISKCON v. Rochford*, 585 F.2d 263 (7th Cir. 1978), *aff'ing in part and vacating in part*, 425 F. Supp. 734 (N.D. Ill. 1977); *Edwards v. Maryland State Fair*, 476 F. Supp. 153 (D. Md. 1979); *Fernandes v. Limmer*, 465 F. Supp. 493 (N.D. Tex. 1979); *United States v. Silberman*, 464 F. Supp. 866 (M.D. Fla. 1979); *Walker v. Wegner*, 477 F. Supp. 648 (D.S.D. 1979); *ISKCON v. State Fair*, 461 F. Supp. 719 (N.D. Tex. 1978); *Hall v. McNamara*, 456 F. Supp. 245 (N.D. Cal. 1978); *ISKCON v. Kearnes*, 454 F. Supp. 116 (E.D. Cal. 1978); *ISKCON v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977); *ISKCON v. Evans*, 440 F. Supp. 414 (S.D. Ohio 1977); *ISKCON v. Contlisk*, 374 F. Supp. 1010 (N.D. Ill. 1973); *ISKCON v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

This list is by no means exhaustive. Both the International Society for Krishna Consciousness (ISKCON) and the Unification Church have separately undertaken litigation campaigns against various forms of governmental regulations of solicitation activity. All the

Schaumburg was not a freedom of religion case, the decision will have a profound effect on these lower court cases. The *Schaumburg* opinion suggests that certain types of state regulation can be maintained against even constitutionally protected solicitation.¹⁴

More fundamentally, however, *Schaumburg* will affect these lower court cases by contributing to our understanding of the first amendment values inherent in solicitation activity. The solicitation issue had not been before the Court since *Murdock*. The extent to which *Schaumburg* supplements the *Murdock* holding regarding religious solicitation is critical to this new series of religious solicitation cases.

This article will examine: 1) *Schaumburg* and its historical precedents, particularly *Murdock*, in an effort to determine what effect the decision will have on the religious solicitation controversy; 2) the speech and religious liberty interests that the Court has found in solicitation activity; and 3) the effect, if any, that those interests have upon each other. This article takes no position regarding the desirability of state regulation of solicitation, whether religious or secular, other than to take the Court at its word that such regulation, if properly tailored, furthers important state interests and can be constitutionally applied even to protected first amendment activity.¹⁵

I. *VILLAGE OF SCHAUMBURG V. CITIZENS FOR A BETTER ENVIRONMENT* : AN INITIAL GLANCE

In 1974, the Village of Schaumburg, Illinois, enacted a comprehensive ordinance regulating the solicitation activities of charitable organizations within the Village.¹⁶ Specifically, the ordinance required that "[e]very charitable organization, which solicits or intends to solicit

cases listed above, for example, have representatives of either the Unification Church or ISKCON as plaintiffs. See also FISHER, FROM CATHOLIC-BAITERS TO "CULTISTS": RELIGIOUS SOLICITORS IN THE COURTS (1979), for an account of some of the issues and strategies behind the litigation campaigns. Mr. Fisher is well-versed on the subject as he has represented both the Unification Church and ISKCON in many of these cases.

14. See text accompanying note 49 *infra*.

15. In Rakay & Sugarman, *A Reconsideration of the Religious Exemption: The Need for Financial Disclosure of Religious Fund Raising and Solicitation Practices*, 9 LOY. L.A.L. REV. 863 (1978), the authors strongly argued that state regulation of solicitations should be maintained against religious organizations. For an account of fraudulent fund raising solicitation schemes that have been perpetrated in the name of religion, see C. BAKAL, CHARITY U.S.A. (1979). Of particular interest are the author's accounts of the Sister Kinney and the Pallottine Mission scandals.

16. The ordinance is entitled "An Ordinance Regulating Soliciting by Charitable Organizations," and is codified as Article III of Chapter 22 of the Schaumburg Village Code, VILLAGE OF SCHAUMBURG, ILL., CODE ch. 22, art. III (1974).

contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit."¹⁷ The regulatory scheme required that such permit application be denied or granted on the basis of whether or not the particular application satisfied certain criteria required by the ordinance. Solicitation without a permit was prohibited.¹⁸

One of the conditions that a charitable organization had to meet to be eligible for a permit under the Schaumburg ordinance was to satisfactorily prove that at least seventy-five percent of the proceeds of its solicitations would be used directly for the charitable purpose of the organization, and not applied to administrative expenses.¹⁹

The plaintiffs, Citizens for a Better Environment (CBE), were a group "organized for the purpose, among others, of protecting, maintaining, and enhancing the quality of the Illinois environment."²⁰ They applied for, but were denied, a solicitation permit because they were unable to demonstrate that they complied with the seventy-five percent limitation.²¹ On the basis of this denial, CBE sued the Village in federal district court charging that the seventy-five percent limitation violated their rights under the first and fourteenth amendments.²²

CBE, in its complaint, described its solicitation activities as both an effort to achieve financial support and as an informational activity designed to provide literature, answer questions, and receive complaints from the public regarding environmental issues. The Village, in its response, alleged that the charitable purposes of CBE were "negligible as compared with the primary objective of raising funds."²³

In its complaint, CBE portrayed itself as an organization engaged in core (noncommercial) first amendment conduct. The Village ordinance was therefore characterized as a direct and impermissible restraint of such protected activity. The Village attempted to portray CBE and its activities as being solely commercial in nature to negate the argument that the ordinance invaded the province of core first amendment activity.

CBE, relying on the "overbreadth" doctrine, prevailed.²⁴ CBE

17. VILLAGE OF SCHAUMBURG, ILL., CODE § 22-20 (1974).

18. VILLAGE OF SCHAUMBURG, ILL., ORDINANCE 1052, §§ 1, 8 (1974).

19. VILLAGE OF SCHAUMBURG, ILL., CODE § 22-20(g) (1974).

20. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. at 625.

21. *Id.*

22. *Id.*

23. *Id.* at 626.

24. The "overbreadth" doctrine operates as an exception to the law of standing as it grants an aggrieved litigant, whose own speech was unprotected, the right to challenge the

was granted a motion for summary judgment in the district court, which held that the seventy-five percent limitation was void on its face. On appeal, the Village claimed that summary judgment was inappropriate given the factual disputes regarding CBE's fund raising practices.²⁵ The Seventh Circuit rejected the Village's argument. It affirmed the lower court decision because CBE attacked the ordinance on the grounds that it infringed core first amendment activity, and therefore, CBE was entitled to have the constitutionality of the ordinance judged on its face. The Seventh Circuit found the specific factual nature of CBE's activities to be immaterial.²⁶

The Supreme Court affirmed in a decision written by Justice White.²⁷ The Court wasted no time in addressing the heart of the Village's contention that the ordinance regulated only commercial and not protected activity. The Village urged that the ordinance should be sustained because it dealt only with solicitation and not with a charity's right to spread its views door-to-door without a permit.²⁸ The Court did not find the Village's argument persuasive and concluded that the financial and nonfinancial aspects of the solicitation could not be constitutionally distinguished. The entire solicitation encounter was of first amendment concern.²⁹

The next question which faced the Court was whether the district and circuit courts, by reviewing the statute on its face without reference to the factual nature of CBE's fund raising practices, properly adjudicated the constitutionality of the statute. The Village contended that CBE was more of a commercial than a noncommercial venture and thus did not have standing to argue that the ordinance infringed upon noncommercial or protected activity, an activity in which CBE was not engaged.³⁰ The Supreme Court again disagreed with the Village. The Court noted that although overbreadth analysis was inappropriate in commercial speech contexts, facial review of the statute was appropriate under the overbreadth doctrine in a noncommercial setting.³¹ The Court stated that the charitable appeal for funds was a form of non-

constitutionality of a statute which purports to "prohibit protected speech or even speech arguably protected" on the grounds that the regulation works as an overbroad intrusion into protected areas. *Young v. American Mini-Theatres*, 427 U.S. 50, 59 (1976).

25. 590 F.2d 220, 223 (7th Cir. 1978).

26. *Id.*

27. Eight Justices voted to affirm; Justice Rehnquist dissented.

28. 444 U.S. at 628.

29. *Id.* at 632.

30. *Id.* at 633.

31. *Id.* at 634.

commercial speech.³²

Having allowed the overbreadth challenge, the Court was quickly able to dismiss the seventy-five percent limitation as being unconstitutional.³³ The Village's prime defense was that the regulation served the Village's substantial interest in protecting the public from fraud. The Village argued that the percentage limitation furthered this purpose because the Village had specifically found that any organization using more than twenty-five percent of its receipts for administration constituted a commercial, and not a charitable, organization and that for such an organization to represent itself as a charity was fraudulent.³⁴ The Court rejected this premise and agreed with the Seventh Circuit that certain charitable organizations, specifically those that disseminate information about and advocate positions on matters of public concern, "necessarily would be unable to comply with the percentage limitation due to the inherent nature of those organizations."³⁵ Therefore, the classification was overlybroad and the Village could not delineate such groups as "fraudulent." The seventy-five percent requirement was too narrowly drawn and was therefore constitutionally void.³⁶

The Court stated that the Village might employ some less intrusive means to further its legitimate interest in preventing fraud. The Village, according to the Court, could utilize its penal laws to directly punish fraudulent misrepresentations.³⁷ Misrepresentations about charitable status might also be prevented, according to the Court, by disclosure laws which would inform the public about how their contributions were being spent.³⁸ The Court also noted a third possibility,³⁹ the legislative scheme upheld in *National Foundation v. Fort Worth*.⁴⁰ Although there was a percentage limitation in *National Foundation* similar to that in Schaumburg's statutory scheme, this limitation could be waived if the organization established that its administrative costs were reasonable.

The Court concluded its opinion by briefly addressing and dis-

32. *Id.* at 632.

33. *Id.* at 635.

34. *Id.* at 636.

35. *Id.* at 635.

36. *Id.* at 637.

37. *Id.* The Court cited *Schneider v. State*, 308 U.S. 147 (1939), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), as support for this proposition.

38. In this regard, the Court favorably noted that an Illinois statute required charitable organizations to register with the Attorney General's office and to report certain information about their structure and fund raising activities. 444 U.S. at 638 n.12.

39. *Id.* at 635 n.9.

40. 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970).

missing the Village's secondary argument that the ordinance was a legitimate means to promote public safety. As the Court pointed out, the relationship of the percentage limitation to public safety was attenuated at best, and certainly not of sufficient precision to withstand constitutional challenge.⁴¹

II. *VILLAGE OF SCHAUMBURG V. CITIZENS FOR A BETTER ENVIRONMENT*: A CRITICAL ANALYSIS

The central and critical holding of the *Schaumburg* case is clear: the appeal for charitable contributions is a protected activity under the first amendment.⁴² The Court's theoretical and precedential basis, however, is not clear. Justice White took great care to state that charitable solicitations are protected and that this holding involved no new conclusions on the part of the Court. He treated the issue almost cavalierly: "The issue before us, then, is not whether charitable solicitations . . . are within the protections of the First Amendment. It is clear that they are."⁴³ The Court, however, had never held that the solicitations of any nonreligious group were to be construed as protected activity. The Court therefore was disingenuous in describing this holding as "clear." In what is undoubtedly the most critical passage in the opinion, Justice White reasoned as follows:

Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for

41. 444 U.S. at 638-39.

42. *Id.* at 633. Justice Rehnquist argued in dissent that the holding was not clear because the Court granted first amendment status only to the solicitation activities of those groups whose "primary purpose is . . . to disseminate information about and advocate positions on matters of public concern," *id.* at 635, or to those groups who are "primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as to solicit financial support." *Id.* at 642. Justice Rehnquist wryly suggests this conclusion consists of two separate results. *See id.* at 641-42. Justice Rehnquist apparently misinterpreted the Court's opinion, however, because the Court clearly indicated that all charitable solicitation is protected activity. *Id.* at 632.

43. *Id.* at 633.

particular views on economic, political or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.⁴⁴

The Court stated that solicitation involves the communication of information, the dissemination and propagation of views, and the advocacy of causes.⁴⁵ It is also intertwined with informative and persuasive speech and is necessary as a financial reality to preserve the group's ability to continue the flow of information and ideas.⁴⁶ The Court noted that all these "elements" are of course within the protection of the first amendment.⁴⁷ Because the charitable appeal for funds contains these first amendment "elements," the Court concluded that the charitable appeal itself is core first amendment speech.⁴⁸ The Court's conclusion, however, does not follow from the Court's premise.

Simply stated, the fact that there are elements of first amendment concern within a given activity does not necessarily dictate that the activity as a whole should be construed as protected speech. If it did, then all actions in which an idea was somehow expressed would have to be construed as first amendment activity. This, of course, has never been the theory of the Court.⁴⁹ For example, it is clear that there are "speech" elements in what is known as commercial speech. In fact, it was the presence of such elements that led the Court in *Virginia Pharmacy*⁵⁰ to overrule the previous doctrine that commercial speech was not entitled to any first amendment protection. *Virginia Pharmacy* and its progeny⁵¹ make it clear that the mere existence of "speech" elements does not entitle a given communication to be automatically accorded noncommercial speech status. If it were otherwise, the commer-

44. *Id.* at 632.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See, e.g.,* United States v. O'Brien, 391 U.S. 367 (1968).

50. 425 U.S. 748 (1976).

51. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar*, 433 U.S. 350 (1977); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977).

cial/noncommercial distinction would collapse. Justice White's "elements" approach is thus not precedentially sound.

The Court was on firmer ground in arguing that precedential authorities had established that first amendment values did inhere in certain solicitation activity. However, none of the cases cited by the Court involved the financial solicitations of any nonreligious organizations. They therefore cannot be construed to stand directly for the proposition that the solicitation of funds by nonreligious groups constitutes protected activity under the first amendment. Further examination was required by the Court in order to determine how critical the religious aspect of the solicitation was to the previous cases, but such examination in *Schaumburg* is lacking.

The Court's use of precedents in the *Schaumburg* opinion is intriguing. The Court listed chronologically and discussed in turn nine cases which relate to canvassing and soliciting by religious and charitable organizations. There is no effort in the opinion to evaluate the precedential weight or relevance of these cases. This is particularly surprising because at least two of the cases arguably stand as authority against the position the Court ultimately takes.⁵² In two other cases the activity involved no financial aspects.⁵³ The final five cases, including *Murdock*, involved only the activities of religious organizations.⁵⁴ However, the Court did not discuss whether the religious solicitation cases are authority in the review of the constitutionality of regulations aimed at nonreligious organizations. In its discussion of *Murdock*, the Court did not state whether *Murdock* turned on freedom of speech or freedom of religion. A separate examination of these cases is therefore in order.

As Justice Rehnquist noted in his dissent in *Schaumburg*, the first two cases discussed by the Court, *Schneider v. State*⁵⁵ and *Cantwell v. Connecticut*,⁵⁶ turned on the excessive amount of discretion that the licensing officials had in determining which organizations would be granted permits to solicit or distribute literature within their communi-

52. *Breard v. Alexandria*, 341 U.S. 622 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

53. *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Thomas v. Collins*, 323 U.S. 516 (1945). No financial activity was involved in *Martin v. Struthers*, 319 U.S. 141 (1943).

54. *Martin v. Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939).

55. 308 U.S. 147 (1939).

56. 310 U.S. 296 (1940).

ties.⁵⁷ The licensing system in those two cases involved a system of governmental censorship that was constitutionally impermissible.⁵⁸ The only relation that *Cantwell* and *Schneider* have to the solicitation issue is that both cases held that the fact that a financial appeal accompanied the dissemination of information, did not automatically transform the venture into a commercial activity. The regulations before the Court in those cases prohibited far more than the financial aspect of the Witnesses' activity; they inhibited the rights of the Witnesses to express their views and disseminate their literature.⁵⁹ The regulations therefore were not so narrowly drawn as to avoid infringing upon protected areas and thus were unconstitutional. The Court in both *Schneider* and *Cantwell* noted that the solicitation of funds could be subject to general regulation.⁶⁰

*Valentine v. Chrestensen*⁶¹ and *Breard v. Alexandria*⁶² are authority for the proposition that commercial solicitations are susceptible to state regulation.⁶³ What is especially interesting about *Schaumburg*'s citation of these cases is that their conclusions as to what is commercial, or nonprotected speech, seem to conflict with that in *Schaumburg*. The holding of *Valentine* was that the mere presence of matters of possible public interest in an otherwise commercial solicitation does not automatically transform that solicitation into a noncommercial enterprise.⁶⁴ In so holding, the *Valentine* Court employed a tact directly opposite to the one noted above in *Cantwell* and *Schneider*, that the presence of a financial appeal in a religious solicitation does not automatically transform the religious appeal into a commercial venture. Thus, the arguable implication of *Valentine*, in light of *Cantwell* and *Schneider*, is that

57. 444 U.S. at 640 (Rehnquist, J., dissenting). Justice Rehnquist argued that *Largent v. Texas*, 318 U.S. 418 (1943), was distinguishable on this ground. As to the distinguishing aspect of *Largent*, Justice Rehnquist is correct. The holding in *Largent*, another religious solicitation case, did turn on excessive discretion. It has not been included in this analysis because the *Schaumburg* Court did not appear to cite *Largent* in its own right other than to note that the case stood for substantially the same proposition as did *Jamison v. Texas*, 318 U.S. 413 (1943).

58. *Schneider v. State*, 308 U.S. at 163-64; *Cantwell v. Connecticut*, 310 U.S. at 305-07.

59. See *Schneider v. State*, 308 U.S. at 163; *Cantwell v. Connecticut*, 310 U.S. at 305.

60. *Schneider v. State*, 308 U.S. at 165; *Cantwell v. Connecticut*, 310 U.S. at 306-07.

61. 316 U.S. 52 (1942).

62. 341 U.S. 622 (1951).

63. *Valentine* and *Breard* were hallmarks of the now out-dated commercial speech doctrine which held that commercial speech was wholly outside first amendment protection. Commercial speech is now held to be entitled some, albeit not full, first amendment protection. See *Bates v. State Bar*, 433 U.S. 350 (1977); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976).

64. 316 U.S. at 54.

only financial appeals of religious groups are noncommercial, as opposed to commercial activity.

The *Breard* holding is even more solidly against that in *Schaumburg*. In *Breard* the Court upheld, as to a magazine subscription solicitor, an ordinance which prohibited "solicitors, peddlers, hawkers, itinerant merchants, or transient vendors of merchandise" from canvassing on private property without permission.⁶⁵ The Court, in *Follett v. McCormick*⁶⁶ and *Murdock v. Pennsylvania*,⁶⁷ had previously held that the "sale" of religious literature was a protected activity. The Court in *Martin v. Struthers*⁶⁸ had struck down an ordinance similar to the one in *Breard* on the ground that such an ordinance was an impermissible restraint on the freedom to disseminate literature under the first amendment.⁶⁹ Seeking to expand these holdings to a nonreligious financial solicitation context, the petitioner in *Breard* attacked the ordinance as being an infringement on his first amendment rights of freedom of speech and of the press.⁷⁰ The Court, however, rejected the argument, and in doing so, explicitly limited the *Martin* holding to its factual situation, wherein the literature being distributed was an invitation to a religious service.⁷¹ The *Breard* petitioner, because he was not engaged in a religious activity, was not considered by the Court to be engaging in anything other than commercial conduct.⁷²

Three of the other decisions discussed in *Schaumburg*, *Martin v. Struthers*,⁷³ *Thomas v. Collins*,⁷⁴ and *Hynes v. Mayor of Oradell*,⁷⁵ involved no question of the solicitation of funds at all. *Martin* involved an attack by a Jehovah's Witness against an ordinance that provided as follows:

It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person

65. 341 U.S. at 624.

66. 321 U.S. 573 (1944).

67. 319 U.S. 105 (1943).

68. 319 U.S. 141 (1943).

69. *Id.* at 149.

70. 341 U.S. at 625.

71. *Id.* at 643.

72. *Id.* at 642.

73. 319 U.S. 141 (1943).

74. 323 U.S. 516 (1945).

75. 425 U.S. 610 (1976).

with them may be distributing.⁷⁶

The ordinance was obviously not aimed at the problem of financial appeals but, in the interests of privacy, was an all out ban on the dissemination and distribution of literature. Not surprisingly, the Court struck down the ordinance on free speech grounds. Justice Black, speaking for the Court, engaged in a lengthy dissertation as to the first amendment value in canvassing:

While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. . . . Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. . . . Door to door distribution of circulars is essential to the poorly financed causes of little people.⁷⁷

Justice Black noted, however, that ordinances regulating fund raising activity involved substantially different considerations than were present in those governing the dissemination of literature alone. Regulation of fund raising was permissible. This distinction between fund raising and protected activity was later expanded in *Thomas v. Collins*.⁷⁸

The *Collins* case put into issue the constitutionality of a Texas statute which required a labor organizer to register before soliciting membership in his organization. R.J. Thomas, a labor organizer, tested the statute by addressing a mass meeting in which he advocated that those in attendance join his labor organization. He was convicted on a contempt charge brought under the statute. The Supreme Court reversed. The requirement of registration prior to engaging in discussion offended Thomas' right of free speech under the first amendment.⁷⁹ The *Collins* Court distinguished the situation before it from cases in which the solicitation of funds was involved by stating that a requirement to register before a person made a public speech was incompatible with the first amendment.⁸⁰ However, once a speaker undertakes the collec-

76. 319 U.S. at 142.

77. *Id.* at 145-46.

78. 323 U.S. 516 (1945).

79. *Id.* at 541.

80. *Id.* at 540.

tion of funds or secures subscriptions, a reasonable registration may be imposed.⁸¹

The third case, *Hynes v. Mayor of Oradell*,⁸² is similarly of no avail in establishing that fund raising can be considered first amendment activity. In *Hynes*, the Court sustained a vagueness challenge brought by political canvassers against an ordinance that required door-to-door canvassers to register prior to canvassing.⁸³ Although *Hynes* did recognize the first amendment values inherent in canvassing,⁸⁴ and reinterpreted *Martin* so as not to confine that opinion to religious factors (as *Breard* had),⁸⁵ there is nothing in the *Hynes* decision which suggests that fund raising shares this first amendment importance.

It is interesting that the Court cited *Martin*, *Collins*, and *Hynes* to reach its conclusion that solicitation can be construed as protected activity. The Village attempted to distinguish activity involving pure dissemination of views from situations in which an appeal for funds was involved. Ironically, support for this distinction, which was ultimately rejected by the Court, is found in these cases.

The only two cases that remained in the Court's review from which it might infer that the charitable appeal for funds is protected activity are *Jamison v. Texas*⁸⁶ and *Murdock v. Pennsylvania*.⁸⁷ *Jamison* does indicate that fund raising can be protected activity but the decision is explicitly based on the free exercise clause and not on the free speech clause. In *Jamison*, a Jehovah's Witness attacked a municipal ordinance regulating the distribution of literature. The ordinance differed from the ones struck down in *Cantwell* and *Schneider* in that it was nondiscretionary. Nonetheless, the application of the ordinance was held to be unconstitutional.⁸⁸ The dependence by the *Jamison* Court on the free exercise clause is in fact disclosed by the *Schaumburg* Court. *Jamison* is cited for the proposition that

although purely commercial leaflets could be banned from the streets, a State could not 'prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a

81. *Id.*

82. 425 U.S. 610 (1976).

83. *Id.* at 623.

84. *Id.* at 617-18.

85. See note 71 *supra* and accompanying text.

86. 318 U.S. 413 (1943).

87. 319 U.S. 105 (1943).

88. 318 U.S. at 417.

lawful fashion to promote the raising of funds for religious purposes.⁸⁹

The *Schaumburg* Court does not provide any insight as to why the promotion of religious interests, as was present in *Jamison*, is authority for finding that CBE's secular solicitations are similarly entitled to first amendment protection. The distinguishing aspect of *Jamison* is seemingly ignored.

Nor does the Court provide this insight in its subsequent treatment of *Murdock v. Pennsylvania*.⁹⁰ *Murdock* is cited by *Schaumburg* as establishing that the "sale of religious literature by itinerant evangelists spreading their doctrine [is] not a commercial enterprise beyond the protection of the first amendment."⁹¹ Again, *Schaumburg* is silent as to why solicitation in a religious context is equal to solicitation in a secular context. Certainly there are reasons for equating the two, but these reasons should have been discussed. This is particularly true in regard to the *Murdock* case because that case was severely criticized for having granted religious solicitors special privileges and exemptions not accorded nonreligious organizations and persons.⁹²

The Court, in short, is being either disingenuous or careless in automatically applying cases with religious freedom overtones to nonreligious subjects without extrapolation or analysis. Freedom of speech and freedom of religion have never been held to be synonymous. It therefore remains necessary to examine how, if at all, the evangelistic practices of the Jehovah's Witnesses in the 1940's can be equated with the fund raising practices of an environmental protection group in the 1980's in determining a thread of first amendment concern.

III. THE FIRST AMENDMENT BASES OF RELIGIOUS SOLICITATION: *MURDOCK V. PENNSYLVANIA*

The seminal case establishing a positive first amendment value in fund raising was *Murdock v. Pennsylvania*.⁹³ At issue was the constitutionality of a municipal ordinance which exacted a license tax on the sale of periodicals within the municipality as applied to the distribution methods for literature by the Jehovah's Witnesses.⁹⁴ The distribution

89. 444 U.S. at 630 (citing *Jamison v. Texas*, 318 U.S. 413, 417 (1943)).

90. 319 U.S. 105 (1943).

91. 444 U.S. 630 (1980).

92. See notes 118-20 *infra* and accompanying text.

93. 319 U.S. 105 (1943).

94. The challenged ordinance required that any person seeking to canvass or solicit in the community must pay a license tax at the rate of \$1.50 per day, \$7.00 per week, \$12.00 per two weeks, or \$20.00 per three weeks. *Id.* at 106.

methods in *Murdock* involved door-to-door "sales" of religious books and pamphlets, where the "price" of the books was twenty-five cents and the "price" of the pamphlets was five cents. However, the Witnesses would accept a lower price or even donate the volumes to an interested person who could not afford the literature.⁹⁵

One year before *Murdock*, in *Jones v. Opelika*,⁹⁶ the Court had upheld the constitutionality of a similar license tax on this type of activity. The *Opelika* Court, by Mr. Justice Reed, stated:

There is to be noted, too, a distinction between nondiscriminatory regulation of operations which are incidental to the exercise of religion or the freedom of speech or the press and those which are imposed upon the religious rite itself or the unmixed dissemination of information. . . .

When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing. Careful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgement of the freedom of speech or the press.⁹⁷

The Court in *Murdock* overruled the *Opelika* decision in a five to four decision,⁹⁸ and held that the license tax on the sale of literature was void as to the literature "sales" of the Jehovah's Witnesses undertaken in their evangelistic efforts. The Court considered the taxes an improper abridgement of the Witnesses' first amendment rights.⁹⁹

It is ambiguous, however, which first amendment freedom the Court in *Murdock* held was abridged by the license tax. The Court did not distinguish between the liberties of speech or religion. This ambiguity has led to differing interpretations of *Murdock*.¹⁰⁰ Thus, *Mur-*

95. *Id.* at 107.

96. 316 U.S. 584 (1942).

97. *Id.* at 596-97.

98. Justices Reed, Frankfurter, Jackson, and Roberts dissented. All four Justices had been in the majority in *Opelika*. The Court's reversal was due to the replacement of Justice Byrne with Justice Rutledge during the interim between *Opelika* and *Murdock*. On rehearing, *Opelika* was decided the same day as *Murdock* in a one paragraph per curiam opinion that relied totally on the *Murdock* decision. 319 U.S. 103 (1943).

99. 319 U.S. at 117.

100. For example, the Court in *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 761 (1976), interpreted *Murdock* as resting on speech grounds, while the Court in *Follett v. McCormick*, 321 U.S. 573, 576 (1944), relied on *Murdock* as a free exercise case.

dock could be interpreted as extending to nonreligious solicitation the same protection afforded religious solicitation. But the Court, in *Schaumburg*, while indicating that nonreligious solicitation was a protected activity, did not indicate whether its holding was precipitated by *Murdock* or some other authority. Thus, the ambiguity in *Murdock* remains unresolved and requires further investigation.

Initially, the Court in *Murdock* noted the religious significance inherent in the distribution of religious literature.¹⁰¹ The Court appears to have described the solicitation activity as religious in nature:

The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.¹⁰²

However at a later point the Court referred to the Witnesses' practices as involving a speech right:

The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.¹⁰³

But the Court again returned to describing the activity in religious terms:

Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can

Professor Kurland, in his comprehensive analysis of the Supreme Court and the freedom of religion, argues that *Murdock* was based on speech and religion. See Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 49 (1961) [hereinafter cited as Kurland]. See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 420-21 (1970) [hereinafter cited as EMERSON].

101. 319 U.S. at 108-09.

102. *Id.* (footnotes omitted).

103. *Id.* at 111.

close its doors to all those who do not have a full purse.¹⁰⁴

Yet, at another point the Court referred to the liberty being protected in terms of issues relating to freedom of the press.¹⁰⁵ The Court, citing *Grosjean v. American Press Co.*,¹⁰⁶ described the challenged tax as a "tax on knowledge" of the kind designed to inhibit the distribution of printed material.¹⁰⁷

The closest the *Murdock* Court comes to definitively stating which liberty or liberties are at issue appears in its concluding statement where the Court describes the license tax as being "an abridgment of freedom of press and a restraint on the free exercise of religion."¹⁰⁸ But the absence of a reference to freedom of speech in this statement clouds even this holding.¹⁰⁹ The Court apparently did not believe it was necessary to distinguish which liberty was allegedly infringed by the tax ordinance in order to decide the case. Once the Court decided that a first amendment freedom was at issue, the matter was settled even though the specific nature of the liberty involved remained nonspecific. According to the Court, the liberties of speech, press, and religion were all preferred,¹¹⁰ and presumably equal.¹¹¹

The failure of the Court to explicitly delineate the nature of the liberty involved is understandable considering the first amendment framework pertaining to canvassing and solicitation issues that existed at the time of the opinion. *Murdock* was one of a series of Jehovah's Witnesses cases¹¹² and the relationship of *Murdock* to previous cases

104. *Id.* at 112.

105. *Id.* at 111.

106. 297 U.S. 233 (1936). The *Grosjean* case involved an attack upon a Louisiana statute that discriminately exacted a heavy tax upon larger newspapers while exempting smaller papers. The Court found the tax to be a deliberate and calculated device to suppress the large newspapers in the state. No finding of improper legislative motivation was present as it was in *Murdock*. For an account of the Louisiana tax case, see Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 381-84 (1976) and EMERSON, *supra* note 100, at 418-19.

107. 319 U.S. at 115 (emphasis added).

108. *Id.* at 117.

109. Freedom of speech was expressly mentioned earlier in the opinion. *Id.* at 115. Justice Douglas' continued reference to freedom of the press throughout the *Murdock* opinion may have been an effort on his part to develop a first amendment doctrine immunizing the press from regulations of general applicability. See also *Breard v. Alexandria*, 341 U.S. 622, 650 (1951) (Black, J., dissenting). The issue of whether special protections exist for the institutional press remains an open issue. See *First Nat'l Bank v. Bellotti*, 435 U.S. 795, 796-801 (1978) (Burger, C.J., concurring).

110. 319 U.S. at 115.

111. *Id.* The Court stated, "[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position." *Id.*

112. The cases are collected in *Niemotko v. Maryland*, 340 U.S. 268, 273-289 (1951) (Frankfurter, J., concurring).

involving the Witnesses may serve to explain the Court's lack of distinction. In *Lovell v. Griffin*¹¹³ and *Schneider v. State*,¹¹⁴ the Court had previously held that the distribution of all but commercial handbills and literature was protected activity under the speech and press clauses of the first amendment.¹¹⁵ Because the religious literature distributed by the Witnesses was posited by the Court as being noncommercial, it was deemed protected under the speech and press clauses.

The touchstone of the Court's inquiry in these cases, it is important to note, was whether or not the solicitation or canvassing activity was commercial. The issue was not whether the activity was religious. The Court's denomination of canvassing or soliciting activities as religious in nature was initially a shorthand, based on *Lovell* and *Schneider*, to indicate that the activity in question was not commercial.¹¹⁶ The distinction between religious activity and other noncommercial activity was not yet of vital concern, and apparently remained of little concern to the *Murdock* majority who continued to present its inquiry in terms of the commercial/noncommercial dichotomy.¹¹⁷

The extent to which *Murdock* turned on peculiarly religious, as opposed to simply noncommercial, factors was of vital concern to the *Murdock* dissenters. In arguments never answered by the majority, the dissenters argued that the decision created a special exemption for religious activity over and above that accorded comparable secular activity. The dissent viewed the majority's position as creating a dangerous precedent. Justice Jackson focused on the religious/nonreligious distinction:

In my view, the First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not . . . political, economic, scientific, new or informational ends as well. When limits are reached which such communications must observe, can one go farther under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote

113. 303 U.S. 444 (1938).

114. 308 U.S. 147 (1939).

115. See *Schneider v. State*, 308 U.S. at 165.

116. The manner by which what was essentially a speech right (the distribution of literature in the *Schneider* case) was transformed, almost by accident, into a free exercise right is discussed in depth in Kurland, *supra* note 100, at 36-43.

117. See, e.g., 319 U.S. at 111, where the Court stated "it plainly cannot be said that petitioners were engaged in a *commercial* rather than a *religious* venture." *Id.* (emphasis added). Of similar effect is the Court's holding that "the mere fact the religious literature is 'sold' . . . does not transform evangelism into a commercial enterprise." *Id.*

a religious ideology? I had not supposed that the rights of secular and nonreligious communications were more narrow or in any way inferior to those of avowed religious groups.¹¹⁸

Justice Jackson then noted that special protection for religious groups was not required by the first amendment:

It may be asked why then does the First Amendment separately mention free exercise of religion? The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was an heretic and guilty of blasphemy because he failed to conform in mere belief, or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement.¹¹⁹

Justice Frankfurter's dissent expounded upon Justice Jackson's last point. Justice Frankfurter contended that not only is special exemption for religious organizations not required by the first amendment in the context of fund raising regulation, it may indeed be prohibited.

The real issue here is not whether a city may charge for the dissemination of ideas but whether the states have power to require those who need additional facilities to help bear the cost of furnishing such facilities. . . . To say that the Constitution forbids the states to obtain the necessary revenue from the whole of a class that enjoys these benefits and facilities, . . . is to say that the Constitution requires, not that the dissemination of ideas in the interest of religion shall be free, but that it shall be subsidized by the state. Such a claim offends the most important of all aspects of religious freedom in this country, namely, that of the separation of church and state.¹²⁰

The criticisms and warnings of the *Murdock* dissent may have been premature. *Murdock* certainly did not hold that only the solicitation activities of religious groups would warrant extended first amendment protection; the question of whether a "special exemption" was

118. *Douglas v. Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring & dissenting). Justice Jackson's concurring and dissenting opinion was appended to the decision in *Douglas* and was written in response to the *Murdock* decision and *Martin v. Struthers*, 319 U.S. 141 (1943).

119. *Douglas v. Jeannette*, 319 U.S. at 179.

120. *Murdock v. Pennsylvania*, 319 U.S. 105, 139-40 (1943) (Frankfurter, J., dissenting).

being carved out for only religious groups was left unanswered. The Court did not reach the question of the protection to be afforded non-commercial and nonreligious solicitation; it only distinguished between religious and commercial solicitations. Thus, the concerns of the *Murdock* dissent were the concerns facing the Court in *Schaumburg*, that is, to what extent was the *Murdock* opinion tied to the religious factors involved in that case.

Analysis of *Murdock's* underlying theory leads to the conclusion that the decision was not necessarily tied to religious factors, although this "theory" was not cogently or explicitly articulated by the Court. The *Murdock* Court, like the later *Schaumburg* Court, noted that certain speech "elements" did exist in solicitation activity. For example, it noted that solicitation includes the communication of information (via the spreading of religious literature),¹²¹ the propagation of views,¹²² and the advocacy of a cause (conversion effort).¹²³ Moreover, solicitation is necessary to the organization because it provides the financial means for the organization to continue its evangelistic efforts.¹²⁴

Fundamentally, however, the theoretical basis for *Murdock* is not provided by mere reference to the speech elements of solicitation, but is provided in that Court's emphasis of the specific quality of the solicitation which emanates its first amendment character. This specific quality in solicitation is the nexus that exists between an appeal for funds and the informational and advocacy effort created by the religious missionary in the conversion effort. The persuasive, informational, and financial aspects inherent in the evangelistic effort to win converts are so inextricably bound, that the entire contact between the missionary and the public assumes a first amendment (speech) character. Thus, the appeal for funds is no more than an "incidental" and "collateral" portion of the solicitation encounter.¹²⁵

What was left unresolved in *Murdock* was whether this special quality that existed in the "nexus" of religious solicitation was peculiar to religious evangelism or whether the same first amendment quality could be found in other nonreligious solicitations as well. During the 1940's, the only litigative context in which nonreligious solicitation was presented to the Court was in the guise of commercial enterprises in

121. *Id.* at 108-09.

122. *Id.*

123. *Id.* at 109.

124. *Id.* at 109 n.7.

125. *Id.* at 111-12 (quoting *State v. Mead*, 230 Iowa 1217, 1219, 300 N.W. 523, 524 (1941)). See also 319 U.S. at 109, 115 & 117.

*Valentine and Breard*¹²⁶ and, thus, for the moment the first amendment quality present in the practices of the Witnesses could not be found in a nonreligious setting. This was to change, however, with the canvassing and fund raising tactics of the public interest advocacy groups working some three decades later.

The "nexus" approach to solicitation received its best articulation in *Schaumburg*, and appeared to be the basis for the Court's concluding that although the Village ordinance might be constitutionally applied to the more traditional forms of charity, it could not constitutionally be applied to public interest groups. The Court noted that public interest groups "necessarily combine"¹²⁷ the financial aspect of the solicitation with the public interest advocacy. As in religious solicitation, this "necessary combination" is not merely an appeal for money; it is an exhortation to the person solicited to show his support. The receipt of monies effects the culmination of the advocacy. The solicitation does more than provide financial support; it implies that the soliciting organization has won a commitment from the solicited person. The grant or denial of a contribution is itself an expression of advocacy.¹²⁸

Under this analysis, religious solicitation is deemed to be a protected activity because of its "speech" character. The fact that the solicitors may or may not be engaging in a religious rite is irrelevant. Thus, even if *Murdock* had not explicitly relied on speech grounds, the foundations for such reliance were implicit in that opinion. Thus, *Schaumburg* simply expanded *Murdock* and, accordingly, is not properly susceptible to the charge leveled earlier that it had engaged in a doctrinal leap.¹²⁹ The problem of exonerating the *Schaumburg* Court is obvious, however. In *Schaumburg*, the Court did not analyze *Murdock* to determine the latter's theoretical bases. Thus, the *Schaumburg* Court gave the appearance of having taken a doctrinal leap even if it actually did not. But whether it is termed a doctrinal leap or an expansion, *Schaumburg* has at least provided a reference through which the differing first amendment strains left dangling in *Murdock* can be forged into a coherent understanding.

126. See notes 45-48 *supra* and accompanying text.

127. 444 U.S. at 635 (quoting *Schaumburg v. Citizens for a Better Environment*, 590 F.2d 220, 225 (7th Cir. 1978)).

128. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

129. The Supreme Court opinion in *Schaumburg* may have undertaken a doctrinal leap in holding that all charitable solicitations are to be protected. The holding of the Seventh Circuit limiting protection to public interest groups is on firmer footing.

IV. RELIGIOUS SOLICITATION AFTER *SCHAUMBURG*: AN EXTRA LAYER OF PROTECTION?

Although the Court in *Murdock* may have relied on speech grounds in reaching its conclusions, that fact does not preclude the possibility that the Court also may have relied on religious grounds, either in the alternative or in addition to the speech grounds. For the moment, however, the cumulative impact of *Murdock* and *Schaumburg* is established. The solicitations of charitable and religious organizations constitute noncommercial speech under the first amendment.

There remains the question of how *Schaumburg* will affect future cases dealing with religious solicitation. Does *Schaumburg* equalize the protection afforded secular and religious solicitation or is there a constitutional requirement that solicitation by religious organizations be afforded a higher degree of protection?

The question is by no means irrelevant. The *Schaumburg* Court, for example, suggested that disclosure laws would be a permissive means to regulate fund raising. Yet religious organizations are already testing the applicability of such laws to religious organizations on the grounds that the laws infringe on their speech and religious guarantees.¹³⁰ Principally, religious groups have claimed that this type of law unconstitutionally infringes upon the right of free speech, right of free exercise, and right to establish a religion.

The first of these arguments, that such a law infringes upon the religious organization's right of free speech, will be the most difficult to maintain after *Schaumburg*, because that case held that solicitations of secular organizations are protected noncommercial speech. Therefore, in order for the Court to hold that religious solicitation is entitled to additional protection under the speech clause, it would have to hold that it is permissible to constitutionally distinguish between classes of protected speech. Then the Court would have to hold that religious speech is somehow more deserving of protection than other classes of protected speech. The Court, however, has frequently and vehemently indicated that such a distinction cuts at the central and fundamental purpose of the first amendment. As the Court noted in *Police Department of Chicago v. Mosley*:¹³¹

But, above all else, the First Amendment means that govern-

130. See *Fernandes v. Limmer*, 465 F. Supp. 493 (N.D. Tex. 1979). See also *ISKCON v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977).

131. 408 U.S. 92 (1972) (citations omitted). In *Mosley*, the Court struck down a Chicago ordinance that prohibited all picketing within 150 feet of a school except for peaceful picketing of any school involved in a labor dispute.

ment has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. . . . There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard.¹³²

Thus, although there may be nonspeech reasons to constitutionally require the exemption of religious solicitation from regulations that may control nonreligious solicitations, there is no authority after *Schaumburg* that justifies this exemption on speech grounds. The *Schaumburg* Court, by holding that secular charitable regulations are protected activities, effectively equalized the speech value in secular and religious solicitation. Any subsequent differentiation between religious and nonreligious solicitation on speech grounds would be tantamount to content discrimination, and therefore, is antithetical to the principles inherent in the speech clause of the first amendment.¹³³

The argument that additional protection must be accorded religious solicitation on free exercise grounds over and above that provided under free speech grounds is potentially more credible. Governmental regulations of religious fund raising have been struck down under the free exercise clause prior to *Schaumburg*,¹³⁴ but again, the influence of *Schaumburg* is likely to be profound. In order to succeed in a free exercise challenge after *Schaumburg*, the issue must be phrased in terms of whether the free exercise clause mandates a greater degree of constitutional protection than does the free speech clause. There is surprisingly little authority on this subject. However, the available law indicates that the answer to this inquiry will be negative.

The first case that sheds light on this issue is *Chaplinsky v. New Hampshire*,¹³⁵ where the defendant, a Jehovah's Witness, was convicted of violating a statute that made it a crime to use offensive lan-

132. *Id.* at 95-96 (citations omitted).

133. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

134. See, e.g., *Follett v. McCormick*, 321 U.S. 573 (1944); *Jamison v. Texas*, 318 U.S. 413 (1943); *ISKCON v. State Fair*, 461 F. Supp. 719 (N.D. Tex. 1978); *ISKCON v. Conlisk*, 374 F. Supp. 1010 (N.D. Ill. 1973); *ISKCON v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

135. 315 U.S. 568 (1942).

guage against another person in a public place. The Court upheld the conviction against both speech and religious challenges.¹³⁶ The speech challenge was dismissed under the "fighting words" doctrine, *i.e.* use of insulting or fighting words is not within the ambit of protected speech. The Court easily dismissed the religious challenge and noted that "even if the activities of the appellant . . . could be viewed as religious in character . . . they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute."¹³⁷ Arguably, *Chaplinsky* suggests that if a free speech challenge is not sustainable on a certain set of facts then a free exercise challenge on these same facts will not be successful either.

The equal treatment accorded free exercise and free speech challenges, evidenced in *Chaplinsky*, is also substantiated by reference to the constitutional tests that the Court has devised in dealing with speech and religion challenges. In fact, the tests are identical. The free exercise test, as announced in *Sherbert v. Verner*,¹³⁸ requires the governmental interest that infringes upon religious activity to be "compelling" in order to justify the infringement.¹³⁹ The free exercise test in *Sherbert* was adopted virtually verbatim from the free speech test articulated in *NAACP v. Button*,¹⁴⁰ as the *Sherbert* Court noted.¹⁴¹ Thus, the use of identical tests appears to preclude the possibility that different results could be achieved.¹⁴² If a state interest is deemed "compelling" with respect to a speech challenge, it must similarly be "compelling" with respect to a free exercise challenge.

The only possible exception to the above analysis may exist in situations where the Court finds that the particular religious activity infringed is of central and critical importance to the religion involved.¹⁴³ In such limited situations, the Court has added additional weight to the religious practitioner's side of the *Sherbert* balancing equation. In *Wisconsin v. Yoder*,¹⁴⁴ the Amish were exempted from compulsory educa-

136. *Id.* at 571.

137. *Id.*

138. 374 U.S. 398 (1963).

139. *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

140. 371 U.S. 415, 438 (1963).

141. 374 U.S. at 403.

142. The same considerations would be present in a challenge of a solicitation statute because after *Schaumburg* both free exercise and free speech interests are recognized as being present in religious solicitation activity.

143. The centrality principle is discussed in Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1394-96, 1417-21 (1967).

144. 406 U.S. 205 (1972).

tion laws and in *People v. Woody*,¹⁴⁵ the Native Americans were exempted from statutes prohibiting the use of peyote. No court has held, however, that this "centrality" principle could be used to exempt a religion from a valid general regulation as applied to core speech activity. It is difficult to imagine how this centrality argument could be presented in the solicitation context. The underlying argument of the religious group would have to be that solicitation was a central part of their religion and its disturbance critically handicapped their religious practice. Judge Young, in a thoughtful opinion in *Edwards v. Maryland*,¹⁴⁶ held that although the practice of begging and alms giving has religious significance in the Hari Krishna religion, it was not so central as to exempt that group from a general regulation.¹⁴⁷

Even if an organization were able to satisfy the centrality test, it is unlikely that it would be able to succeed in a free exercise challenge upon a solicitation regulation where a free speech challenge had failed. Inherent in a positive result to such a challenge would be the conclusion that the exercise of religion is entitled to a higher deference than the exercise of the right of expression. The Court in its first amendment litany has suggested that precisely the opposite is true; that if any freedom is considered preferred, it is the freedom of speech.¹⁴⁸ A favorable holding by the Court on the free exercise claim would require the Court to disavow these earlier cases.¹⁴⁹ Moreover, as has been pointed out by Professor Kurland, although the establishment clause provides a restraint upon the free exercise principle in the first amend-

145. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

146. 476 F. Supp. 153 (D. Md. 1979).

147. *Id.* at 165.

148. See, e.g., *Street v. New York*, 394 U.S. 576 (1969); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring). Political speech, in particular, has been advanced as being of prime first amendment concern because it is through the political system that our societal decisions are affected, including those that may affect our religious practices. Thus, the Court in *Buckley v. Valeo*, in dealing with a campaign practices case, described the governmental regulations involved in that case as operating "in an area of the *most fundamental* First Amendment activities." 424 U.S. 1, 14 (1976) (emphasis added).

149. One Justice, Justice Murphy, believed that the freedom of religion was the preferred freedom. Concurring in *Martin v. Struthers*, 319 U.S. 141 (1943), he stated, "I believe nothing enjoys a higher estate in our society than the right [to] . . . freely . . . practice and proclaim one's religious convictions." *Id.* at 149 (Murphy, J., concurring). Previously in *Jones v. Opelika*, 316 U.S. 584 (1942) (the opinion later overruled by *Murdock*), he had stated that "[i]mportant as free speech and a free press are to a free government and a free citizenry, there is a right even more dear to many individuals—the right to worship their Maker." *Id.* at 621 (Murphy, J., dissenting). Justice Murphy was joined in his *Martin* opinion by Justices Rutledge and Douglas and was joined in his *Opelika* decision by Justices Black, Douglas, and Stone.

ment, there is no such restraint upon the speech clause.¹⁵⁰ Thus, the wording of the first amendment itself leads to the conclusion that it is the speech clause, and not the free exercise clause, that is potentially entitled to greater deference.¹⁵¹

The final inquiry is whether a religious organization will be able to maintain a successful establishment clause attack against a statute that is constitutionally able to withstand a free speech challenge after *Schaumburg*. Again this question has remained unanswered in the courts, although one decision¹⁵² after *Schaumburg* did hold on establishment clause grounds that a charitable solicitation scheme was unconstitutional as applied to religious organizations. The court did not interpret the validity of the law with respect to other forms of protected solicitations.

The tests for determining the validity of a law under the establishment clause were initially set forth in *Lemon v. Kurtzman*¹⁵³ and have

150. Kurland, *supra* note 100, at 52. The Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), has affirmed Professor Kurland's theory. In *Buckley* it was argued that public subsidy of elections was prohibited as being an establishment clause type of violation. As the state cannot subsidize religion, so, it was argued, can the state not subsidize partisan politics. The court, however, dismissed the argument in a footnote. *Id.* at 93 n.126. Analysis of this issue is found in Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 31-34.

151. An inference that the speech clause is entitled to more constitutional deference than is the free exercise clause is found in the flag salute cases. In 1940, the Court in *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), reversed a Third Circuit ruling which held that compulsory participation in flag salute ceremonies was unconstitutional with respect to those persons who claimed that the salute exercises conflicted with their religious beliefs. The Supreme Court, per Justice Frankfurter, rejected the Court of Appeals' conclusion: "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.* at 594-95. Compulsory flag salute ceremonies were then constitutionally permissible.

Three year later in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court overruled *Gobitis* and held the flag salute statutes to be unconstitutional. *Id.* at 642. *Barnette*, however, turned on speech and not religious grounds, although the latter ground was argued in that case as well. The Court held that it need not reach the religion issue. *Id.* Its failure to do so left the *Gobitis* holding, that the statute did not violate free exercise, unanswered. Thus, the possibility remains that a free speech challenge may be sustained while a free exercise claim is denied where both liberties are equally at issue.

152. *Heritage Village Church v. North Carolina*, 299 N.C. 399, 263 S.E.2d 726 (1980). There were two parts to the finding. The first, of no concern here, was that the North Carolina statute was unconstitutional in that it impermissibly exempted some churches from its requirements while requiring compliance from those religious organizations whose financial support is derived from contributions solicited from persons other than its own members. N.C. GEN. STAT. § 108-75.7(a)(1). The second finding of the court was that the statute's disclosure and percentage limitations worked as an unconstitutional entanglement between church and state under the establishment clause. *Id.* at 17-20.

153. 403 U.S. 602 (1971).

recently been reiterated in *Committee for Public Education & Religious Liberty v. Regan*.¹⁵⁴ The tests are: the statute must have a secular purpose, its principal or primary effect must neither advance nor inhibit religion, and it must not foster an excessive governmental entanglement with religion.¹⁵⁵

The relationship of the establishment tests to statutory provisions that regulate certain activities is not immediately apparent. As has been stated by the Court, "establishment" in its original understanding "connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."¹⁵⁶ Therefore, previously the establishment clause inquiry by the Supreme Court was aimed exclusively at statutory provisions which conferred a benefit upon religious institutions, such as aid to parochial education,¹⁵⁷ tax exemptions,¹⁵⁸ or statutes which are based on the tenets of certain religious beliefs.¹⁵⁹ Recently, however, the lower courts, focusing on the entanglement prong of the establishment test, have inquired as to general regulatory measures which in no way confer a benefit upon a religious institution.¹⁶⁰ The Supreme Court itself has performed statutory cartwheels in order to construe a general regulatory measure as exempting religious institutions, thereby avoiding the constitutional entanglement question.¹⁶¹ Thus, although the question is open, it is likely that the Court will hold that an entanglement analysis may be appropriate in dealing with the effects of regulatory laws upon religious organizations.¹⁶²

Entanglement brings into play a different set of considerations than are present in either the free exercise or free speech issues. The

154. 444 U.S. 646 (1980).

155. *Id.* at 623 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

156. *Walz v. Tax Comm'r*, 397 U.S. 664, 668 (1970).

157. *See, e.g.*, *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Wolman v. Walter*, 433 U.S. 229 (1977); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

158. *Walz v. Tax Comm'r*, 397 U.S. 664 (1970).

159. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

160. *Surinach v. Pesquera De Busquets*, 604 F.2d 73 (1st Cir. 1979); *Fernandes v. Limmer*, 465 F. Supp. 493 (N.D. Tex. 1979); *Heritage Village Church v. North Carolina*, 299 N.C. 399, 263 S.E.2d 726 (1980).

161. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979).

162. One author has already suggested that the entanglement test be confined to analysis of statutory provisions which do provide benefits to religious institutions. Gianella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 172. *See also* *Heritage Village Church v. North Carolina*, 299 N.C. 399, 263 S.E.2d 726 (1980) (Huskins, J., dissenting). Judge Huskins argued that the application of the entanglement analysis to a regulatory provision is no more than a restatement of the free exercise issue. *Id.* at 414, 263 S.E.2d at 741.

concern in entanglement is not the relative strength or preferred nature of a particular freedom guarantee; rather the concern is the overall resulting relationship between church and state that is affected by the challenged statute. Thus, the entanglement inquiry does not apply to such matters as whether a religious solicitor will be allowed special access to a forum that has been denied to nonreligious fund raisers.¹⁶³ Entanglement inquiry is pertinent solely to those statutory provisions which result in a regulatory relationship between the state and the activity of the organization. Examples of such provisions include disclosure laws of the type receiving judicial approbation in *Schaumburg*,¹⁶⁴ and percentage limitations both of the type struck down in *Schaumburg* and of the type upheld in *National Foundation v. Fort Worth*.¹⁶⁵

Regardless of which type of statutory provision is involved, the statute should stand against an entanglement attack if it has already been held constitutional with respect to nonreligious protected activity. Again the key is that if the statute has survived the free speech challenge it has been found to be supported by "compelling" state interests.¹⁶⁶ It would appear, therefore, to be anomalous for a "compelling" state statute to be construed as fostering *excessive* entanglement as is required by the establishment test. A finding of "compelling" would seem to preclude that the same provision be construed as "excessive." To the extent that the nonexcessive language in the entanglement test requires that the statutory provision in question be narrowly drawn, that factor too is covered in the speech inquiry.¹⁶⁷ If a statute is narrowly drawn so as to avoid unnecessary intrusions into protected activity, it would seem that it similarly would not be excessive in its application to that activity.

The problem with the entanglement issue is that, superficially, provisions such as disclosure laws appear to create an involvement of state with religion. Indeed, they do. However, the Court has acknowledged that in state/church relations "some involvement and entanglement are inevitable."¹⁶⁸ Thus, it has been held that the SEC may require a reli-

163. See, e.g., *Edwards v. Maryland State Fair*, 476 F. Supp. 153 (D. Md. 1979); *ISKCON v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

164. See *Fernandes v. Limmer*, 465 F. Supp. 493 (N.D. Tex. 1979); *Heritage Village Church v. North Carolina*, 299 N.C. 399, 263 S.E.2d 726 (1980).

165. 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970). The difference between the *Schaumburg* and *Fort Worth* regulations is that the Fort Worth ordinance allowed the percentage limitation to be waived if it could be shown that the organization's administrative costs were not "unreasonable." See *id.* at 46.

166. See note 96 *supra* and accompanying text.

167. See, e.g., *Schaumburg v. Citizens for a Better Environment*, 444 U.S. at 626.

168. *Lemmon v. Kurtzman*, 403 U.S. 602, 625 (1971).

gious organization to submit to the provisions of the Securities and Exchange Act¹⁶⁹ and that a state may require a religious organization to provide its records for state review pursuant to a criminal subpoena.¹⁷⁰ If the state's interest is strong enough to outweigh free exercise (or free speech) concerns, it will necessarily survive the entanglement inquiry. Indeed, the leading case, *Surminach v. Pesquera De Busquets*,¹⁷¹ which expanded the entanglement inquiry to regulatory measures, stated as much. Religious solicitation and secular solicitation appear to be on an equal plane after *Schaumburg*.

CONCLUSION

A situation need not be of establishment clause proportions before the problem inherent in granting special exemption and privileges to religious institutions becomes apparent. Since *Chaplinsky v. New Hampshire*¹⁷² and *Cantwell v. Connecticut*,¹⁷³ it has been held that an organization or person should not be able to proceed unregulated under the pretext of religious conviction into areas where, because of important governmental interests, those not religiously motivated may not go.

The problem of preferential religious treatment is perhaps most acute in areas relating to fund raising. The critical concern is that there are generally no distinctions between the external manifestations of religious fund raising and secular fund raising other than the inherent nature of the person's beliefs. In addition, as we broaden our definitions of religion and religious activity,¹⁷⁴ expand the financial and regulatory benefits already available to those claiming religious status,¹⁷⁵ and become increasingly reluctant to inquire into the legitimacy of a person's religious beliefs,¹⁷⁶ the problem is expanding to almost limit-

169. SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976).

170. *In re Rabbinical Seminary*, 450 F. Supp. 1078 (E.D.N.Y. 1978).

171. 604 F.2d 73 (1st Cir. 1979).

172. 315 U.S. 568 (1942).

173. 310 U.S. 296 (1940).

174. *United States v. Seeger*, 380 U.S. 163, 184 (1965), held that a religious purpose is one that occupies the same place in the belief of the holder as an orthodox belief in God. In *Malnak v. Yogi*, 440 F. Supp. 1284 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3rd Cir. 1979), the court held it was a violation of the establishment clause to teach transcendental meditation in the public schools on the ground that it was the teaching of religious doctrine.

175. See *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973) (tax exemptions). See also *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974). But see *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968), where the court did not allow a group claiming to be a religious organization an exemption from federal drug regulations regarding LSD.

176. *United States v. Ballard*, 322 U.S. 78 (1944).

less proportions. One does not normally associate, for example, the sale of frozen fish¹⁷⁷ or the issuance of financial securities¹⁷⁸ with religious activity, but in two recent cases the courts were faced with such claims. Even more disturbing, is a statement by the Fifth Circuit Court of Appeals in a footnote in *International Society for Krishna Consciousness v. Eaves*.¹⁷⁹ The court noted that the *Murdock* case leads to the arguable conclusion that a religious organization may constitutionally claim exemption from a regulatory provision solely because it needs the funds to prosper and survive.¹⁸⁰

Perhaps the most articulate argument against special exemption for religious fund raising activity was voiced by Justice Jackson, concurring in *Prince v. Massachusetts*.¹⁸¹

I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose.¹⁸²

In his following paragraph, Justice Jackson again criticized *Murdock* for rejecting this principle of separating immune religious activities from secular type activities.¹⁸³ But in this criticism Justice Jackson also went too far. Unlike the "ordinary commercial methods of sales of

177. *Muhammad Temple of Islam v. Shreveport*, 387 F. Supp. 1129 (W.D. La. 1974), *aff'd*, 517 F.2d 922 (5th Cir. 1975).

178. *SEC v. World Radio Mission, Inc.*, 544 F.2d 535 (1st Cir. 1976).

179. 601 F.2d 809, 826-27 n.15 (5th Cir. 1979).

180. *Id.*

181. 321 U.S. 158 (1944).

182. *Id.* at 177-78.

183. *Id.* at 178.

articles to raise propaganda funds,”¹⁸⁴ the activities of the Jehovah’s Witnesses in *Murdock* were a matter of first amendment concern.

The entire evangelistic encounter is pervaded with the type of communications and advocacy that is at the heart of the first amendment. The question in *Murdock* was not whether that case was rightly decided; it was. The question was whether it would be wrongly interpreted so as to require special exemptions for religious activity in fund raising endeavors that did not share the first amendment character of the Witnesses’ evangelism in *Murdock*. This question has apparently been answered through the back door in *Schaumburg*. By elevating the first amendment status of nonreligious solicitation to that accorded religious solicitation, the Court has eliminated the “special exemption” and assuaged the concerns, however belatedly, of Justice Jackson and the other *Murdock* dissenters. At the same time, the Court, by recognizing the first amendment character inherent in certain solicitations (specifically the “secular evangelism” of the public interest groups), has accepted the important, albeit unarticulated, foundation of *Murdock*, and in so doing has added to our first amendment understanding. The problem with *Schaumburg* is that it accomplished these results without the reasoning or discussion that would have made the opinion itself an invaluable first amendment teaching.

184. *Murdock v. Pennsylvania*, 319 U.S. at 110.

