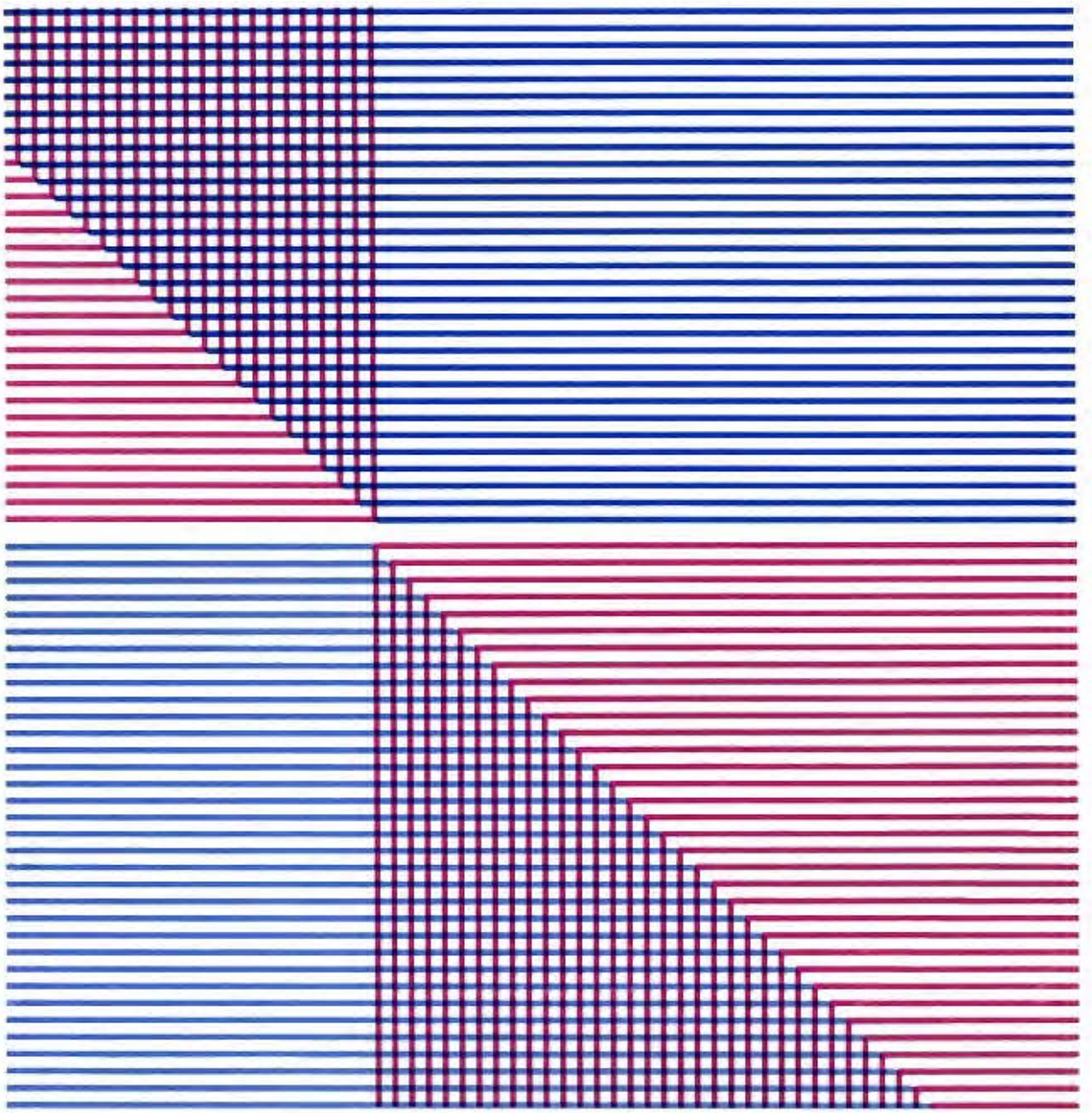
Religion in the Constitution: A Delicate Balance



Clearinghouse Publication No. 80
United States Commission on Civil Rights

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U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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Preface

Historian Sanford H. Cobb has written:

> [A]mong all the benefits to mankind to which this soil has given rise, this pure religious liberty may be justly rated as the great gift of America to civilization and the world, having among principles of governmental policy no equal. . . .[1]

Although the history of colonial America and its European roots is replete with instances of religious intolerance,[2] the cruelest of religious persecutions seem to be behind us. Many persons, however, still allege that they are deprived of their constitutional rights because of their religious beliefs and practices:

> A strange paradox has arisen in our country. It says that you may have your freedom as long as you are in the majority, or as long as you are in the mainstream. But if your beliefs are different, you may believe them but you may not practice them unless they do not conflict with the majority, or unless they do not conflict with a contract, or unless they do not conflict with the wishes of an employer, or unless they are not inconvenient to the employer.[3]

Some of these allegations were examined by experts assembled at a consultation sponsored by the U.S. Commission on Civil Rights on April 9–10, 1979. Although it was recognized that religious discrimination exists in education and housing,[4] the Commission, in its consultation and in this report, focused on religious discrimination in two major areas of current concern: the right of prisoners to practice their religions and employment discrimination. This report will address civil rights issues that derive from the first amendment's guarantee of free exercise of religion and prohibition against the establishment of religion. Abridgement of these freedoms, which apply to the States through the 14th amendment, becomes discrimination when penalties or disadvantages are imposed on someone because of that person's religious beliefs or practices. Prejudicial stereotypes about Catholics or Jews, for example, have led to their exclusion from elite schools and academies, private clubs in which major business deals are consummated, corporate boardrooms, and high-

[1] Stanford Cobb, *The Rise of Religious Liberty in America* (New York: Burt Franklin, 1970), p. 2.

[2] Religious intolerance also played a role in the Nativist movements of the 1800s and other eras of antiforeign, anti-immigration feeling in this country. *See, e.g.,* U.S., Commission on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* (1980), chap. 1.

[3] W. Melvin Adams, director, Public Affairs and Religious Liberty, National Conference of Seventh-Day Adventists, statement, *Religious Discrimination: A Neglected Issue,* a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Apr. 9–10, 1979, p. 3.

[4] Ibid., pp. 6–9.

level government positions. The perpetuation of these stereotypes continues a history of discrimination based on religious affiliation and seriously limits the opportunities available to people because of their religion.

The right to be free from discrimination based on religious practices or beliefs arises also under law.[5] The Commission is acting under its legal mandate to study and collect information and to appraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws because of race, color, *religion,* sex, age, handicap, or national origin, or in the administration of justice.[6]

Chapter 1 of this report focuses on the history behind the adoption of the religion clauses in the first amendment. Chapter 2 examines the historical development of constitutional law in classic religion cases such as those dealing with aid to church-supported schools and conscientious objectors, the tests for determining whether statutes are constitutional under the first amendment, the tensions that exist between the free exercise and establishment clauses, and the development of acts that govern the free exercise of religion for Indians. Chapter 3 addresses accommodation of religious practices and beliefs in employment, and chapter 4 discusses religious freedom and the incarcerated.

[5] For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination because of religion in employment, 42 U.S.C. §2000e-2(a)-(d) (1976); the Comprehensive Employment and Training Act in benefits and employment, 29 U.S.C. §834(a) (Supp. IV 1980); the Public Works Development Act in programs or activities funded under the statute, 42 U.S.C. §6727 (Supp. IV 1980); and the Arms Export Control Act prohibits religious discrimination in the furnishing of defense articles or services and in employment and contracts, 22 U.S.C. §2755(a), (b) (1976).

[6] 42 U.S.C.A. §§1975c(a)(2), (3) (Supp. 1974–1979).

Contents

Introduction

At first impression the issue of religious discrimination seems to be simple; civilized people should not tolerate such discrimination. It is, of course, not that simple. Many questions are involved: What constitutes a religion? What is a religious practice? What happens when a religious practice runs contrary to deeply held societal values? In our society these and other complex questions are addressed within a specific constitutional framework, the origins of which stem both from resistance to governmental imposition of a state religion and avoidance of the oppression and discrimination practiced against those not members of any state-sanctioned religion. In constitutional terms this means that the founders' focus in the first amendment was to preclude the government from supporting any particular religion and to assure the free exercise of varied and diverse religious beliefs and practices. These two goals, set forth in the Constitution as absolutes, do not always operate in concert. In addition to this inherent conflict, other portions of the Constitution, such as the equal protection clause, can come into play when resolving religious discrimination issues.

The religion clauses of the first amendment require a constant balancing of competing interests. Although the establishment clause mandates government neutrality, that neutrality is often tempered by the necessity for a certain level of government involvement to ensure the free exercise of religion. The deprivation of the free exercise right occurs when a person is not permitted to observe or practice his or her religious beliefs; discrimination occurs when certain religious groups are treated differently from others or when a person is disadvantaged or penalized because of religious beliefs or practices. For example, prisoners, who are under the complete jurisdiction and control of the government, do not abdicate completely their first amendment right to practice their religions, for them to do so, the government must make available places of worship and chaplains. The affirmative requirements of the free exercise clause preclude the denial of religious practice in prisons, so an exception to the prohibition against government involvement in religion has been permitted by the courts. The provision of these services, however, leads to questions of establishment and, in that particular setting, also raises the issue of favoritism among religions because the chaplains who work for the prison systems are affiliated with the more traditional religions and often do not understand the requirements of newer, non-Western, or less well-known religions. The other balancing test required occurs when prison administrators curtail certain religious practices that they believe could affect the maintenance of security in the institution. Those wishing to interpret strictly the tenets of their religions, in such a situation, believe that their free exercise rights are being infringed. Inmates whose religions forbid the cutting of hair, for example, face resistance from prison administrators who believe that contraband and weapons could easily be hidden in long hair, thereby jeopardizing security within the prisons. In cases such as these, the courts must weigh the security issue and the free exercise issue to determine the degree of accommodation, if any, that the prisons must accord the inmates' practice of their religions.

The conflict between the establishment and free exercise clauses is further illustrated in the protection of American Indians because of their unique relationship with the Federal Government. In many of the situations where Indian religious practices come into conflict, it is with the Federal Government. For example, Federal energy policies may conflict with traditional values of preserving the land intact. Access to sacred places may be limited by the Federal Government in its capacity as manager of the national park system. In these and many other settings, the Federal Government's obligations are contradictory. As trustee for Indian rights, it may advocate the free exercise of Native American religions. At the same time, it may be pursuing other national policies, while balancing the mandate to refrain from conduct so supportive that it would constitute an impermissible establishment of religion.

Problems of religious discrimination in employment generally arise in two situations. Opportunities can be denied on the basis of prejudicial stereotypes about members of certain religions. Such discrimination is akin to blatant and intentional race or sex discrimination and is just as invidious. More frequently, problems of religious discrimination in employment occur when neutral work rules conflict with the religious needs of an employee who is an adherent of a minority faith. The most common example of this is when an employer with Saturday business hours requires employees to work that day and has an employee whose religion forbids working on Saturday. Practices such as being open on Saturday may indeed further legitimate business purposes and be pursued without any intent to discriminate. They, nevertheless, can threaten religious freedom and diversity and can be remedied only by accommodating the job requirements to the employee's religious needs. The problem is compounded by the diversity of religions with differing practices and requirements, the variety of employer needs and requirements, the prohibitions of the establishment clause, and the general compatibility of secular tradition with the observances of predominate religions. Employers are legally required to reasonably accommodate their employees' religious needs unless they can demonstrate that doing so would cause them undue hardship. Because these conflicts tend to arise in isolated instances, courts have been grappling with the issue of how much accommodation is required on a case-by-case basis, weighing the competing interests that must be balanced in each unique employer-employee relationship.

A common theme uniting these diverse issues is that the religion clauses of the first amendment are, as the Supreme Court has noted, "cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other," necessitating a vigilant balancing of the two. In addition, the mandate of either clause may conflict with other constitutionally based requirements, again necessitating a delicate balancing exercise. Although the first amendment also mandates allowing diverse religions to flourish and showing partiality toward none, its neutrality additionally prescribes a policy of nondiscrimination so that certain religious groups are not treated differently from others and no person is disadvantaged or penalized because of religious beliefs or practices.

Balancing competing interests and accommodating diversity of belief and practice are struggles, as every issue addressed in this statement indicates, and there are no simple answers or easy resolutions to these problems. The remainder of the statement addresses ways in which courts, Federal agencies and departments, and employers have attempted to balance these fundamental rights with other competing and compelling interests.

Chapter 1

Why Separation? A History

It behooves every man who values liberty of conscience for himself to resist invasions of it in the case of others, or their cases may, by change of circumstances, become his own.

—Thomas Jefferson[1]

Pre-Reformation Roots of Establishment

In 1791 the new United States adopted a constitutional amendment that provided for free exercise of religion and forbade the government to establish a church. In doing so it overthrew a centuries-old tradition of church-state entanglement dating back to the Roman Empire.

Under Rome, after initial persecution, Christianity had become the predominant religion by the end of the fourth century, with all pagan worship proscribed[2] and limitations put on Jews such as bans on conversion of males to Judaism.[3] When the Roman Empire collapsed in the West in 476, the Christian Church emerged from the ruins as the most stable institution in western Europe.[4]

The philosophical foundations for a new Christian unity in western Europe and for a state that fostered it were expressed by St. Augustine, whose *City of God* (written between 413 and 427) describes the Christian commonwealth as the only political community that can truly provide justice.[5] Augustine, who as bishop had to deal with heretics, also called on the state's power to repress heresy with force,[6] which became the accepted norm of medieval Europe.[7]

As new kingdoms, led by rulers converted to Christianity, emerged in the fifth through eighth

[1] Frank Swancara, *Thomas Jefferson versus Religious Oppression* (New York: University Books, 1969), p. 53, citing letter.

[2] James W. Thompson and Edgar N. Johnson, *An Introduction to Medieval Europe, 300–1500* (New York: W.W. Norton, 1937), pp. 29–33 (hereafter cited as *Medieval Europe).* The Emperor Julian, 361–63, attempted to revive paganism. See Samuel Dill, *Roman Society in the Last Century of the Western Empire* (New York: Meridian Books, 2d rev. ed., 1958), pp. 1–112, on paganism's persistence in the late western Roman Empire.

[3] Judaism was exempted by the Emperor Theodosius as a legitimate religion. Frederick A. Norwood, *The Development of Modern Christianity Since 1500* (New York: Abingdon Press, 1956), p. 14. See Jacob R. Marcus, *The Jew in the Medieval World* (New York: Meridian Books, 1961), p. 3; S. Safrai, "The Era of the Mishnah and Talmud (70–640)," in *A History of the Jewish People,* ed. H.H. Ben-Sasson (Cambridge: Harvard University Press, 1976), pp. 350, 359.

[4] See Thompson and Johnson, *Medieval Europe,* pp. 46–52, on the organization of the early church and the development of the ascendancy in the west of the Bishop of Rome. See ibid., pp. 51–52, 118–19; and 129–36, on the breakup of Christianity into eastern and western churches.

[5] John B. Morrall, *Political Thought in Medieval Times* (London: Hutchinson, 1958, repr. New York: Harper Torchbooks, 1962), pp. 20–21. Morrall traces the idea of the state and its relationship to the church from Roman times through the 15th century.

[6] Thompson and Johnson, *Medieval Europe,* pp. 52–53.

[7] Morrall, *Political Thought,* pp. 21–22.

centuries,[8] the church began to gain political and moral power over rulers whose annointing and coronation ceremonies were performed by churchmen.[9] After the eighth century, church and state became intimately linked, which was considered entirely proper.[10] Debate centered not on separation, but on the role church and state should have in each other's affairs.[11]

In this medieval Europe, where the interests of church and state were officially allied, the non-Christian and heretic had no place. The ideal of Christian unity admitted no deviation and to hold different religious views was dangerous. Heresy was forcefully repressed,[12] and Jews, the major non-Christian group, were subjected to many kinds of repression, from civil restrictions to massacre. The official church view of Jews was codified by the fourth Lateran Council of 1215, which decreed, among other things, that Jews should be distinguishable by their dress, not exact excessive interest, not appear in public on Good Friday or Easter, and not hold any public office where they might exercise authority over Christians.[13]

Although some protections were decreed by popes and provided in charters obtained from rulers, Jews had little recourse when religious zeal, superstition, mob fury, or greed were aroused. As the First Crusade got underway in 1096, for instance, the crusaders slaughtered, robbed, and forcibly converted Jews in the Rhineland and elsewhere.[14] When the crusaders took Jerusalem, they herded the Jews into a synagogue and burned them alive.[15] Other massacres of Jews occurred periodically elsewhere, for example, in 1190 in England,[16] in 1298 in Bavaria,[17] and in 1348 in Switzerland and Germany during the Black Death plague, which Jews were accused of causing.[18]

After 1096 Jews were under growing pressure in many states and were increasingly barred from most occupations.[19] Rulers looked on them as special serfs who might, in effect, be taxed at will.[20] A classic case occurred in France when Philip Augustus came to the throne in 1180. Needing money, he imprisoned all Jews until a ransom was paid, and the following year he cancelled all Christian debts to Jews, but took 20 percent of the loan value for himself.[21] Jews were expelled from many countries in the 12th through 15th centuries, and by the 16th century they had been permanently expelled from most of western Europe (in central Europe expulsions tended to be temporary).[22]

The persecution of Jews (and in smaller numbers, Moors) in Spain presents a classic case of the horrors that can be perpetrated in the name of religion and

[8] See Joseph R. Strayer, *Western Europe in the Middle Ages* (New York: Appleton-Century-Crofts, 1955), pp. 30–34, and R.R. Palmer, *A History of the Modern World* (New York: Alfred A. Knopf, 1961, 2d. ed.), pp. 13–16 and 17–18 for short descriptions of this period and Thompson and Johnson, *Medieval Europe,* chaps. 5 and 8.

[9] Morrall, *Political Thought,* p. 24.

[10] Palmer, *A History of the Modern World,* pp. 21, 32–36, and 44–49, describes briefly the main events in the shifting relationships between popes and kings. Morrall, *Political Thought,* pp. 28–40 and 56–58, for example, discusses the philosophical arguments about who should be preeminent. Brian Tierney, *The Crisis of Church and State 1050–1300* (Englewood Cliffs, N.J.: Prentice-Hall, 1964), provides summaries of opposing interpretations, with selected documentary excerpts.

[11] For instance, Marsiglio of Padua, who in the 14th century argued forcefully against papal claims to power and emphasized the civil role of government, believed that the state must support the church. Thompson and Johnson, *Medieval Europe,* pp. 966–67; Morrall, *Political Thought,* p. 116.

[12] The Albigensian crusade, begun in 1208 in southern France, was one of the major antiheretical efforts. Thompson and Johnson, *Medieval Europe,* pp. 499–502. It also provides but one example of many instances where political and other motives were intermixed and papered over with the name of religion. Other prominent instances of heresy and attempts to extinguish it were John Hus and his followers in Bohemia in the 15th century, ibid., pp. 983–87, and the Lollards in England, A.G. Dickens, *The English Reformation* (New York: Schocken Books, 1964, repr. 1974), pp. 24–26.

[13] Marcus, *The Jew in the Medieval World,* pp. 137–41. See H.H. Ben-Sasson, "The Middle Ages," in *A History of the Jewish People,* pp. 407–08, and Marcus, *The Jew in the Medieval World,* pp. 111–13, on the views of Pope Gregory I (590–604), which set the course for official policy.

[14] Ben-Sasson, "The Middle Ages," pp. 413–14; Steven Runciman, *A History of the Crusades,* vol. 1, *The First Crusade and the Foundation of the Kingdom of Jerusalem* (New York: Harper & Row, 1964), pp. 134–41. See, for example, Marcus, *The Jew in the Medieval World,* p. 47, for an excerpt from the chronicle of Jacob von Konigshofen (1346–1420) describing what happened in Strasbourg.

[15] Ben-Sasson, "The Middle Ages," p. 414; Runciman, *The First Crusade,* p. 287. The crusaders also massacred nearly all the Moslems. Runciman, pp. 286–87.

[16] Marcus, *The Jew in the Medieval World,* pp. 131–36.

[17] Ben-Sasson, "The Middle Ages," p. 486.

[18] Marcus, *The Jew in the Medieval World,* p. 43.

[19] Ben-Sasson, "The Middle Ages," pp. 469–71.

[20] Ibid., pp. 478–79.

[21] Marcus, *The Jew in the Medieval World,* p. 24.

[22] See Frederick D. Mocatta, *The Jews of Spain and Portugal and the Inquisition* (New York: Cooper Square Publishers, 1973), p. 41, and Ben-Sasson, "The Middle Ages," pp. 463, 576–83, and 590.

state. Jews had been relatively secure in earlier medieval Spain despite limits on their activities,[23] and outbreaks of violence such as the massacre of Jews by Moors in Granada in 1066 were exceptional.[24]

By the 14th century, however, the climate of opinion was changing. Legislation calling for Jews to wear distinguishing badges was first passed in Castile in 1371. Twenty years later massacres took place in the largest cities—4,000 Jews were killed in Seville alone—and forced conversions began.[25] Converted Jews were known as New Christians, and their numbers grew steadily in the 15th century, fostered by sporadic killings and by restrictive legislation.[26] The rulers began expelling Jews from parts of Spain in 1482, ending with total expulsion in 1492.[27]

Those who remained as converts were discriminated against by exclusionary legislation that, for example, banned all those of Jewish descent from office and made their testimony in court against Old Christians inadmissible.[28] New Christians were accused of being insincere in conversion,[29] and the Inquisition was set up in Seville in 1480 to ensure religious orthodoxy.[30] By 1483 a unified Inquisition had been established for all of Spain under the control of the Spanish monarchs.[31]

The precise number of victims of the Inquisition is impossible to tell; many thousands were burnt in person or in effigy, and many more were subjected to other penalties.[32] Inquisitors gave heretics a grace period of 30 to 40 days to confess,[33] but penitents could only receive absolution if they furnished the inquisitors with names of other heretics.[34] Those who repented after the grace period had expired had their property confiscated and could be imprisoned up to a life term. If a deceased was discovered to have lived as an undetected heretic, the body was exhumed and burned at the stake.[35] Those who refused to repent, relapsed from penitence, or were judged to have made false penitence were turned over to the secular arm for burning.[36]

Uniform religious belief and loyalty to Spain became synonymous,[37] a pernicious union of church and state echoed elsewhere in Europe with the coming of the Reformation.

The Reformation

The Reformation of the 16th century[38] did not bring religious liberty or a relaxation of the union of church and state.[39] Reformers such as Martin Luther and John Calvin viewed religious reform as a proper subject for the state and heresy or divergence from the true religion as unacceptable.[40] Thousands of people were executed in ensuing years because they held religious beliefs divergent from those accepted where they lived. As with the Jews in the First Crusade, many barbarities occurred because

[23] Henry Kamen, *The Spanish Inquisition* (New York: New American Library, 1965), pp. 12–13; Palmer, *A History of the Modern World,* p. 63, n. 10.

[24] Kamen, *The Spanish Inquisition,* p. 13.

[25] Ibid., p. 23; Ben-Sasson, "The Middle Ages," pp. 569–70.

[26] Kamen, *The Spanish Inquisition,* pp. 27 and 31.

[27] Ibid., pp. 31–32.

[28] Ibid., pp. 40 and 123–24. This policy of racial purity, known as *limpieza de sangre,* continued to the mid-19th century. Ibid., pp. 133–39.

[29] Kamen, ibid., p. 30, states that most were not sincere converts and many continued to practice Judaism.

[30] Ibid., pp. 43–44.

[31] Ibid., pp. 47–48. See ibid., pp. 283–88, for a discussion of Protestant exaggerations about the Spanish Inquisition. Ibid., pp. 110–18, describes actions against the Moors and pp. 86–89, 198–213, other Inquisition action in areas such as usury, witchcraft, and Protestants. Strictly speaking, the Inquisition had no jurisidiction over Jews, only over Christians and thus only over Jews who had converted.

[32] Ibid., pp. 280–82, 224–27, 216–17, 86–89.

[33] Fernand Hayward, *The Inquisition* (Paris: Librarie Artheme Fayard, 1965), pp. 139–40.

[34] Mocatta, *The Jews of Spain and Portugal,* p. 37.

[35] Hayward, *The Inquisition,* pp. 140–42. This practice was not confined to Spain. In England under Henry VIII, "Protestant forms" used in a will caused the exhumation and burning of one body in 1531. Dickens, *The English Reformation,* p. 96. Under Queen Mary, the bodies of four heretics were exhumed and burned. J.D. Mackie, *The Earlier Tudors,* 1485–1558 (Oxford: Oxford Univ. Press, 1957), p. 553.

[36] Mocatta, *The Jews of Spain and Portugal,* p. 38.

[37] Kamen, *The Spanish Inquisition,* p. 124. Ibid., pp. 57–73, discusses the near-universal acceptance by Spaniards of the Inquisition's activities. Kamen argues that the Inquisition arose from class and social struggles of the 15th century and that its actions were as much, if not more, related to racism and anti-Semitism as they were to preservation of religion.

[38] See Palmer, *A History of the Modern World,* pp. 49–52, 56–62, and 68–69, for a brief discussion of the orgins of the Reformation and Preserved Smith, *The Age of the Reformation* (New York: Henry Holt & Co., 1920), pp. 699–750, for a somewhat dated but still useful survey of the various phases of historical interpretation of the Reformation.

[39] Norwood, *The Development of Modern Christianity,* p. 83, and Smith, *The Age of the Reformation,* p. 641.

[40] On Luther, see Smith, *The Age of the Reformation,* p. 70, and Palmer, *A History of the Modern World,* p. 51. On contrasts between Luther's earlier, more liberal and later, more restrictive views on heresy see Smith, *The Age of the Reformation,* pp. 643–44; and on Jews, Marcus, *The Jew in the Medieval World,* pp. 165–69. On Calvin, see Norwood, *The Development of Modern Christianity,* pp. 58–59, and Smith, *The Age of the Reformation,* pp. 171 and 646–47.

religious tolerance was not accepted and because the state enforced uniform religious belief.

By the 1570s, the religious map of Europe was drawn by the principle that the people followed the ruler's choice of religion.[41] England's history illustrates clearly the operation of this principle. Lacking a male heir, determined to remarry, and balked by the pope in his efforts to end his marriage to Queen Catherine, King Henry VIII declared the English church separate from Rome, with himself as head, by the Act of Supremacy, passed by Parliament in 1534.[42] Those who did not conform to this change were in danger, as the execution of Sir Thomas More and some 30 others demonstrated.[43]

When Mary became queen in 1553, the English were required to be Catholics. Heresy burnings began in 1555, and somewhat more than 282 people were executed.[44]

Anglicanism returned to England with Elizabeth, who succeeded in 1558. She reestablished the Church of England the following year, and penalties were enacted against Catholics and Calvinists who did not acknowledge the Anglican Church.[45] During Elizabeth's reign, about 250 people died for their religious beliefs (including those who died in prison).[46] Some of these were traitors from Elizabeth's point of view, for the pope had excommunicated and deposed her in 1570 and his successor had encouraged her assassination.[47] The pernicious identification of loyalty to the state with loyalty to one church was again at work. The Catholics who were executed under Elizabeth considered themselves religious martyrs.[48]

In other countries, rulers also saw religious diversity as rebellion or unacceptable for other reasons, and a change in rulers could mean a change in acceptability of religious belief. In France, for instance, the Protestants were fiercely repressed at first by Henry II.[49] The next ruler, Catherine de Medicis, gave them some toleration,[50] but she and her son Charles IX reversed this policy in 1572 and Protestants were killed all over France.[51] By 1595, with a new king, Henry IV, the French Protestants had again gained toleration, which was to be revoked in 1685 by yet another ruler, Louis XIV.[52]

Seventeenth century Europe continued to fight over religion. Although political, dynastic, and other elements played a large part in these conflicts, "religion and politics were cut from the same cloth; indeed. . .the most intensely political issues were precisely the religious ones."[53]

Some accommodation, however, was reached in a few nations. The Netherlands (gaining de facto independence by the end of the 16th century after a long struggle with Spain) established the Dutch Reformed Church.[54] After some initial persecution, a policy of general toleration was adopted, even of sects considered extreme, such as the Mennonites.[55]

In England, the immediate backdrop to the American colonial experience, religious and constitutional issues came to a head in the reign of Charles I (1625–49). Charles' attempt to rule without Parliament and Parliament's efforts to change the Anglican Church and to gain control of all taxation resulted in civil war in 1642.[56] Victory for Parliament and republican government from 1649 to 1660 followed. Religious freedom was provided for Christians, except

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[41] See Palmer, *A History of the Modern World,* p. 80, for a breakdown of religious divisions.

[42] A series of laws passed by Parliament, one in 1532, three in 1533, and five in 1534, separated the English church from Rome. Dickens, *The English Reformation,* pp. 116–20. See Henry Osborn Taylor, *Thought and Expression in the Sixteenth Century* (New York: Frederick Ungar Publishing Co., 1930, 2d. rev. ed., 1959), vol. II, pp. 20–75, and Dickens, *The English Reformation,* pp. 1–110, on the origins of the English reformation, which were more complex than the description here.

[43] Palmer, *A History of the Modern World,* p. 77, and Dickens, *The English Reformation,* pp. 171–2, 178, 183, 237.

[44] Dickens, *The English Reformation,* p. 266, discusses the question of the exact number martyred.

[45] Palmer, *A History of the Modern World,* p. 78; J.B. Black, *The Reign of Elizabeth, 1558–1603* (Oxford: Oxford Univ. Press, 1959), pp. 184, 185, 455, 456.

[46] Black, *The Reign of Elizabeth,* p. 188. Some Puritans and Anabaptists were among those executed. Ibid., pp. 202, 204, 205. The Northern Rebellion in 1569–70 ended with execution of about 500 rebels; this was a Catholic-feudal rebellion, not strictly speaking on religious grounds alone. Ibid., pp. 135–36, 143.

[47] Ibid., pp. 185–86, 167, 178–79.

[48] Ibid., pp. 185–86.

[49] Philippe Erlanger, *St. Bartholomew's Night* (New York: Pantheon Books, 1962), pp. 5–16.

[50] Ibid., pp. 31–33.

[51] See ibid., pp. 125–55, for the background of the decision and pp. 155–93 for details of the massacre.

[52] Palmer, *A History of the Modern World,* pp. 118 and 164.

[53] Carl J. Friedrich, *The Age of the Baroque, 1610–1660* (New York: Harper & Row, 1962), p. 161.

[54] Norwood, *The Development of Modern Christianity,* pp. 62–63.

[55] Palmer, *A History of the Modern World,* pp. 112, 138.

[56] Friedrich, *The Age of the Baroque,* pp. 285–93.

for Catholics and those Anglicans supporting episcopal government of the church,[57] and a loosely organized Protestant church was established.[58] In Ireland, where most of the people remained Catholic, Catholicism was fiercely repressed in 1649–50.[59] The Irish Catholics suffered religious, civil, political, and other disabilities for many generations thereafter.

The monarchy was restored in England with Charles II in 1660, the Church of England was reestablished, and opposing religions were not tolerated.[60] Suspicions of Catholicism persisted,[61] and in 1688 the throne was offered to James II's Protestant daughter Mary, wife of Dutch William of Orange, who invaded England. James II fled to France.[62]

One of the outcomes of this Glorious Revolution was the Toleration Act of 1689, which allowed dissenters from the Anglican Church to practice their religion in England and Scotland, but excluded them from public life and political service. Catholics were not given toleration, but those who did not support rebellion were not molested.[63]

As the 18th century opened, then, some slight progress had been made in religious toleration in Europe, but usually with definite limits and often with civil liabilities. Church and state were still tied together, and very few argued for a separation.

America

Settlers in North America brought with them the historical baggage of Europe's religious differences, especially England's. Many who came did so precisely because of religious belief or religious persecution. But that experience was expressed differently in different colonies.

[57] Ibid., p. 305. Jews were still prohibited by law from living in England.

[58] Antonia Fraser, *Cromwell* (New York: Dell, 1975), pp. 467, 567.

[59] Palmer, *A History of the Modern World,* p. 148; Fraser, *Cromwell,* pp. 368, 393–97. See also Friedrich, *The Age of the Baroque,* p. 291.

[60] Palmer, *A History of the Modern World,* pp. 149–50.

[61] Ibid., p. 151.

[62] Ibid., pp. 152–53.

[63] Ibid., p. 153.

[64] "Puritan" historically refers to those who wanted to rid the Church of England of nonscriptural elements. Puritans were strongly opposed to the episcopal form of church government.

[65] Thomas Jefferson Wertenbaker, *The Founding of American Civilization: The Middle Colonies* (New York: Cooper Square Publishers, 1963), pp. 166, 189 (hereafter cited as *The Middle Colonies).*

New England

The Puritans[64] who sailed to Massachusetts in the 1620s sought a place where they could live and worship by their own beliefs, which they could defend with the full force of government.[65] That they themselves were the victims of imposed religious uniformity made no difference to their attitude toward other dissenters, since they believed that salvation was possible only through their church and its ordinances.[66]

The form of religious organization followed by these Puritans was congregationalism. Each congregation of believers was independent and made its own decisions, with the congregation hiring, and initially ordaining, the minister.[67] In early years, church and town were virtually one, and only church members were permitted to vote, a restriction that remained until 1691.[68] The Bay Colony's Body of Liberties in 1641 specified that free worship was for those who adhered to Congregational worship.[69]

The colony's laws provided for the godly life as the founders envisioned it, regulating behavior such as blasphemy and disparagement of ministers and requiring church attendance and financial support.[70] In the 1650s harsh punishment was meted out to Quakers and Baptists for daring to preach and practice what the Congregationalists saw as heresy. The first Quakers who arrived in Boston were imprisoned until they could be shipped out.[71] Now laws were passed against Quakers, penalizing those who brought Quakers into Massachusetts, forbidding Quaker meetings, and imposing the death penalty on those who returned after banishment.[72]

[66] Ibid., p. 189; and Gustavus Myers, *History of Bigotry in the United States,* ed. Henry M. Christian (New York: Capricorn Books, 1960), p. 4.

[67] William W. Sweet, *The Story of Religion in America* (Grand Rapids, Mich.: Baker Book House, 1930, repr. 1973), pp. 50–51. See Norwood, *The Development of Modern Christianity,* p. 136, and Wertenbaker, *The Middle Colonies,* pp. 167–70, on organization of the Congregational churches.

[68] Sweet, *The Story of Religion,* pp. 51, 61.

[69] Robert Allen Rutland, *The Birth of the Bill of Rights, 1776–1791* (Chapel Hill: Univ. of North Carolina Press, 1955), p. 15.

[70] Evarts B. Greene, *Religion and the State: The Making and Testing of an American Tradition* (New York: New York Univ. Press, 1941), pp. 40–42. Myers, *History of Bigotry,* pp. 22, 25, gives examples of disparagement.

[71] Sweet, *The Story of Religion,* pp. 94–95.

[72] Ibid., p. 95.

The laws provided for fines, whipping, and boring of the tongue as well.[73] Four Quakers were executed between 1658 and 1661, when the king directed that in the future Quakers be sent to England for trial. The executions were unpopular,[74] and the laws were enforced less and less, and 20 years later were suspended.[75] Many Quakers, thereafter, however, were jailed for refusing to pay tithes.[76]

Baptists were persecuted also. In one instance, for refusing to pay his fine in 1651, one Baptist received 30 strokes "upon his bare back with a three-corded whip. As he left the stake, streaming with blood, two compassionate bystanders took him by the hand, but were themselves arrested, fined, admonished, and threatened with whipping."[77] Other Baptists suffered fines, prison, and banishment.[78] The last serious persecution in Massachusetts based on religion was in 1692 when 19 people were hanged and 1 pressed to death in the Salem witchcraft scare.[79]

In 1684 the Bay Colony charter was revoked and 2 years later a Dominion of New England was formed.[80] The new royal governor, among other measures, restricted town meetings in Massachusetts and also denied towns the right to collect taxes for support of churches. This raised fears of an Anglican establishment, leading the Congregationalists to express their thanks for James II's Declaration of Indulgence, which relieved dissenters and Catholics from the legal penalties for nonconformity.[81] For their own defense, the Puritan leaders saw that they might have to accept some toleration of other religions.[82]

The new Massachusetts charter of 1691 granted freedom of worship to all Christians except Catholics (following the English Act of Toleration).[83] Dissenters were still taxed to support Congregational ministers, but in 1727 the Five Mile Act allowed the dissenting Anglican Church to receive taxes collected from members within a 5-mile distance. The following year the benefits of this act were extended to Baptists and Quakers.[84] The Congregationalists, however, continued to be very influential in Massachusetts.[85]

As in Massachusetts, Congregationalism was established in New Hampshire and Connecticut, with some differences. When Connecticut and New Haven were united in 1664, for example, the latter's suffrage qualification of church membership was dropped.[86] The New Hampshire settlements had been under Massachusetts protection from 1641 to 1679, when New Hampshire became a royal colony. The Charter of 1680 called for "liberty of conscience for all Protestants,"[87] but the first royal governor was a narrow Anglican and by the time he left in 1685, many fears had been raised of an Anglican establishment.[88]

In Rhode Island the attitude to religious difference was opposite to that elsewhere in New England. The colony was founded by Roger Williams, who was driven into exile by the Bay Colony authorities for having maintained, among other things, that the state's power does not extend to man's spiritual affairs.[89] In a 1661 deed, Williams stated his purpose for establishing a colony: "I desired it might be for a shelter for persons distressed for conscience."[90]

Rhode Island's charter contained the broadest grant of religious liberty given by an English monarch. It read:

[73] Ibid. and Wertenbaker, *The Middle Colonies,* p. 121.

[74] Richard Hofstadter, William Miller, and Daniel Aaron, *The American Republic* (Englewood Cliffs, N.J.: Prentice-Hall, 1959), vol. I, p. 84.

[75] Sweet, *The Story of Religion,* p. 95.

[76] Ibid.

[77] Wertenbaker, *The Middle Colonies,* p. 122.

[78] Sweet, *The Story of Religion,* pp. 74–75.

[79] Swancara, *Thomas Jefferson Versus Religious Oppression,* p. 29. See Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford Univ. Press, 1965), pp. 124–25, for a succinct summary of this matter, contemporaneous with witchcraft scares in Europe, and Kamen, *The Spanish Inquisition,* pp. 202–05, for a summary of the European picture, where some estimates put the number of witches executed in Germany alone in the 17th century at 100,000.

[80] Wesley Frank Craven, *The Colonies in Transition, 1660–1713* (New York: Harper & Row, 1968), pp. 212–15.

[81] Ibid., pp. 220–21.

[82] Ibid., p. 221.

[83] Sweet, *The Story of Religion,* p. 76; Craven, *The Colonies in Transition,* p. 283.

[84] William Taylor Thom, "The Struggle for Religious Freedom in Virginia; The Baptists," in *Johns Hopkins University Studies in Historical and Political Science,* ed. Herbert B. Adams (Baltimore: Johns Hopkins Press, 1900, and New York: Johnson Reprint Corp., 1973), p. 51.

[85] Norwood, *The Development of Modern Christianity,* p. 136; Morison, *The Oxford History,* p. 177.

[86] Sweet, *The Story of Religion,* pp. 53–54, and Wertenbaker, *The Middle Colonies,* p. 171. The Connecticut Charter of 1662 had said nothing about the franchise or Connecticut's ecclesiastical system and did not provide for Anglican worship. Craven, *The Colonies in Transition,* p. 46.

[87] Rutland, *The Birth of the Bill of Rights,* p. 20.

[88] Craven, *The Colonies in Transition,* p. 215.

[89] Sweet, *The Story of Religion,* p. 68.

[90] Ibid., p. 69.

No person within the said colony, at any time hereafter, shall in any wise be molested, punished, disqualified, or called into question for any difference of opinion in matters of religion: every person may at all times freely and fully enjoy his own judgment and Conscience in matters of religious concernments.[91]

Williams supported complete religious freedom for all—Christian and Jew, Moslem and pagan—as well as complete separation of church and state.[92] Other exiles from Massachusetts, such as Anne Hutchinson and John Clarke, joined Williams in Rhode Island, which had more religious freedom than any other colony through the colonial period.[93]

The Middle Colonies

The colony that came closest in religious freedom to Rhode Island was Pennsylvania, established in 1681–82 by the Quaker William Penn. The Frame of Government of 1683 gave religious toleration to those who "confess and acknowledge the one Almighty and Eternal God, to be the Creator, Upholder, and Ruler of the World."[94] Some 3,000 Quakers had been imprisoned in the first 2 years of Charles II's reign, and although they subsequently became accepted in England, many Quakers wished to leave the corruption of England.[95] Pennsylvania became the home for Christians of many other sects as well—Anglicans, Presbyterians, Lutherans, Mennonites, Moravians, Dunkers, etc. The Quakers did not enforce the tenets of their religion on others, but they did legislate their views on moral matters, as the New England Puritans did. Thus, theaters were banned, as were gambling, profanity, and drunkenness.[96]

The charter of 1683 did not provide complete religious freedom; only Christians were able to vote and hold office.[97] Philadelphia's first Jewish congregation had been organized by 1747; restrictions on public worship and full participation in business were ignored in practice.[98] At the time of the Revolution, Pennsylvania had the only Catholic church outside of Maryland.[99]

In Delaware, an early exclusiveness under the Swedes, with Lutheran churches and prohibition of Jewish settlement,[100] did not have time to become fully institutionalized. Only 17 years after the building of Fort Christina in 1638, the Dutch took over, and then in 1664 the colony became part of the Duke of York's grant; he sold the territory to Penn in 1682. Delaware afterwards followed Pennsylvania's charter in terms of religious liberties.[101]

New York's story is one of change. The New Amsterdam colony, first settled in 1623, had established the Dutch Reformed Church, but toleration, after payment of church taxes, was to be accorded to others, in the spirit of the Netherlands, at that time the most tolerant of the European countries.[102] The last Dutch governor, Peter Stuyvesant, however, was intolerant of nonconformists, whom he had jailed, fined, and banished.[103] He also tried to exclude Jews in 1654, but was overruled by the West India Company.[104]

When the Dutch surrendered to the English in 1664, they were guaranteed liberty of conscience and worship, within limits.[105] The Duke's Laws of 1665 provided that each community was to have a church with a Protestant minister elected by the freeholders and supported by taxing everyone in the community—"an indefinite number of established congregations."[106] No one, however, was to be fined, harassed, or jailed for religious views.[107] By 1692 the royal government was trying to establish the Anglican Church, and in 1693 the assembly did

[91] Sanford H. Cobb, *The Rise of Religious Liberty in America* (New York: Burt Franklin, 1902, reprinted 1970), p. 436.
[92] Sweet, *The Story of Religion,* pp. 67, 70–71; Norwood, *The Development of Modern Christianity,* pp. 111–12.
[93] About 1699 a provision added to the charter limited free settlement to Christians. See Marcus, *The Jew in the Medieval World,* pp. 80–81. A congregation of Jews had been openly organized in Rhode Island in 1658. Henry L. Feingold, *Zion in America* (New York: Twayne Publishers, 1974), p. 30. From 1719 to 1783, Rhode Island law had a clause excluding Catholics from office, but it apparently was never enforced. Rutland, *The Birth of the Bill of Rights,* pp. 17–18. Catholics lost the right to vote in 1729. John E. Pomfret, *Founding the American Colonies 1583–1660* (New York: Harper & Row, 1970), p. 231.
[94] Rutland, *The Birth of the Bill of Rights,* p. 20.
[95] Morison, *The Oxford History,* pp. 126–27.
[96] Wertenbaker, *The Middle Colonies,* pp. 189–90.
[97] Craven, *The Colonies in Transition,* p. 196.
[98] Feingold, *Zion in America,* p. 28.
[99] Morison, *The Oxford History,* p. 176.
[100] Feingold, *Zion in American,* p. 30.
[101] Charles and Mary Beard, *The Beards' New Basic History of the United States,* rev. William Beard (Garden City, N.Y.: Doubleday, 1968), p. 36.
[102] Wertenbaker, *The Middle Colonies,* pp. 82–84.
[103] Ibid., p. 123.
[104] Marcus, *The Jew in the Medieval World,* pp. 69–72.
[105] Wertenbaker, *The Middle Colonies,* p. 84.
[106] Ibid., p. 85.
[107] Craven, *The Colonies in Transition,* p. 76.

establish it in the boroughs of New York, Westchester, Queens, and Richmond.[108]

Public worship was forbidden to Jews in New York, but a synagogue was built in the 1680s anyway. After 1700, Jews voted, but were disqualified in a close election in 1737.[109]

New Jersey's history of state involvement with religion is also mixed. In 1665 the proprietors had granted liberty of conscience to those who did not disturb the peace, but also allowed the assembly to appoint ministers and to maintain them.[110] Some of the earliest settlers in New Jersey were Puritans from New England, leaving what they considered a relaxation of discipline by the clergy there. Other early settlers were Quakers and Baptists persecuted in New England and New Amsterdam.[111]

Some of the early New Jersey towns attempted to create strict Puritan commonwealths. In Newark, settled in 1666, the "town meeting might vote at one moment on the regulation of fences, next on repairing the church, next on providing a night watch, and then on levying taxes to pay the minister's salary."[112] After 1713, however, church and town business were dealt with at separate meetings.[113]

After 1674 New Jersey was split into East and West Jersey.[114] The West Jersey Fundamental Laws of 1676 provided broad religious freedom,[115] and no church was established in the ensuing settlement of West Jersey. When the Jerseys were reunited as a royal colony in 1703, the Anglican Church was not established.

The South

Maryland, begun as a refuge for English Catholics, initially had no established church. The first settlers who arrived in 1634 were mostly Protestants. They were accompanied by a governor with instructions not to offend Protestants.[116] In 1649 the assembly passed the Toleration Act, which provided for free exercise of religion for Christians believing in the Trinity and the divinity of Christ. Those who denied these two propositions could be hanged, and insults to the Virgin Mary, the apostles, or the evangelists could be punished by fines or whipping.[117] A group of Puritans took control of the Maryland government in 1654 and tried to end toleration, but 3 years later, when the colonial proprietor regained control, the act was put back into effect.[118]

In 1692 Maryland was made a royal colony, and the Church of England was established, with a poll tax of tobacco for support.[119] Dissenters and Quakers were given the benefits of the English Act of Toleration.[120] Jews, however, were not given toleration[121] nor were Catholics.[122]

Virginia's charter of 1606 had provided for preaching the faith according to Anglican doctrine.[123] In 1619 the first Jamestown Assembly enacted a law setting fines for nonattendance at Anglican services.[124] Under the Act of 1623, every settlement had to have a place for worship and attendance was required. Compulsory tithes were levied (paid in tobacco or currency based on tobacco prices). In the 1650s dissenting ministers were banned, and in the 1660s fines were imposed on those who refused to have their children baptized in the Anglican faith.[125] Only marriages performed by Anglican ministers were legal,[126] and blasphemy was subject to severe penalties.[127]

Dissenters, after 1689, could obtain licenses for preaching and for places to preach in, but still had to pay tithes and subscribe to the Anglican articles of religion.[128] Licenses were not always granted, however, and the evangelizing of Baptists in the 1760s brought this issue to a head. Many were jailed for unlicensed preaching and disturbing the peace. Between 1768 and 1778, 55 prison terms were served by Baptists, and others were flogged and arrested.[129]

[108] Wertenbaker, *The Middle Colonies,* p. 87. The act itself did not mention the Church of England or the Book of Common Prayer, and some tried to use that omission for their own groups.
[109] Feingold, *Zion in America,* p. 24.
[110] Craven, *The Colonies in Transition,* p. 92.
[111] Wertenbaker, *The Middle Colonies,* pp. 123–26.
[112] Ibid., p. 128.
[113] Ibid., p. 130.
[114] Craven, *The Colonies in Transition,* pp. 106–07, describes how this occurred.
[115] Rutland, *The Birth of the Bill of Rights,* pp. 18–19.
[116] Sweet, *The Story of Religion,* pp. 78–79.
[117] Morison, *The Oxford History,* pp. 84–85, and Sweet, *The Story of Religion,* pp. 80–81.
[118] Sweet, *The Story of Religion,* p. 81.
[119] Ibid., p. 41. The final act of establishment was in 1702.
[120] Craven, *The Colonies in Transition,* pp. 275–77.
[121] Feingold, *Zion in America,* p. 28.
[122] Sweet, *The Story of Religion,* p. 43.
[123] Helen Hill Miller, *The Case for Liberty* (Chapel Hill: Univ. of North Carolina Press, 1965), p. 9.
[124] Greene, *Religion and the State,* p. 34.
[125] Miller, *The Case for Liberty,* pp. 9–10.
[126] Cobb, *The Rise of Religious Liberty,* p. 92.
[127] Myers, *History of Bigotry,* pp. 17–18.
[128] Miller, *The Case for Liberty,* p. 10.
[129] Ibid., pp. 14–19, discusses some of these cases.

These persecutions occurred shortly after a lawsuit that had made Anglican ministers appear greedy and grasping. Poor tobacco crops in 1755 had caused the Virginia assembly to authorize paying the clergy that year in currency based on the old price of tobacco. The same action was taken in 1758, but was disallowed by the king. Several ministers then sued their vestries for either tobacco or cash at the current price. They won, but were given damages of only one penny.[130]

Jews were excluded from Virginia from the start, and at the time of the Revolution about six Jewish families lived there.[131]

The Carolina Charter of 1663 provided liberty of conscience for those who conducted themselves quietly and gave the general assembly the right to appoint and support ministers; others also had the right to maintain ministers.[132] The Fundamental Constitutions of 1699 (later revised and dated 1670)[133] continued freedom of conscience, but required public support of the Anglican Church after the colony had been sufficiently settled.[134] Freedom was not limited to Christians, and no religious test or oath for office was allowed.[135]

With new missionary activity by the Church of England and concerned that their title would be challenged, the proprietors moved to establish the Anglican Church in South Carolina in 1704.[136] The first legislation excluded dissenters from the assembly, and they charged irregularities in the enactment. Eventually, revised legislation in 1706 established the Anglican Church, but did not require membership in it to hold office.[137] In North Carolina, where many Quakers had settled, final legislation was not passed establishing the Anglican Church until 1711.[138]

Georgia, last of the colonies to be chartered in 1732, had freedom of conscience except for Catholics. In 1752 it became a royal colony, and the Anglican Church was established.[139]

[130] Ibid., pp. 12–14. The second of the two cases was argued by Patrick Henry for the laymen.
[131] Feingold, *Zion in America,* pp. 27–28.
[132] Craven, *The Colonies in Transition,* p. 92.
[133] Ibid., p. 99.
[134] Ibid., p. 102.
[135] Ibid., p. 102.
[136] Ibid., pp. 277–78.
[137] Ibid., pp. 278–79.
[138] Ibid., pp. 279–80.
[139] Feingold, *Zion in America,* p. 29; Charles and Mary Beard, *The Beards' New Basic History,* p. 36.

The Move to Disestablishment

Diversity in religious belief flourished at the end of the colonial period. Most of this diversity was Protestant, for only about 25,000 Catholics and 2,000 Jews lived in the colonies at the time of the Revolution[140] of a total population of about 2.5 million.[141] Of the Protestants, Congregational and Anglican Church members (the established churches) were outnumbered by Quakers, Presbyterians, Lutherans, Baptists, Mennonites, Dutch Reformed, and other groups.[142]

The religious revival known as the Great Awakening brought even greater diversity during the second and third quarters of the 18th century. The preaching of men such as Jonathan Edwards, George Whitefield, Theodore Frelinghuysen, Gilbert Tennent, and Samuel Davies spurred new enthusiasm for religion, splits among various denominations, and new less formalized religious organizations.[143]

For some of the participants in the Great Awakening, separation of church and state grew naturally out of their religious views,[144] as religious freedom had for the Quakers a century before.[145] Others, such as the Baptists in Virginia, were more active than before in contesting the establishment of churches.[146]

America's religious experience, of many settlers fleeing religious conformity and persecution in Europe, of the effects of establishment of churches in New England and the South, of the changes in which church was emphasized or established, and equally important, the examples of Rhode Island and Pennsylvania as proof that separation of church and state and religious liberty could work, all led to a logical result:

> For assuredly it was the long experience with sectarianism and denominationalism that taught Americans that investing a privileged church with power. . .produced nothing but resentment and acrimony, but permitting competing denominations to balance themselves under a broad tent of

[140] Hofstadter, Miller, and Aaron, *The American Republic,* p. 109.
[141] Morison, *The Oxford History,* p. 228.
[142] Henry Steele Commager, *The Empire of Reason* (Garden City, N.Y.: Anchor Press/Doubleday, 1977), p. 167.
[143] Sweet, *The Story of Religion,* pp. 127–54, provides a useful summary of the Great Awakening.
[144] Ralph Ketcham, *From Colony to Country: The Revolution in American Thought, 1750–1820* (New York: Macmillian, 1974), pp. 67–68.
[145] Wertenbaker, *The Middle Colonies,* pp. 188–89.
[146] Sweet, *The Story of Religion,* pp. 189–90.

toleration and equality prospered both them and society.[147]

Even had the experiences of the martyrs of the 16th and 17th centuries in Europe been forgotten by the colonists, religious persecution had not ceased in Europe. Many German settlers, for example, came from the Palatinate, where after 1690 Protestants were being persecuted by the Catholic rulers.[148] Close at hand, too, were reminders of the inequities to which religious intolerance and church establishment could lead. The persecution of Baptists in Virginia was a case in point.

Another factor was new Anglican missionary activity after the turn of the century, whose workers actively pushed for an American bishop.[149] For those whose whole emphasis in church organization was opposed to the hierarchical episcopate and who knew the role of Anglican bishops in persecuting dissenters, this was an anathema. Loss of religious liberty and of lay control of the churches were feared.[150] "Virulent pamphlets set up the Anglican bishop, in lawn sleeves, cope, and mitre, as the colonial bogeyman of the 1740's. . . ."[151] New England Congregationalists and Presbyterians from the middle colonies thought the danger so great that they held annual meetings for 10 years, starting in 1766, to "prevent the establishment of an Episcopacy in America."[152] Most Anglican laymen and churchmen opposed the American episcopate too.[153]

The rhetoric and justification of the Puritan rebels of 17th century England was well-known to the colonists,[154] and that rhetoric opposed episcopacy. Some of it, too, supported tolerance of various religious beliefs and held the germ of the idea of church-state separation.

Moreover, colonists required to pay for support of an established church that they did not believe in could hardly have wished to continue such an arrangement, especially when the cry of unjust taxation was in the air. "This unequal Burthen is complain'd of as inconsistent with the spirit of Taxation," said a 1776 memorial from the Scotch-Irish to the Virginia assembly, complaining about having to support the established church along with their own ministers.[155]

Added to the increased religious diversity of the colonies in the mid-18th century was increased secularism. Most Americans had no affiliation with a church, and there was only about one church for every 900 people.[156] Even in New England with its tradition of piety, only about one in eight people were church members.[157] The 18th-century Enlightenment fostered secularism[158] or at most deism, with its emphasis on ordered observation of nature and on improving society.[159] To that atmosphere of indifference to religion, skepticism, and secularism was added the disrepute of many of the Anglican clergy in Virginia, the colony where the Anglican Church had been established longest.[160]

At least some religious toleration existed in all the colonies by the end of the colonial period, whether imposed on them initially by extension of the English Act of Toleration as in Massachusetts, or arising from principle in the founding as in Rhode Island, or springing from a desire to encourage settlers as in the Carolinas. During the French and Indian War the colonists were forced to cooperate against common enemies despite religious differences.[161] Yet most colonies also had an established church or some involvement of the state with religion. (Nowhere was the established church entrenched in the way it was in England, however.)[162] The inertia of the state's traditional involvement with religion was overcome by the efforts of many, from George Mason, James Madison, and Thomas Jefferson in Virginia, to Isaac Backus and John Leland in New England, to the many individuals who laid siege to constitutional assemblies with petitions for religious freedom and disestablishment.[163]

147 Commager, *The Empire of Reason,* pp. 210–11.
148 Wertenbaker, *The Middle Colonies,* pp. 265–66.
149 Sweet, *The Story of Religion,* p. 174.
150 Morison, *The Oxford History,* p. 152.
151 Ibid.
152 Sweet, *The Story of Religion,* p. 174.
153 Ibid., p. 175; Hofstadter, Miller, and Aaron, *The American Republic,* p. 110.
154 Ketcham, *From Colony to Country,* p. 11.
155 Miller, *The Case for Liberty,* pp. 24–25.
156 Hofstadter, Miller, and Aaron, *The American Republic,* p. 108.
157 Commager, *The Empire of Reason,* p. 167.
158 Ibid., pp. 45–47.
159 Carl L. Becker, *The Heavenly City of the Eighteenth-Century Philosophers* (New Haven: Yale Univ. Press, 1932, repr. 1962), pp. 56–57, 83–86.
160 Sweet, *The Story of Religion,* p. 37, discusses the exaggerations of this point.
161 Greene, *Religion and the State,* p. 68.
162 Ketcham, *From Colony to Country,* p. 35.
163 Ibid., pp. 67–68; Sweet, *The Story of Religion,* pp. 189–93.

The cause of the Revolution itself—liberty and independence—supported the idea of liberty and independence for religious groups.[164] Natural rights were the focus, and the idea that freedom of conscience was a natural right, not one that could be curtailed by government, was expressed by the First Continental Congress in 1774 in a letter seeking Catholic Quebec's support that enumerated the rights of peoples.[165]

Changed attitudes toward religious freedom were to be reflected first in the new State constitutions, but the fight for complete religious freedom and disestablishment of all churches took many more years.

State and Federal Constitutions

At the Virginia convention in 1776, held shortly before the national convention, entreaties were received from across the colony for relief from restrictions on conscience and worship, for free exercise, for exemption from taxes paid to support any church, and for disestablishment of the Church of England.[166] That convention voted to support independence from England and adopted a far-reaching bill of rights that included this section on religion, proposed by Patrick Henry and drafted by James Madison:

> That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forebearance, love, and charity toward each other.[167]

Although Virginia had complete freedom of conscience, disestablishment of the Anglican Church was not legislated until 1785.[168] In the other new States, the picture was mixed. Although all declared freedom of worship, that freedom was generally limited in some way. New Jersey rejected church establishment, but gave full religious liberty only to Protestants.[169] Religious freedom was limited to Christians by Maryland and Delaware.[170] Pennsylvania required officeholders to believe in the divine origin of the New Testament, and Georgia barred Catholics from public office.[171] In New York and Delaware, ministers could not hold public office.[172] Ministers were also barred from public office in South Carolina, which established the Protestant religion, although individuals could not be compelled to support a church.[173] In Massachusetts, Connecticut, and New Hampshire, the Congregational Church was established[174] and did not lose this position until 1817 in New Hampshire, 1818 in Connecticut, and 1833 in Massachusetts.[175]

The Confederation that governed the States before 1787 allowed free exercise of religion, but did not avoid church-state association. In fact, religion was encouraged. Congress passed the Northwest Ordinance, banning the molesting of a person because of religious beliefs, but stating that religion is "necessary to good government and the happiness of mankind."[176] Religion was held to be a matter for the States, not for Congress.

The Constitutional Convention of 1787 included among its delegates Protestants, Catholics, and freethinkers.[177] On August 6 it considered a draft of the Constitution, reported by a committee of five. That draft contained no language with respect to a religious test for Federal officeholders, but required in its Article XX that they take an oath to support the Constitution.[178] General Charles C. Pinckney of South Carolina, an Episcopalian, proposed the language that became section 3 of Article VI of the Constitution, providing: "No religious test shall ever be required as a qualification to any office or public trust under the United States." This section was unanimously adopted by the convention on August 30,[179] and the new Congress approved the Constitu-

[164] Greene, *Religion and the State,* p. 75. For discussions of the part played by religion in laying the ground for revolutionary sentiment, see Ketcham, *From Colony to Country,* pp. 38–53 and 65–66, and Commager, *The Empire of Reason,* pp. 166–68.
[165] Rutland, *The Birth of the Bill of Rights,* p. 28.
[166] Cobb, *The Rise of Religious Liberty,* pp. 490–91.
[167] Greene, *Religion and the State,* p. 78, citing bill of rights.
[168] Greene, *Religion and the State,* pp. 87–88.
[169] Rutland, *The Birth of the Bill of Rights,* p. 43.
[170] Ibid., pp. 52, 55.
[171] Ibid., pp. 90, 61.
[172] Ibid., pp. 63, 56.
[173] Ibid., p. 65.
[174] Ibid, pp. 69–70, 74–76, 89–90.
[175] Sweet, *The Story of Religion,* p. 190.
[176] Greene, *Religion and the State,* p. 83, citing Article I of the Ordinance of 1787.
[177] Ibid., p. 84.
[178] Hamilton P. Richardson, *The Journal of the Federal Convention of 1787 Analyzed* (San Francisco: Murdock Press, 1899), pp. 126, 134, 195.
[179] Joseph Henry Crooker, *The Winning of Religious Liberty* (Boston: Pilgrim Press, 1918), p. 236.

tion on September 28, 1787.[180]

When the Constitution went to the States for ratification, some favored a more definite expression of religious liberty and other rights. The movement was led by James Madison[181] and "radical republicans," who wanted to limit the arbitrary exercise of power by a strong central government.[182] Several States, including Massachusetts, Virginia, New Hampshire, Rhode Island, North Carolina, and South Carolina, passed resolutions recommending that a bill of rights be added to the Constitution.[183] The Massachusetts resolution read as follows:

> And as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears, and quiet the apprehensions, of many of the good people of this commonwealth, and more effectually guard against an undue administration of the federal government,—the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution. . . .[184]

Madison, a member of Congress, had also originally proposed an obligation on the States, which would have read, "No state shall violate the equal rights of conscience. . . ."[185] but it did not pass.

The Bill of Rights became the first 10 amendments to the Constitution in 1791. Its words on religion are these, in the first amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." It applied, at the time, only to Congress and not to State governments.

In Virginia, which had the most advanced constitutional provision, it was not until the 1785 Act for Establishing Religious Freedom that disestablishment became a reality.[186] Various laws since its 1776 bill of rights had gradually chipped away at the status of the Church of England as a result of a strenuous effort by Jefferson, who described the debates as "the severest struggles in which I have ever been engaged. . . .Although the majority of our citizens are dissenters, a majority of the legislature were Churchmen."[187] Disestablishment was even more gradual in the other States, although it did finally come about. The last State was Massachusetts, which did not abolish tithes and separate civil and religious affairs until 1833.[188]

Discrimination in the 19th and 20th Centuries

Thomas Jefferson recognized early the importance of popular support in making religious liberty a reality:

> Our laws have applied the only antidote to [intolerance], protecting all on an equal footing. But more remains to be done, for although we are free by the law, we are not so in practice; public opinion erects itself into an Inquisition, and exercises its offices with as much fanaticism as fans the flames of an Auto-da-Fe.[189]

Jefferson's words were prophetic. The 19th and 20th centuries in America witnessed a reluctance of legislatures and courts to disentangle themselves from the prevailing religion, as well as popular movements to deprive religious minorities of their rights. One writer observed this irony in 1924:

> It is in highest degree depressing and not a little remarkable that among a people and under a government where freedom of worship, freedom of conscience and freedom of speech are embedded in the rock of fundamental law, there should now exist organizations whose sole aim is persecution. . . .[190]

Even though the laws of most States prohibited an establishment of religion, blasphemy laws continued to be enforced vigorously. In 1824 in Pennsylvania, a speaker in a debating society was convicted under a blasphemy statute for saying: "The Holy Scriptures are a mere fable; they are a contradiction and although they contain a number of good things, yet they contain a great many lies."[191] In a 1920 opinion, the Supreme Court of Maine proclaimed "*Stability* of government in no small measure de-

[180] Arthur E. Sutherland, *Constitutionalism in America: Origin and Evolution of its Fundamental Ideas* (New York: Blaisdell Publishing Co., 1965), p. 178.

[181] Crooker, *The Winning of Religious Liberty,* p. 237.

[182] David G. Smith, *The Convention and the Constitution* (New York: St. Martin's Press, 1965), pp. 86–88.

[183] Crooker, *The Winning of Religious Liberty,* pp. 236–37; Sutherland, *Constitutionalism in America,* p. 180.

[184] Sutherland, *Constitutionalism in America,* p. 179, citing resolution.

[185] Ibid., p. 195, citing Madison's fifth proposal.

[186] Greene, *Religion and the State,* pp. 87–88.

[187] Cobb, *The Rise of Religious Liberty in America,* p. 494 citing Jefferson.

[188] Ibid., pp. 512–15.

[189] Swancara, *Thomas Jefferson versus Religious Oppression,* p. 134, citing an 1817 letter.

[190] Nicholas M. Butler, in Phillips Brooks, *Tolerance: Two Lectures* (New York: E.P. Dutton & Co., 1924), p. 1.

[191] Swancara, *Thomas Jefferson versus Religious Oppression,* p. 56.

pends upon the reverence and respect which a *nation* maintains toward its *prevalent* religion."[192] As late as 1921, a Socialist lecturer was convicted under a Maine blasphemy statute because a translation of his lecture, which had been delivered in Lithuanian, "seemed to show ridicule of some biblical texts."[193] The Christian orientation of judges extended to the credentialing of courtroom witnesses, the admission of dying declarations, and the validity of trusts. In 1820 the highest New York court recognized the English common law banning as a courtroom witness anyone who did not profess a belief in God.[194]

The Supreme Court of Illinois, in 1856, held incompetent a witness who did not believe in divine punishment.[195] Illinois corrected this, finally, in its 1870 State constitution, which provided, "[N]o person shall be denied any civil capacity. . .on account of his religious opinions."[196]

Although statements made as part of a dying declaration are, under common law, admissible in court, a New Jersey jury in 1857 was instructed that if the dying person did not believe "in a future state of rewards and punishments," it must disregard his dying declaration.[197] As late as the beginning of the 20th century, the dying declarations of "infidels" (including pagans, agnostics, Jews, and Mohammedans) were excluded in Mississippi.[198] The Supreme Court of Pennsylvania in 1870 agreed with a lower court's invalidation of a bequest to the Infidel Society of Philadelphia "for the free discussion of religion, politics, etc." The court feared the bequest would cause "denial of the doctrines and obligations of revealed religion."[199]

In an 1880 case, the Supreme Court of Pennsylvania declared that a court of equity should not enforce a trust "where its object is the propagation of atheism, *infidelity*. . . ."[200]

Most States abandoned religious tests for holders of public office, although a few, especially in the South, survived until the Civil War and even later.[201] In 1835 the Tennessee constitution provided, "No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil government of this state."[202] The 1868 constitution of North Carolina provided, "The following classes of persons shall be disqualified for office: First. All persons who shall deny the existence of Almighty God. . . ."[203] On the other hand, in the early 19th century, many State constitutions disqualified clergymen from holding important public offices.[204]

The last two centuries have also witnessed various popular movements fueled by religious bigotry. The movement of Nativism flourished in the mid-19th century, reacting to the wave of immigrants by defending "Americanism and Protestantism."[205] However, there was strong anti-Catholic sentiment even earlier.

Between 1820 and 1930, 38 million immigrants came to America.[206] Since most of the mid-19th century immigrants were Catholics from Ireland and Germany, Nativists were anti-Catholic as well as antiforeign. The movement was partly a reaction to Catholic demands for public aid to parochial education and for use of the Catholic version of the Bible, rather than the King James version, for Catholic students in public schools.[207] The Archbishop of New York also objected in 1840 to use in the public schools of books that commonly used the term "popery."[208] Anti-Catholic literature was published, arousing strong prejudices.[209]

The Nativists' verbal attacks were followed closely by physical violence. In 1834 the Ursuline Convent was burned down in Charlestown, Massachusetts,[210] and in the town of Chelsea, a frenzied Protestant congregation tore the cross from a

[192] Ibid., p. 74.
[193] Ibid., p. 58.
[194] Ibid., p. 88.
[195] Ibid., p. 90.
[196] Ibid., p. 91, quoting constitution.
[197] Ibid., p. 98.
[198] Ibid., p. 99.
[199] Ibid., p. 114.
[200] Ibid., pp. 114–15.
[201] Greene, *Religion and the State,* p. 94.
[202] Swancara, *Thomas Jefferson versus Religious Oppression,* p. 107.
[203] Ibid.
[204] Greene, *Religion and the State,* p. 95.
[205] Mecklin, *The Story of American Dissent,* p. 354.
Nativism was the name given to the protest movement by Protestant descendants of original European settlers against the waves of new, largely Catholic, immigrants during the second half of the 19th century.
[206] Thomas J. Curran, *Xenophobia and Immigration 1820–1930* (Boston: Twayne Publishers, 1975), p. 22.
[207] Ibid., p. 34.
[208] Myers, *History of Bigotry,* p. 112.
[209] Curran, *Xenophobia and Immigration 1820–1930,* pp. 26–27. Myers, *History of Bigotry,* discusses this literature in detail. See pp. 66–70, 84–109.
[210] Myers, *History of Bigotry,* pp. 84–91.

Catholic church and shattered it. Martial law had to be declared in 1844 to control anti-Catholic riots in Philadelphia.[211] In 1854 Protestants in Dorchester celebrated the Fourth of July by blowing up a Catholic chapel at 3 o'clock in the morning.[212] Other anti-Catholic riots occurred that year in New York City, Bath, Maine, Lawrence, Massachusetts, and St. Louis, Missouri.[213] In Louisville in 1855 a bishop wrote that "[n]early one hundred poor Irish have been butchered or burned, and some twenty houses have been consumed in the flames," and city officials ignored the incident. Similar events also occurred in Ohio, Connecticut, New York, and elsewhere that year and in Baltimore in 1856.[214] The "Know-Nothings," a national group of Nativists of the 1850s, formed secret fraternal societies to maintain their sense of exclusivity as they pondered the twin threats of immigration and Catholicism.[215] They acquired some political power in their advocacy of native-born Protestant candidates for local and national office. To appeal to an even broader spectrum of supporters, they gradually admitted to their midst native-born Catholics and foreign-born Protestants. Political considerations also caused them to discontinue the secrecy of their deliberations. The group split hopelessly over the issue of slavery and disintegrated in the late 1850s.[216]

Other persecution during this period was directed at the Mormons, who were driven from their settlements in the East by local abuse, murder, and mob fury. Finally, in 1847 they left Iowa for Utah, where they could live in peace.[217]

In the late 19th century the anti-Catholic banner was picked up by the American Protective Association, founded in Iowa in 1887. A secret organization that persistently fed on antipapal prejudice, its membership eventually reached 1 million. The APA spread rumors and circulated falsified documents about Catholics. For instance, a forged letter from church officials and a false papal encyclical were published, revealing alleged plans by Catholics to remove heretics and take over North America. It has been said that "the American Protective Association of the nineteenth century was as vicious and unconscionable in attacking Catholics as the Nazis of the twentieth are in maligning Jews."[218] The rise of the APA has been attributed to Protestant resentment of the success of some second-generation Catholics in industry and the professions, to scandals involving Irish-American politicians in New York, to the political and industrial unrest of the period, and to the continuing controversy over parochial schools. The main argument put forth by the organization was that Catholics cannot be good Americans because they place loyalty to the pope over loyalty to the country. In addition to statements about the Catholic Church's desire to control American politics, the APA press also claimed that firearms were stored under Catholic churches.[219] A Protestant minister recalled his boyhood during the APA era:

> I know what prejudice against the Catholics means. I was brought up in the midst of that prejudice, in Eastern Massachusetts. We were living in the vicinity of the city of Boston when I was a child, in the midst of the American Protective Association agitation. That great wave of hatred against the Catholics was, perhaps, the fiercest thing that ever swept any particular part of this country. In the neighborhood where I lived and where I went to school it was commonly believed that in every Catholic church a musket was planted in the cellar whenever a Catholic boy was born in the neighborhood of the parish. Men and women of families throughout our neighborhood discharged their Irish-Catholic servant-girls, because they didn't dare to eat the food those girls placed upon the table lest it be poisoned. The Ku Klux Klan agitation of the last few years was kindergarten play compared to that furious scourge that swept the hearts of men. And the scars of that scourge are on my heart today.[220]

The APA as a formal organization was defunct by 1900.[221]

In 1921, during the depression following World War I, the Ku Klux Klan was revived. Originally founded in 1866 to maintain "the supremacy of the white race" and relegate "the African race to that condition of social and political inferiority to which God has destined it," the Klan's activities became so violent that its founders disowned the group, but it was continued by others.[222] It grew in a time of increased crime, divorces, and scandals, and general

[211] Ibid., pp. 119–24.
[212] Everett R. Clinchy, *All in the Name of God* (New York: John Day, 1934), pp. 17–18.
[213] Myers, *History of Bigotry,* pp. 140–43.
[214] Clinchy, *All in the Name of God,* p. 18, and Myers, *History of Bigotry,* p. 152.
[215] Curran, *Xenophobia and Immigration 1820–1930,* pp. 44–45.
[216] Ibid., pp. 58–73.
[217] Myers, *History of Bigotry,* pp. 117–18.
[218] Curran, *Xenophobia and Immigration 1820–1930,* pp. 18, 84–85.
[219] Ibid., pp. 87–88.
[220] Ibid., p. 93, quoting John Haynes Holmes.
[221] Ibid.
[222] Ibid., pp. 76–79, 80–81.

lawlessness, as an organized force that would restore order. In its new incarnation it banned from membership foreigners, Jews, and Roman Catholics, as well as blacks. According to one author, Klan members "played upon tribal fears and the terrors of insecurity in a period of moral instability and economic crisis. They warmed up all the old anti-Catholic dregs left over from previous hysterias and regaled the public with the 'Protocols of the Elders of Zion,' documents which had long before been proved to be a forgery."[223] By 1923 the KKK had 2.5 million members.[224]

The same anti-Catholic rhetoric heard during the earlier APA era was present during the Klan resurgence, and new charges were added. In addition to churches storing arms, and the pope desiring to dominate American politics, it was also whispered that priests seduced confessing women. The Klan's anti-Catholic campaign became particularly vicious in 1928, when the Democratic Party nominated for President a Catholic, Alfred E. Smith. With the Klan of the 1920s came the birth of organized anti-Semitism in America. While there were only 6,000 Jews in the United States in 1820, the number had grown to 4 million by 1920. At first the anti-Semitism was relatively mild. Early laws providing political disabilities for Jews were pro-Christian rather than anti-Jewish, and in the early 20th century Jews were credited with helping, rather than hindering, industrial development. Klan propaganda accused Jews of being responsible for communism and of entering into a capitalist conspiracy to control the world. European propaganda against Jews also fueled the flames.[225]

The Klan died for a second time during the Coolidge era, with prosperity apparently bringing about a disinterest in hatred.[226] Religious discrimination remained, however, and still exists today. Discrimination based on religious belief or practice, although more subtle than in the past, continues in housing, employment, and memberships in private clubs. Free exercise issues over the past 30 years relating to Indians, prisoners, conscientious objectors, and in employment are discussed at length in subsequent chapters of this statement. A resurgence of religious bigotry by hate groups has added a violent undertone that, left unchecked, could doom this country to repeat a part of history better left behind.

[223] Ibid., p. 20.
[224] Ibid.
[225] Ibid., pp. 109–10, 118–19.
[226] Ibid., p. 119.

Chapter 2

The First Amendment

The first amendment to the Constitution prohibits the Congress from passing any law "respecting an establishment of religion or prohibiting the free exercise thereof," restrictions that also apply to the States through the 14th amendment.[1] The Constitution is otherwise almost silent on the subject of religion, but the two short clauses in the first amendment have generated more than their share of judicial controversy over interpretation, scholarly debate, and litigation in the two centuries since their adoption. The two clauses are, as Chief Justice Burger noted, "cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[2] This potential conflict requires a constant balancing of competing interests as some situations require a level of government involvement to ensure free exercise. Although the amendment's language purports to erect a wall of separation between government and religious institutions, "[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts,"[3] and satisfying the mandate of one clause may well result in an impingement on the other. As Chief Justice Burger noted:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: That we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[4]

The first clause, prohibiting government establishment, was designed to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity."[5]

Education

In a 1971 decision, after noting that there were "necessary and permissible contacts" such as "[f]ire inspections, building and zoning regulations, and

[1] Cantwell v. Connecticut, 310 U.S. 296 (1940), and Murdock v. Pennsylvania, 319 U.S. 105 (1943), held that the free exercise guarantee applies to the States through the 14th amendment. *See also* Justice Brennan's concurring opinion in School District v. Schempp, 374 U.S. 203, 230 (1963), in which he presented the view held by some that the incorporation of the establishment clause into the 14th amendment is conceptually impossible because the clause is not a provision of the Bill of Rights that protects an individual freedom. Justice Brennan, however, rejected this argument and subscribed to a unitary view of the clauses, seeing them as coguarantors of religious liberty and, therefore, absorbable through the 14th amendment and applicable to the States. Another argument that he presented and of which he disposed was that the Framers only intended the prohibition to foreclose Congress from establishing religion. Justice Brennan argued that the 14th amendment created, among the new Federal rights, the right to be free from any governmental involvement in religion. Some constitutional scholars, however, still maintain that establishment of religion by the States was intended to be *protected* by the first amendment, arguing that it was designed to forbid Federal interference with the then-existing established religions in each of the States. Gerald Gunther, *Cases and Materials on Constitutional Law,* 10th ed. (Mineola, N.Y.: Foundation Press 1980), p. 1553, n. 1.

[2] Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668–69 (1970).

[3] *Id.* at 670.

[4] *Id.* at 669.

[5] *Id.* at 668.

state requirements under compulsory school-attendance laws," the Court stated:

> Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.[6]

As a result of this construction of the establishment clause, a number of seemingly inconsistent decisions have been handed down by the Supreme Court. This has prompted one recent Supreme Court majority, in upholding a State statute funding private religious and nonsectarian schools for the costs of complying with State student evaluation and reporting requirements, to observe:

> This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools. But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States. . .produces a single, more encompassing construction of the Establishment Clause.[7]

One of the earliest cases in which the specter of State involvement in religion was raised was *Everson v. Board of Education.*[8] In that case, the United States Supreme Court considered the constitutionality of a New Jersey statute that authorized local school districts to make rules and contracts to provide transportation for pupils to and from schools. One local board of education, pursuant to that statute, reimbursed parents for student transportation on public buses, including parents of students who attended parochial school. A taxpayer challenged the constitutionality of the reimbursement; the Supreme Court held that it did not breach the "high and impregnable wall" between church and state.

In reaching its conclusion, the Court distinguished between religious and nonreligious benefits, deciding ultimately that the aid was secular and educational, benefiting the children, not their religion.[9] This particular characterization of the aid and benefit derived led ultimately to the development of the first prong of the test now used to determine whether a statute violates the establishment clause, that being whether such statute reflects a clearly secular legislative purpose.[10]

Although the Court in *Everson* determined that the State was providing a general, governmental service, the dissenters were not convinced of the secularity of the service provided:

> It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified with the Catholic Church?" But before these school authorities draw a check to reimburse for a student's fare they must ask just that question. . . .To consider the converse of the Court's reasoning will best disclose its fallacy. . . .Could we sustain an Act that said the police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid.[11]

The often subtle factual distinctions necessary to ascertain secular purpose led the Court finally to articulate a three-pronged test, based on 25 years of decisions, to determine the constitutionality of a statute for establishment clause purposes. In addition to the requirement of reflecting a "clearly secular legislative purpose," a statute must have a "primary effect that neither advances nor inhibits religion" and must avoid "excessive government entanglement with religion."[12]

The application of this three-pronged test has led to decisions by the Supreme Court that have permitted governments to supply noneducational

[6] Lemon v. Kurtzman, 403 U.S. at 614.

[7] Committee for Public Education v. Regan, 444 U.S. 646, 662 (1980).

[8] 330 U.S. 1 (1947). Most of the cases involving establishment clause issues focus on religious exercises in public schools or aid to parochial schools.

[9] *Id.* at 16–18.

[10] Epperson v. Arkansas, 393 U.S. 97 (1968).

[11] 330 U.S. at 25–26 (Jackson and Frankfurter, JJ., dissenting).

[12] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

services to sectarian schools, such as health and nutritional aids,[13] to loan nonreligious textbooks,[14] and to finance transportation. The keys, for establishment clause purposes, are that the aid be available to all and not be used to advance ideologically any religion or sectarian teachings.[15] Any aid to sectarian elementary and secondary schools does raise the specter of unconstitutionality and is viewed with suspicion. Such aid is treated differently because sectarian schools are considered to be permeated with the values and beliefs of the particular religion with which they are affiliated. Hospitals, for example, do not normally engage in "religious instruction or guidance or indoctrination"[16] and, therefore, public support of church-affiliated hospitals has long been deemed acceptable.[17]

Nearly a quarter-century elapsed after the *Everson* decision before the Supreme Court was again squarely presented with the issue of direct financial aid to sectarian schools. The issues in *Lemon v. Kurtzman*[18] were a Rhode Island act that provided for a 15 percent salary supplement to be paid to teachers who taught at nonpublic schools with the exception of teachers who taught religion and a Pennsylvania statute that provided for reimbursement to nonpublic schools for secular textbooks, instructional materials, and teachers' salaries, again, only if they taught secular subjects. Applying the three-pronged test to determine constitutionality, the Supreme Court found that the statutes had a secular legislative purpose and were not intended to advance religion. The Court did, however, find the States' entanglement with religion to be excessive, noting that "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and State."[19] In *Lemon,* the Court made clear that because the benefits inured to the institutions and not the children, the arguments of the two States involved would be viewed with a higher degree of suspicion. Schemes to provide tuition credits or grants that directly benefit the child have, however, never succeeded in persuading a majority on the Court that they are not violative of the establishment clause. A New York State program that provided for maintenance and repair of nonpublic facilities and equipment, for tuition reimbursement, and for income tax benefits for nonpublic school attendance was determined to be unconstitutional because it had a primary effect that advanced religion.[20]

Although cases involving aid to sectarian schools and students have presented the tougher issues for establishment clause purposes, there have been numerous cases involving the establishment clause and public schools. A year after its decision in *Everson,* the Court held in *McCollum v. Board of Education* that a public school "released time" program that allowed students voluntarily to attend classes offered by privately employed religious teachers on public school premises violated the establishment clause.[21] The Court found the aid to be "invaluable" to sectarian groups because of its "use of the State's compulsory public school machinery."[22] But in *Zorach v. Clauson,* a similar case 4 years later, which involved a "released time" program in which the students voluntarily *left* the premises for religious instruction or devotional exercises, the program was found not violative of the establishment clause.[23] In the majority opinion, Justice Douglas, one of the most fervent church-state separatists ever to sit on the Court, wrote that to find otherwise would be reading into the Bill of Rights a "philosophy of hostility to religion."[24] According to Justice Douglas:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. . .the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the

[13] Everson v. Board of Education, 330 U.S. 1, 16–18 (1947).

[14] Board of Education v. Allen, 392 U.S. 236 (1968).

[15] Some, however, have maintained that textbooks selected and used in "an atmosphere deliberately designed. . .to maintain a religiously reverent attitude" cannot ever be classified as secular aid. Freund, "Public Aid to Parochial Schools," 82 *Harv. L. Rev.* 1680, 1683 (1969).

[16] Lemon v. Kurtzman, 403 U.S. 602, 633 (1971) (Douglas, J., concurring).

[17] Bradfield v. Roberts, 175 U.S. 291 (1899).

[18] 403 U.S. 602 (1971).

[19] *Id.* at 620–21.

[20] Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). The Court noted that the argument that the State has an obligation to equalize the position of those who elect to send their children to nonpublic schools was "wholly at variance with the Establishment Clause." *Id.,* n. 38.

[21] McCollum v. Board of Education, 333 U.S. 203 (1948).

[22] *Id.* at 212.

[23] Zorach v. Clauson, 343 U.S. 306 (1952).

[24] *Id.* at 315.

specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter.[25]

The factual distinctions in the two cases are apparent, and the different conclusions can be reconciled. Justice Brennan, in a concurring opinion in *Abington School District v. Schempp,* distinguished the cases:

> [T]he *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not. The *McCollum* program. . .brought government and religion into that proximity which the Establishment Clause forbids. To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.[26]

Many scholars, however, believe that the distinction the Court drew between the two cases was artificial, arguing that the *Zorach* program was inherently coercive and therefore unconstitutional.[27] The desire of young children to conform and not be ostracized would, it is argued, lead some children to participate in unwanted religious training. Justice Jackson, addressing this issue in his concurring opinion in *McCollum,* said that he did not believe that the Constitution could be construed "to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress."[28]

Conscientious Objectors

The second clause of the first amendment, providing that Congress not prohibit the free exercise of religion, has been construed broadly, without the somewhat tortuous devising of tests to which the Court had to resort for establishment clause purposes. Throughout the years, the Court has held to an expansive interpretation that encompasses all sorts of religious beliefs, including the constitutionally protected right to have no religion. The series of cases involving conscientious objection provide a comprehensive view of the ever-evolving notion of what constitutes a religious belief.

Some individuals hold beliefs that require them to refrain from bearing arms, participating in war, military training, or any form of preparation for war, such as the manufacture of arms or even the payment of taxes that support defense. Although Congress has provided for the exemption of conscientious objectors who meet its standards in at least some of these situations, *dicta* from the courts have thus far indicated there is no constitutional requirement to do so. Rather, considering such exemptions to be a matter of "legislative grace," courts have required those seeking the exemptions to meet the standards set by statute.

Congress' definition of conscientious objection has required the objection to have some base in religious training or belief. Cases involving conscientious objection can arise during the preinduction of draftees, among persons already serving in the armed forces seeking discharge on grounds of conscience, among students required to participate in the Reserve Officer Training Corps, and among aliens seeking United States citizenship. Issues raised by interpretation and application of the exemptions include the religious quality of the belief required, whether objection is to all war (absolute) or to only a particular war (selective), and whether the objection is sincerely held.[29]

The first amendment's guarantee of free exercise would seem to require governmental accommodation to conscientious objection, at least absent a compelling governmental interest that cannot be achieved by means that do not burden religion. "[C]onscience and belief are the main ingredients of First Amendment rights. They are the bedrock of free speech as well as religion."[30]

But whether or not it is constitutionally required, Congress has made provision for the exemption of objectors from military duty. Reasons why the exemption has been considered to be in the Nation's interest include a recognition of the importance of protecting deeply held moral and religious convic-

[25] *Id.* at 312.

[26] 374 U.S. 203, 262–63 (1963).

[27] See 52 *Colum. L. Rev.* 1033 (1952); Regan, "The Dilemma of Religious Instruction and the Public Schools," 10 *Cath. Law.* 42 (1964); Cushman, "The Holy Bible and the Public Schools," 40 *Cornell L.Q.* 475 (1955).

[28] 333 U.S. at 233.

[29] During the summer and fall of 1982 several objectors were prosecuted for failure to register for the draft. The government successfully argued that while there is a recognized conscientious objection to serving in the armed forces, there is no concomitant allowable objection to merely registering. *New York Times,* July 14, 1982, p. 20; Oct. 6, 1982, p. 12; Oct. 5, 1982, p. 14; Aug. 23, 1982, p. 12.

[30] Gillette v. United States, 401 U.S. 437, 465–66 (1971) (Douglas, J., dissenting).

tions, the small numbers of objectors, and the fact that objectors probably cause no disruption if exempt, while the presence of objectors in the armed services, or in jail, "could be a greater detriment to a war effort than any manpower advantage gained through their conscription. These men will not fight, and it takes men to guard them in prison; men who could otherwise be fighting."[31]

The *Selective Draft Law Cases*[32] determined that Congress had both the power of conscription and the authority to exempt conscientious objectors from the draft. In the 1917 Selective Draft Act, an exemption was recognized only for members of the few religious sects that traditionally and historically had objected to war in any form.[33] This provision was altered, first in application, and then by amendment of the statute.[34] The 1940 version no longer limited its coverage exclusively to members of the traditionally pacifist churches, but did require a belief in God. This was still inconsistently applied; some draft boards granted exemptions to philosophical, humanitarian objectors, while others required church attendance and affiliation with those religions recognized as having always opposed war.[35] In 1948 Congress amended the language to require belief in a "Supreme Being."[36]

The applicable provision of the code currently in effect reads, in part:

> Nothing contained in this title. . .shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.[37]

This is the current code provision concerning induction, training, and service in the armed forces, but although its wording has varied over the years, the courts' interpretations of its requirements have been applied also to regulations governing requests for discharge from the services on conscientious grounds,[38] to refusal by persons seeking citizenship to promise to bear arms to defend the United States,[39] and to students seeking exemption from required participation in military training[40] because the central issues have been the same. "[I]n the forum of conscience, duty to a moral power higher than the State has always been maintained."[41]

The requirement that the objection be "by reason of religious training and belief" has caused the greatest problem of interpretation and application of the statute. Despite the clarity of the definition provided in the current version of the statute, courts have extended the exemption to cover objectors who explained their beliefs in humanistic and atheistic terms or arguably personal, moral, and ethical codes.

In *United States v. Seeger,*[42] the United States Supreme Court held that the statute requires a "given belief that is sincere and meaningful and occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[43] Seeger had been convicted for refusal to submit to induction after his application for conscientious objector status had been denied. On his application form he had placed the word "religious" in quotes and had stated that he preferred to leave open the question of his belief in a supreme being, but he acknowledged a skepticism regarding the existence of God.[44] He

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[31] "The Conscientious Objector and the First Amendment," 34 *U. of Chi. L. Rev.* 79, 89 (1966).

[32] Selective Draft Law Cases, 245 U.S. 366 (1918).

[33] Selective Draft Act of 1917, ch. 15, 40 Stat. 78.

[34] The 1940 Selective Service Act, ch. 720, §5(g), 54 Stat. 889. Both President Wilson and his Secretary of War had ordered a broader scope of application of the 1917 act's narrow restrictions. *See,* "The Legal Relationship of Conscience to Religion: 'Refusals to Bear Arms'," 38 *U. of Chi. L. Rev.* 583, 586–87 (1971) (hereafter cited as "Refusals to Bear Arms").

[35] Theodore Hochstadt, "The Right to Exemption from Military Service of a Conscientious Objector to a Particular War," 3 *Harv. C.R-C.L. L. Rev.* 1, 24 (1967).

[36] *See,* United States v. Seeger, 380 U.S. 163, 178 (1965) for a discussion of the legislative history regarding this language change.

[37] 50 U.S.C. App. §456(j) (1976).

[38] *See, e.g.,* Rosenfeld v. Rumble, 515 F.2d 498 (1st Cir. 1975); Shaffer v. Schlesinger, 531 F.2d 124 (3d Cir. 1976); Taylor v. Claytor, 601 F.2d 1102 (9th Cir. 1979); DeWalt v. Commanding Officer, Fort Benning, Ga., 476 F.2d 440 (5th Cir. 1973).

[39] *See, e.g.,* United States v. Schwimmer, 279 U.S. 644 (1929); United States v. Macintosh, 283 U.S. 605 (1931); United States v. Bland, 283 U.S. 636 (1931); Girouard v. United States, 328 U.S. 61 (1946); *In re* Weitzman, 426 F.2d 439 (8th Cir. 1970).

[40] *See, e.g.,* Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972).

[41] United States v. Macintosh, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting).

[42] 380 U.S. 163, 166 (1965).

[43] *Id.* at 166.

[44] *Id.*

described himself as a believer in "goodness and virtue for their own sakes."[45]

The Court determined that Seeger's belief fell within the statutory exemption, saying that he "professed 'religious belief' and 'religious faith'. . .[and] did not disavow any belief 'in a relation to a supreme being'; indeed he stated that 'the cosmic order does, perhaps, suggest a creative intelligence'."[46]

The Court interpreted the statute's requirement for an objection based on "religious training and belief" by saying: "Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[47] This was presumably done to avoid the constitutional attack, should beliefs not affiliated with any formal religion be denied protection of the conscientious objector statute.[48]

> While the applicant's words may differ, the test is. . .essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?
>
> Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. . . .The validity of what he believes cannot be questioned.[49]

Five years later the United States Supreme Court stretched the meaning of "religious training and belief" even farther in its opinion in *Welsh v. United States.*[50] Welsh had been denied exemption because no religious base could be found for his opinions and beliefs. Welsh would neither affirm nor deny a belief in a "Supreme Being," and he had completely struck the words "my religious training and belief" on his application. In fact, he denied that his views were religious.[51] But again, the Court went to great lengths to find his conscientious objection as falling within the requirements of the statute. The Court actually rejected Welsh's own statement of the nonreligious character of his beliefs. The court of appeals found that the draft appeal board was "entitled to take him at his word," but the Supreme Court disagreed:

> [I]t places undue emphasis on the registrant's interpretation of his own beliefs. The Court's statement in *Seeger* that a registrant's characterization of his own belief as "religious" should carry great weight, does not imply that his declaration that his views are nonreligious should be treated similarly. When a registrant states that his objections to war are "religious," that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word "religious" as used in [the statute], and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption.[52]

The opinion recognized that Welsh's conscientious objection to war was "undeniably based in part on his perception of world politics" and insisted that the statute should be read: "to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded. . .upon considerations of public policy." The statute was meant only to exclude: "those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical or religious principle. . . ."[53]

The Court seemed unwilling in both *Seeger* and *Welsh* to reach the constitutional issues, recognizing that if the objectors in these two cases were not covered by the statute, then the statute must fail as "underinclusive" in terms of the first amendment. Justice Harlan, in his concurring opinion in *Welsh,* described *Seeger* as "a remarkable feat of judicial surgery to remove. . .the theistic requirement" of the statute's language, and described the prevailing opinion in *Welsh* as "perform[ing] a lobotomy [that] completely transformed the statute. . . ."[54]

> When the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this veering off the path that

[45] *Id.*
[46] *Id.* at 187.
[47] *Id.* at 176.
[48] *Id.* at 188 (Douglas, J. concurring).
[49] *Id.* at 184.
[50] 398 U.S. 333 (1970). Justice Black announced the judgment of the Court and delivered an opinion that was joined by Justices Douglas, Brennan, and Marshall. Justice Harlan delivered a concurring opinion, and Justice White wrote a dissenting opinion joined by the Chief Justice and Justice Stewart.
[51] *Id.* at 337, 341.
[52] *Id.* at 341.
[53] *Id.* at 342.
[54] *Id.* at 351 (Harlan, J. concurring).

has been plainly marked by the statute. Such a course betrays extreme skepticism as to constitutionality. . . .

The constitutional question that must be faced in this case is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. . . .Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment.[55]

Justice Harlan would either require the statute to extend its coverage to all objections based on sincerely held conscientious beliefs or would strike the provision altogether. The issue is whether the first amendment protects religion or conscience. Some see conscience as stemming from religion, while others see conscience as the broader term, finding all religions to be rooted in conscience. Before he became a Justice on the Supreme Court, Harlan Fiske Stone wrote:

While conscience is commonly associated with religious convictions, all experience teaches us that the supreme moral imperative which sometimes actuates men to choose one course of action in preference to another and to adhere to it at all costs may be disassociated from what is commonly recognized as religious experience. . . .[B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep is its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.[56]

Since the post-World War II Nuremberg trials, individual conscience has been recognized as an authority requiring obedience above and before the state, and such recognition is included in instructions in warfare issued by the United States to its military forces.[57] "Although Congress and the courts have thus far failed to give constitutional or statutory dignity to conscience where its claims are projected clear of religious formula, other agencies in our day have selected conscience for the highest position in any order of values."[58] In a number of areas, the Court has "read into" the first amendment such freedoms as association and the right to privacy. According to one commentator:

The Court has held that, without these "peripheral rights," the rights specifically enumerated in the Constitution would be less secure. . . .In the same way the Court should conclude that in order to secure more fully the rights protected by the free exercise clause, it is necessary to protect conscience even when it purports to speak in a language ostensibly nonreligious.[59]

The second requirement of the statute is that there be a "total" objection to all wars or to "participation in war in any form." Objectors during the First and Second World Wars generally fell into the category of total objectors, the vast majority of them coming from the traditionally pacifist sects that held nonviolence as a tenet of their religions. During the Vietnam war, however, partly because of the nature of the war, and partly due to the Court's expanded interpretation of the religious belief clause, persons with objection to one particular war, "selective" objectors, sought exemption under the statute. The Supreme Court did not expand the meaning of the requirement for objection to "participation in war in any form" to include these objectors.

In *Gillette v. United States,*[60] the United States Supreme Court did finally consider the constitutionality of the conscientious objector exemption, but only with respect to its provision for objection to all war rather than exempting those who object to only a particular war. One of the defendants in *Gillette* was a Roman Catholic who believed that his religious training morally obligated him to fight "just" wars, but also morally obligated him not to

[55] *Id.* at 354, 356 (Harlan, J. concurring).

[56] Harlan Fiske Stone, "The Conscientious Objector," 21 *Colum. U.Q.* 253, 263, 269 (1919), as quoted in "Refusals to Bear Arms," 38 *U. of Chi. L. Rev.* 583, 587. Before he became a Supreme Court Justice, Stone served as a member of the War Department Board of Inquiry that judged World War I objectors' qualifications for the exemption of the Selective Draft Act of 1917.

[57] Milton R. Konvitz, *Religious Liberty and Conscience* (New York: Viking Press, 1968), p. 99. "The essence of the Nuremberg principle is that every soldier, every officer, every man—Christian, Jew, Hindu, Moslem, pagan, atheist—must conduct himself on the belief that he has moral duties 'superior to those arising from any human relation'." Ibid., p. 100.

[58] Ibid., p. 99. Besides the United States' military instructions previously noted, the establishment of principles by "other agencies" referred to include similar instructions by the British military, the Universal Declaration of Human Rights, the Pastoral Constitution on the Church in the World (Vatican Council II, 1965), and the principle established in international law by the Nuremberg trials that "the defense of having acted pursuant to orders of the government or a superior officer does not absolve a defendant from responsibility." Ibid., pp. 99–101.

[59] Ibid., p. 105.

[60] 401 U.S. 437 (1971).

participate in "unjust" wars. His conscience told him the Vietnam war fell into the latter category, as did Gillette's.[61] Both believed that denying them an exemption required them to act contrary to their convictions, violating both the establishment and free exercise clauses. The Court found the requirement to have a valid secular purpose and that it did not discriminate among religions.[62]

Forty years earlier, in an oft-quoted dissent in which he was joined by Justices Holmes, Brandeis, and Stone, Chief Justice Hughes wrote concerning the denial of citizenship to a "specific objector":

> Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression.[63]

In *Rosenfeld v. Rumble,*[64] a Jewish naval lieutenant was denied a conscientious objector discharge because he said in response to a hypothetical question that he would personally take up arms against an invader whose sole purpose was the extermination of all Jews. This was considered sufficient evidence that he was not opposed to all wars "in any form." In *Taylor v. Claytor,*[65] another naval officer was similarly denied discharge as a conscientious objector because he said he would fight to protect the country from an invasion. *United States v. Curry*[66] held that because an applicant could not say conclusively that he would not fight if the United States were attacked, he did not qualify for the exemption. Curry acknowledged the possibility that he would fight "if his life or the lives of those close to him were seriously threatened."[67]

> Local boards and courts. . .are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.
>
> But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case.[68]

The hypothetical question presented to Rosenfeld asking what he would do if an invader came with the avowed purpose of extinction of all Jews was a variation on an earlier "test" of "sincerity" employed by draft boards. Frequently, during hearings to examine their qualifications for the exemption, objectors would be asked hypothetical questions concerning the extent of their unwillingness to kill or to participate in any acts of violence. Such hypotheticals usually included the use or threat of violence against a loved one, testing either the applicant's "sincerity" or the "totality" of the objection. One commentator noted:

> It is difficult to see how the fact that an objector really "could" force himself to kill in war is relevant to the decision to withhold an exemption which traditionally has been granted to avoid coercing someone to act contrary to his conscience. . . .This approach assumes that the sincere "conscientious" objector could not even entertain the possibility of acting contrary to the dictates of his conscience. . . .Yet the possibility remains that acts contrary to the dictates of one's conscience prove only mortality, not insincerity.[69]

An objector not granted the exemption who refused induction could be convicted of a crime that carried a sentence of imprisonment up to 5 years or a fine of $10,000. A person granted the exemption had to perform 2 years of alternate service, which was sometimes more arduous, difficult, and as dangerous as military service, but without veterans' benefits.[70] Punishments may have been considerably worse for objectors during the earlier wars of this century, including possible life sentences.[71]

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[61] *Id.* at 439–41. See also, *id.* at 470–75 (Douglas, J., dissenting).

[62] *Id.* at 460–62.

[63] United States v. Macintosh, 283 U.S. 605, 635 (1931), (Hughes, C.J., dissenting).

[64] 515 F.2d 498 (1st Cir. 1975).

[65] 601 F.2d 1102 (9th Cir. 1979).

[66] 410 F.2d 1297 (1st Cir. 1969).

[67] *Id.* at 1299.

[68] United States v. Seeger, 380 U.S. 163, 184–85 (1965).

[69] "Refusals to Bear Arms," 38 *U. of Ch. L. Rev.* 583, 608–09 (1971).

[70] Theodore Hochstadt, "The Right to Exemption from Military Service of a Conscientious Objector to a Particular War," 3 *Harv. C.R.-C.L. L. Rev.* 1, 25 (1967). *See also,* Ehlert v. United States, 402 U.S. 99, 115–18 (1971) (appendix to opinion of Justice Douglas, dissenting) consisting of an affidavit detailing abuse of one Vietnam war objector imprisoned in the brig at Treasure Island.

[71] *See e.g.,* Roderick Seidenberg's description of prison life of World War I conscientious objectors in *Instead of Violence,* ed. by Arthur and Lila Weinberg (New York: Grossman Publishers, 1963), pp. 199–202. "[O]ur offense was the gravest one can commit—. . .we had offended military pride." Ibid., p. 200.

Cases that turn on the question of sincerity often do not provide a clear picture about the deciding factor. In *Shaffer v. Schlesinger,*[72] the third circuit reversed a denial of a conscientious objector's discharge from the army, holding that the facts did not support a conclusion of insincerity. The officer had enrolled in graduate school, by his admission "more or less" to avoid active duty; he had attended school for 1 week and dropped out, but failed to notify military authorities of his change in status; he had voluntarily participated in ROTC and had a father and grandfather who were career military officers. It also appeared that the officer's beliefs had "crystalized" after 1 month of military service and that his decision to seek an exemption was influenced by his inability to defend his participation in the military to a pacifist encounter group of which he was a member.

In *DeWalt v. Commanding Officer, Fort Benning, Georgia,*[73] however, the claim of conscientious objector status by a first lieutenant in the army seeking a discharge was found to be insincere because he did not seek the status until his assignment to combat duty in Vietnam was imminent. Other facts considered were that he had qualified as an expert both with the M–16 rifle and with a .38 caliber pistol, had had no religious training prior to military service that taught that all wars are immoral, and did not suggest the manner in which his reading had influenced his decision. Those responsible for interviewing him and for reviewing his case, however, consistently stated that they believed him to be sincere in his claim. After their initial report found him to be sincere, the Department of the Army sent the case back to them to make a second judgment based on closer scrutiny, and they again judged him sincere, but stated they "thought DeWalt was more concerned with his discharge from service than either his commitment to the Army or the fact that another man with similar training would have to undertake combat duty in his stead."[74] The Department of the Army then denied his request on the ground that his professed views were not truly held, and the circuit court affirmed.

Although the two religion clauses are obviously interrelated and issues often point to a tension between them, the Supreme Court has successfully balanced the competing interests and avoided deciding which of the clauses would be controlling. The court was, however, faced with a choice in *Wisconsin v. Yoder,*[75] a case in which it was willing to allow an impingement on the establishment clause in order to preserve free exercise. At issue in *Yoder* was a State compulsory school attendance law that required children to attend public or private school until they reached the age of 16. Several Amish parents declined, on the basis of a sincerely held religious belief, to send their children to school past the eighth grade. The Court set the stage for the constitutional clash of the two clauses:

> [E]nforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs. . . .[The] Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.[76]

Although the Court did allow the free exercise of religion to prevail, and as shown in the quotation above, indicated a possible preference for the free exercise clause, the issue was avoidable in *Yoder.* In a footnote, the Court dismissed the notion that accommodating the religious beliefs of the Amish by exempting them from the State's compulsory education law constituted an impermissible establishment of religion.

> The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose. Such an accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[77]

Although the Supreme Court has articulated tests and standards to define what constitutes impermissible establishment and, as the Selective Service cases in this chapter and the discussions in subsequent

[72] 531 F.2d 124 (3d Cir. 1976).

[73] 476 F.2d 440 (1973).

[74] *Id.* at 441.

[75] 406 U.S. 205 (1972).

[76] *Id.* at 219–21.

[77] *Id.* at 234–35, n. 22, citing Sherbert v. Verner, 374 U.S. 398, 409 (1963).

chapters indicate, when an individual or group can claim an exemption to government regulation on religious grounds, there is still a fine, tense line between the two clauses that has yet to be clearly defined.

American Indians

The tension between free exercise and establishment of religion is most evident in situations where the government bears a special relationship of responsibility to those seeking to practice their religion, for example, in prison or among American Indians or members of the armed services. Each of these groups is, to a greater or lesser degree, under the control or jurisdiction of the government, and the failure of the government to provide for religious needs would result in the denial of free exercise oppportunity, the "hostility" that Justice Douglas found so repugnant to the first amendment.[78] The need that Justice Douglas saw for government neutrality requires in these unique situations a degree of government involvement that in other circumstances would constitute impermissible establishment.

The official policy of the United States toward American Indian governments has usually been one of protecting the political, and recently, the cultural integrity of the tribes, but it has never extended to American Indian religious freedom. The reluctance of the government to adopt a policy of active protectionism towards Native American religions stems in part from the constitutional restriction imposed by the establishment clause and the government's strict construction of that clause with respect to Native American religions. While failing to resolve the constitutional conflict, the Federal Government has, in recent years, made some effort to provide statutory protections for Native American religions.[79]

In large part, the Federal Government's failure to protect Native American religions stems from its long history of antagonism and refusal to treat them as "significant" as western religions. Over the past three centuries, white colonists and Federal agents have actively suppressed the practice of 1,000-year-old rituals and sacraments that served a central and life-sustaining function for American Indians.

The attitudes of the young American government toward Native American religions were influenced to some extent by the policy of previous governments in their dealings with the Indian peoples. For example, conversion of the Indians was set forth in most of the early charters as one of the principal aims of English settlement in the New World.[80] In the Southwest, Juan Fonte, a Spanish missionary, wrote in 1607 that he was exceedingly glad upon "seeing the door now opened to us for numerous conversions, especially since these developments can go forward without the aid of captain and soldiers."[81]

The English, Spanish, French, and Portuguese tended to view the Native American religions as heathenistic and contemptible, and each group of missionaries taught the Indians only as their interest was served. For example, the Spanish missionaries in the Southwest directed all their efforts toward concentrating Indians into compact settlements centered about mission churches where hundreds were put to work digging ditches, building irrigation dams, and tending the livestock.[82]

The English stopped trying to convert the Indians when "it became evident that the Indians were not going to accommodate their lives to serve the English."[83] Before this realization, the English had little toleration for "different" religions and in New England directly confronted and denounced the Indian view of the world.

The following exchange of creation stories indicates the intolerance toward Native American religions:

> A missionary once undertook to instruct a group of Indians in the truths of his holy religion. He told them of the creation of the earth in six days, and of the fall of our first parents by eating an apple. The courteous savages listened attentively and, after thanking him, one related in his turn a very ancient tradition concerning the origin of the maize. But the missionary plainly showed his disgust and disbelief, indignantly saying: "What I delivered to you were sacred truths, but this that you tell me is mere fable and falsehood."[84]

[78] Zorach v. Clauson, 343 U.S. 306 (1952).

[79] American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. §1996 (Supp. IV 1980).

[80] *See,* generally, *The Indian and the White Man,* ed. Wilcomb E. Washburn (New York: Anchor Books, 1964), chap. V (hereafter cited as *The Indian and the White Man).*

[81] Edward H. Spicer, *Cycles of Conquest* (Tucson: University of Arizona Press, 1962), p. 25.

[82] Ibid., p. 29.

[83] *The Indian and the White Man,* p. 161.

[84] Charles Eastman, *The Soul of the Indian,* as quoted in U.S.,

Religious goals of the settlers were used to justify military conquest. Before they conquered them, the Spanish, usually priests, often read to the Indians a document containing a brief history of the world since creation and discussing the Papacy and the donation by Pope Alexander IV of the lands then occupied by the Indians to the King of Spain. If the Indians failed to acknowledge the Spanish King's power over them and surrender to the military authorities, any cruelties that followed were justified, since the basis had been laid for a "theologically proper" war.[85]

The Holland Pilgrims also approved of violence against the Indians when peaceful efforts to convert them failed. For instance, John Robinson, the spiritual leader of the Pilgrims left behind in Holland, discussing the murder of several Indians, wrote to William Bradford:

> Concerning the killing of those poor Indians. . . .Oh, how happy a thing had it been, if you had converted some before you had killed any!
>
> Necessity of this, especially of killing so many. . . .I see not. Methinks one or two principals would have been well enough, according to that approved rule, the Punishment to a few, and the fear to many.[86]

Another incident that reflects the non-Indian's intolerance of the Indian religions and the suspicion with which Indians viewed the white man's Christianity occurred between a Seneca Chief and a Boston missionary in 1805:

> Chief Red Jacket: Brother, we do not wish to destroy your religion or take it from you. We only want to enjoy our own. Brother, we are told that you are preaching to the white people in this place. . . .We are acquainted with them. We will wait a little while, and see what effect your preaching has upon them. . . .As we are going to part, we will come and take you by the hand, and hope the Great Spirit will protect you on your journey, and return you safe to your friends.

As the Indians began to approach the missionary, he rose hastily from his seat and replied that he could not take them by the hand; that there was "no fellowship between the religion of God and the works of the devil."[87]

The adoption of the U.S. Constitution, with its prohibition of government establishment of religion and its guarantees of religious freedom, signified a new sense of religious maturity that should have transcended the previous Christian-Native American relationships. But in spite of the first amendment's prohibition against the establishment of religion, the government continued to subsidize various Christian sects in their efforts to convert an "ignorant and dependent race."[88]

The executive branch, in charge of the Indian agencies, represented the government's most persistent presence in the propagation of the faith and the suppression of tribal religions. Andrew Jackson, discussing the removal of the Five Civilized Tribes, reflected the government policy that was rapidly becoming synonymous with missionary endeavors: "[The removal] will. . .perhaps cause them gradually, under the protection of the government and through the influence of good counsels to cast off their savage habits and become an interesting, civilized and Christian community."[89]

This government policy of Christianization continued, and in 1869 President Grant appointed a board of commissioners to advise the Indian Bureau. The policy of the Indian Bureau had been to grant funds to various religious denominations for the establishment of schools on the reservations. On the advice of the commissioners, the Bureau decided to give sole jurisdiction of each reservation to one denomination. Protestant missionaries, operating schools on the reservations with Bureau grants, as had the Jesuits and friars before them, refused to attend any traditional ceremonies and vigorously condemned any surviving Native American religions.[90]

The policy was also reflected in legislation. For example, the Dawes Severalty Act[91] was endorsed by a representative from Kansas as having the approval of "all those who have given attention to

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Department of the Interior, *American Indian Religious Freedom Act,* Federal Agencies Task Force Report (1979), p. 1 (hereafter cited as Task Force Report).

[85] Task Force Report, p. 1.

[86] John Robinson, letter to William Bradford in *The Indian and the White Man,* pp. 176–77.

[87] "Red Jacket and the Missionary," in *The Indian and the White Man.*

[88] Task Force Report, p. 2.

[89] Andrew Jackson in *A Compilation of the Messages and Papers of the Presidents,* vol. II, ed. J.D. Richardson, p. 519 as quoted in Task force Report, p. 3.

[90] Spicer, *Cycles of Conquest,* pp. 517–18.

[91] Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. Also known as the Indian General Allotment Act, the Dawes Act governed the separation of reservation land into individual allotments.

the. . .Christianization, and the development of the Indian race."[92]

Resisting the encroachment of white men on their territory and their religious freedom, the Indians developed ways of skillfully circumventing the onerous rules that were gradually eroding their lifestyle. For example, the Lumni and Nooksack peoples performed their most important ritual on the national holidays and informed the agents that they were performing these in honor of the United States. Around 1889 new religions also surfaced, indicating that the Indians were looking for "a new hope in the midst of ruin."[93]

The earliest of these new religions of which there is a clear record is the Ghost Dance that appeared among the Plains Indians in 1889. This dance was part of a messianic religion preached by Wovoka, a Paiute who claimed to have had a supernatural revelation. The dance was aimed at eliminating the white man and the return of Indian country to the Indians. Not only would the old ways and land be restored but life of the dead ancestors as well, hence its name, Ghost Dance.

As the Ghost Dance gained momentum among various tribes across the country, Federal agents became alarmed and notified the military forces:

> This was in the Moon of Falling Leaves, and across the West on almost every Indian reservation the Ghost Dance was spreading like a prairie fire under a high wind. Agitated Indian Bureau inspectors and Army officers from Dakota to Arizona, from Indian Territory to Nevada were trying to fathom the meaning of it. By early autumn the official word was: Stop the Ghost Dancing.[94]

By midwinter, ghost dancing on the Sioux reservations was so prevalent that almost every activity stopped. The agents from Pine Ridge telegraphed Washington: "Indians are dancing in the snow and are wild and crazy. . . .We need protection and we need it now. The leaders should be arrested and confined at some military post. . . ."[95]

Non-Indian fear and apprehension of Indian ceremonials such as dancing were reflected in regulations issued by the Bureau of Indian Affairs. For example, in 1892, when Commissioner Thomas Morgan revised the regulations governing the operation of tribal courts, the first rule prohibited dancing:

> Dances, etc.—Any Indian who shall engage in the sun dance, scalp dance, or war dance, or any other similar feast. . .shall be deemed guilty of an offense, and upon conviction thereof shall be punished for the first offense by the withholding of his rations for not exceeding ten days or by imprisonment for not exceeding ten days; and for any subsequent offense under this clause he shall be punished by withholding his ration for not less than ten nor more than thirty days, or by imprisonment for not less than ten nor more than thirty days.[96]

This suppression of Indian dancing, including the infamous massacre at Wounded Knee, continued until the enactment of the Reorganization Act of 1934.[97] As late as 1921, the Indian Affairs Office released Circular No. 1665:

> The sun dance, and all other similar dances and so-called religious ceremonies are considered "Indian Offenses" under existing regulations, and corrective penalties are provided. I regard such restriction as applicable to any dance which involves. . .the reckless giving away of property. . .frequent or prolonged periods of celebration. . .in fact any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.[98]

In 1934, under the leadership of John Collier, a new policy towards Indian religions was initiated. Under the 1934 Indian Reorganization Act,[99] a principle of noninterference in Indian religious affairs was established. This policy marked the end of intentional Federal prosecution. But today, otherwise neutral statutes often have a discriminatory effect on Native American religious freedom. Such facially neutral policies include commerce and border crossing regulations, fish and game laws, property laws protecting museum ownership rights to sacred Indian artifacts, and laws governing public access to Federal parks and other public lands. The uniqueness of the religions lies in their central focus on land and geological formations that often are under Federal or State jurisdiction.

[92] Cong. Globe, 49th Cong., 2d Sess. (Dec. 15, 1886) (remarks of Rep. Perkins), as quoted in Task Force Report, p. 5.
[93] Spicer, *Cycles of Conquest*, p. 526.
[94] Dee Brown, *Bury My Heart at Wounded Knee* (New York: Holt, Rinehart, Winston, 1970), pp. 434–35.
[95] James C. Olson, *Red Cloud and the Sioux Problem* (Lincoln: University of Nebraska Press, 1965), p. 326, as quoted in Brown, *Bury My Heart at Wounded Knee*, p. 436.
[96] *Report of the Commissioner of Indian Affairs* (1892), p. 29, as quoted in Task Force Report, p. 6.
[97] Indian Reorganization Act, ch. 576, 48 Stat. 984 (June 18, 1934). Although the act did not specifically lift the ban on dancing, it granted many reforms and considerable rights of self-government that had this result.
[98] Office of Indian Affairs, *Circular No. 1665* (Apr. 26, 1921), as quoted in Task Force Report, pp. 6–7.
[99] Ch. 576, 48 Stat. 984 (June 18, 1934).

The Federal Government has to some extent become more aware of the basic tenets of Native American religions. Since 1934 a series of steps have been taken that reflect the government's attempts to balance the religious needs of American Indians against its own interest in certain lands and their resources. Recently attempts were made to restore sacred lands and access to sacred places within Federal lands to tribal religious leaders. In 1973 the Blue Lake Area was returned to the Taos Pueblo; and in 1974, Mt. Adams to the Yakima Nation.[100]

For this trend to continue, decisionmakers and legislators at various levels of both Federal and State governments must become aware of the basic tenets of Native American religion in order to recognize the potential discriminatory effect of their rules or decisions on the religious freedom of American Indians.

Sacred Land

Native American religions are as diverse and multiple as American Indian tribes and nations. But there are some basic tenets that transcend each tribal group, the most important of which is land:

> So intimately is all of Indian life tied up with the land and its utilization that to think of Indians is to think of land. The two are inseparable. Upon the land and its intelligent use depends the main future of the American Indian.[101]

Rivers, mountains, deserts, fields, stones, and running water, as well as plants and animals, are endowed with protective power in Native American religious belief. The American Indians believe that there are numerous supernatural beings, in addition to the great Creator. None of these supernatural beings is supreme, however, but each is under the Creator's direction and guidance. Such beings include the sun as father and the earth as mother:

> Exposure to the sun and contact with the earth bring strength and blessing. Winds, rain, clouds, thunder, and storms are Sun and Earth's means of communication with each other and with mankind. . . .Solstices, equinoxes, and eclipses. . .are to be regarded as the work of the many spirits.[102]

Above all the supernatural beings and all the powers of nature is the Creator, who makes humans. The way in which creation occurs varies from tribe to tribe. Generally, the Creator makes men out of the dust of the earth or the mud of lakes or river bottoms:

> "Let the earth be known as our Grandmother. . .Our Grandmother is like a woman;. . .[l]et her begin to bear life. . . ." When Maheo said that, trees and grass sprang up to become the Grandmother's hair. The Flowers became her bright ornaments, and the fruits and the seeds were the gifts that the earth offered back to Maheo. . . .Maheo looked at the Earth Woman and he thought she was. . .the most beautiful thing he had made so far. She should not be alone. . .Maheo reached into his right side and pulled out a rib bone. He breathed on the bone, and laid it softly on the bosom of the Earth Woman. The bone moved and stirred, stood upright and walked. The first man had come to be.[103]

In most religions with which westerners are familiar, a story of creation suggests a divine creator of humans, and worship is not usually placed on the earth itself. Native American religions emphasize the significance and power of God's creatures and the powers of nature as well as the creator itself.

Religious sites such as churches, mosques, the Vatican, and the Western (Wailing) Wall hold religious significance for Jews, Christians, and Moslems. Because non-Indians are more familiar with these structures, it is easier for them to understand the effect of a law that would forbid access to them or that would allow tourists to come in at any time during high mass, for example, and take photographs of the ceremony. However, it is more difficult for non-Indians to understand the burden on Native American religions of such laws governing access to Federal lands, for example, even though some lands, rivers, or mountains may hold as much religious significance for an American Indian as the church does for the Christian.

> [T]he Navajo people. . .don't go out and build. . .churches at every place they regard as holy. The sites that can be of religious importance to them may be utterly indistinguishable to us as such. . .a particular bush, a particular tree, a rock, a rise in the landscape. . .these sites and the beliefs that are associated with them provide. . .a very basic premise [for an] entire way of life.[104]

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[100] Task Force Report, p. 7.

[101] John Collier, *Report of the Commissioner of Indian Affairs* (1938), cited in *The Indian and the White Man,* p. 394.

[102] Alice Marriott and Carol K. Rachlin, *American Indian Mythology* (New York: New American Library, 1968), p. 33 (hereafter cited as *American Indian Mythology).*

[103] Mary Little Bear Imkanish, quoted in *American Indian Mythology,* pp. 41–42.

[104] Richard Hughes, former Navajo Legal Services attorney, testimony before the New Mexico Advisory Committee to the

To prevent the unnecessary restriction of religious freedom, decisionmakers need to review statutes, regulations, and policies to determine if any of them may adversely affect Native American religious practice. Recognizing the need for such internal evaluations, in 1978 Congress passed, and President Carter signed into law, the American Indian Religious Freedom Act. The act states:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects and the freedom of worship through ceremonials and traditional rites.[105]

In spite of this policy initiative, problems still remain, such as access to off-reservation areas for the gathering of natural products for healing and ceremonial purposes. Often these off-reservation areas also contain sites that are revered as holy in the Native American tradition. Indeed, the Federal land in and of itself, to which the American Indians may seek access, may hold special religious significance such as cemeteries or the Black Hills.

Many of the lands that are of special reverence to the American Indians are currently under Federal jurisdiction. As long as these lands remain in their natural state, their use by the Federal Government will not be incompatible with Native American religious principles. Efforts to prevent the development of the land in a way antithetical to Indian religious tenets have not always been successful. In 1981 the Hopi Indian Tribe and the Navajo Medicinemen's Association brought suit challenging the actions of various officials of the Agriculture Department authorizing further development of the Arizona Snow Bowl, a recreational facility within the Coconino National Forest near the San Francisco Peaks.[106] The Indians claimed that the continued operation and expansion of the facilities prohibited the free exercise of their religion because the peaks were sacred and central to the practice of their religions. The court rejected the Indians' claims that the development would violate the first amendment and the American Indian Religious Freedom Act.[107] Balancing the right to practice Indian religious beliefs against the government interest in keeping the lands open to the public, the court found the government's arguments compelling:

> [The] plaintiffs seek to have the government restrict the public's use of these mountains solely because of the religious beliefs of the plaintiffs. They want the San Francisco Peaks to become a "government-managed religious shrine" to the exclusion of any development.[108]

The court found that the first amendment does not mandate the management of a religious shrine; furthermore, "it is clearly prohibited by the establishment clause."[109]

The plaintiffs then argued that the Forest Service totally failed to apply the American Indian Religious Freedom Act in determining whether to authorize the Snow Bowl expansion project. The government rebutted these arguments claiming that it had complied with the duties prescribed by the American Indian Religious Freedom Act for Federal agencies.[110]

The court held that the defendants had complied with the act's requirements, noting that the plaintiffs were objecting to the decisions reached by the

U.S. Commission on Civil Rights, "Open Meeting on the Impact of Energy Development on Minorities, Women and the Elderly in Northwestern New Mexico," Grants, New Mexico, Apr. 3–4, 1981, transcript, vol. I., p. 59.

[105] Pub. L. No. 95–341, 92 Stat. 469 (1978) (codified at 42 U.S.C. §1996 (Supp. IV 1980)).

[106] Hopi Indian Tribe v. Block, No. 81–0481 (D.D.C., June 15, 1981) 8 *Indian L. Rep.* 3073.

[107] Much of the decision relied on a previous case, Badoni v. Higginson, 638 F.2d 172 (1980). In *Badoni,* the Indian plaintiffs claimed that government management of the Rainbow Ridge National Monument and of Glen Canyon Dam and Reservoir violated their first amendment rights. The plaintiffs claimed that by impounding water to form Lake Powell, the government had drowned some of their gods and denied them access to a prayer spot sacred to them. Secondly, the *Badoni* plaintiffs alleged that by allowing tourists to visit the Rainbow Bridge, the government had permitted desecration of the sacred nature of the site. Because of these governmental actions, plaintiffs had not been able to conduct religious ceremonies at the prayer spot. The *Badoni* court held in favor of the government. The court rejected the Indians' claim because it found that the government had not burdened the plaintiff's religion and had a strong interest in assuring public access to the monument. The court stated that the issuance of regulations to exclude tourists from the monument would be a clear violation of the establishment clause. 638 F.2d at 179. The court also refused to order the government to police the actions of tourists visiting the monument. *Id.*

[108] Hopi Indian Tribe v. Block, No. 81–0481 (D.D.C., June 15, 1981), 8 *Indian L. Rep.* 3073, 3075.

[109] *Id.* at 3076.

[110] Those duties are: (1) agencies are to evaluate their policies and procedures with the aim of protecting Indian religious freedom; (2) they are to consult with Indian groups in regard to proposed actions; and (3) they are to make those changes necessary to protect and preserve Native American religious cultural rights and practices. Pub. L. No. 95–341 §2, 92 Stat. 470 (1978).

agencies and not to the procedures followed pursuant to the Religious Freedom Act:

> The Act does not require that access to all publicly owned properties be provided to the Indians without consideration for other uses or activities, nor does it require that Native traditional religious considerations always prevail to the exclusion of all else.[111]

When public safety or welfare is threatened by religious practices, there may be justification for upholding the government regulation. But though no issues of public health or safety were presented in this case, the Court upheld the government expansion because the Indians had failed to prove that "the particular area sought to be developed is central or indispensable to the practice of their religion."[112]

It is unclear from the case what criteria the court used in reaching its decision on the importance of the practices that would be affected by the expansion. Although the plaintiffs alleged that the peaks were themselves a deity that brought harmony and balance, healing, and spiritual development to their people, the court made it clear that a plaintiff's assessment of the religious import of his belief does not always have to be taken at face value. Courts are reluctant to set out criteria for determining the importance of a religious practice, since they are only concerned with the sincerity of the plaintiff's belief and do not pass on the validity or rationality of a religion.[113] Usually, in cases in which the court must determine whether the belief seeking protection is central to the religion of the plaintiff, the judiciary is generally predisposed to the Western tradition.[114] This predisposition can result in an unfavorable ruling on the issue of the belief's importance when members of less conventional or non-Western religions are seeking relief from free exercise violations. The courts most often give greatest weight to sacramental practices concerning worship of a deity or that affect a "transfiguration of some part of the material order and invest it with divine attributes."[115]

Other major tests of the use of the American Indian Religious Freedom Act to protect the land in its natural state are being pursued by the All Indian Pueblo Council and the Navajo Indians. The All Indian Pueblo Council is testing the act in reference to the Baca geothermal demonstration project at Redondo Peak, a mountain sacred to the people of the Jemez Pueblo and other Pueblo people.[116] The plaintiffs alleged in their complaint that the Secretary of Energy, responsible for the approval and Federal funding of the proposed geothermal power plant at a site near Redondo Peak, was obligated to ensure that such an action did not interfere with the religious practices of American Indian tribes.[117] The plaintiffs cited as the basis for this obligation the first amendment, the trust relationship between the Federal Government and Indian tribes, and the American Indian Religious Freedom Act.[118]

The Pueblo way of life, like that of other American Indian people, is tied to the land. The beliefs of the Pueblo prescribe certain relationships with the natural world. Because space is sacred to them, each Pueblo sets precise limits to its world. Their horizontal world is bounded in each direction by sacred mountains, one of which is Redondo Peak. The Jemez Pueblo, however, believe that all of the Jemez Mountains, including Baca, the location of the proposed geothermal plant, are sacred.[119]

In January 1980 the Department of Energy issued a final environment impact statement on the proposed Baca project. The report stated that the proposed project would infringe on the religious rights of the Pueblos, but the Department of Energy, acknowledging alternatives to the construction of the plant, decided to fund the Baca project.[120] Although the Department of Energy promised to pursue a mitigation plan that would minimize the effect on the religious freedom of the Pueblos, as of

[111] 8 *Indian L. Rep.* 3076.

[112] *Id.*

[113] *See, e.g.,* United States v. Ballard, 322 U.S. 78, 86–87 (1944); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

[114] *See,* Donald A. Giannella, "Religious Liberty, Nonestablishment, and Doctrinal Development," 80 *Harv. L. Rev.* 1381, 1419 (1967).

[115] *Id.* at 1419.

[116] Pueblo of Jemez v. Secretary of Energy, No. 81-0113 (D.D.C., filed Jan. 16, 1981).

[117] *Id.*, complaint at 5.

[118] *Id.*

[119] U.S., Department of Energy, "Final Environmental Impact Statement/Geothemal Demonstration Program 50 MW Power Plant, Baca Ranch, Sandoral and Rio Arriba Counties, New Mexico," DOE/EIS-0049, January 1980, pp. 4–23 and 3–102 through 3–105.

[120] Pueblo of Jemez v. Secretary of Energy, No. 81-0113 (D.D.C., filed Jan. 16, 1981), complaint at 13–16.

January 1981, it had "not developed or promulgated any such plan or proposal."[121] Thus the Pueblo Council filed suit to restrain the Department of Energy from approving, funding, or in any way encouraging the development of the plant until it formulates a land use plan.

The Navajo are also concerned about the development of an energy project near Mount Taylor that is likely to affect their religious practices. Developed by the Gulf Mineral Resources Company, this project includes the construction of a uranium mine and mill near Mount Taylor, considered sacred by the Navajo, Laguna, Acoma, and Zuni Tribes. This mountain is one of four sacred mountains that define the Navajo world. The land located inside the four sacred mountains is regarded as belonging to the Navajo people. There have already been numerous instances of insensitivity to the religious beliefs of the Navajo where companies in the region have destroyed religious sites or shrines by clearing them for right-of-ways or mining projects.[122]

The Federal Government has been unable, in many instances, to strike a balance between the protection of the religious freedom of American Indians and the government's competing interests. As the Task Force on the American Indian Religious Freedom Act indicates, there are a substantial number of Federal statutes that can be utilized to prevent that conflict.[123] These statutes govern the Bureau of Land Management, the Department of the Interior, the Department of Transportation, the Department of Defense, the Office of Surface Mining, the Fish and Wildlife Service, and the Tennessee Valley Authority. There are also numerous applicable statutes that regulate public lands, the environment, mining of Federal lands, and wilderness perservation. The Task Force on the Native American Religious Freedom Act made the following recommendations:

(1) [that] each agency. . .accommodate Native American religious practices to the fullest extent possible under existing federal land and resource management statutes;

(2) [that] existing regulation, policies and practices [be revised] to provide for separate consideration of any Native American religious concerns prior to making any decision regarding the use of Federal lands and resources;

(3) [that Federal] areas of special religious significance to Native Americans [be protected] in a manner similar to its reservation and protection of areas of special scientific significance.[124]

Sacred Objects

Another major problem confronted by American Indians is the return of religious artifacts to their communities. These objects are sometimes taken by hunters who enter Indian lands for the purpose of illegally expropriating sacred objects that are later sold to museums. In other cases, Indian people without valid title sell the objects.

Many problems related to museum possession are the result of the handling, care, and treatment of the objects. Some of the objects are not supposed to be preserved but should be left to disintegrate naturally. These objects have different meanings for each tribe. While some tribes are seeking the return of their objects, other groups wish only to work with museums to protect these objects from desecration.

Several American Indian groups have made formal nonlegal requests for the return of the sacred objects.[125] Once possession is acquired, museums generally ignore the requests of tribes for return of the objects. Some museums, however, have been coooerative, e.g., the Denver Art Museum's return of a war god to Zuni war priests, the Heard Museum's return of Kiwa masks to Hopi elders, and the 1977 Wheelwright Museum return of 11 medicine bundles to Navajo medicine men.[126]

A basis for deterring original appropriations of the objects from Indian lands is found in the Act for the Preservation of American Antiquities.[127] The act makes it illegal for anyone to appropriate, excavate, or otherwise harm any object of antiquity situated on government lands without government permission.[128] The weakness of the act may lie in its failure to define terms such as "ruin" or "monument" or "object of antiquity."

[121] *Id.* at 16.

[122] New Mexico Advisory Committee to the United States Commission on Civil Rights, *Energy Development in Northwestern New Mexico: A Civil Rights Perspective* (1982), pp. 66–68.

[123] Task Force Report, pp. 59–62. The Task Force lists 25 applicable Federal statutes that it calls "broad enough to require or permit the consideration of Native religious practices." Ibid., p. 59.

[124] Ibid., pp. 62–63.

[125] Bowen Blair, "Native Americans versus American Museums: A Battle for Artifacts," 7 *Am. Ind. L. Rev.* 125 (1979).

[126] Task Force Report, p. 78.

[127] Act of June 8, 1906, Ch. 3060, 34 Stat. 225 (codified at 16 U.S.C. §§431–433 (1976).

[128] 16 U.S.C. §433.

In *United States v. Diaz*,[129] the ninth circuit declared the statute unconstitutionally vague because it failed to define the significant statutory terms.[130] The case was an appeal from a conviction for stealing Apache religious face masks found in a cave on the San Carlos Indian Reservation, land owned and controlled by the government. A medicine man testified that the masks were made in 1969 or 1970;[131] an anthropologist testified that they were religious objects and emphasized that they were deposited in remote places on the reservation, as they were never allowed off the reservation and were only to be handled by the medicine man.[132] He also testified that in anthropological terms "objects of antiquity" could include objects that were made as recently as yesterday if they related to religious or social traditions of long standing.[133] The court, however, rejected this definition. Although the act[134] prohibits the removal of an "object of antiquity" from Federal lands without government permission, the sacred objects that were not made hundreds of years ago may not be protected from theft until a clear anthropological definition of "antiquity" is included in the statute.

The weakness of the Antiquities Act was pointed out again by the Arizona district court's opinion in *United States v. Jones*.[135] After they were seen digging among Indian ruins, the defendants were arrested with clay pots, bone awls, stone matates, and other Indian artifacts. The prosecutors indicted them for theft and malicious mischief because they realized that no conviction under the Antiquities Act would be upheld. The court dismissed the charges, holding that the Antiquities Act was "the exclusive means through which the government could prosecute" a defendant for acts encompassed by the act.[136]

[129] 499 F.2d 113 (9th Cir. 1974).
[130] *Id.* at 115.
[131] *Id.* at 114.
[132] *Id.*
[133] *Id.*
[134] 16 U.S.C. §433 prohibits excavation and removal of any objects of antiquity located on the lands owned or controlled by the U.S. Government; 16 U.S.C. 432 requires Federal permits for excavation and removal of antiquities located on lands owned or controlled by the United States under uniform administrative rules.
[135] 449 F. Supp. 42 (D. Ariz. 1978). 16 U.S.C. §433 which prohibits excavation and removal of any objects of antiquity located on the lands owned or controlled by the U.S. Government; 16 U.S.C. 432 which requires Federal permits for excavation and removal of antiquities located on lands owned or controlled by the United States under uniform administrative rules.

Congress passed another law in 1979 that may make up for some of the deficiencies in the Antiquities Act. The Archaeological Resources Protection Act of 1979[137] was designed to protect archaeological resources on public and Indian lands. The congressional statement of purpose notes that "existing Federal laws do not provide adequate protection to prevent the destruction of these archaeological resources and sites resulting from uncontrolled excavation and pillage."[138] The term "archaeological resources" has been defined in the statute and should eliminate any vagueness problems that may have existed in the Antiquities Act:

> The term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations. . .shall include. . .: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures, or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of the foregoing items.[139]

Under the statute, an item will not be considered an archaeological resource unless "such item is at least 100 years of age."[140] Therefore, objects that hold sacramental importance for American Indians that were carved only 80 years ago will not be protected under the act.

Any person who is interested in excavating or removing any resource located on Indian land or public lands must first apply to the Federal land manager for a permit.[141] Where the land manager has reason to believe that a permit may result in harm to a religious or cultural site, the manager must

[136] 449 F. Supp. at 46. Congress corrected this problem with new legislation in 1979 *(see,* Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified at 16 U.S.C. §§470aa-470ll (Supp. IV, 1980)). Several Western States and Indian nations enacted their own antiquities acts prior to enactment of the new Federal statute. *See,* e.g., South Dakota (S.D. Comp. Laws. Ann. §1-20-35 (1980)); Colorado (Colo. Rev. Stat. Ann. §24-80-409 (1973)); New Mexico (N.M. Stat. Ann. §18-6-9 (B)(1) (1978)); Navajo Antiquities Act (Jan. 27, 1972), *reprinted in* 7 *Am. Ind. L. Rev.* 153 (1979).
[137] 16 U.S.C. §§470aa-470ll (Supp. IV 1980).
[138] *Id.* §470aa(a)(3).
[139] *Id.* §470bb(1).
[140] *Id.*
[141] *Id.* §470cc(a).

notify any Indian tribe which may consider the site religiously important.[142] Most important, the statute requires that an applicant for permission to dig or remove resources located on Indian lands obtain the consent of the Indian or Indian tribe with jurisdiction over the land.[143]

The act does not affect any person who has had lawful possession of an archaeological resource prior to October 31, 1979. The penalties for selling, purchasing, exchanging, transporting, receiving, or offering to sell, purchase, or exchange an archeological resource, in violation of the act are much stiffer than the penalties of the Antiquities Act:[144]

> Any person who knowingly violates or counsels, procures, solicits or employs any other person to violate any prohibition contained in. . .[this section] shall. . .be fined not more than $10,000 or imprisoned not more than a year, or both.[145]

Although the statute takes care of the problem of pothunters who steal Indian ceremonial objects that are at least 100 years old, the problem of reacquiring objects held by museums before the effective date of the Resources Protection Act still remains. For example, the Zunis have negotiated with the Smithsonian Institute and the Denver Art Museum for the return of their War Gods stolen from their reservation at the turn of the century.[146] Neither museum has relinquished the objects, but the Smithsonian offered to acquiesce if the Zunis could build an adequate museum to house the Gods.[147]

The American Indian Task Force recommended several actions that could be taken to solve some of the problems of the retention by museums of sacred objects. They suggested that museums could decline to acquire for their collections any objects that are of current religious significance to American Indians. Furthermore, they should return to the tribes objects in their possession when third parties assert no interest. Museums should also work with traditional American Indian leaders in exhibiting, labeling, and storage of the objects. The Task Force recommended that religious teachers be allowed to perform periodic ritual treatments when necessary.[148]

[142] *Id.* §470cc(c).
[143] *Id.* §470cc(q)(2).
[144] *Id.* §470ee(b).
[145] *Id.* §470ee(d).
[146] Blair, "Native Americans versus American Museums: A Battle for Artifacts," 7 *Am. Ind. L. Rev.* 125, 127 (1979).
[147] *Id.*

Several Federal statutes also provide a further basis for Federal jurisdiction in this area. Unlike the Archaeological Resources Protection Act, these statutes, if utilized, would permit the government to exert pressure on museums to return sacred objects in their possession to Indian tribes. For example, one provision of the American Indian Religious Freedom Act declares that it shall be the policy of the United States to protect right of freedom of religion, "including. . .[the] use and possession of sacred objects."[149]

The Nation's need to regulate border crossings between the United States and the neighboring countries of Mexico and Canada is also an interest that requires balancing against the religious freedom of American Indians. For example, Indian religious leaders often transport sacred objects, such as feathers, ceremonial masks, and peyote across the borders. At border crossings, customs officials search the bags containing the objects to ascertain if items are being transported illegally. When the objects are handled by persons other than the traditional religious leaders, their spiritual powers are impaired. Moreover, in the past, border officials have confiscated some of the objects.

Ceremonial Use of Peyote

States have a legitimate right to regulate drug traffic. The religious ceremonies of the Native American Church, however, are largely dependent upon the use of a hallucinogenic drug called peyote. Peyotism first appeared among the plains tribes and gained more followers among the Kiowa Tribes in the early 1900s.[150] When other traditional religious ceremonies and the Ghost Dance were crushed by the Federal Government, peyotism offered a supernaturalistic alternative to the old religions.

In peyote cases, the State often charges the defendant with illegal possession, transportation, or use of the drug. The defendant raises the defense that the drug is an essential element of his religious practice and is thus protected by the first amendment free exercise clause. The court must then balance the State's need to regulate the drug against

[148] Task Force Report, p. 81.
[149] American Indian Religious Freedom Act, 42 U.S.C. §1996 (Supp. IV 1980).
[150] De Verges, "Freedom of Religion Peyote and the Native American Church," *Am. Ind. L. Rev.* 71 (Winter 1974).

the defendant's right to freely practice his religion. Several cases have presented this issue,[151] but the landmark cases in this area are *People v. Woody*[152] and *State v. Whittingham.*[153]

The court in *Woody* held that a State could not apply its statute prohibiting peyote use in such a way as to prevent an Indian tribe from using the drug as a sacrament. Navajos, meeting in a hogan in the desert to perform a religious ceremony, were arrested by police after they observed the use of peyote in the ceremony. The Indians presented the arresting officer with a copy of the Native American Church's articles of incorporation, which declared, "we pledge ourselves to work for unity with the sacramental use of peyote. . . ."[154] At trial, the Indians were convicted of possession of narcotics, despite their assertion that the criminal statute abridged their right of free exercise of their religion.

On appeal, the issue before the court was whether the statute imposed a burden on religion. Not questioning the existence of a bona fide religion, the court discussed the long history of peyotism and its important ceremonial function in the Native American Church.[155] Although the court acknowledged a right of the State to regulate narcotics use, it required the demonstration of a compelling interest before religious free exercise can be abridged, and rejected the State's arguments that its compelling reason for regulating peyote lay in its "deleterious effects upon the Indian community and. . .in the infringement such practice would place upon the enforcement of the narcotic laws."[156]

The State relied principally on *Reynolds v. United States,*[157] the case upholding prohibition of polygamy against members of the Mormon church. The court noted that in that case, polygamy was found to be the seed of destruction of a democratic society and classed with such religious rites as sacrifice of human beings and funereal immolation of widows.[158] Similarly, the court found inapplicable *Braunfeld v. Brown,*[159] a case upholding the Pennsylvania Sunday Blue Law against free exercise objections from Sabbatarians, because the religious practice or belief struck down was only incidental to their religion rather than an integral element just as it had found polygamy to be in *Reynolds.*

> The test of constitutionality calls for an examination of the degree of abridgment of religious freedom involved in each case. Polygamy, although a basic tenet in the theology of Mormonism, is not essential to the practice of the religion. . . . *Braunfeld* represents only an incidental infringement of religious freedom contrasted with "a strong state interest in providing one uniform day of rest for all workers." . . .[P]eyote, on the other hand, is the *sine qua non* of defendants' faith. It is the sole means by which defendants are able to experience their religion; without peyote defendants cannot practice their faith.[160]

In *State v. Whittingham,*[161] the Arizona court of appeals was presented with the same issues confronted by the California Supreme Court in *Woody.*

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[151] Golden Eagle v. Johnson, 493 F.2d 1179 (9th Cir. 1974) *cert. denied,* 419 U.S. 1105 (1975), and State v. Soto, 210 Or. App. 794, 537 P.2d 142 (1975). In *Golden Eagle,* the court held that the first amendment did not require an adversary hearing or a special warrant procedure to determine whether the person to be arrested had a good faith use of peyote for religious purposes. In *Soto,* the defendant offered to present evidence that he had been a practicing member of the Native American Church for 6 years and that the peyote button in his possession was carried for religious purposes. The court upheld his conviction against a first amendment challenge by asserting the State's right to restrict religious practice but not religious belief. In Whitehorn v. Oklahoma, 561 P.2d 539 (1977), the court held that it was a defense to show that peyote was used in connection with a bona fide religious practice. The determination of whether a defendant charged with possession of peyote was a member of the Native American Church was to be made by the trial court. This case-by-case approach has led to numerous arrests of individuals who practice peyotism in the Native American Church. The court on this question said: "We wish to make it abundantly clear that we do not hold today that all members of [NAC] must. . .carry certificates of membership; we do hold that unless or until such time the legislature acts to exempt and provide for the administration of such exemption the question of membership in the Native American Church is for the trier of fact." (561 P.2d at 546).

[152] 40 Cal. Rptr. 69, 394 P.2d 813, 61 Cal. 2d 716 (1964).

[153] 394 P.2d at 816.

[154] 19 Ariz. App. 27, 504 P.2d 950 (1973).

[155] 394 p. 2d at 817–18.

[156] *Id.* at 816, 818.

[157] 98 U.S. 145 (1878).

[158] *Id.* at 165–66.

[159] 366 U.S. 599 (1960).

[160] 394 P.2d at 820. Although the *Woody* result was encouraging to NAC members, one commentator, John T. Doyle, has expressed dissatisfaction with some aspects of the court's opinion. His first criticism of the decision lies in the court's long discussion of peyotism and the Native American Church, with its references to membership and Christian parallels, and the way in which it sought to show how peyote was used religiously. For example, the court notes that "peyote serves as a sacramental symbol similar to bread and wine . . . .[and] prayers are devoted to it much as prayers are directed to the Holy Ghost." (394 P.2d at 817). Doyle points out that the court relied heavily on the fact that peyotism was the *sine qua non* of the defendants' faith in exempting the Indians from the general regulatory scope of the statute. Doyle argues that this "theological heart" reasoning gives license "to the government to determine what is important to a religion and what is not." Doyle, "Dubious Intrusions: Peyote, Drug Laws, and Religous Freedom," 8 *Am. Ind. L. Rev.* 79, 88 (1980).

[161] 19 Ariz. App. 27, 504 P.2d 950 (1973).

In *Whittingham,* the appellants were arrested at a hogan where they were ingesting peyote. They claimed that at the time of the arrest they were engaged in a religious ceremony to bless their marriage. The defendants were nevertheless convicted of violating a State statute prohibiting possession of peyote. On appeal, the court noted that the first amendment grants an individual the right to practice his religion without government interference absent a compelling State interest. To reach the compelling interest issue, however, "state regulation must be of the nature and quality so as to preclude or prohibit the free exercise of religion."[162] Like the *Woody* court, the Arizona court of appeals took notice of the long-established history of peyotism and its large membership, and it rejected the State's argument that once exceptions were given, enforcement of peyote regulation would be difficult and "fraudulent claims of religious sincerity would reign."[163] Noting that it had been guided by the California Supreme Court's decision in *Woody,* and finding the defendants immune from prosecution under the Arizona statute, the court stated:

> Where sincere participants ingest peyote while taking part in a bona fide religious ceremony, and. . ."the use of peyote incorporates the essence of the religious expression," there is a clear exception from the purview of [the statute].[164]

Most interestingly, the Arizona court took notice of the fact that many legislatures in other States[165] had found that it was in their interest to carve out statutory exceptions to the States' general drug regulatory scheme for persons who ingested peyote for religious purposes:

> The State of Arizona's interest cannot be of such a different quality or nature than those jurisdictions that have acknowledged an exception within their criminal codes for the sacramental use of peyote in a bona fide religious ceremony.[166]

The Federal Government has failed in many instances to protect the religious freedom of the American Indian from government intrusion. The American Indian Religious Freedom Act was an important recognition of American Indian rights to the free exercise of their religion. However, the failure of non-Indians to understand the nature of much of Indian religious tradition has rendered the act largely ineffectual. The vagueness of other Federal statutes has weakened the protections they were intended to offer. Legislation that grants specific rights and that provides a mechanism for redress would better protect Indian religious rights. Specific rights needing Federal protection include the preservation of sacred land in its natural state and assured American Indian access to religious sites. The protection of ceremonial religious practices and the proper treatment and return of religious artifacts and sacred objects are also among Indian religious rights to be respected.

[162] 504 P.2d at 952.
[163] *Id.* at 951, 954.
[164] *Id.* at 954 (quoting *Woody).*
[165] States that have created exceptions for the use of peyote in religious ceremonies include New Mexico (N.M. Stat. Ann. §204.204(7) (Supp. 1981). The Federal Government also permits the importation and exportation of peyote for lawful purposes at the discretion of the Attorney General. 21 U.S.C. §§952, 953 (1976).
[166] 504 P.2d at 954.

Chapter 3

Religious Discrimination in Employment

The Problem

Protecting adherents of religious belief from discrimination is clearly consistent with basic national concepts of religious liberty embodied in the first amendment. Religious freedom, the freedom to believe and practice according to the religious dictates of one's own conscience, as recognized by the first amendment, is one of the highest values of our society.[1] Within the broad area of religious discrimination, employment discrimination has the most significant economic results both for those directly affected and for society generally. However, the problem of religious discrimination in employment is not as simple, and the goal of eliminating it not as easy, as it might, at first, appear. Employment discrimination on the basis of religion is not always apparent. Additionally, the diversity of religious beliefs and practices that exists in our Nation, the variety of employment practices and needs, and the constitutional restraints on governmental involvement contained in the establishment clause present further and often competing interests that must be balanced.

Religious freedom is denied when employers base hiring and promotion decisions on prejudicial stereotypes about members of certain religions or, motivated by intolerance, blatantly discriminate on the basis of religion. Our Nation's history has been marked by periods when expressions of religious bigotry were less restrained than at present.[2] Societal disapproval of intentional discrimination most likely decreases its occurrence, but, particularly when supported by legal sanctions, also drives intentional religious discrimination underground, and those motivated by bigotry continue their discriminatory practices, but create pretexts to explain them. As victims of discrimination in other areas have discovered, in the absence of admissions by the perpetrators, discriminatory intent is exceedingly difficult to prove.[3]

Discrimination can, of course, continue to operate even in the absence of discriminatory motives. In 1971 the U.S. Supreme Court realized that traditional notions of discrimination which looked for evil purpose failed to address practices undertaken for reasons unrelated to prejudice the consequences of which were, nevertheless, discriminatory.[4] Consequently, the Court held that Title VII prohibits any employment practice that has a discriminatory effect unless it can be justified as a business necessity.[5]

Because discrimination is manifested most frequently and tellingly by the unequal outcomes it

[1] Braunfeld v. Brown, 366 U.S. 599, 613 (1961) (Brennan, J., dissenting). *See also,* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 212–14 (1964); Follet v. McCormick 321 U.S. 573, 575 (1944); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 639 (1943); Cantwell v. Conn., 310 U.S. 296, 303 (1940). As the introduction illustrated, these values have not always been pursued in practice.

[2] The history of religious intolerance and discrimination is discussed more fully in chap. 1.

[3] *See, e.g.,* Comment, "Proof of Racially Discriminatory Purpose Under the Equal Protection Clause," 12 *Harv. C.R.-C.L. L. Rev.* 725, 733–34 (1977).

[4] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[5] *Id.*, at 431.

generates, statistics play an important role in uncovering its presence. Statistics are used for two related purposes, either as an "avenue of proof. . .to undercover clandestine and covert [intentional] discrimination"[6] or to demonstrate the adverse effects of employment policies and practices regardless of their purpose. Statistics, however, are generally less useful tools for victims of religious discrimination than for those who suffer employment discrimination on the basis of race or sex. Discrimination by race, color, sex, or national origin generally affects a large and identifiable class; class actions are prevalent and defendants are subject to the possibility of substantial court-ordered remedies. Religious discrimination, on the other hand, generally involves the complaint of a single individual,[7] and statistical evidence is generally unavailable.[8]

In 1979 the Commission held a consultation to identify civil rights issues related to religious discrimination.[9] At that consultation the Commission heard statements and received documents which indicated that religious discrimination in employment continues to be a problem, and that it is especially prevalent for members of minority religions in, and aspiring to, the upper echelons of the corporate arena. For example, one participant said:

> [V]ast areas of enterprise in American life are conspicuous by the absence of Jews among the corporate leaders. . . .[C]ontrary to the historic stereotype of the Jewish banker, Jews are conspicuous by their absence in the field of investment banking. . .the commercial airlines, automobile manufacturing, the shipping industry, mineral extractions, steel and aluminum manufacturing and the list goes on. . . .The Jew who seeks a corporate career and aspires to the executive suite faces a path filled with pitfalls of discrimination.[10]

The American Jewish Committee's research revealed that among 1,200 of the largest industrial and financial institutions only a few have more than one or two top executives who are Jewish. This significant underrepresentation is not the result of unavailability. Although less than 1 percent of all corporate executives are Jewish, approximately 10 percent of all college graduates are Jewish. A survey conducted by the New York State Attorney General of employment patterns in the banking industry revealed that seven of the largest New York City area banks had virtually no Jews in top executive positions although 50 percent of the college graduates in New York are Jews.[11]

One of the reasons given for this underrepresentation is that corporate employers deliberately place limits on the numbers of Jews and members of other religious minorities who can attain top executive positions and on the positions they can obtain. "The Jew who aspires to ascend the corporate ladder frequently bangs his head against the Jewish ceiling. You can be promoted so high and no higher. . . ."[12] It is also contended that employment decisions are based upon prejudicial stereotypes.[13] Additionally, neutral practices that may be unrelated to prejudice also act to perpetuate this discriminatory process. For example, corporate recruitment generally occurs on campuses with few Jewish students.[14]

Whatever their genesis, these practices have resulted in a virtual lockout of Jews from high-level positions in the business sector and have coalesced to create a self-perpetuating cycle of discrimination. A study at the Harvard School of Business Administration indicated that more than 75 percent of business executives felt that a Jewish religious background was a hindrance to obtaining a high-level corporate executive position.[15] Aware of the prevalence of discrimination, Jews are discouraged from seeking careers that lead to top-level executive positions.[16] Consequently, industry officials erroneously conclude that Jews are not really interested in

[6] International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971)).

[7] Lee Boothby, legal counsel, General Conference of Seventh-Day Adventists, statement, *Religious Discrimination: A Neglected Issue,* a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Apr. 9–10, 1979, p. 33 (hereafter cited as *Religious Discrimination Consultation).*

[8] Nevertheless, representatives of minority religions, civil rights organizations, and Federal officials, in statements at the Commission's consultation, opposed including enumeration of religious preference in the census. Ibid., pp. 42–43.

[9] *Religious Discrimination Consultation.*

[10] Ira Gissen, director, National Discrimination Department, Anti-Defamation League of B'nai B'rith, statement, ibid., p. 81.

See also, Office of Federal Contract Compliance religious discrimination guidelines, which state: "Special attention shall be directed toward executive and middle-management levels, where employment problems relating to religion. . .are most likely to occur." 41 C.F.R. §60–50.2(b) (1981).

[11] Seymour Samet, national director, Domestic Affairs Department, American Jewish Committee, *Religious Discrimination Consultation,* p. 84.

[12] Gissen Statement, *Religious Discrimination Consultation,* p. 81.

[13] Ibid.

[14] Samet Statement, *Religious Discrimination Consultation,* p. 84.

[15] Ibid.

[16] Ibid.; Gissen Statement, ibid., p. 82.

such jobs and continue practices that have the effect of excluding them.[17]

Roman Catholics, and those ethnic groups that are predominantly Catholic, are also alleged to suffer religious discrimination in the corporate arena. As Michael Schwartz, associate executive director of the Catholic League for Religious and Civil Rights, noted at the Commission's consultation, the evidence of such religious discrimination is "far from exhaustive and it is not uniform."[18] In some instances, it concerns members of the Catholic Church; in others, graduates of Catholic schools, and in still others, the available data is about members of ethnic groups that are overwhelmingly Catholic.

> [T]here is sufficient evidence to indicate that Catholics are still seriously underrepresented in certain high-paying and prestigious occupations and, in general terms, it seems that the more prestigious the position, the more difficult it is for a Catholic to attain it.[19]

Mr. Schwartz explained that he did not mean to suggest that Catholics ought to occupy 25 percent of every job category in the country, "but rather to indicate that they are so far out of line in fairly widespread categories that it makes it apparent that there is a problem somewhere along the line."[20] He cited prejudicial stereotypes as one problem that creates such disproportionate results and pointed to a survey that showed 35 percent of non-Catholics considered Catholics to be narrowminded and under the influence of church dogma,[21] and he explained the discriminatory consequences of such prejudicial stereotypes:

> When it comes to professional advancement, a stereotype like this can be crippling. . . .The implication is that. . .[a Catholic] is incapable of independent thought and. . .unsuited to a position of responsibility. When we add to this the negative stereotypes that burden so many predominantly Catholic ethnic groups the situation is even worse.[22]

Employers' use of private clubs that exclude Catholics, Jews, and other religious groups also impedes their career advancement. Major business deals and the courting of clients often take place inside locker rooms, on tennis courts, by the pool, or in the club's dining facilities. As one consultation participant stated: "It is a fact of industrial history of the United States that the United States Steel Corporation was organized on a private golf course outside of Pittsburgh."[23] Private clubs have been described as "an extension of the executive suite."[24] They provide an important source of business contacts and potential corporate customers and a place where corporate policies are established.[25]

Too frequently, these clubs restrict membership on the basis of religion and present antidiscrimination laws do not forbid such practices.[26] As members of excluded religions move into positions where their ability to work effectively and progress further in the corporate structure depends in part on their ability to establish extensive business and social relationships, such exclusionary membership practices become increasingly more salient barriers to equal employment opportunity.

The problem of discriminatory private membership clubs is compounded because employee membership and other club fees and expenses are frequently paid by the employer. Employers assume such costs for business purposes and regularly claim a business expense deduction from their tax liability for such payments. The Internal Revenue Service permits such claims.[27]

As the Commission has stated previously, the development of effective civil rights remedies re-

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[17] Gissen Statement, *Religious Discrimination Consultation,* p. 82.

[18] Michael Schwartz, associate executive director, Catholic League for Religious and Civil Rights, statement, ibid., p. 88.

[19] Ibid.

[20] Ibid., p. 99. *See also,* U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* (1981), pp. 39–41 (hereafter cited as *Affirmative Action Statement).* The Commission said, "We reject the allegation that numerical aspects of affirmative action plans inevitably must work as a system of group entitlement. . . ." Rather, numerical statistics that show disparate outcomes by race, sex, national origin, or religion "are quantitative warning signals that discrimination may exist." Ibid., p. 39.

[21] *Religious Discrimination Consultation,* p. 91. Although religious discrimination generally revolves around religious practices, Mr. Schwartz stated that Catholics are also discriminated against simply on the basis of their belief. Ibid., p. 92.

[22] Ibid., p. 91. Catholics who are members of ethnic minorities that as a group are not predominantly Catholic, such as Asians, blacks, and American Indians, also feel the effects of compounded stereotypes and prejudices that take their toll in the denial of jobs and promotions.

[23] Gissen Statement, *Religious Discrimination Consultation,* p. 82.

[24] Ira Gissen, testimony, *Club Membership Practices of Financial Institutions,* Hearings Before the Senate Committee on Banking, Housing and Urban Affairs, 96th Cong. 1st Sess., July 13, 1979.

[25] Ibid., Carol S. Greenwald, testimony, Women's Equity Action League.

[26] Private clubs also discriminate against women and racial minorities, impeding their career advancement as well. Ibid.

[27] *See,* McGlotten v. Connally, 338 F. Supp. 448, 457–59 (D.D.C. 1972) (3-judge court). Federal efforts to remedy this problem are discussed later in this chapter.

quires a full and accurate appreciation of the problems they seek to resolve.[28] In some respects, the problem of religious discrimination in employment can best be understood by comparing it to the problems of race or sex discrimination.[29] The three can be similar.[30] Individual actions intentionally undertaken to deny employment benefits or opportunities on the basis of an applicant's or employee's religion operate much like similar acts of blatant race or sex discrimination and are just as impermissible. Moreover, analogous to the situation in race or sex discrimination cases, the particular religious preference of the victim is irrelevant.[31] It does not matter whether the victim belongs to a predominate religion with many supporters or to a very small sect, the tenets of which are unfamiliar, or even strange, to most people.

Most religious discrimination cases, however, involve interests, dynamics, and problems not present in race or sex cases. To begin with, the interests that those affected are seeking to protect in race and sex cases are different from those at stake in religious discrimination cases. In race and sex cases complainants assert a constitutionally protected right not to be treated differently on account of such status, whereas complainants in religious discrimination cases generally claim that the uniform application of neutral rules impinges on a constitutionally protected right to be different. In the former case the 14th amendment is the ultimate source of constitutional protection, while in the latter instance 1st amendment rights are also implicated. Whereas the 14th amendment in civil rights cases scrutinizes the validity of rules and practices that distinguish between classes of people, "the values of the First Amendment. . .look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals."[32] Rather than seeking rules and practices that disregard their status, members of minority religions seek exemptions from the otherwise equal application of work rules because of their status. Consequently, victims of religious discrimination are almost always acutely aware of their plight. Race or sex discrimination, on the other hand, often occurs without either its perpetrators' or victims' knowledge; only after statistical analysis demonstrates the disproportionate effect of an otherwise neutral practice to be race or gender specific does the presence of such discrimination become apparent.[33]

More important, protecting the religious liberty interests at stake in most religious discrimination cases serves entirely different social goals than are sought in race or sex cases. While the elimination of race or sex discrimination seeks to ensure equality, the elimination of religious discrimination seeks to preserve diversity.[34]

The dynamics of religious discrimination are not the same as in race or sex discrimination. The "effects test" that the Supreme Court developed to identify unintentional discrimination recognizes the reciprocal and self-reinforcing consequences of historical patterns of pervasive structural and societal discrimination. The Supreme Court noted that basing employment decisions on educational qualifications unrelated to actual job requirements reinforced and perpetuated the consequences of historical patterns of racial discrimination in education.[35]

Analysis of the process of race and sex discrimination contained in civil rights law is, therefore, premised on an appreciation of its historical and social pervasiveness. Most incidents of religious discrimination in employment, however, do not flow from such patterns of historical and structural discrimination, but are instead scattered conflicts between the religiously compelled needs of certain employees and the current practices of their employers.[36] Nevertheless, while workplace rules that are

[28] *Affirmative Action Statement,* pp. 1, 5, 30.

[29] The processes that discriminate against white women differ in some respects from those encountered by minorities. The underlying dynamics and consequences are, nevertheless, in important respects, similar. *See, Affirmative Action Statement,* pp. 11–12. The Commission is also currently studying discrimination against the handicapped.

[30] Civil rights law does distinguish between the three bases in certain respects. For example, religious- and gender-based employment practices are permissible if religion or sex is a bona fide occupational qualification, and a special exemption exists with regard to coreligionist preferences for religious schools. 42 U.S.C. §2000e-2(e) (1976).

[31] See, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (white male employees alleging disparate treatment on the basis of race have a cause of action under Title VII).

[32] Braunfeld v. Brown, 366 U.S. 599, 610 (1961) (Brennan, J., dissenting).

[33] *Affirmative Action Statement,* p. 9.

[34] *See,* Young v. Southwestern Savings and Loan Association, 509 F.2d 140, 141 (5th Cir. 1975).

[35] Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971).

[36] Our Nation has, as chap. 1 demonstrated, an undeniable history of religious bigotry and discrimination, and, to some extent, the underrepresentation just discussed is a consequence of that history. It is also true that current practices, particularly acts of intentional discrimination, such as exclusionary private clubs, perpetuate discrimination. Nevertheless, religious discrimination

incompatible with religious needs generally do not compound the effects of pervasive historical patterns of discrimination, neither are they ahistorical or entirely unrelated to religious practices generally.

Even though employment practices and workplace rules may currently be essentially secular in purpose, it is not accidental that they are generally compatible with majority practices and beliefs. The practice that creates one of the recurring problems in this area involves the custom of not working on Sunday. Historically, the legal origins of the custom derived from religious forces that sought to establish state religions.[37] Although the religious character of the tradition has lessened and may actually have been superseded by secular concerns, it is not entirely coincidental that the one day generally set aside for rest harmonizes with the practices of our Nation's major religions. Such harmony exists elsewhere also, such as in some of our definitions of criminal conduct. "Cultural history establishes not a few practices and prohibitions religious in origin which are retained as secular institutions and ways. . . ."[38] Secular holidays generally coincide with the chief religious observances of our Nation's major religions. Such practices may not perpetuate discrimination in the manner of an unnecessary job requirement but provide support, albeit indirect, for adherents of predominate faiths. Such support is not available to believers of minority religions whose creeds compel practices that have not been absorbed by secular culture.

Finally, two additional factors complicate the problem of religious discrimination in employment: the diverse and myriad practices of the numerous different religious groups that exist in our country and the restraints on governmental entanglement with religion commanded by the establishment clause.

"[W]e are a cosmopolitan nation made up of people of almost every conceivable religious practice."[39] Given both the corresponding diversity in employer needs and preferences and the frequent compatability of secular rules and traditions with practices of the predominate sects, this variety serves to limit contention between religious practices and work rules to specific situations. Further, the variety and unforeseeability of such tensions preclude the prior development of controlling standards that do not themselves inadvertently threaten someone's religious liberty. Thus, these practical considerations warrant the development of remedies to problems of religious discrimination in employment on a case-by-case basis. The degree of incompatability, the importance of the competing interests, and the feasibility of alternatives simply cannot be determined in a factual vacuum.

These practical constraints are reinforced by the prohibitions of the establishment clause. Because the establishment clause forbids governmental initiatives that promote sectarian purposes, favor particular religions or all religion, or entangle the state with religion,[40] the methods that can be employed by the government to eliminate religious discrimination are limited in ways that they are not in the case of race or sex discrimination. The limits, however, are not always easy to discern. Secular interests can parallel and even indirectly benefit sectarian ones and constitutionally be pursued. If, however, otherwise permissible sectarian purposes primarily benefit religion or particular religions, establishment clause concerns necessarily arise.[41] Yet, as is almost invariably the case, the restrictions of the establishment clause must be tempered by the countervailing protections of the free exercise clause, which is an expression of sensitivity to the vulnerability of smaller sects to encroachment and persecution by larger religions that enjoy secular support.[42]

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was not as pervasively institutionalized as race or sex discrimination, and most complaints of religious discrimination present either contemporary acts of intentional discrimination based on prejudice or, even more commonly, neutral rules that conflict with religious beliefs or practices.

[37] See, McGowan v. Maryland, 366 U.S. 420, 431–33 (1961).

[38] McGowan v. Maryland, 366 U.S. at 503–04 (Frankfurter, J., concurring). The text cited specifically refers to religious practices retained "long after their religious sanctions and justifications are gone." *Id.* at 504. The establishment question is, of course, more delicate when practices assume overriding secular connotations while their religious nature remains viable.

[39] Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (Warren, C.J.).

[40] *See generally,* Everson v. Bd. of Educ., 330 U.S. 1, 14–16 (1947). The constraints of the establishment clause are discussed more fully in chap. 2.

[41] On the other hand, when government action and religious interests conflict, the first amendment is also implicated through the free exercise clause. Such conflicts then almost automatically raise establishment questions, as restrictions on any particular religion necessarily benefit others.

[42] The clause was added to the Constitution because its framers were mindful of "the then recent history of. . .persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience." McGowan v. Maryland, 366 U.S. 420, 464 (1961) (Frankfurter, J., concurring).

The Law

Title VII

Title VII of the Civil Rights Act of 1964[43] makes it unlawful for an employer or union to discriminate against employees on the basis of religion.[44] Although the act specifies that it protects not only beliefs but "all aspects of religious observance and practice,"[45] it provides no guidance as to the beliefs protected other than that they must be religious. In most cases whether a practice or belief is religious is not at issue.[46] Guidance is available, however, from cases arising in another context. Under the Universal Military Training and Service Act (UMTSA), persons can be exempted from military service "if, by reason of religious training and belief, [they are] conscientiously opposed to participation in war in any form."[47] The U.S. Supreme Court has held under UMTSA that an individual's beliefs are religious if they are sincere and meaningful and "in his own scheme of things religious."[48] Thus, as the Court explained, these sincere and meaningful beliefs "need not be confined in either source or content to traditional or parochial concepts of religion."[49] Applying this approach to Title VII, persons who sincerely hold meaningful religious beliefs but are not members of recognized churches as well as church members whose own religious beliefs require practices and observances that are not compelled by church doctrine would be protected.[50]

Most important, recognizing the peculiar nature of the problem, the statutory prohibition against religious discrimination in employment creates a special category of discrimination, reasonable accommodation, that does not apply to race, color, sex, or national origin, the other bases of discrimination prohibited by Title VII. Section 701(j) of Title VII[51] provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Under section 701(j) employers and unions[52] have an affirmative obligation to make reasonable accommodation unless they can demonstrate undue hardship. This obligation was underscored and its scope addressed in 1977 when the Supreme Court first reviewed section 701(j), in the case of *Trans World Airlines v. Hardison.*[53]

The Case Law

Section 701(j) was added to Title VII in 1972.[54] After 1972 lower Federal courts faced the task of determining on a case-by-case basis the extent of accommodation required and when it ceases to be reasonable and constitutes undue hardship. Prior to 1977 and the *Hardison* decision, there was no uniform standard against which steps taken to accommodate an employee could be measured. For

[43] 42 U.S.C. §§2000e to 2000e–17 (1976 & Supp. IV 1980).
[44] 42 U.S.C. §2000e–2(a), (c)–(d) (1976).
[45] *Id.* §2000e(j).
[46] 29 C.F.R. §1605.1 (1982).
[47] 50 U.S.C. App., §456(j) (1976).
[48] United States v. Seeger, 380 U.S. 163, 166, 176, 185 (1965); *see also,* Welsh v. United States, 398 U.S. 333 (1970).
[49] 398 U.S. at 339.
[50] *See,* TWA v. Hardison, 432 U.S. 63, 90 n.4 (1977) (Marshall, J., dissenting); *see also,* Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163, 166 n.4 (5th Cir. 1976) (logic or validity of belief not relevant); Young v. Southwestern Savings & Loan Association, 509 F.2d 140 (5th Cir. 1975) (atheist protected against compulsory religious practices). *But see,* Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622, 629–32 (W.D. Pa. 1979) (reviewing religious basis of beliefs violates first amendment), *rev'd on other grounds,* 613 F.2d 482 (3d Cir. 1980).
[51] 42 U.S.C. §2000e(j)(1976).
[52] *Id.,* §§2000e(j), 2000e–2(a), (c).
[53] 432 U.S. 63 (1977).
[54] Pub. L. No. 92–261, §2(7), 86 Stat. 103 (codified at 42 U.S.C. §2000e(j) (1976)). The accommodation requirement originated in 1966 when the EEOC issued its first guidelines on religious discrimination. Section 1605.1 stated that an employer had an obligation to accommodate the religious practices of its employees or prospective employees unless to do so would create a "serious inconvenience to the conduct of the business." 29 C.F.R. §1605.1 (a)(2) (1967). The regulation, however, emphasized the elimination of intentional acts of discrimination. *Id.* §1605.1 (a)(3) *See generally,* 32 *Rutgers L. Rev.* 484, 485 n. 11 (1979). After receiving numerous complaints from Sabbatarians, the EEOC revised regulation 1605.1 and struck a new balance, requiring employers to make reasonable accommodations to the religious needs of employees, "where such accommodation can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. §1605.1 (b) (1968). Some courts questioned the validity of the EEOC guidelines, finding them inconsistent with or exceeding the authority of Title VII. *See, e.g.,* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970) *aff'd by an equally divided Court,* 402 U.S. 689 (1971). Others, however, upheld the "reasonable accommodation" requirement of the guidelines as a proper interpretation of Title VII. *See,* Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Reid v. Memphis Pub. Co., 468 F.2d 346 (6th Cir. 1972). The latter cases were decided with the benefit of Congress' new addition of §701(j), making Title VII consistent with the EEOC interpretation by incorporating the "reasonable accommodation" requirement.

example, the sixth circuit defined "undue hardship" as "something greater than hardship"[55] and further distinguished undue hardship from inconvenience,[56] while the ninth circuit described the undue hardship analysis as a "business necessity test."[57] There had developed what one commentator characterized as "a complex and conflicting body of decisional law"[58] on this issue.

Trans World Airlines v. Hardison[59] involved the discharge of a Sabbatarian because he refused to work his assigned Saturday shift. Larry Hardison was employed by TWA as a clerk in the stores department at its Kansas City base. It operated 24 hours a day, 365 days a year, and no job there could remain unfilled. If an employee was absent, someone else had to cover the position. Within a year after he was hired, Hardison joined the Worldwide Church of God. Among the church's tenets is a prohibition of work on the Sabbath from sunset on Friday until sunset on Saturday and on certain specified religious holidays. He informed his manager of his religious requirements and a number of suggestions were made to accommodate him. Potential conflicts between his work schedule and his religious obligation to avoid Sabbath work were temporarily avoided when Hardison transferred to the 11 p.m.–7 a.m. shift. Observance of religious holidays was made possible by swapping days off on traditional holidays that most other employees preferred to have off for off days coinciding with the religious holidays of the Worldwide Church of God.[60]

Hardison's position, like others at TWA's Kansas City base, was subject to a seniority system contained in a collective-bargaining agreement between TWA and the International Association of Machinists and Aerospace Workers. Hardison's seniority allowed him to obtain a work schedule that permitted him to observe the Sabbath regularly. Subsequently, however, he successfully bid for a transfer to a different building. Under the collective-bargaining agreement, each building had entirely separate seniority tests. In the new building Hardison was second from the bottom on the seniority list and consequently was unable to bid for a shift that would avoid Saturday assignments. Hardison refused to report to work on Saturdays and was discharged. He thereafter brought suit in Federal court claiming that his discharge constituted religious discrimination in violation of Title VII.[61]

The eighth circuit court of appeals held that TWA had rejected three reasonable alternatives, any one of which would have satisfied its obligation without causing undue hardship and, consequently, had not met its resonsibility reasonably to accommodate Hardison's religious needs under the EEOC guidelines.[62] The three alternatives were:

(1) TWA could have permitted Hardison to work a 4-day week utilizing a supervisor or worker on duty elsewhere to fill his Saturday shift;

(2) TWA could have permitted Hardison to work a 4-day week and filled his Saturday shift with other available personnel and paid them overtime; or

(3) TWA could have imposed a swap between Hardison and another employee either for another shift or for Sabbath days.[63]

The first two alternatives could have been undertaken within the framework of the seniority system but would have either reduced efficiency or required the payment of premium overtime costs; the third alternative would have breached the seniority provisions of the collective-bargaining agreement.[64]

Hardison maintained that the statutory obligation to accommodate religious needs took precedence over the collective-bargaining agreement and its seniority system.[65] This issue was extensively discussed by Justice White in delivering the opinion of the Court, noting that "collective bargaining. . .lies at the core of our national labor policy and seniority provisions are universally included in such [negotiated] contracts."[66] Work schedules can be allocated either according to the preferences of employees or by involuntary assignment. The former system was, in fact, used to provide Mr. Hardison his religious holidays off. However, some form of involuntary work assignment is obviously

[55] Cummins v. Parker Seal Co., 516 F.2d 544, 550–51 (6th Cir. 1975).

[56] *Id.* at 550.

[57] Yott v. North American Rockwell Corp., 501 F.2d 398, 400–01 (9th Cir. 1974).

[58] 1976 *U. Ill. L.F.* 867, 869. See also, 32 *Rutgers L. Rev.* 484, 487–88 (1979); TWA v. Hardison, 432 U.S. 63, 75 n.10 (1977).

[59] 432 U.S. 63 (1977).

[60] *Id.* at 66–68.

[61] *Id.* at 67–69.

[62] *Id.* at 76. (Hardison rested his claim on the 1967 EEOC guidelines because it arose prior to the 1972 amendment.)

[63] *Id.*

[64] *Id.* at 76–77.

[65] *Id.* at 79.

[66] *Id.*

required when, as was the case with Saturday shifts at TWA's Kansas City base, fewer employees select a shift than the employer requires. Given such a situation, TWA and the IAM had contractually agreed that employee preference for shift assignments would be respected as much as possible on the basis of seniority; the desires of employees with insufficient seniority would be overridden by the requirements of the business.[67]

The Supreme Court's opinion in *Hardison* emphasized that if TWA had circumvented the seniority system to accommodate Hardison, it would have had to deny a senior employee his shift preference and deprive him of negotiated contract rights.[68] The basis for overriding the senior employee's preference would have been "at least in part because he did not adhere to a religion that observed the Saturday Sabbath."[69] The Court characterized such an accommodation as "unequal treatment,"[70] holding that the Title VII obligation to reasonably accommodate does not require that collectively bargained seniority systems be ignored. Indeed, by emphasizing that Title VII is intended to eliminate discrimination in employment and noting that it prohibits discrimination directed against majorities as well as minorities, the Court implied that such accommodation violates the Title VII rights of majority religion adherents.[71]

The Court also found support for its holding in section 703(h) of Title VII, which immunizes bona fide seniority or merit systems that have the effect of perpetuating discrimination.[72] "[A]bsent a discriminatory purpose the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."[73] The circuit court's conclusion that negotiated seniority systems are not absolute restrictions on possible accommodations to an employee's religious practices was, according to Justice White's reasoning, "in substance nothing more than ruling that operation of the seniority system was itself an unlawful employment practice" even in the absence of discriminatory intent.[74] The Court viewed such a ruling as inconsistent with section 703(h) and rejected the circuit court's analysis.[75]

The Court also examined the two alternatives suggested by the eighth circuit that would not have violated the seniority system, permitting Hardison to work a 4-day week and using either a supervisor or worker on duty elsewhere to replace him on his Sabbath or pay overtime to fill the slot with other available personnel. Without discussion, the Court held that requiring an employer to bear more than a *de minimis* cost to accommodate an employee's religious beliefs or practices is an undue burden[76] and relied on the findings of the district court that either alternative would have created an undue hardship.[77]

The Court concluded its opinion by reiterating a concern that Title VII not be construed as requiring employers to "discriminate against some employees in order to enable others to observe their Sabbath."[78]

In the Court's judgment, the two replacement alternatives were analogous to the suggestion that the seniority system be circumvented[79] because they would also require unequal treatment on the basis of religion; "the privilege of having Saturdays off would be allocated according to religion."[80]

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[67] *Id.* at 80.

[68] *Id.*

[69] *Id.* at 81.

[70] *Id.*

[71] *Id.*

[72] "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . .provided that such differences are not the result of an intention to discriminate because of. . .religion. . . ." 42 U.S.C. 2000e-2(h) (1976)

[73] 432 U.S. at 82. *See also,* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (construing §703(h) as exempting from Title VII pre-act bona fide seniority systems that may perpetuate pre-Title VII discrimination).

[74] 432 U.S. at 82.

[75] *See,* Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). *Franks* held that §703(h) does not bar a remedial award of retroactive seniority. *Id.* at 762. The Court in *Hardison* found *Franks* distinguishable, as it characterized Hardison's claim as one that directly attacked the operation of a seniority system rather than one that sought a remedial exception. 432 U.S. at 79 n.12, 82 n.13.

[76] 432 U.S. at 84. By narrowly restricting the duty to accommodate, the Court avoided petitioner's establishment clause challenge.

[77] *Id.* at 83 n.14, 84 n.15. Replacement would have required either the extra expense of premium overtime pay if an additional worker were hired to fill Hardison's position on his Sabbath or reduced efficiency if a supervisor or other worker on duty elsewhere were required to fulfill his duties on those days. *Id.* at 76.

[78] *Id.* at 85.

[79] The Court conceded, however, that unlike the suggestion to circumvent the seniority system other employees would not necessarily have been burdened by replacement. *Id.* at 84–85.

[80] *Id.* That financial costs were involved in permitting Hardison to observe his Sabbath was clearly a consideration in the Court's

The Court, while recognizing that Title VII imposes an obligation on employers to reasonably accommodate the religious beliefs and practices of their employees, narrowly restricted the scope of accommodations required. It held that an accommodation that would require more than a *de minimis* cost, either as lost efficiency or higher wages, or one that involved unequal treatment on the basis of religion constituted an undue hardship and was not intended by Title VII.

Because it incorporates the *de minimis* standard into section 701(j), the opinion runs the risk, as Justice Marshall noted in dissent, of being interpreted as holding that an employer "need not grant even the most minor special privilege to religious observers to enable them to follow their faith."[81]

Apparently, however, the fear that *Hardison* in effect eviscerates the statute has, as of yet, been unrealized. Although the Supreme Court established the *de minimis* standard, its application still requires a case-by-case judicial determination. Additionally, there remain issues concerning the scope of section 701(j) left unresolved by *Hardison.*

It is generally agreed that some of the factors to be weighed in determining reasonableness include the particular job situation of the employer and the uniqueness of the employee's duties. However, the criteria for determining when the accommodation becomes unreasonable or the hardship on the employer undue have not been clearly delineated. Since *Hardison,* courts have applied the *de minimis* standard to determine whether an employer's efforts to accommodate employees' religious needs are reasonable but have differed over the extent of this obligation. Nevertheless, Federal district and circuit courts since *Hardison* have occasionally found that employers have failed to satisfy their obligation to accommodate and, regardless of the outcomes in specific cases, have begun fleshing out the substantive and procedural requirements of section 701(j).

Claims of religious discrimination under Title VII take many forms. Conflicts between conscience and work rules have involved dress codes,[82] grooming requirements,[83] mandatory attendance at company-sponsored religious events,[84] proselytizing on the job,[85] flag raising,[86] and scope of work.[87] Nevertheless, most cases involve one of two issues,

judgment that the replacement suggestions constituted unequal treatment. Whether such considerations were determinative must, however, await further interpretation by the Court.

[81] 432 U.S. at 87. Justice Marshall (joined by Justice Brennan) criticized the Court's opinion both as to its interpretation of the law and its consideration of the facts. *Id.* at 92 n.6. First, recognizing that problems of accommodation arise "only when a neutral rule of general applicability conflicts with the religious practices of a particular employee," *id.* at 87, he contended that creating an obligation to accommodate the statute, "in plain words," requires unequal treatment constrained only by the limitation against undue hardship. *Id.* at 88. He found support for his contention both in the legislative history and in that any other interpretation effectively nullifies the statute. *Id.* at 88–89. Additionally, he concluded that TWA had not established that it had exhausted all reasonable accommodations nor proved that those remaining would have caused undue hardship. *Id.* at 91–97. Justice Marshall "seriously questioned" the interpretation of undue hardship as meaning more than *de minimis* cost, *id.* at 93 n.6, and even assuming such an interpretation to be correct, expressed "grave doubts" whether the record supported the district court's finding that either replacement alternative would have created an undue burden. *Id.* at 92 n.6. With regard to the latter, he noted that the finding was made prior to and without the benefit of the *de minimis* standard and could have been premised on a misunderstanding of applicable law. Additionally, his review of the record showed it to be lacking sufficient evidence on the issue. *Id.* Moreover, assuming that the three alternatives suggested by the circuit court were appropriately rejected, Justice Marshall opined that TWA had failed to meet its burden of establishing that accommodation was not possible. Without explicitly rejecting the Court's opinion that accommodation which impinges on the contracted seniority rights of other employees is precluded, Justice Marshall noted that the impossibility of a voluntary swap of days or shifts by Hardison with another employee was not established, *id.,* at 94–95, and he suggested two alternatives, paying a substitute the premium and passing the cost onto Hardison or transfering him back to his previous department, *id.* at 95. Although conceeding that either would have violated the collective-bargaining agreement, Justice Marshall stated that neither would have deprived any employee of contractual rights or violated the seniority system. *Id.* at 95–96. (The majority, however, appears not to have been convinced that the latter suggestion would not violate the seniority system. *Id.* at 83 n.14.)

[82] EEOC Dec. No. 71-2620 (1973 CCH EEOC Dec. ¶6283 (June 25, 1971).

[83] Isaac v. Butler's Shoe Corp., 511 F. Supp. 108 (N.D. Ga. 1980), and Marshall v. District of Columbia, 392 F. Supp. 1012 (D.D.C. 1975).

[84] Young v. Southwestern Savings & Loan Association, 509 F.2d 140 (5th Cir. 1975).

[85] See, N.Y. State Comm'n on Discrimination, 1951 Rep. Prog. 41 (Sciuto v. Bankers Trust Co.), *reported in,* "Accommodation of An Employee's Religious Practices Under Title VII," 1976 *U. Ill. L.F.* 867, 873 n.28.

[86] Gavin v. Peoples Natural Gas Co., 613 F.2d 482 (3rd Cir. 1980).

[87] *See, e.g.,* Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979) (denial of promotion to IRS attorney who refused to process tax-exemption applications for purposes repugnant to his religious principles was a violation of Title VII because reasonable accommodation without undue hardship was possible); McGinnis v. U.S. Postal Service, 512 F. Supp. 517 (N.D. Cal. 1980) (preliminary injunction granted to prevent discharge of employee who refused to distribute draft registration forms).

either work schedules that conflict with religious observance practices of Sabbatarians,[88] as in *Hardison,* or the mandatory payment of union dues.

Sabbatarians

Shortly after the Supreme Court's decision in *Hardison,* a number of cases were decided by lower Federal courts in which employers were held to have satisfied their obligations to accommodate the religious beliefs and practices of their Sabbatarian employees. In two of those cases[89] the decision hinged on the unwillingness of the employee to accommodate the needs of the employer.

In *Chrysler Corporation v. Mann,*[90] the eighth circuit considered important the fact that the plaintiff, a baptized member of the Worldwide Church of God, "did little to acquaint [his employer] with his religion and its potential impact upon his ability to perform his job."[91] The court found the plaintiff had refused to use for his religious purposes either the five paid excused absences or unpaid leave for good cause that were available to him under the terms of the controlling collective-bargaining agreement.[92] The court premised its opinion on a recognition of a "mutuality of obligation" for reaching employer-employee accommodation.[93] The employee has an obligation to "attempt to accommodate his beliefs," else, according to the court, "a mere recalcitrant citation of religious precepts" could serve to excuse shirking one's duties.[94]

In *Jordan v. North Carolina National Bank,*[95] the fourth circuit reversed a lower court's decision in favor of a job applicant. The circuit court held that her request for a "guarantee" that she would not be required to work on Saturdays was a "pre-requirement so limited and absolute that it speaks its own unreasonableness and is thus beyond accommodation."[96]

It soon became apparent, in *Redmond v. GAF Corporation,* that the Supreme Court's decision in *Hardison* was not universally understood as rendering Title VII's accommodation obligation a nullity.[97] In *Redmond,* the seventh circuit held that employees have a duty to inform their employers of their religious needs, and that although employees should be encouraged to suggest possible accommodations, they are under no obligation to attempt to accommodate their beliefs themselves prior to seeking relief from their employer.[98] It was found that the plaintiff had given sufficient notice that, for religiously compelled reasons, he could not work on Saturday. The record suggested that the employer's knowledge of the employee's conflict substantially preceded the meeting at which he was discharged after giving actual notice of his inability to work on Saturdays.[99] Finally, because the employer had made no effort to accommodate and had introduced

[88] Sabbatarians, unlike Sunday worshippers, observe the Sabbath from Friday sundown to Saturday sundown. Jews, Anabaptists, Seventh-Day Adventists, and the Worldwide Church of God are some of the well-known Sabbatarian denominations. Although most of the cases deal with Sabbatarians, the problem is by no means limited to them. Sunday worshippers are in a similarly conflicted situation when their employer requires that they work on Sunday. *See,* Galen Martin, executive director, Kentucky Commission on Human Rights, statement, *Religious Discrimination Consultation,* p. 49.

[89] Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *cert. denied,* 434 U.S. 1039 (1978), and Jordan v. North Carolina National Bank, 565 F.2d 72 (4th Cir. 1977). In an intervening case, Huston v. Local No. 93, 559 F.2d 477 (8th Cir. 1977), the *Hardison* holding was controlling. Interestingly, the employer had accommodated "until valid complaints were received from Union members who had seniority rights greater than Huston's." *Id.* at 480.

[90] 561 F.2d 1282 (8th Cir. 1977).

[91] *Id.* at 1285.

[92] *Id.* at 1283–84, 1286.

[93] *Id.* at 1285.

[94] *Id.* The court also rejected the district court's finding that the discharge was actually a result of antagonism to the employee's beliefs. *Id.* at 1286.

[95] 565 F.2d 72 (4th Cir. 1977).

[96] *Id.* at 74. Judge Winter, dissenting, recognized the request for a "guarantee" as "an expression of the firmness and sincerity of her beliefs and fair notice to the Bank. . .that she could not comply with any order or directive to work on Saturdays." He emphasized the district court finding that "the Bank had done *nothing* to satisfy the Act." *Id.* at 77 (emphasis in original).

[97] 574 F.2d 897 (7th Cir. 1978). Plaintiff in *Redmond* was not a Sabbatarian but a Jehovah's Witness who was appointed the leader of a Bible study class, a lifetime position requiring the recommendation of the elders of his congregation and the approval of the church's New York headquarters. The work conflict arose when the Body of Elders, in a decision that Redmond could not reverse, changed the class meeting time from Tuesday evenings to Saturday. *Id.* at 899 nn.3, 4.

[98] *Id.* at 901–02. *See also,* Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 401 n.3 (9th Cir. 1978) (agreeing).

[99] 574 F.2d at 899, 903. *Compare,* Ferguson v. Kroger, 16 FEP Cases 773 (S.D. Ohio 1978) (3 days' notice insufficient where employer had little knowledge of employee's religious needs and employee had changed her vacation schedule that would otherwise have allowed the required time off); Smith v. United Refining Co., 21 FEP Cases 1481 (W.D. Pa. 1980) (notice of request for leave timely but inadequate because employer not informed of its religious character), *with* Willey v. Maben Mfg. Co., 479 F. Supp. 634 (N.D. Miss. 1979) (3-day notice sufficient where employer notified at time of hire).

no evidence at the trial to show any inconvenience to justify its refusal, the court held that Redmond's discharge constituted religious discrimination.[100]

In situations where employers have at least attempted accommodation, courts are more responsive to their claims. In *Wren v. T.I.M.E.-D.C.*,[101] for example, the employer's unsuccessful attempts to accommodate were found to be adequate because greater accommodation would have caused undue hardship for the company. Donald Wren was an over-the-road truck driver who became a member of the Worldwide Church of God. Under the applicable collective-bargaining agreement, drivers with sufficient seniority to obtain regularly scheduled runs were placed on an "extra board" and called, in order of seniority, for jobs as they became available. A driver could refuse a call if junior drivers were available. If no driver on the "extra board" could be obtained, off-duty regular drivers, laid-off drivers, and casual drivers were called in descending order. These drivers were not paid to be on call and their use entailed additional expenses because the employer would then be required to make extra contributions to insurance and pension funds.[102] Wren, an "extra-board" driver, sought to be available for work on his Sabbath only when no drivers, including casual drivers, were available.[103] The court held that such an accommodation incurred more than *de minimis* cost and thus was an undue hardship not required by Title VII.[104] Although the court conceded that the employer "did not bend over backwards to accommodate the plaintiff," it noted "efforts [made] within the seniority system to aid him."[105]

Similarly, in *EEOC v. Picoma Industries, Inc.*,[106] partly because some accommodation had been provided, the court found that requiring an employer to allow its Sabbatarian employee to switch shifts 1 day a month would impose an undue hardship.[107] The conflict arose when the company, to discourage absenteeism, instituted a policy of rotating shifts that permitted shift switching on a weekly basis only. Because of its unpopularity, volunteers willing to swap for the shift that conflicted with the plaintiff's Sabbath were generally unavailable. The company, however, allowed the plaintiff to leave work early on Fridays during weeks he was assigned the afternoon, 3 p.m. to 11 p.m., shift without disciplinary action or loss of seniority but also without pay.[108] The court explained how these factors were weighed as it balanced the potential damage to the employee's freedom of religion against the employer's regulatory scheme:

> Were the hardship suffered by [the employee] greater, or had [the employer] not already made some accommodation. . .the Court might be inclined to attach less significance to [the employer's] interest in holding firm in its policy of permitting shift-switching only on a weekly basis.[109]

In the final analysis "reasonable accommodation" is, as the *Redmond* court stated, "a relative term and cannot be given a hard and fast meaning."[110]

Each case involving such a determination necessarily depends upon its own facts and circumstances, and comes down to a determination of "reasonableness" under the

[100] 574 F.2d at 904. In fact, unlike *Hardison,* the conflict involved overtime requirements that arose only infrequently, there was no showing of reduced efficiency, and neither premium overtime pay nor a seniority system were involved. *Id.* at 903–04. Because "'reasonable accommodation' is a relative term and. . .[e]ach case. . .depends upon its own facts and. . .the unique circumstances of the individual employer-employee relationship," the court held that the issue of accommodation is a question of fact that can be rejected only if clearly erroneous. *Id.* at 902–03.

[101] 595 F.2d 441 (8th Cir. 1979).

[102] *Id.* at 443.

[103] *Id.* at 444.

[104] *Id.* at 445. In addition to the administrative costs of obtaining drivers not on call and the required contributions, the court included the "foreseeable" additional costs of delays and cancellations. *Id.* Under the accommodation sought, however, Wren was willing to work if replacements were not otherwise obtainable. *Id.* at 444.

[105] *Id.* at 445 (quoting from the district court opinion, 453 F. Supp. 582, 584 (E.D. Mo. 1978)). Presumably the efforts the court referred to were the permission to refuse calls if junior drivers were still on call and two occasions when plaintiff was reinstated after being terminated for refusing Sabbath work. The court also considered Wren's refusal to bid on a regular run that would not have conflicted with his religious obligations when that opportunity was once available in light of the obligation on employees to attempt some accommodation unilaterally. *See,* Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977) His willingness to work on Saturdays, if no other drivers were available, was not, however, considered in that light, nor was his occasional past willingness to work on Saturdays when called. This was apparently considered as evidence of the strength, sincerity, and limitations of his religious motivation. 595 F.2d at 444.

[106] 495 F. Supp. 1 (S.D. Ohio 1978).

[107] *Id.* at 3–4. Generally, employer claims of undue hardship when conflicts arise infrequently are viewed with greater skepticism than when such conflicts are bound to recur. *See, e.g.,* Padon v. White, 465 F. Supp. 602, 607–08 (S.D. Tex. 1979).

[108] 495 F. Supp. at 2. Rotating shifts have become a frequently encountered problem for Sabbatarians. *See,* Boothby Statement, *Religious Discrimination Consultation,* p. 33.

[109] 495 F. Supp. at 3.

[110] Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978).

unique circumstances of the individual employer-employee relationship.[111]

That the balancing of interests is dependent upon the unique facts of each specific situation can be seen by comparing *Picoma* with the case of *Brown v. General Motors Corporation.*[112] In *Brown,* where the employer refused the accommodation provided in *Picoma* of permitting a Sabbatarian employee to leave work early on Friday without pay and instead terminated him, the court held the employer failed to satisfy its obligation to reasonably accommodate even though the conflict arose weekly, some initial efforts to accommodate were taken, and the refusal was an attempt to combat a demonstrated problem of absenteeism.[113]

Such cases also illustrate two related legal issues that have not been clearly resolved: whether an employer can establish undue hardship without taking some steps to accommodate, and what evidence the employer must present to establish undue hardship.

Some courts have placed a burden on an employer to prove that good faith efforts were made to accommodate and then, if the steps taken were unsuccessful, to demonstate that the employee's religious beliefs could not be accommodated without undue hardship.[114] Others allow an employer to fulfill its obligation by proving that any proposed or possible accommodation would create an undue hardship without requiring that efforts to accommodate first be attempted.[115] One court, while adopting the latter "nonactive effort" standard, stated that because of the failure to take specific steps and attempt to accommodate, "the burden of proving undue hardship in a factual vacuum is particularly onerous."[116]

In *Hardison,* the Supreme Court indicated that the likely cost or burden of having to accommodate similarly the religious needs of other employees beyond just the one instance presented could be a factor in determining whether an accommodation was reasonable or constituted an undue hardship.[117] Generally, if others who would seek similar accommodation can be identified, courts have considered the additional demands that multiple accommodations would entail, but have refused to give weight to speculation, conjecture, or anticipated hardship.[118]

Few courts, when reviewing the conflicts that confront Sabbatarians, explicitly recognize that members of predominate churches encounter such crises of conscience less frequently because secular society has institutionalized its traditional workweek and holidays in conformance with their religious practices. They also generally do not acknowledge that the rights advanced by the Sabbatarian employee involve basic religious liberty interests. One district court, however, noted the purpose of the accommodation requirement:

> [It] is simply to lessen the discrepancy between the conditions imposed on. . .[Sabbatarians'] religious observances and those enjoyed, say, for observances by adherents of majority religions as a result of the five-day week and the Christmas and Easter vacations or regular school calendars.[119]

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[111] *Id.* at 902–03.

[112] 601 F.2d 956 (8th Cir. 1979).

[113] *Id.* at 958–60. In this case, the court was not able to find more than a *de minimis* inconvenience to the employer. It rejected the district court's finding of undue hardship. *Id.*

[114] *See, e.g.,* Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d, 397, 401 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979). *See also,* Yott v. North American Rockwell Corp., 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 445 U.S. 928 (1980); Burns v. Southern Pacific Transp. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979); McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978).

[115] *See, e.g.,* Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979); Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978).

[116] Edwards v. School Bd. of Norton, 483 F. Supp. 620, 626 (W.D. Va. 1980) (permitting teacher's aide to be absent on religious holidays not undue hardship; discharge illegal), *vacated on other grounds,* 658 F.2d 951 (4th Cir. 1981).

[117] TWA v. Hardison, 432 U.S. 63, 84 n.15 (1977) Coworker resistance to accommodation has arisen and been given serious consideration in one case brought by a Sabbatarian. Brener v. Diagnostic Center Hospital, (671 F.2d 141 (5th Cir. 1982).

[118] Most such cases, as well as most cases that consider the dissatisfaction of coworkers with accommodation, involve employees whose religious beliefs prohibit the payment of union dues. *See, e.g.,* Yott v. North American Rockwell Corp., 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 445 U.S. 928 (1980); McDaniel v. Essex Int'l., Inc., 571 F.2d 338 (6th Cir. 1978).

[119] Niederhuber v. Camden Voc. and Tech. School Dist., 495 F. Supp. 273, 280 (D.N.J. 1980), *aff'd.,* 671 F.2d 496 (1981) (religious discrimination in employment brought under first amendment) (quoting from Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 179, 593 P.2d 852, 859, 154 Cal. Rptr. 907, 914 (1979)). *See also,* McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055, 1062 (W.D. Mich. 1981), which, reviewing the constitutionality of §701(j) in a union dues case, stated that if only the establishment clause were involved, the obligation would be suspect, but free exercise considerations are also present.

Union Dues Cases

Almost all cases brought under Title VII seeking exemption from the collectively bargained obligation to pay union dues[120] have been brought by members of the Seventh-Day Adventist Church.[121] A tenet of the church is that its members not belong to or contribute to labor organizations.[122]

In such cases courts are confronted with an apparent statutory conflict between the reasonable accommodation requirement of Title VII and sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act (NLRA).[123] The NLRA permits collective-bargaining agreements containing union security clauses. Such clauses require union membership as a condition of employment but prevent discharge at the instigation of the union for any reason other than failure to pay uniformly charged dues.[124]

One of the first cases presenting religious opposition to the payment of union dues to be reviewed by an appellate court following *Hardison* was *McDaniel v. Essex International, Inc.*[125] Doris McDaniel, a Seventh-Day Adventist, sued her employer, Essex International, and union, the International Association of Machinists (IAM), after she had been discharged for refusing to pay union dues. She had previously advised both Essex and IAM that her refusal was based on her religious convictions and offered to contribute an amount equal to the union dues to a nonsectarian charity of their choice.[126] In their defense, the employer and union cited the security clause of the collective-bargaining agreement. The basic conclusion of the district court was that religious interests protected by section 701(j) must be subordinated to the interests in favor of collective bargaining and union security agreements specifically protected by the NLRA.[127] Relying on earlier cases that had held the clause provisions of the NLRA constitutional, the union and employer maintained that those statutory provisions expressed a congressional balancing of the interests involved and, therefore, contained themselves the full extent of accommodation that could be required.[128]

The sixth circuit rejected these contentions. It cited *Hardison* for the proposition that section 701(j) requires that some effort be made to accommodate an employee's religious needs[129] and stated that sections 8(a)(3) and 8(b)(2) of the NLRA were not intended to strike a balance between the religious needs of individual employees and the security requirements of unions; rather, they were a compromise "between the abuses of compulsory unionism and the problem of 'free-riders'."[130] Additionally, while acknowledging the national policy of promoting labor peace served by the union security provisions of the NLRA, the court noted that: "[s]ince July 2, 1964. . .there has been no national policy of higher priority than the elimination of discrimination in employment practices."[131]

Because the NLRA does not provide relief from the obligation to accommodate, the determination of whether reasonable accommodation has been made becomes a question of fact. The district court had found that IAM would suffer undue hardship if forced to forego McDaniel's dues.[132] The circuit court rejected this finding, however, because there was no factual evidence to support it and expressed "skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice."[133] The case was,

[120] *See generally,* "Accommodating the Anti-Union Religious Employee—A Balanced Approach," 32 *Rutgers L. Rev.* 484 (1979).

[121] *See, e.g.,* Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163 (5th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978).

[122] 533 F.2d at 166; 571 F.2d at 340.

[123] Codified at 29 U.S.C. §§158(a)(3), (b)(2) (1976).

[124] *See generally,* NLRB v. Gen. Motors Corp., 373 U.S. 734 (1963).

[125] 571 F.2d 338 (6th Cir. 1978). Two cases presenting the tension between union security agreements and Title VII were decided by circuit courts prior to *Hardison.* Yott v. North American Rockwell Corp., 501 F.2d 398 (9th Cir. 1974), held that Title VII did not modify the union security provisions of the NLRA. *Id.* at 401. The case was remanded for a determination of whether accommodation was, nevertheless, possible. The decision on appeal from the remand, 602 F.2d 904, *aff'g,* 428 F. Supp. 763 (C.D. Cal. 1977), is discussed later in this section. In the other case the fifth circuit held that §701(j) of Title VII constituted a religion-based exemption from the union security provisions of the NLRA. Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163, 170 (5th Cir. 1976), *cert. denied,sub nom.,* Int'l Ass'n of Machinists v. Hopkins, 433 U.S. 908 (1977).

[126] 571 F.2d at 340. She also offered at trial to pay to the union an amount equivalent to the percentage of the union dues equal to the percentage of the union budget used for purposes that did not violate her religious beliefs, with the remainder paid to charity. *Id.* at 343–44.

[127] *Id.* at 340–41.

[128] *Id.* at 341.

[129] *Id.* at 342.

[130] *Id.* at 342–43.

[131] 571 F.2d at 343. (July 2, 1964, was the effective date of Title VII.)

[132] 571 F. 2d at 343.

[133] *Id.*, citing its own opinion in Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1976).

therefore, remanded to the district court for a redetermination of the undue hardship question.[134]

On remand, the district court found that exempting McDaniels from the security clause of the contract would not impose an undue hardship on the union.[135] Although the workplace was located in an area with an unusually high concentration of Seventh-Day Adventists, the court found it significant that no other employee or prospective employee had requested a similar accommodation. The union had not attempted to determine the number of Adventists in the applicable labor pool, and the only relevant evidence tended to show that most Adventists were not factory workers.[136] Moreover, the court found that the union's action was not based on any special consideration of the unique demographics of the local area but, rather, was simply policy established by the national office.[137] The court noted, however, that the accommodation was not perpetual and changed circumstances could render it unreasonable:

> If it. . .[becomes]. . .clear. . .in the future, that this type of accommodation would result in the loss of union dues of a substantial number of individuals, the union would be free to raise undue hardship as a defense. . . .[138]

The ninth circuit has decided a number of union dues cases since *Hardison.* In *Anderson v. General Dynamics Convair Aerospace Division,*[139] it articulated these standards for reviewing such cases: to establish a *prima facie* case of religious discrimination under Title VII, a discharged employee must prove (1) a bona fide belief that union membership and the payment of union dues are contrary to religious faith; (2) the employer and union were both informed of the conflict between the union security agreement and his religious beliefs; and (3) discharge was solely for refusal to join the union and pay dues. If the employee is successful in establishing a *prima facie* case, the burden then shifts to the employer and to the union to show that good faith efforts were made in an attempt to accommodate the employee's religious beliefs and, if such efforts were unsuccessful, to demonstrate the inability to accommodate without undue hardship.[140]

In *Anderson,* the union contended that (1) its failure to attempt accommodation was excused because the employee insisted on making a substitute payment to a charity of his own choice rather than paying a sum equivalent to dues to the union for charitable purposes; (2) this insistence was based on a general distrust of unions and not religious beliefs; and (3) the suggested accommodation was an undue hardship as a matter of law because the employee would become a "free rider."[141]

The court rejected all three contentions because the burden to accommodate is on the employer and union, not the employee. The union and employer cannot refuse to accommodate because of deficiencies in any accommodation suggested by the employee.[142] In response to the contention that accommodation would mean "free riders," the court cited the sixth circuit's rejection of that argument in *McDaniel*[143] and followed its reasoning, finding that such speculation did not constitute undue hardship.[144] The court described undue hardship as "something greater than hardship" that is based on the evidence, not on assumptions, opinions, hypothetical facts, or general sentiment.[145] Finally, the court discussed the relevance to a determination of undue hardship of coworker dissatisfaction: "Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship."[146]

> If relief under Title VII can be denied merely because the majority group of employees, who have not suffered

[134] 571 F.2d at 344. The district court had accepted the employer's and union's contention that the accommodation was an undue hardship, concluding that in §§8(a)(3) and (b)(2) Congress had reduced the union shop requirement to its "financial core." *Id.* at 341.

[135] 509 F. Supp. 1055, 1059 (W.D. Mich. 1981). The finding was an alternative disposition, as the court understood the circuit court's statement of an employer's obligation (571 F.2d at 343) to preclude an undue hardship defense if no efforts are made to attempt accommodation. 509 F. Supp. at 1058–59.

[136] 509 F. Supp. at 1060.

[137] *Id.* at 1061. The court also compared the circuit court's skepticism of hypothetical hardships with *Hardison's* consideration of the likelihood of undue hardship. "[T]he precise quantitative difference between 'likely' and 'hypothetical' hardship is not certain [but the facts here] clearly [fall] on the 'hypothetical' side of the line." *Id.* at 1060.

[138] *Id.* at 1061.

[139] 589 F.2d 397 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979).

[140] *Id.* at 401.

[141] *Id.*

[142] *Id.* The court agreed *(id.* at n.3) with Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978), that once an employee has given sufficient notice of the conflict and its religious character, he has no obligation to make efforts to compromise or accommodate his own religious beliefs before seeking relief from his employer. *Id.* at 901–02.

[143] McDaniel v. Essex Int'l., 571 F.2d 338 (6th Cir. 1978).

[144] 589 F.2d at 401–02.

[145] *Id.* at 402.

[146] *Id.*

discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.[147]

In a companion case, *Burns v. Southern Pacific Transportation Co.*,[148] some evidence of hardship was presented and was analyzed according to the *Hardison* principles.[149] Witnesses had testified "that 'free rider' problems could cause dissension among employees, resulting in inefficiency." The court minimized that evidence as reflecting only a general sentiment that did not relate to the actual situation in the case at hand of substitute charity payments and noted that the consequences of an accommodation not yet attempted remain hypothetical and deserving of skepticism.[150] Moreover, finding "some fellow-workers' grumbling or unhappiness with a particular accommodation" insufficient, the court expanded its *Anderson* definition of undue hardship to require a showing of "actual imposition on co-workers or disruption of work routine."[151]

In a third ninth circuit case,[152] the Adventist employee sought an accommodation that was held to be unreasonable. In *Yott v. North American Rockwell Corp.* the employee, Kenneth Yott, rejected the union's suggested accommodation that he make a substitute charity contribution and proposed three alternatives: (1) he could be provided a job not covered by the collective-bargaining agreement; (2) he could be exempted entirely from the security clause; or (3) his wages could be reduced by the amount he would otherwise pay as union dues.[153]

The court began its review by stating that the charity substitution accommodation offered by the employer and union was a good faith effort that would have constituted reasonable accommodation.[154] The court also noted, quoting from its earlier opinion, that the district court found that the proposals suggested by Yott would have constituted an undue hardship and the court could only reject those findings if they were "clearly erroneous."[155]

Yott appealed only the district court's rejection of his first two alternatives.[156] After reviewing the record the court accepted the findings that either moving Yott to a position outside the bargaining unit or exempting him from the requirements of the security clause would have constituted undue hardship. Transfer was unacceptable for three reasons. First, because the union was attempting to organize all workers, the salutary effect of transfer would be of "such temporary duration as to make the accommodation ineffectual and thus unreasonable."[157] Additionally, any other position would require training, the cost of which would be more than *de minimis* and, finally, such an accommodation would entail preferential treatment prohibited by *Hardison*.[158] Exemption was also considered unacceptable because it "could lead to further exemptions. . .and [the union] would again engage in organizational activities and Rockwell would again incur the costs connected with such effort."[159] The court distinguished *Anderson* and *Burns* on the basis that the history of labor relations at the plant was one of

[147] *Id.*, quoting Franks v. Bowman, 424 U.S. 747, 775 (1976) (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971)).

[148] 589 F.2d 403 (9th Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979).

[149] 589 F.2d at 406.

[150] *Id.* The fact that then AFL–CIO President George Meany supported the charity substitute was also mentioned by the court. *Id.* at 407 n.2. *See also,* Nottelson v. Smith Steelworkers Wkrs. D.A.L.U. 19806, 643 F.2d 445, 452 (7th Cir.) (AFL–CIO Executive Council adopted charity substitute as an appropriate accommodation), *cert. denied,* 454 U.S. 1046 (1981).

[151] 589 F.2d at 407. The court also rejected the union's claims that it would suffer substantial financial hardship from the loss of $19 monthly and rejected, as not supported by the record, the district court's finding that a greater than *de minimis* hardship would occur because "vast numbers of persons" would seek similar accommodation. *Id.* "If, in the future. . .[such] fear[s] should become a reality, undue hardship could be proved." *Id.See also,* McDaniel v. Essex Int'l Inc., 571 F.2d 338, 343–44 (6th Cir. 1978).

[152] Yott v. North American Rockwell Corp., 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 445 U.S. 928 (1980).

[153] *Id.* at 907. Yott rejected the charity substitute on the ground that it was against his religion to be required to make any charitable contribution. *Id.* The case was before the circuit court for the second time. Prior to *Hardison* the court had held that §701(j) did not modify the security clause provisions of the NLRA but had remanded for a determination of whether accommodation was, nevertheless, possible. 501 F.2d 398 (1978). On the second appeal the court did not discuss the relationship between Title VII and the NLRA.

[154] 602 F.2d at 907 (citing, Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 405 (9th Cir. 1978)).

[155] 602 F.2d at 907–08 quoting from the decision in the first appeal, Yott v. North American Rockwell Corp., 501 F.2d 403 (9th Cir. 1974), and Redmond v. GAF Corp., 574 F.2d 897, 902–03 (7th Cir. 1978).

[156] 602 F.2d at 907. The district court had found the third alternative unworkable as employer payment of dues on his behalf would, nevertheless, constitute income to Yott. *Id.* Yott appealed the district court's determination that §701(j) was unconstitutional, an issue avoided by the circuit court as its affirmance of the factual determination precluded the necessity of its consideration. *Id.* at 906.

[157] *Id.* at 908.

[158] *Id.*

[159] *Id.* at 909.

"friction" resulting from "free riders" who paid "neither union dues nor the equivalent thereof to a charity."[160] There was evidence that prior to the collective-bargaining agreement "there was substantial animosity between union and non-union workers. . .that. . .was eliminated by the union security clause."[161] The court concluded by declaring that "a standard less difficult to satisfy than the *'de minimis'* standard. . .is difficult to imagine."[162]

Two subsequent union dues cases involving employees willing to accept the charity contribution substitute have found such an accommodation reasonable.[163] Additionally, the standards for reviewing undue hardship developed in these union dues cases have been applied to cases holding employers liable for failure to reasonably accommodate the religious needs of Sabbatarians.[164]

Religious Employers

Title VII was amended in 1972 to permit religious organizations to discriminate on the basis of religion in hiring.[165] The amendment exempts all activities of any religious organization from Title VII's ban on religious discrimination in employment. Before 1972 only the "religious activities" of such organizations had been exempted.[166]

One of the first cases that presented this exemption issue was *King's Garden v. Federal Communications Commission.*[167] A church radio licensee argued that the amendment exempted it from the Federal Communications Commission's (FCC) ban on religious discrimination in employment. The court, however, construing the amendment to avoid substantial establishment clause difficulties,[168] held that, whatever its consequences under Title VII, the amendment did not create an exemption from the FCC's antibias rule.[169]

The FCC's ban on religious discrimination in employment exempted employment connected with the espousal of a licensee's religious view.[170] King's Garden claimed that applying the antireligious bias ban to its radio station violated its first amendment rights because the station was an integral part of the church's mission and structure. The court rejected this argument, stating that those aspects of a religious organization engaged in nonsectarian enterprise must be treated as any other similar secular endeavor:

> A religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group like any other, may buy and operate a licensed radio or television station. But, like any other

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[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir.), *cert. denied,* 102 S. Ct. 671 (1981); Nottelson v. Smith Steel Wkrs. D.A.L.U. 19806, 643 F.2d 445 (7th Cir.), *cert. denied,* 454 U.S. 1046 (1981). Both *Tooley* and *Nottleson* also reviewed the relationship between §701(j) and §§8(a)(3), (b)(2) of the NLRA and adopted the *McDaniel* analysis (from 572 F.2d at 343) Both also rejected determinations of hypothetical undue hardship based on conjecture (648 F.2d at 1243; 643 F.2d at 452). *Tooley* stated, "The *magnitude* as well as the *fact* of hardship must be determined by. . .the examination of the facts of each case." 648 F.2d at 1243 (emphases in original).
State courts have also found the charity substitute reasonable. *See, e.g.,* Wondzell v. Alaska Wood Products, Inc., 601 P.2d 584 (Alaska 1979); Maine Human Rights Comm'n v. Local 1361, 383 A.2d 369 (Maine 1978).
In December 1980 the NLRA was amended to permit employees who for religious reasons cannot support a union to pay amounts equivalent to union fees to a charity that the employee selects from a list provided in the collective-bargaining agreement. 29 U.S.C. §169 (Supp. IV 1980).

[164] *See, e.g.,* Brown v. Gen. Motors Corp., 601 F.2d 956, 958–59 (8th Cir. 1979) (permitting Sabbatarian to leave early on Friday was reasonable accommodation when no actual cost was incurred, efficiency loss was *de minimis,* and a collective-bargaining agreement was not violated); Kendall v. United Airlines, Inc., 494 F. Supp. 1380, 1390 (N.D. Ill. 1980) (no evidence demonstrating that granting Sabbatarian an extended leave of absence to accrue sufficient seniority to obtain nonconflicting schedule would constitute undue hardship). Each applied a version of the *prima facie* test for religious discrimination articulated in *Anderson* at 589 F.2d 397, 401.

[165] 42 U.S.C. §2000e-1 (1976), which states in pertinent part:
> This subchapter shall not apply. . .to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

See generally, Senate Subcommitte on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d sess., *Legislative History of the Equal Employment Opportunity Act of 1972,* at 1229–30 (Committee print 1972).

[166] *Compare* Pub. L. No. 92–261, §3, 86 Stat. 103, *codified at* 42 U.S.C. §2000e–1 (1976), *with,* Pub. L. No. 88–352, §702, 78 Stat. 255.

[167] 498 F.2d 51 (D.C. Cir.), *cert. denied,* 419 U.S. 996 (1974).

[168] *Id.* at 55–57. "From 1964 to 1972 Congress had. . .a firm purchase on the tightrope [between the establishment clause and the free exercise clause]." *Id.* at 56. "The customary and. . .prudent course is to construe statutes so as to avoid, rather than aggravate, constitutional difficulties. . . .This course is open to us. . . ." *Id.* at 57.

[169] *Id.* at 58. FCC regulations bar employment discrimination by broadcast licensees on the basis of race, color, religion, national origin, or sex. 47 C.F.R. §73.2080 (a) (1981).

[170] 498 F.2d at 59.

group, a religious sect takes its franchise burdened by enforceable public obligations.[171]

The exemption allowing religious organizations to discriminate on the basis of religion is not a blanket exemption. Title VII does not provide exemptions with regard to discrimination on the basis of race, color, sex, or national origin,[172] and in reported cases involving religiously affiliated educational institutions it has been held that Title VII is applicable to them and their employees.

The fifth circuit has been confronted twice with the application of Title VII to the relationship between religious educational institutions and their facilities. In *EEOC v. Mississippi College,*[173] the court held that Title VII's ban on race, sex, and national origin discrimination is applicable to religious educational institutions. The school, in an attempt to extricate itself from Title VII's reach, relied on an earlier case, *McClure v. Salvation Army,*[174] which held that the relationship between a church and its ministers was not covered by Title VII. The court held that reliance misplaced. The college was not a church and its faculty and staff not ministers. That the faculty were "expected to serve as exemplars of practicing Christians did not serve to make. . .their employment matters of church administration and thus purely of ecclesiastical concern."[175] The underlying charge in *Mississippi College* was sex discrimination. In its defense, the college claimed that the employment decision at issue was in fact based on the exempted basis as it was a coreligionist preference.[176] The court, without considering the constitutional problem identified in *King's Garden,* stated that if the institution presented convincing evidence that the basis of the disputed practice was religion, the exemption precluded review of that decision.[177]

In *EEOC v. Southwestern Baptist Theological Seminary,*[178] a seminary asserted that the *McClure* holding should be applicable to it because, unlike Mississippi College, the seminary was a church and its faculty were ministers. The court accepted this argument, finding that the seminary was a church insofar as it was "principally supported and wholly controlled by the [Southern Baptist] Convention for the avowed purpose of training [Baptist] ministers,"[179] but, as there were three categories of seminary employees, each had to be considered separately to determine whether they were to be considered ministers for Title VII purposes. The court accepted the district court's findings that the faculty and administrative staff served ministerial functions, but the support staff did not.[180] Thus, the court held that the provisions of Title VII and the EEOC reporting requirements could be applied only to the seminary in its relationship with its nonministerial employees, the support staff. In so holding, the court refused to modify *McClure* to grant a total exemption to a religious organization and all its employees.[181]

In *Dolter v. Wahlert,*[182] the court held that a sectarian high school was susceptible to Title VII's mandate against sex discrimination. In *Dolter* a teacher had been dismissed because she was single and pregnant. The school argued that as a private Roman Catholic high school it was immune from the jurisdiction of Title VII because of the first amendment's guarantee of free exercise of religion. Reviewing the legislative history of Title VII, the court found that the intent of Congress was to subject religious institutions to Title VII except with respect to discrimination in favor of coreligionists.

[171] *Id.* at 60. While the court rejected the claim that the ban was facially unconstitutional, it rejected King's Garden's claim that the exemption was too narrow as a premature attack on the application of the exemption.

[172] *See,* McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972); EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982).

[173] 626 F.2d 477 (5th Cir.), *cert. denied,* 453 U.S. 912 (1981).

[174] 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896 (1972).

[175] 626 F.2d at 485.

[176] *Id.* at 484–85. The case arose on a petition of the EEOC following the school's refusal to respond to a subpena issued during the investigation of the underlying claim. *Id.* at 480–81.

[177] *Id.* at 485. The court stated that after the presentation of convincing evidence of religious preference, the exemption provided in 42 U.S.C. §2000e–1 would operate to foreclose the otherwise available opportunity to investigate whether that assertion was merely pretextual. *Id.* The court did not consider the exemption provided in 42 U.S.C. §2000e–2(e)(2) (1976) for religious educational institutions. The court also rejected the college's claim that application of Title VII to it violated both the establishment and free exercise clauses. *Id.* at 486–89.

[178] 651 F.2d 277 (5th Cir.), *cert. denied,* 102 S. Ct. 1749 (1982).

[179] 651 F.2d at 283.

[180] *Id.* "[E]mployment decisions regarding faculty members [are made] largely on religious criteria. . . .[Their] level of religious commitment. . .is considered more important than. . .their academic abilities. . . .[N]o course taught. . .has a strictly secular purpose. [T]he faculty are intermediaries between the Convention and the future ministers. . . .They do instruct the seminarians in the 'whole of religious doctrine,' and only religiously oriented courses are taught." *Id.* at 283–84.

[181] *Id.* at 282.

[182] 483 F. Supp. 266 (N.D. Iowa 1980).

Thus, the court held that the school could be subject to Title VII as an employer generally, but exempt with respect to its privilege of employing only Catholics as teachers.[183]

In addition, the school invoked another exemption of Title VII, the exemption for bona fide occupational qualification (BFOQ) on the basis of religion.[184] The school maintained that it was entitled to set standards of morality for its teachers that are consistent with the moral and religious precepts of the Catholic Church and that the discharge resulted from the teacher's failure to meet such a BFOQ.[185] The court was not unresponsive to the school's claim that it may be entitled to impose a moral code as a BFOQ, but noted that "even where such code of conduct truly constitutes a legitimate religious BFOQ, the law nevertheless requires that it not be applied discriminatorily on the basis of sex."[186]

Constitutional Questions

The defendants in *Hardison* also maintained that section 701(j) violates the establishment clause of the first amendment. The Supreme Court, by deciding for the employer and union on statutory grounds, was able to avoid the constitutional issue.[187] In other cases before lower Federal courts, however, the issue has been squarely presented. Although the clear trend of judicial opinion has been to support the constitutionality of the statute, contrary opinions illustrate the delicate balancing of interests inherent in the first amendment.

The first circuit case in which section 701(j) was upheld against an establishment clause challenge, *Cummins v. Parker Seal Co.*,[188] preceeded *Hardison.* In a 2 to 1 decision the sixth circuit found that the prevention of employment discrimination was a secular purpose sufficient to sustain the statute.[189] The court also discerned pragmatic neutral purposes[190] underlying the statute analogous to the congressional attempts to accommodate free exercise values and avoid unnecessary clashes with dictates of consciences that the Supreme Court had held constitutionally permissible in conscientious objector cases.[191] Additionally, the sixth circuit ruled that although some religious institutions would derive incidental benefits from the statute, its primary effect neither advances nor inhibits religion.[192] Finally, because the contacts between the government and religion necessitated by the statute would both be minimal and occur in a labor relations context, fears of excessive governmental entanglement with religion were held groundless.[193] The court also considered the reasonable accommodation requirement in light of the Supreme Court's ruling in *McGowan v. Maryland*[194] that Sunday closing laws are not unconstitutional. As the reasonable accommodation requirement constitutes less interference with employer rights than Sunday closing laws and has no greater tendency toward the establishment of religion, the court stated that *McGowan* "supported, if not compelled"[195] its conclusion.

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[183] *Id.* at 271.

[184] 42 U.S.C. §2000e-2(e)(1) which in pertinent part states:
[I]t shall not be an unlawful employment practice for an employer to hire and employ employees. . .on the basis of. . .religion. . .in those certain instances where religion. . .is a bona fide occupational qualification necessary to the normal operation of that particular business or enterprise. . . .

[185] 483 F. Supp. at 271.

[186] *Id.* at 271. Because there was a factual dispute as to whether the code against premarital sex that the school maintained was the grounds for discharge was applied equally to both male and female teachers, the court was restrained from granting summary judgment. *Id.*

[187] 432 U.S. 63, 70 (1977).

[188] 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court,* 402 U.S. 689 (1971), *vacated and remanded on other grounds,* 433 U.S. 903 (1977), *rev'd on other grounds,* 561 F.2d 659 (6th Cir. 1977). The claim in *Cummins* arose prior to the 1972 amendment that codified §701(j) and was based on the obligation to accommodate contained in EEOC's predecessor regulation, 29 C.F.R. §1605.1 (1974). *Id.* at 546. The court's constitutional analysis was, nevertheless, explicitly applicable to both. *Id.* at 551.

[189] *Id.* at 552. The prohibitions of the establishment clause and the countervailing values of the free exercise clause are discussed more fully in chap. 2. The court in *Cummins,* as have most courts that have reviewed the issue, employed the test developed in Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772-73 (1977) to determine whether §701(j) runs afoul of the establishment clause.

[190] "[T]he reasonable accommodation rule reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience." *Id.* at 552-53.

[191] *Id.,* citing, Gillette v. United States, 401 U.S. 437, 452-53 (1971) (quoting United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting)). First amendment issues and conscientious objectors are discussed more fully in chap. 2.

[192] 516 F.2d at 553.

[193] *Id.* at 553-54.

[194] 366 U.S. 420 (1961), and companion cases, Two Guys v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Supermarket, 366 U.S. 617 (1961).

[195] 516 F.2d at 554. *See also,* McDaniel v. Essex Int'l Inc., 509 F. Supp. 1055, 1063-66 (W.D. Mich. 1981), *on remand from,* 571 F.2d 338 (6th Cir. 1978).

The *Cummins* court's resolution of the constitutional issue was not, however, unanimous. Judge Celebreeze, in dissent, argued that the reasonable accommodation requirement grants preferences on the basis of religion and breaches the wall of separation that the first amendment erects between church and state.[196] Judge Celebreeze also would have found neither the purpose nor effect of section 701(j) to be valid. In his view, the reasonable accommodation requirement, because it requires "preferential treatment" on the basis of religion, contradicts and departs from Title VII's otherwise valid secular purpose of eliminating discrimination.[197] Additionally, Judge Celebreeze determined that section 701(j) violated the stricture against statutes with primary effects that either advance or prohibit religion. Stating that the standard requires "even-handedness in operation" and neutrality in primary effect,[198] he identified the statute as discriminating both between religion and nonreligion and among religions[199] and concluded that "[t]he primary, indeed, the sole, impact of the rule" is to aid particular persons on the basis of their religion.[200]

Since *Hardison,*[201] both the seventh and ninth circuits have found section 701(j) to be constitutional. In *Nottleson v. Smith Steel Workers D.A.L.U. 19806,*[202] the seventh circuit also applied the three-part, secular purpose, primary effect, and excessive entanglement test. The court found that the purpose of section 701(j) to be consistent with the secular antidiscrimination purpose of Title VII in that it is specifically designed to address unintentional discrimination and protect those whose "religious beliefs are not reflected in facially neutral majoritarian rules."[203]

The court also found that the statute did not violate the establishment clause in its primary effect, stating that:

> [Section 701(j)] does not confer a benefit on those accommodated but relieves those individuals of a special burden that others do not suffer by permitting them to fulfill their societal obligations in a different manner. . . .[204]

The Supreme Court has permitted similar accommodations in other contexts supporting "the principle of supremacy of conscience" and the statute applies to all faiths equally; therefore, the *Nottleson* court found the primary effect of section 701(j) to be

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[196] *Id.* at 555.

[197] *Id.* at 556. Justice Celebreeze also examined the majority's second pragmatic secular purpose and dismissed any legislative concern protecting those who will not compromise their religious beliefs by stating that there is no governmental punishment in the absence of the accommodation requirement, but rather merely a "'hands-off' attitude. . .allowing employers and employees to settle their own differences." *Id.* He characterized the majority's neutral, pragmatic purpose as "an assertion that it is a valid secular purpose to grant preferences to persons whose religious practices do not fit prevailing practices," *id.,* and argued that parochial aid cases had firmly established the proposition that the free exercise clause does not permit governmental aid to particular religions or to all religions. *Id.* at 557, citing McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Torcasco v. Watkins, 367 U.S. 448 (1961); Zorach v. Clauson, 343 U.S. 306 (1952). "The Free Exercise Clause. . .does not offer a sword to cut through the structures of the Establishment Clause." 516 F.2d at 557. Moreover, his analysis of the amendment's legislative history concluded that the congressional purpose when enacting it was the impermissible promotion of a particular religion. 516 F.2d at 556, citing 118 *Cong. Rec.* 705 (1982) (remarks of Sen. Randolph).

[198] 516 F.2d at 558 (quoting Gillette v. United States, 401 U.S. 437, 450 (1971)).

[199] 516 F.2d at 558.

[200] *Id.* at 559. Judge Celebreeze stated that voiding the reasonable accommodation requirement would not eliminate the prohibition against religious discrimination and expressed his conviction that to do so would neither threaten religious diversity nor deprive employers of the ability to accommodate voluntarily. *Id.* at 560. Although it was not necessary, as he would have held the statute unconstitutional because of impermissible sectarian purpose and effect, that he resolve the excessive entanglement question, Judge Celebreeze expressed concern that reviewing the sincerity of a complainant's beliefs could require improper judicial inquiries. *Id.* at 559.

[201] The eighth circuit in *Hardison* also confronted the establishment clause issue and determined that §701(j) was constitutional. Hardison v. TWA, 527 F.2d 33, 44 (8th Cir. 1975), *rev'd on other grounds,* 432 U.S. 63 (1977), citing, Cummins v. Parker Seal Co., 516 F.2d 544, 552 (6th Cir. 1975).

[202] 643 F.2d 445 (7th Cir. 1981).

[203] *Id.* at 454. Additionally, the court found it a permissible secular purpose "to relieve individuals of the burden of choosing between their jobs and their religious convictions where such relief will not unduly burden others," *id.* citing, United States v. Macintosh, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting); Abington School Dist. v. Schempp, 374 U.S. 203, 294–99 (1963) (Brennan, J., concurring), and dismissed the argument that the legislative history discloses a desire to promote a particular religion as both inaccurately incomplete and irrelevant in light of the statute's facially valid secular purpose. 643 F.2d at 454 n.11. The court was also "inclined to agree," 643 F.2d at 453, that Rankins v. Commission on Professional Competence, 444 U.S. 986 (1979) *dismissing for want of a substantial Federal question,* 593 P.2d 852 (Cal. 1979) (State constitution requiring reasonable accommodation does not violate establishment clause), was binding precedent in light of Hicks v. Miranda, 422 U.S. 332, 343–45 (1975) (dimissal of appeal under 28 U.S.C. §1257(2) (1976) for want of substantial Federal question is a decision on the merits).

[204] 643 F.2d at 454.

permissible.[205] Finally, noting that determining the sincerity of an employee's religious beliefs has been permitted by the Supreme Court in conscientious objector cases, *Nottleson* concluded that such inquiries do not constitute excessive entanglement of church and state.[206]

However, as in *Cummins,* the court's opinion was not unanimous. Judge Pell issued a dissenting opinion in which he said that entanglement cannot be avoided when requiring that accommodation be made to the diverse practices of the many different religions that exist in our Nation.[207]

The ninth circuit was confronted with the establishment clause attack on the reasonable accommodation requirement after a number of district courts in that circuit had considered the issue and adopted contrasting positions.[208] In *Tooley v. Martin-Marietta Corp.,* the ninth circuit affirmed the statute's constitutionality.[209] There the court noted that the neutrality required of the government by the establishment clause in religious matters "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation."[210]

Further, its review of Supreme Court decisions delineating the restrictions of the establishment clause concluded that government may legitimately enforce accommodation of the beliefs and practices of members of minority religions, when the accommodation both reflects the "obligation of neutrality in the face of religious differences" and does not constitute "sponsorship, financial support, or active involvement of the sovereign in religious activities."[211] Looking at the charity substitute for union dues in the case before it, the ninth circuit found both prongs of this test satisfied.[212]

Ultimate resolution of the issue must await Supreme Court pronouncement. It is, however, noteworthy that those opinions that have found the requirement to be constitutional have explicitly recognized that accommodation is generally sought by members of smaller religions attempting to protect freedom of conscience concerns from incompatible social requirements that do not burden predominate church members.[213]

Federal Agency Guidelines

Although *Hardison* to some extent defined employers' obligations, they remain uncertain about the extent of their duty to accommodate the religious needs of their employees. Federal agencies such as the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs in the Department of Labor have tried to eliminate some of that confusion by issuing guidelines and regulations that explain the employer's Title VII obligations. These guidelines also offer suggestions and give examples of ways to accommodate the religious needs of employees.

The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) is the Federal agency responsible for enforcing Title VII.[214] In response to concerns

[205] *Id.* at 454–55, citing, Gillette v. United States, 401 U.S. 437, 453 (1971) (military service); Wis. v. Yoder, 406 U.S. 205, 234–36 (1972) (education); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (education); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (unemployment compensation).

[206] 643 F.2d at 455.

[207] *Id.* at 458. Judge Pell stated that he "essentially agreed with and would adopt the reasoning and analysis" in Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782 (S.D. Cal. 1980), *rev'd,* 648 F.2d 1247 (9th Cir. 1981). He noted that *Anderson* was then under review, but stated his agreement with the district court's analysis "irrespective of the result that may be reached by the Ninth Circuit in reviewing that case." 643 F.2d at 456.

[208] *Compare* Yott v. North American Rockwell Corp., 428 F. Supp. 763 (C.D. Calif.), *aff'd on other grounds,* 602 F.2d 904 (9th Cir. 1979), and Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782 (S.D. Calif. 1980), *rev'd,* 648 F.2d 1247 (9th Cir. 1981), finding the statute unconstitutional, *with,* Tooley v. Martin Marietta Corp., 476 F. Supp. 1027 (P. Ore. 1979), and Burns v. Southern Pacific Trans. Co., 20 EPD at 11,977–11,978 (D. Ariz. 1979), finding the statute constitutional.

[209] 648 F.2d 1239, 1244–46 (9th Cir. 1981).

[210] *Id.* at 1244, citing, Sherbert v. Verner 374 U.S. 398, 422 (1963) (Harlan, J., dissenting).

[211] 648 F.2d at 1244 (quoting from Wis. v. Yoder, 406 U.S. 205, 234 n. 22 (1972)), and citing, Walz v. Tax Commission, 397 U.S. 664, 668 (1970); Sherbert v. Lerner, 374 U.S. 398, 409 (1963).

[212] 648 F.2d at 1245. Although it questioned whether the three-part *Nyquist* test was appropriate, *id.* at 1255 n.9, the court, nevertheless, found the statute secular in purpose, with a primary effect that neither advances nor inhibits religion or any particular religion without causing excessive entanglement. *Id.* at 1245–46. The court noted that the second test looks towards primary effects, not "ancillary or indirect" benefits or burdens that are neither direct nor substantial, and that the third test precludes "only *excessive* government entanglement." *Id.* at 1246 (emphasis in original).

[213] Contradictory opinions have also issued from various district courts in other circuits. *Compare,* Gavin v. People's Natural Gas Co., 464 F. Supp. 622, 626–33 (W.D. Pa. 1979), *vacated on other grounds,* 613 F.2d 432 (3rd Cir. 1980); Isaac v. Butler Shoe Corp. 511 F. Supp. 108, 110–13 (N.D. Ga. 1980) (unconstitutional), *with,* Jordan v. N.C. Nat'l Bank 399 F. Supp. 172, 179–180 (W.D. N.C. 1975), *rev'd on other grounds,* 565 F.2d 72 (4th Cir. 1977).

[214] 42 U.S.C. §§2000e–2000e–14(1976 and Supp. IV 1980); Exec. Order 12067, *reprinted in,* 42 U.S.C. §2000e (Supp IV 1980); Exec.

raised by *Hardison,* the EEOC conducted public hearings in 1978 in New York City, Milwaukee, and Los Angeles.[215] Based on the testimony and evidence presented at those hearings, EEOC found:[216]

1. There is widespread confusion concerning the extent of accommodations required under *Hardison.*

2. The religious practices of some persons and groups are not being accommodated.[217]

3. Many of the testifying employers had developed alternative employment practices which met the employer's business needs and the religious needs of the employee.

4. Little evidence was submitted that showed actual attempts to accommodate having unfavorable consequences to the employer's business.[218]

Based on these findings, the Commission revised its guidelines to clarify the obligation to accommodate the religious practices of employees and prospective employees imposed by section 701(j). In many respects the guidelines merely restate applicable law as expressed in the statute and developed by the courts. Thus, the new guidelines, like those issued in 1967, emphasize that under section 701(j) it is unlawful for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that the accommodation would result in undue hardship on the conduct of his business.[219] They also, however, provide guidance for employers in making accommodation decisions not clearly provided for in the statute or case law and announce the approach that the agency will take when investigating employee claims of failure to accommodate.

The guidelines require employees to notify the employer or labor union of their need for a religious accommodation.[220] The guidelines do not require that the employees take steps to accommodate their beliefs themselves and state that the employer's obligation arises upon being notified of the need for accommodation.[221] The guidelines also do not explicitly preclude an employer from demonstrating undue hardship without having first attempted accommodation. Rather, they state that refusal to accommodate is justified only upon a demonstration "that an undue hardship would in fact result from each available alternative method of accommodation."[222] They also incorporate some skepticism of hypothetical hardships.[223]

When there is more than one available method of accommodation, each of which will not cause undue hardship, the guidelines establish several criteria that EEOC will consider in determining whether the accommodation offered is reasonable. In assessing the proposed accommodation's reasonableness, the Commission will examine:

(1) the alternatives for accommodation considered by the employer or union, and

(2) the alternatives that were actually offered to the person requesting accommodation.[224]

If there are alternatives for accommodating the religious practices of an individual that would not cause undue hardship, the guidelines require the employer or union to offer the one that least

Order 12106, *reprinted in,* 42 U.S.C. 2000e–4 (Supp. IV 1980); Exec. Order 12144, *reprinted in,* 42 U.S.C. §2000e–4 (Supp. IV 1980); Reorg. Plan No. 1 of 1978, *reprinted in* 42 U.S.C. §2000e–4 (Supp. IV 1980). The total number of complaints and the number of complaints alleging religious discrimination in employment filed with EEOC received during fiscal years 1977 through 1981 are:

In FY '77, 85,663 charges were filed; 1,930 (22 percent) alleged religious discrimination. In FY '78 the comparable statistics were 71,200 charges; 1,427 (2 percent) religious. In FY '79, 79,084 charges; 4,703 (6 percent) religious. FY '80 found 79,868 charges; 1,853 (23 percent) allegations of religious discrimination and for FY '81, 94,460 charges of which 1,969 (2.1 percent) alleged religious grounds. U.S. Equal Employment Opportunity Commission, *Annual Reports* (12 though 16) (1977 through 1981).

[215] Approximately 150 witnesses, including employers, employees, religious organizations, labor unions, and local, State, and Federal Government representatives testified or submitted written statements. 29 C.F.R. Part 1605, app. A (1980).

[216] *Id.*

[217] Some of the practices not being accommodated were observance of Sabbath and holy days, need for prayer break during work hours, certain dietary requirements, abstention from work during mourning for deceased relatives, prohibition against medical exams, prohibition against membership in labor unions, and dress and other grooming codes. *Id.*

[218] EEOC stated that "[e]mployers appeared to have substantial anticipatory concerns but no, or little, actual experience with the problems they theorized would emerge. . . ." *Id.*

[219] 29 C.F.R. 1605.2(b)(1). Similarly, the guidelines state that labor unions, employment agencies, and joint labor-management committees controlling apprenticeship or other training or retraining programs are also covered. *Id.*, §1605.2(b)(2),(3).

[220] *Id.*, §1605.2(c)(1).

[221] *Id.*

[222] *Id.*

[223] *Id.* which states, "A mere assumption that many more people with the same religious practices as the person being accommodated may also need accommodation is not evidence of undue hardship."

[224] *Id.* at §1605.1(c)(i) and (ii).

disadvantages the individual with respect to his or her employment opportunities.[225]

In addition, the guidelines state that EEOC will determine whether an accommodation would require more than *de minimis* cost or undue hardship by considering the identifiable cost in relation to the size and operating cost of the employer and the number of persons needing accommodation.[226] Consistent with *Hardison,* costs similar to the regular payment of premium wages for substitutes are considered to be more than *de minimis.*[227] However, under the guidelines, provided that payment is infrequent, an employer might be required temporarily to pay premium wages for a substitute while a more permanent accommodation is being sought.[228] Moreover, administrative costs, such as the costs of rearranging schedules and recording substitutions for payroll purposes, will generally not be considered to constitute more than *de minimis* cost.[229]

The guidelines also suggest three means of accommodating conflicts between work schedules and religious practices:

(1) voluntary substitutes or swaps;[230]

(2) flexible scheduling;[231] and

(3) lateral transfer and change of job assignment.[232]

The guidelines are consistent with the position taken by those Federal courts that have reviewed the issue of union membership and the payment of dues.[233] When an employee's religious practices do not permit compliance with provisions in collective-bargaining agreements that require union membership or the payment of union fees, "the labor organization should accommodate the employee by not requiring the employee to join the organization. . . ." and should permit the employee to donate the equivalent sum to a charitable organization in lieu of dues.[234]

The guidelines also address employment selection practices, an area of potential conflict that has not been the subject of much litigation.[235] "The duty to accommodate pertains to prospective employees as well as current employees."[236] Thus, the guidelines make clear that the obligation to accommodate applies to the scheduling of tests or other selection procedures.[237] Based on the hearings it conducted before promulgating the guidelines, EEOC concluded that the use of preselection inquiries that determine an applicant's availability have an exclusionary effect on the employment oppportunities of persons with certain religious practices.[238] Therefore, the guidelines state that preselection inquiries to determine an applicant's availability will be considered by EEOC to violate Title VII unless the employer can show either that the inquiries did not have an exclusionary effect on employees or prospective employees who have religious beliefs or practices requiring accommodation or that they are justified as a business necessity.[239] The guidelines state that employers with a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures that serve their interest but have a less exclusionary effect and suggest as an example of such a procedure that the employee refrain from making such inquiries until after a

[225] *Id.*

[226] *Id.* at §1605.2(e)(1).

[227] *Id.*

[228] *Id.*

[229] *Id.* Undue hardship may also be shown where a variance from a bona fide seniority system is necessary to accommodate an employee's religious needs when "doing so would deny another employee his or her benefits guaranteed by that system." *Id.* at §1605.2(e)(2). EEOC, however, states that it encourages labor unions and management to make provisions for voluntary substitutes and swaps in their collective-bargaining agreements. *Id.*

[230] *Id.* at §1605.2(d)(1)(i). This arrangement may be made where a voluntary substitute with substantially similar qualifications is willing to work for the employee seeking accommodation. The EEOC believes that the obligation to accommodate requires employers and unions to facilitate the securing of a substitute. The guidelines offer some suggestions on how this could be done. These include publicizing policies regarding accommodation and voluntary substitutions, promoting an atmosphere in which substitutes are highly regarded, and installing a bulletin board for matching substitutes with available positions.

[231] *Id.* at §1605.2(d)(1)(ii). Flexible schedules might include flexible arrival and departure times, floating or optional holidays, use of lunch time in exchange for early departure, staggered work hours, and allowing an employee to make up time lost due to religious observance.

[232] *Id.* at §1605.2(d)(1)(iii).

[233] *See, e.g.,* McDaniel v. Essex Int'l Inc., 571 F.2d 338 (6th Cir. 1978); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1979).

[234] *Id.* at §1605.2d(2).

[235] *But see,* Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975); Jordan v. North Carolina National Bank, 566 F.2d 72 (4th Cir. 1977).

[236] *Id.* at §1605.3(b)(1).

[237] *Id.* at §1605.3(a).

[238] *Id.* at §1605.3(b)(2). This concern, of course, has to be balanced with the employees' obligations to inform the employer of their religious need for accommodation.

[239] *Id.*

position is offered but before the applicant is hired.[240] The guidelines state that EEOC will infer that an accommodation requirement discriminatorily influenced a decision not to hire[241] if either an inquiry into a qualified applicant's need for accommodation preceded a position being offered or a qualified applicant was rejected after the employer determined the applicant's need for accommodation.

The Office of Federal Contract Compliance Programs

The Office of Federal Contract Compliance Programs (OFCCP), in the Department of Labor, is charged with implementing Executive Order 11246[242] which requires businesses that contract with the Federal Government to agree, as a condition of their contracts, not to discriminate and to take affirmative action.

OFCCP has issued guidelines to clarify the obligations of Federal contractors with respect to accommodating the religious practices and beliefs of their employees and prospective employees.[243] The guidelines not only prohibit a contractor from discriminating against persons because of their religion, but also impose an affirmative obligation on such an employer to ensure that job applicants and employees are treated equally without regard to their religion.[244]

The guidelines specifically address the affirmative action measures required regarding outreach and positive recruitment.[245] Employers are required to review their selection procedures and employment practices to determine if members of various religious or ethnic groups are receiving fair opportunities for job advancement.[246] Based upon their findings, they must take appropriate and positive steps to recruit persons from religious groups that are underutilized in the company.[247]

The guidelines list eight positive outreach and recruitment activities that may be required, based upon the findings that result from the contractor's review of its employment practices. The measures listed are: (1) internal commmunication to foster understanding, acceptance, and support of the obligation to provide equal employment opportunity; (2) developing internal procedures to ensure that equal employment opportunity plans are being fully implemented; (3) periodically informing employees of the employer's commitment to equal employment opportunity; (4) enlisting the assistance and support of all recruitment sources; (5) reviewing personnel records to locate promotable and transferable members of various religious groups; (6) establishing meaningful contact with religious organizations and leaders; (7) engaging in significant recruitment activities at schools with substantial enrollments of religious minorities; and (8) using religious media for employment advertising.[248]

In addition, the guidelines incorporate section 701(j) of Title VII by stating that Federal contractors must reasonably accommodate the religious observances and practices of their employees unless it can be demonstrated that to do so would result in undue hardship in conducting the businesses.[249]

OFCCP's responsibility for enforcing Executive Order 11246 also involves it with the previously discussed problem of discriminatory private clubs. Exclusionary private clubs deny employment opportunities to members of religious minorities who are pursuing corporate careers. This problem is compounded because employee membership and other club fees and expenses are frequently paid by the employer.

Although the membership practices of private clubs are not within the purview of antidiscrimination legislation, the practices of employers are.[250] Nevertheless, the Federal Government has been slow to enforce antidiscrimination law in this area. In 1975 the Department of the Treasury discovered

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[240] *Id.*

[241] *Id.*

[242] 3 C.F.R. 339 (1965), *reprinted as amended* at 42 U.S.C. §2000e at 1232 (1976).

[243] 41 C.F.R. Part 60–50 (1981). These guidelines pertain to both religious discrimination and discrimination on the basis of national origin.

[244] *Id.* at §60–50.2(a).

[245] *Id.* at §60–50.2(b).

[246] The guidelines emphasize that the employer should direct special attention to the executive and middle-management positions, stating that it is within these areas that most employment problems relating to religion occur. *Id.*

[247] The guidelines state that the scope of the employer's efforts to remedy such deficiencies will necessarily depend on the nature and extent of the deficiency as well as the employer's resources. *Id.*

[248] *Id.* at §60–50.2(b)(1)–(8). For a detailed discussion on the utilization of affirmative action measures in employment, see U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* (1981), appendix.

[249] 41 C.F.R. at §60–50.3.

[250] *Compare,* 42 U.S.C. §2000e–2(1976) *with,* Exec. Order 11246. 3 C.F.R. 169, (1965) *reprinted as amended* at 42 U.S.C. §2000e at 1232 (1976).

that this type of discrimination was widespread in the banking industry.[251] Because the problem of employer payment of membership fees in discriminatory clubs was not addressed in any Federal regulation, Treasury sought the advice of the Department of Labor, which consequently sought legal advice from the Department of Justice. The Department of Justice responded that if fee payments by Federal contractors to exclusionary organizations conferred a business advantage on employee members over similarly situated employees who were excluded, then that practice violated the Executive order.[252] Nevertheless, the Department of Labor hesitated to provide the Treasury Department with instructions for handling such discrimination practices.

Subsequently, the Federal financial regulatory agencies issued a policy statement in 1979 on the payment of employee membership dues by financial institutions to exclusionary clubs, encouraging such institutions to examine their fee payment policies and to eliminate any discrimination that such an examination disclosed.[253] Moreover, the Federal financial regulatory agencies argued strongly that regulation in this area was required and urged the Department of Labor to develop it. That same year, the Senate Committee on Banking, Housing and Urban Affairs held hearings which revealed that such practices were common and invidious, and it also urged the Department of Labor to issue appropriate regulations.[254]

Finally, in early 1980 the Department of Labor issued a proposed regulation addressing the issue.[255] Essentially, the proposed regulation would have clearly established that an employer's policy of paying membership fees and other expenses for employees' participation in discriminatory private clubs would have violated Executive Order 11246 if it conferred an employment advantage on the employees for whom such payments are made over similarly situated employees who were excluded from membership. The proposed regulation would also have established a procedure whereby contractors would review their policies to determine whether such an employment advantage existed and would have required the cessation of payments if the determination was that membership did confer such an advantage.[256]

The proposal was considered inadequate by many, but it represented a positive step by the Department of Labor to assume its enforcement responsibilities. Nevertheless, a year later the Department of Labor announced its intention to withdraw the proposed regulation and has since taken no action in the area.[257]

[251] *Club Membership Practices of Financial Institutions,* Hearings Before the Senate Committee on Banking, Housing and Urban Affairs, July 13, 1979, 96th Cong. 1st sess.

[252] Anthony Scalia, Assistant Attorney General, U.S. Department of Justice, letter to William J. Kilberg, Solicitor of Labor, U.S. Department of Labor, Dec. 7, 1977.

[253] Federal Financial Institutions Examination Council, *Policy Statement on Discrimination* (Oct. 11, 1979). The Federal financial regulatory agencies are the Federal Reserve Board, National Credit Union Administration, Federal Home Loan Bank Board, Federal Deposit Insurance Corporation, and the Comptroller of the Currency.

[254] Ibid.

[255] 45 Fed. Reg. 4953 (Jan. 11, 1980) (proposed rule). *See also* 46 Fed. Reg. 3892 (Jan. 16, 1981), final rule amending 41 C.F.R. Part 60-1.

[256] 46 Fed. Reg. 3892 (Jan. 16, 1981).

[257] *See,* 46 Fed. Reg. 11253 (Feb. 6, 1981) (deferring effective date of final rule); 46 Fed. Reg. 18951 (Feb. 27, 1981) (proposed withdrawal of rule).

Chapter 4

Religious Freedom in Prison

Although it was long believed that prisoners gave up most of their basic rights and freedoms upon entering a correctional institution, it is now recognized that they retain some of these rights while incarcerated. The past two decades have seen an unprecedented explosion in the litigation of prisoners' rights. The leading cases that broke ground and paved the way toward this recognition of prisoners' rights tested the limits of first amendment religious freedom in prison.

The freedom to believe in and, subject to some constraints, practice a religion is of paramount concern to prisoners, who have lost nearly every other right, privilege, benefit, or opportunity. In prison, the practice of familiar religious rituals is often the last vestige of normalcy that a prisoner can grasp or turn to for comfort. As one commentator noted, "Religion is the sigh of the oppressed creature, the heart of the heartless world, just as it is the spirit of a spiritless situation."[1] But that freedom many may take for granted often becomes a volatile, complicated issue in prison.

Courts have had to consider the question of what constitutes a religion. This threshold question determines whether a claim qualifies for first amendment protection. Once the court is satisfied the religion is genuine and the prisoner's professed belief is sincere, the preferred position of religious freedom is then weighed against the State's interest in maintaining prison security or other lesser interests such as the efficient management of the institution, health and welfare of other inmates, economic considerations, and convenience to prison staff. Courts have used a number of different "tests" to determine which interests are paramount, with mixed results. Litigated issues have included the rights of individual prisoners to attend religious services, to be ministered to by religious leaders of their own choosing, to possess religious literature, to correspond with the heads of their sects or churches, to have special diets according to the mandates of their religions, to refuse certain types of work, to celebrate religious holidays, to possess and wear religious medals or special headdress and vestments, to preach to others, and to wear beards or special hair styles.

The tension between the establishment and free exercise clauses of the first amendment is especially pronounced in the prison setting. Since the state has deprived inmates of the freedom to attend religious services of their choice, the state has an obligation to make such services available so that prisoners will not be deprived of their free exercise rights. But the very act of providing for religious services, making places of worship and chaplains available at government expense, would seem to clash with the establishment clause.

The Establishment Clause in Prison

The Federal prison population of approximately 26,000 inmates is currently served by a religious staff

[1] Christopher Hitchens, "The Lord and the Intellectuals," *Harper's,* July 1982, p. 60, 63, quoting "Critique of Hegel's Philosophy of Right."

of 63 full-time chaplains of whom 41 are Protestant, 21 Roman Catholic, and one a Jewish Rabbi.[2]

Institution Chaplains are available to assist in the expansion of an inmate's knowledge and understanding of and commitment to the beliefs and principles of the inmate's religion. Upon request, the Chaplain is available to provide pastoral care, counseling, religious education and religious instruction commitment to the beliefs and principles of the religion of their choice. The chaplains are available to provide pastoral care and counseling.[3]

Less than 1 percent of the total Bureau of Prisons budget is devoted to religious needs, including chaplain salaries, contracted services of local ministers, facilities, and other costs of providing for individual and communal worship.[4]

Whether or not the Federal Government, or any State or local government, should be in the business of supplying chaplains and religious services with taxpayers' money is complicated by the fact that chaplains, although serving all denominations, are selected from a rather narrow spectrum of traditional religious affiliation. This raises questions about the dictates of the first amendment's prohibition against the establishment of religion and the concomitant duty to remain neutral and not favor one religion over another, since *"the most effective way to establish any institution is to finance it. . . ."*[5]

Supreme Court Justice Brennan, in his concurring opinion in *Abington School District v. Schempp,* argued that for the government to provide prison chaplains does *not* violate the establishment clause, but rather is essential to avoid violating the free exercise clause. The meaning of the two clauses taken together, according to Justice Brennan, is that the government must always be neutral with respect to individual religions, and "hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners. . .cut off by the State from all civilian opportunities for public communion. . . ."[6] For prisoners' free exercise rights not to be abridged, the government must make available the means for worship for those who want it:

[W]here the government has total control over people's lives, as in prisons, a niche has necessarily been carved into the establishment clause to require the government to afford opportunities for worship. . . .The government, in its control of prisons, is precluded from denying religious observance to inmates. . . .Thus, in the prison setting the establishment clause has been interpreted in the light of the affirmative demands of the free exercise clause.[7]

To accept this argument does not render the issue meaningless, however, for neither subjecting the establishment clause to nor merging it with the free exercise clause automatically removes all constitutional impediment. There remain serious problems in the government's sponsoring religious activity anywhere, especially in prison. There are myriad problems both in the choice of what services to make available and in assuring that the government-provided religious activity is not coercive.

With the vast proliferation of religions and sects in our Nation replicated inside prison, the government must decide what faiths should be represented by its chaplains. The chaplains, although each is affiliated with a particular church, minister to all faiths and are "responsible for providing the resources of religion to all inmates—those who have a specific religious need, those who have no religious affiliation."[8]

Perhaps the greatest of the establishment problems is that the coercive environment of prison can compel, even subtly, participation in a particular religious activity:

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.[9]

[W]hile government provides prisoners with chapels, ministers, free sacred texts and symbols, there subsists a danger that prison personnel will demand from inmates the same obeisance in the religious sphere that more

[2] Richard A. Houlahan, priest and administrator, Federal Prison Systems Chaplaincy Services, statement, *Religious Discrimination: A Neglected Issue,* a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Apr. 9–10, 1979, p. 131 (hereafter cited as *Religious Discrimination Consultation).*

[3] U.S., Department of Justice, Bureau of Prisons, Federal Prison System Program Statement No. 5360.4, sec. 3.a (June 3, 1980).

[4] Houlahan Statement, *Religious Discrimination Consultation,* p. 132.

[5] Abington School Dist. v. Schempp, 374 U.S. 203, 229 (1963) (Douglas, J. concurring) (emphasis in the original).

[6] *Id.* at 298–99 (Brennan, J. concurring).

[7] United States v. Kahane, 396 F. Supp. 687, 698 (E.D.N.Y.) (citations omitted), *aff'd sub nom.* Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).

[8] Houlahan Statment, *Religious Discrimination Consultation,* p. 124.

[9] Engel v. Vitale, 370 U.S. 421, 430–31 (1962).

rightfully they may require in other aspects of prison life.[10]

This danger is demonstrated by the practice of some parole boards of taking recommendations from chaplains regarding parole decisions or of including in a prisoner's record his religious activity (or lack thereof) among the facts to be considered in parole determination. In *Remmers v. Brewer,*[11] the U.S. Eighth Circuit Court of Appeals held that the participation of two prison chaplains on the diagnostic committee that reported to the parole board on an inmate's suitability for parole did not violate the establishment clause, but it cautioned: "[g]reat care must be exercised to avoid even the appearance of reliance on 'religious reports' as determinative of one's status for parole eligibility."[12]

At the Commission's consultation on religious discrimination, Alvin Bronstein, director of the national prison project of the American Civil Liberties Union, expressed concern over establishment problems:

> What happens in this process is that if a prisoner comes up before a disciplinary board or a classification board or parole board where one or more members are making their decision based on their own values, the fact of whether or not a prisoner attends religious services will be weighed by that decisionmaker and, in that manner, the State is engaging really in the establishment of religious criteria for matters that are wholly inappropriate for those kinds of criteria.[13]

However, Bureau of Prisons General Counsel Clair Cripe said that to omit the prisoner's religious record would be discriminatory:

> [T]o say that absolutely no comment can be made in reports about an inmate's religious activities means that. . .there is discrimination against the inmate who chooses to be active in religious matters in that one can look at the reports about his activities in prison and get a complete picture of what he's doing, with one exception, and that is we have a total gap as to what he may have done in the religious area.[14]

The district court in *Remmers v. Brewer*[15] found no establishment clause violation because there was no evidence that adherence to a particular religion was a prerequisite to a favorable parole recommendation for an inmate from the chaplain.[16] However, the court did not focus on the more significant question of whether government action in any way induces a choice for religious activity per se, with the result of discrimination against prisoners who would rather choose *no* religious activity.

Another district court saw the filing by chaplains of religious reports on prisoners as a clear violation of the neutrality that the first amendment requires of the government:

> [I]t is likely that the inmates' very knowledge of the existence of these religious reports may compel some to participate in religious activities. The government, by allowing these reports to be submitted, is in effect promoting religion among inmates and indirectly punishing the atheist, agnostic, or Eclatarian who declines to participate in these religious programs.[17]

Although parole is perhaps the most important decision regarding an inmate that could be influenced by his participation in religious programs, there are other circumstances affecting prisoners where it may also be taken into account, including decisions by classification boards and custody boards, job programming decisions, disciplinary proceedings, and even decisions regarding such a private matter as marriage:[18]

> Just a few years ago, we learned that if a District of Columbia prisoner wanted to marry, that the sole administrative procedure set up for that was an interview with the Protestant chaplain, and the Protestant chaplain was given the sole discretion to decide whether or not the prisoner should marry. . . .[W]e took the chaplain's deposition, and he quite flat out—said he makes the decision based on his religious training—whether he thought it would be a morally good thing to do. And the Protestant chaplain was making this decision for Muslim prisoners, for Jewish prisoners, for Catholic prisoners, but was using his own

[10] Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969).
[11] 494 F.2d 1277 (8th Cir. 1974).
[12] *Id.* at 1278.
[13] Alvin Bronstein, statement, *Religious Discrimination Consultation,* p. 155.
[14] Clair A. Cripe, statement, *Religious Discrimination Consultation,* p. 121.
[15] 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd,* 494 F.2d 1277 (8th Cir. 1974).
[16] 361 F. Supp. at 543–44.
[17] Theriault v. Carlson, 339 F. Supp. 375, 382 (N.D. Ga. 1972). This case, known as *Theriault I,* was extensively litigated over a period of at least 8 years and its "subsequent history" includes many reported opinions. The latest reported decision is found at 620 F.2d 648 (7th Cir. 1980) and contains an account, with citations, of the major reported opinions in the litigation's lengthy history.
[18] Bronstein Statement, *Religious Discrimination Consultation,* p. 155. Texas prisoners were given "points of merit" for attending services. *See,* Cruz v. Beto, 405 U.S. 319, 320 (1972).

religious tenets to decide whether or not this prisoner should marry.[19]

The Free Exercise Clause in Prison

Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners.[20]

Not long ago the courts took a "hands off" approach with respect to the administration of prisons. The reluctance of courts to scrutinize the policies and practices of prison management was dramatically altered over the past two decades in a major legal "revolution" consisting of extensive litigation of all aspects of prisoners' rights. As noted previously, this sudden change of direction by the Nation's courts was initiated in the area of religious freedom.

One critical reason why litigation testing the reaches of the free exercise clause in prison met with a new response from the judiciary in the early 1960s, leading the way to prison reform through litigation of other prisoner rights, was the hope that religion might serve a "rehabilitative function."[21]

The Threshold Tests

Before a free exercise claim can be assessed in light of the first amendment, a prisoner may be required to show that what he wishes to practice is in fact a religion, that the activity is a necessary or customary part of the worship or celebration of that religion, and that his belief in the religion is sincere. These threshold questions are not always easily answered.

The litigation revolution in prisoners' rights of the early 1960s was led by Black Muslim prisoners seeking guarantees of free exercise. Initially, the courts questioned whether their movement was a religion. Although some recognized its religious ties to Islam, one of the world's major religions, other courts viewed the Black Muslim movement as a hostile, racist, and politically oriented group that was organized solely for the purpose of instigating agitation among inmates.[22] In *Pierce v. LaValle*[23] the district court rejected the religious claims of Black Muslim prisoners in northern New York who had alleged they were punished for their religious beliefs:

> It should be emphasized that the Muslim Brotherhood, as it existed at Clinton Prison, is not a religion. Rather it is an organization which sets itself up as an adjunct to the Islamic faith. Membership in the Brotherhood and adherence to the principles thereto was the basis of the punishment visited upon the three plaintiffs rather than their belief in the religion of Islam.[24]

To support its finding that the Muslim Brotherhood was not a religion, the court published, as an appendix to its opinion, a collection of brotherhood documents that demonstrated a total lack of religious orientation of the organization.[25]

Some very militant Black Muslim groups in the early 1960s mixed religious and political beliefs and actions in a manner that made it difficult for courts to separate the two and to protect the purely religious activities in prison. In *Banks v. Havener,*[26] however, a district court did separate them and devised a standard that looked to both equal protection and free exercise. Despite the fact that the Black Muslim plaintiffs had participated in prison riots, the court refused to condone the government's supression of their religious freedoms, since Protestant and Catholic inmates had also participated in the riots without any curtailment of their religious activities. The court held prison officials accountable for proof that the teachings and practices of a sect create a clear and present danger[27] before religious activities

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[19] Bronstein Statement, *Religious Discrimination Consultation,* p. 155.

[20] Cruz v. Beto, 405 U.S. 319, 321 (1972).

[21] "Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality." Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969).

[22] *Compare, e.g.,* Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) with Pierce v. LaValee, 212 F. Supp. 865 (E.D.N.Y. 1962). *See also,* Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied,* 379 U.S. 892 (1964); Long v. Parker, 390 F.2d 950, *vacated and remanded,* 384 U.S. 32 (1966).

[23] 212 F. Supp. 865 (N.D.N.Y. 1962).

[24] *Id.* at 869.

[25] *Id.* at 870–74.

[26] 234 F. Supp. 27 (E.D. Va. 1964). A separation was also noted in Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied,* 379 U.S. 892 (1964), but with the emphasis on being wary of the political component rather than on protecting the religious one: "The particular characteristics of the Muslims obviously require that whatever rights may be granted because of the religious content of their practices must be carefully circumscribed by rules and regulations which will permit the authorities to maintain discipline in the prison." *Id.* at 911.

[27] The various tests courts have used in considering prisoners' free exercise claims are discussed in the next major section of this chapter.

can be barred, and found the authorities had not met that burden in this instance.[28]

The court in *Banks v. Havener* found the Black Muslim group to have a "religion," and thus first amendment rights, by separating out the political aspects of the group's activities. The court did not question whether Islam was a religion but accepted it as an "established" religion.[29] The court also applied an equal protection standard by comparing the political acts of Black Muslims with those of members of other religious denominations.

When confronted with something other than the conventional established religions, courts have had a difficult time determining whether first amendment protection applies. Many courts have declined to consider the question of what constitutes a religion, holding that this is not a proper inquiry for courts:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others, yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . .The First Amendment does not select any one type of religion for preferred treatment. It puts them all in that position.[30]

The same principle was used in *Fulwood v. Clemmer*[31] to accept the Black Muslim faith as a religion:

> Nor is it the function of the court to consider the merits or fallacies of a religion or to praise or condemn it, however excellent or fanatical or preposterous it may be. Whether one is right about his religion is not a subject of knowledge but only a matter of opinion.[32]

Similarly, in *Cooper v. Pate*[33] the seventh circuit refused to consider whether Black Muslim beliefs actually constitute a religion: "A determination that they do not would be indistinguishable from a comparative evaluation of religions, and that process is beyond the power of this court."[34]

Those courts that have actually grappled with the question of what constitutes a religion have required, as a minimum, a belief in a supreme being. The United States Supreme Court defined "religious beliefs" in *United States v. Seeger*:[35] "Within that phrase would come all sincere religious beliefs which are based upon a power or being or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[36]

In *Loney v. Scurr*,[37] the Church of the New Song—CONS (also called Eclatarianism), a religion initiated by a prisoner for prisoners, was accorded first amendment protection. The court compared the new religion with more orthodox recognized faiths and relied to a large degree on expert testimony that identified the following common characteristics of religion:

> (1) a cognitive element—belief in the truth of certain things; (2) moral dimension—belief in the rightness or wrongness of certain behavior; (3) religion must provide an emotional experience; and (4) religion creates a community.[38]

By applying a test that determines whether the religion at issue possesses "the cardinal characteristics associated with traditional 'recognized' religions in that it teaches and preaches a belief in a Supreme Being, a religious discipline and tenets to guide one's daily existence," courts have accorded first amendment protection to a church that ministers exclusively to homosexuals[39] and to a church established in prison by an inmate and admittedly begun as a "game."[40]

Once a prisoner's beliefs are held to constitute a religion, the court may still examine whether the claimed beliefs are sincerely held. Courts are more

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[28] 234 F. Supp. at 30.
[29] *Id.*
[30] United States v. Ballard, 322 U.S. 78, 86–87 (1944) (citations omitted).
[31] 206 F. Supp. 370 (D.D.C. 1962).
[32] *Id.* at 373.
[33] 382 F.2d 518 (7th Cir. 1967).
[34] *Id.* at 521.
[35] 380 U.S. 163 (1965).
[36] *Id.* at 176.
[37] 474 F. Supp. 1186 (S.D. Iowa 1979).
[38] *Id.* at 1193.
[39] Lipp v. Procunier, 395 F. Supp. 871, 876 (N.D. Cal. 1975).
[40] Because it was found to have much in common with traditional faiths, the "Church of the New Song" was held to be a religion entitled to first amendment protection in Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd per curium,* 494 F.2d 1277 (8th Cir.), *cert. denied,* 419 U.S. 1012 (1974), and in Loney v. Scurr, 474 F. Supp. 1186 (S.D. Iowa 1979). The first court to consider the legitimacy of the Church of the New Song also held it to be a religion, Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972). But this opinion, *Theriault I,* was reversed upon appeal, 495 F.2d 390 (5th Cir. 1974) *(Theriault II),cert. denied,* 419 U.S. 1003. This case has a lengthy complex history, including a decision by the U.S. District Court for the Western District of Texas that called the religion a "sham." Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex. 1975) *(Theriault IV).* The major decisions of Theriault's litigation are summarized in the most recent reported decision, Church of the New Song v. Establishment of Religion, 620 F.2d 648 (7th Cir. 1980).

likely to be concerned with the issue of sincerity than of the merits of the religion, but many acknowledge that such an inquiry may be beyond the court's power to determine. Questionable evidence is sometimes considered, such as the inmate's "classification"—how he identified his religious affiliation at the time he first entered prison—or the length of time and degree of devotion with which he has practiced his chosen faith. Other criteria that have been used include the degree of inconvenience and discomfort or even punishment the prisoner is willing to take for adherence to his professed beliefs.

In *Teterud v. Gillman,*[41] where an Indian prisoner refused, on religious grounds, to have his hair cut, the district court noted the difficulty of ascertaining the sincerity of a person's avowed beliefs because there is no way to probe the "inner workings of the mind."[42] However, the failure of prison officials to show that the prisoner was insincere caused the court to accept his sincerity. The eighth circuit affirmed, finding the prisoner's belief sincere for three reasons: the warden's acknowledgment of his sincerity; the prisoner's own statement that he would feel dead if forced to act contrary to his belief; and the court's finding that his past membership in other churches did not negate his Indian beliefs, since Indian religion is not exclusive.[43]

The opposite result was reached on a similar issue by another district court in *United States ex rel. Goings v. Aaron.*[44] Despite the fact that the prisoner had been punished, and faced added punishment, for holding fast to his avowed beliefs and refusing to cut his hair, the court failed to recognize his sincerity, partly because he had lived for more than 26 years without following Indian customs.[45]

In requiring the very minimum accommodation to a Jewish prisoner's needs for kosher foods, the court in *United States v. Kahane*[46] noted that only the sincere would be likely to choose such a "repetitive and spartan" diet under prison conditions.[47]

Some prison regulations have required prisoners to identify a religious preference upon entering the institution and then have not permitted them to change that choice during their incarceration. This practice was criticized in *Maguire v. Wilkinson*[48] for viewing all religious beliefs acquired in prison as spurious, and the regulation was held unconstitutional on first amendment and equal protection grounds.[49]

Occasionally courts have also considered whether the religious activity was central or vitally important to followers of the faith. In *Teterud v. Burns,*[50] for example, in determining whether the prisoner should be permitted to wear long hair as an exercise of his religion, the eighth circuit said that it was not necessary to prove that wearing long hair is an "absolute tenet of the Indian religion practiced by all Indians. . . .Proof that the practice is deeply rooted in religious belief is sufficient. It is not the province of government officials or court to determine religious orthodoxy."[51]

A contrary view was held by the U.S. District Court for the Eastern District of New York in *United States v. Shlian,*[52] where the court denied a special kosher diet to an inmate, stating that no formal penalty existed for the nonobservance of Jewish dietary laws. Although the court acknowledged that "non-compliance is said to affect the moral and spiritual character of the individual which ultimately determines his well-being and salvation,"[53] it found that the prisoner put himself in that position by breaking man's laws.[54]

Balancing Tests

Once courts are satisfied that the threshold tests have been met,[55] they must decide how to balance the interests of the prisoner in the free exercise of his

[41] 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd,* 522 F.2d 357 (8th Cir. 1975).
[42] 385 F. Supp. at 156–57.
[43] 522 F.2d at 360–61.
[44] 350 F. Supp. 1 (D. Minn. 1972).
[45] *Id.* at 4.
[46] 396 F. Supp. 687 (E.D.N.Y. 1975), *aff'd sub nom.* Kahane v. Carlson, 527 F.2d 492 (2d Cir.).
[47] 396 F. Supp. at 703.
[48] 405 F. Supp. 637 (D. Conn. 1975).
[49] In an earlier case, Long v. Katzenbach, 258 F. Supp. 89 (M.D. Pa. 1966), a prison rule denying access to Muslim services to prisoners not on the "Muslim list" had been found acceptable. The rule was changed, however, during the process of the litigation, permitting prisoners to change their religious affiliation, and mooting the issue of whether the classification was reasonable. *See also,* Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968), where it was held that prison officials reasonably denied a non-Jewish prisoner the right to attend Jewish services, since the Jewish chaplain had a policy of refusing to accept converts.
[50] 522 F.2d 357 (8th Cir. 1975).
[51] *Id.* at 360.
[52] 396 F. Supp. 1204 (E.D.N.Y. 1975).
[53] *Id.* at 1206.
[54] *Id.*
[55] Courts will only consider the threshold questions where they are at issue, as in the cases brought by prisoner adherents of nontraditional faiths.

religion against the competing interests of the prison administration in such matters as the health and safety of inmates and staff, the orderly operation of the institution, the economic cost to the government of providing for special services, and the protection of the community.

Most cases arising outside prison have used the "preferred" position of first amendment rights to tip the scales in that direction by requiring the government to meet the strictest, severest tests. Standards employed in free exercise cases usually include some variation and combination of the "compelling interest" and "least drastic means" tests.[56] This places on the government the burden of proving that a compelling state need cannot be met through alternative means that would cause less or no infringement of free exercise rights. This standard does not mean that the right to free exercise is absolute, but it assures that any restraints on free exercise must be clearly justified.

However, in free exercise cases arising in the context of a correctional institution, the courts have tended to use a variety of other tests that afford less protection to free exercise rights. These tests may subject the government to less stringent standards and place the initial burdens of proof on prisoners. It has been argued, however, that there is no justification for applying different judicial standards to free exercise claims in and outside of prison, since the values to be protected by the first amendment remain the same.[57]

Tests sometimes employed by courts in prison free exercise cases include "reasonableness" (the prisoner must show that the prison regulation is unreasonable); "substantial interference" (the prisoner has the burden of proving a vague and ambiguous standard of the degree of the infringement); and "arbitrary and capricious" (the prisoner must show the prison regulation to be totally lacking in any reasonable justification). By tipping the scale against prisoners' free exercise rights, these tests clearly limit the guarantees of the first amendment.

In *United States v. Huss,*[58] the right of Jewish inmates to receive a special kosher diet was denied because they could not prove that prison regulations were "clearly unreasonable." The court noted that the "compelling interest" test applies in first amendment cases outside prison, but insisted this was not a correct test for prison cases, claiming that prisoners' first amendment rights are severely curtailed.[59] Similarly, a prisoner wishing to follow laws forbidding the shaving or cutting of hair was unable to satisfy the court in *Brooks v. Wainwright*[60] by showing that required twice-weekly shaves and periodic haircuts constituted an "unreasonable and arbitrary regulation." The court in *LaReau v. MacDougall*[61] accepted the contention of prison officials that to allow prisoners in segregation to attend chapel would be to "invite trouble," calling this a "substantial reason" to limit first amendment rights. In *Sweet v. South Carolina Dept. of Corrections,*[62] the fourth circuit held that prisoners in segregation could be denied the right to attend chapel services with the general prison population:

> Prison authorities may adopt any regulations dealing with the exercise by an inmate of his religion that may be reasonably and substantially justified by considerations of prison discipline and order.[63]

Other tests that have been used in prison free exercise cases include: whether the regulation is "relevant, desirable, or necessary";[64] whether the religious activity presents "a clear and present danger";[65] and whether the regulation has "an important objective and the restraint of religious liberty is reasonably adapted to achieving that objective."[66]

The inconsistent application of these various tests and the vagueness of many of their standards give little protection to prisoners' free exercise rights. The "compelling interest" test, when combined with the "least drastic means" requirement, provides the strongest guarantee both in and out of prison that the important and necessary interests of the govern-

[56] *See,* Sherbert v. Verner, 374 U.S. 398, 406–09 (1963). *See also,* "The Religious Rights of the Incarcerated," 125 *U. Pa. L. Rev.* 812 (1977).

[57] *See,* "The Religious Rights of the Incarcerated," 125 *U. Pa. L. Rev.* 812, 874 (1977). *See also,* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975). The court stated that in determining the constitutionality of a regulation restricting first amendment rights, it will be "as vigilant in protecting a prisoner's constitutional rights as [it is] in protecting the constitutional rights of a person not confined." *Id.* at 359.

[58] 394 F. Supp. 752 (S.D.N.Y. 1975).

[59] *Id.* at 761–62.

[60] 428 F.2d 652, 653 (5th Cir. 1970).

[61] 473 F.2d 974, 979 (2d Cir. 1972).

[62] 529 F.2d 854 (4th Cir. 1975).

[63] *Id.* at 863 (footnotes omitted).

[64] Peek v. Ciccone, 288 F. Supp. 329, 336 (W.D. Mo. 1968).

[65] Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968).

[66] Burgin v. Henderson, 536 F.2d 501, 503 (2d Cir. 1976).

ment can be met while at the same time giving the greatest degree of protection to the first amendment rights of all persons. For example, in another case brought by prisoners in segregation seeking the right to attend chapel services, the court found that alternative means could be used to achieve the legitimate interests of both the prison administrators and the inmates:

> Although the state's interest in maintaining the security of its houses of detention is "compelling," the state can, and therefore must, satisfy this interest by "less drastic" means than the total curtailment of plaintiffs' right to participate with non-segregated inmates in religious observances.[67]

In *Cooper v. Pate*[68] Black Muslims had been denied an opportunity to attend religious services on grounds of prison security. The seventh circuit determined that there were less drastic and less sweeping means of achieving the necessary control over such group services than categorically banning them.[69] Stating the equal protection basis to the "compelling interest" and "least drastic means" tests, the court said:

> [D]iscrimination in treatment of adherents of different faiths could be justified, if at all, only by the clearest and most palpable proof that the discriminatory practice is a necessity. Proof which would be more than adequate support for administrative decision in most fields does not necessarily suffice when we are dealing with the constitutional guarantee of freedom of religion. . . .[70]

Specific Religious Practices Under the Free Exercise Clause in Prison

Worship Services and Religious Ceremonies

The U.S. Department of Justice's Bureau of Prisons regulations are sufficiently vague that they allow prison administrators almost total discretion in deciding when a prisoner may be denied an opportunity to attend religious services:

> b. Institution Chaplains shall schedule religious services of worship, activities, ceremonies and meetings. All religious services, meetings, ceremonies, and activities are coordinated by the Chaplain under general supervision of the Warden. If an institution has no staff Chaplain, a staff member designated by the Warden shall exercise the authority of the Chaplain.
>
> Services of worship, religious activities, ceremonies, and meetings of a religious nature shall be scheduled with reasonable frequency. The availability of staff supervision must be taken into consideration as well as a recognition of the proportionate sharing of time and space available in terms of the total demand.
>
> 5. *Scheduling to Observe Religious Holidays, Services, Meetings, Ceremonies and Activities.*
>
> a. The Warden shall endeavor to facilitate the observance of important religious holidays or celebrations that do not coincide with legal holidays, and facilitate that observance in accordance with specific requirements of a faith group, e.g., fasting, worship, diet, or work proscription. The inmate must initiate a request for specific observance of a religious holiday.
>
> b. The Warden may relieve an inmate from a work assignment if a religious activity, service, ceremony or meeting is also scheduled at that time. The Warden may schedule the inmate to make up work at another time. The Warden shall take into consideration the availability of staff and space within the institution when scheduling religious services, activities, or meetings. Normally meetings of a religious nature are scheduled so as not to conflict with inmate work assignments.
>
> c. The Chapel may be open during the noon meal hour for prayer and worship.[71]

Although religious services are the most basic form of religious practice, worship services are not provided in prison for many religious sects, and some inmates are restricted from attending those that are held. Given the extent of the proliferation of religious sects, both in and out of prison, it is impossible to provide chaplains for each faith. Clearly, the government does not have an affirmative duty to provide clergy and religious services according to the preference of each prisoner.[72] It has attempted to accommodate individual prisoners, however, by expecting chaplains of any faith to minister to all.[73]

Nonetheless, using equal protection and "less drastic means" tests, many courts have decided that where the government provides services for any religious group, it must similarly accommodate others whenever feasible. Thus, if ministers of a particular sect offer to conduct services at little or no cost to the government, and prison security can

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[67] Wilson v. Beame, 380 F. Supp. 1232, 1238 (E.D.N.Y. 1974).

[68] 382 F.2d 518 (7th Cir. 1967).

[69] *Id.* at 522.

[70] *Id. See also,* Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969), quoting Sherbert v. Verner, 374 U.S. 398 at 403, 406, 407, and Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[71] U.S., Department of Justice, Bureau of Prisons, Federal Prison System Program Statement No. 5360.4, secs. 3.b, 5.a-c (June 3, 1980).

[72] Gittlemacker v. Prasse, 428 F.2d 1, 4 (3d Cir. 1970).

[73] Houlahan Statement, *Religious Discrimination Consultation,* p. 124.

be maintained, the authorities cannot deny access to such services when it is providing similar services at government expense for other denomimations.[74]

Once services are provided, attendance may be limited by the available space or for security reasons,[75] or certain classes of prisoners may be restricted from attendance because they are thought to present a security risk.[76] The practice of excluding prisoners from services simply because they did not identify themselves upon entering prison as a member of that particular faith no longer complies with Federal prison policy.[77]

Among religious ceremonies once forbidden in prison but now more likely to be accepted is the Native American practice called the "sweat lodge." The Native American Church initially had difficulty in gaining recognition as a religion, perhaps because it consists of many practices and traditions that make up Indian cultural history and that vary from tribe to tribe and even within a tribe. The fact that much of the tradition was unwritten and its rituals neither known nor understood by non-Indian prison administrators and judges increased the difficulty.[78]

A description of the sweat lodge was read at the Commission's consultation by Felix White, executive director of the Nebraska Indian Commission, excerpted from a book that has become known as the Indian Bible:

> The sweat lodge is usually a low lodge covered with blankets or skins. The [individual] goes in undressed and sits by a bucket of water. In a fire outside, a number of stones are heated [and then] rolled in, one or more at a time. The [individual] pours water on them. This raises a cloud of steam. The lodge becomes very hot. The individual drinks copious draughts of water. After a sufficient sweat, he raises the cover and rushes into [a body of]. . .water. After this, he is rubbed down with a buckskin and wrapped in a robe to cool off. This [is] used as a bath, as well as a religious purification.[79]

Lompoc Warden Larry Taylor expressed the apprehension with which administrators had initially viewed permitting such a ceremony in prison:

> When we were first approached at Lompoc about having a sweat lodge, our reaction was no, we're not going to have a sweat lodge. They're too secret; they're a fire hazard; they're a security hazard. . . .[80]

But he admitted that these fears were due largely to a lack of knowledge:

> [U]nfortunately, we had to be faced with a court case before we did the research, we have done the research now and have agreed to provide the Indians of Lompoc a sweat lodge.[81]

In another Federal suit,[82] also settled by voluntary changes by the prison administrators, it was agreed that "routine Indian religious ceremonies, including a sweat lodge, pipe ceremonies and medicine men ceremonies" would be provided by the State for Indian prison inmates.[83]

Dietary Restrictions

Bureau of Prison regulations concerning religious objection to or requirements for certain foods do not really resolve the important issues. While permitting prisoners to abstain from foods prohibited by their faith, there is no assurance that in so doing they may still receive a nutritiously adequate diet, and the provision of one special meal a year according to religious dictates is also inadequate to meet the mandates of many religions:

> 4.a. An inmate may abstain from eating food items served to the general inmate population which are prohibited by the inmate's religion (See Part 547, Subpart B).
>
> b. As a once-a-year accommodation, staff may make arrangements with an inmate religious group to have a special meal which meets liturgical or ceremonial standards of the religion. In most situations, all or most food

[74] *See, e.g.,* Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Sewell v. Pegelow, 304 F.2d 670 (4th Cir. 1962); Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968). *See also,* Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966).

[75] *See,* Long v. Katzenbach, 258 F. Supp. 89 (M.D. Pa. 1966); Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969).

[76] Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969); LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972); Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975).

[77] "An inmate may designate any or no religious preference. An inmate may change this designation at any time." U.S., Department of Justice, Bureau of Prisons, Federal Prison System Program Statement No. 5360.4, sec. 3.e. (June 3, 1980).

[78] *See,* Larry F. Taylor, warden, Federal Correctional Institution, Lompoc, Calif., statement, *Religious Discrimination Consultation,* pp. 127–29.

[79] Felix White, statement, *Religious Discrimination Consultation,* pp. 164–65, quoting Ernest Thomas Seaton, "The Spartan of the West," *Woodcraft.*

[80] Taylor Statement, *Religious Discrimination Consultation,* p. 129.

[81] Ibid. The case to which the warden was referring is Terry Bear Riles v. Grossman, Civ. No. 77-3985 R JK (g) (C.D. Cal., filed Oct. 25, 1977). *See* 5 Ind. L. Rep. L-3 (1978)).

[82] Crowe v. Erickson, No. 72-4101 (D.S.D. May 4, 1977).

[83] *Id.,* Agreement in Settlement, item 2.(b), *reprinted in* 4 Ind. L. Rep. F-91 (June 20, 1977).

items to be served are from the main serving line. If the inmates representing the organization request, based upon documented necessity, staff may purchase from a food supplier specially prepared food items which meet religious requirements. Funds for the purchase of special food items are provided from:

1. Funds from Chaplain's budget;
2. Inmates' commissary accounts; or
3. Funds provided by the community organization[84]

Many of the dietary cases deal with the prohibition against eating pork, observed as religious law by both Jews and the followers of Islam. A Black Muslim seeking a pork-free menu was denied a special prison diet by the fourth circuit because it appeared he could obtain a balanced ration by voluntarily avoiding pork.[85] Meals were served cafeteria style; therefore, the court believed that because the prisoner had an "unfettered choice in the selection of his meal,"[86] he could choose a nonoffending diet. But following this reasoning, the court in *Ross v. Blackledge*[87] required that a complete evidentiary hearing be held to determine whether the diet resulting from total abstention from pork would be adequate. And in *Barnett v. Rodgers*[88] it was found that extensive inclusion of pork products in the cooking and flavoring of many of the foods in prison fare without identifying the pork made it necessary for the Muslims to abstain from all dishes not obviously pork-free. The *Barnett v. Rodgers* court noted that the prison administration provided fish on Fridays to accommodate Catholic custom and considered the Black Muslims' request for one full-course pork-free meal and coffee three times a day a plea "for a modest degree of official deference to their religious obligations."[89]

Although the issue of a pork-free diet was first raised by Muslim prisoners, several Jewish inmates later brought similar suits seeking kosher meals. Since the number of Jewish prisoners is relatively small, their special religious needs were not at first recognized by prisons. In 1975 three cases arising in New York prisons held divergent views regarding the rights of Jewish prisoners to receive kosher diets.

In *United States v. Huss,*[90] the U.S. District Court for the Southern District of New York concluded that the Bureau of Prisons had no obligation to provide kosher meals, accepting the Bureau's argument that this should be true throughout the prison system, including New York City (where most Jewish prisoners are likely to be found), and that the Bureau should have the option of assigning prisoners anywhere in the prison system without regard to their special religious dietary needs.[91] The court based its decision largely on cost, finding it too expensive to require the prison to provide special meals. It also rejected the possibility of using food prepared outside the prison for security reasons, saying it would be too easy a vehicle for smuggling contraband into the prison.[92] The court believed it was possible for an orthodox Jew to have an adequate diet from regular prison fare while abstaining from those items prohibited by religious law, even though evidence was given that kosher dietary requirements go beyond merely abstaining from pork; they affect how all foods are cooked and the utensils with which they are cooked, served, and eaten. The decision also noted that no specific penalty is given for violation of the dietary laws, although it acknowledged the effect on "the moral and spiritual character of the individual."[93]

Just 2 days after the *Huss* decision, the U.S. District Court for the Eastern District of New York arrived at a very different result on the same issue in *United States v. Kahane.*[94] Taking extensive detailed evidence regarding the history and meaning of the Jewish religious dietary laws, the *Kahane* court found that depriving the prisoner, who was an ordained orthodox rabbi, of kosher meals violated his constitutional right to the free exercise of his religion. It further recognized the self-defeating aspect of prison regulation that "affects the moral and spiritual character," as was ignored by the *Huss*

[84] U.S., Department of Justice, Bureau of Prisons, Federal Prison System Program Statement No. 5360.4, secs. 4.a-b (June 3, 1980).
[85] Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968.
[86] *Id.* at 778.
[87] 477 F.2d 616 (4th Cir. 1973), *cert. denied,* 414 U.S. 868.
[88] 410 F.2d 995 (D.C. Cir. 1969).
[89] *Id.* at 1001.
[90] 394 F. Supp. 752 (S.D.N.Y. 1975), *vacated on other grounds,* 520 F.2d 598 (2d Cir. 1975).
[91] 394 F. Supp. at 757.
[92] Bureau of Prison testimony asserted that the cost of providing a kosher meal was prohibitive—two or three times the cost of providing the ordinary prisoner diet. The Bureau acknowledged, however, that although the cost would be slight since there are so few orthodox Jewish prisoners, their real fear was the precedent that such a decision would set for the Black Muslims. *Id.* at 758.
[93] *Id.* at 755, 759.
[94] 396 F. Supp. 687 (E.D.N.Y. 1975), *aff'd sub nom.* Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).

court: "Stripping a prisoner of the opportunity to maintain and strengthen his religious and ethical values would be so counterproductive of good sentencing principles as to require reconsideration of incarceration."[95]

Addressing the government's arguments that had been found persuasive in the *Huss* decision, the *Kahane* court suggested a number of "less drastic alternatives" such as precooked frozen kosher meals that could be prepared with "virtually no administrative inconvenience by heating in regular prison kitchens," the use of disposable utensils, and the provision of fruits, breads, cheeses, tinned fish, and boiled eggs, as long as the alternatives selected supply adequate nutrition for anyone incarcerated for long periods of time. The court refused to give serious weight to the argument regarding cost because of the very small number to be accommodated and found it unlikely that others would demand such a "spartan" and repetitive diet unless their needs were sincere.[96]

The basic difference between the *Huss* and *Kahane* decisions was the test applied—the *Huss* court asking the prisoner to prove the prison regulation "clearly unreasonable,"[97] and the *Kahane* court demanding proof from the Bureau of Prisons of a "compelling state interest."[98] Expressing the "least drastic means test" another way, the *Kahane* court said, "[T]he [Muslim diet] cases require the least denigration of the human spirit and mind consistent with the needs of a structured correctional society."[99]

On appeal to the second circuit, the *Kahane* decision was affirmed, requiring the prison administration to provide a diet "sufficient to sustain the prisoner in good health without violating the Jewish dietary laws. . .," which it found to be "an important, integral part of the covenant between the Jewish people and the God of Israel."[100]

Followers of Islam, whose religious laws forbid the eating of pork or pork products, are also forbidden to handle pork. A Black Muslim prisoner assigned to kitchen duty declined to remove pork from plates during a cleanup detail. Although he was otherwise cooperative and completed his work after someone else removed the pork, he was placed in segregation indefinitely as punishment and held there for an additional 4 months after the Bureau of Prison policy was changed to permit prisoners to refuse to handle pork for religious reasons. Such punishment could constitute cruel and unusual in violation of the eighth amendment, according to the seventh circuit, but the court found no first amendment violation; it believed the constitutional right had not been clearly established at the time of the incident.[101]

Although a once-a-year holiday meal such as a Jewish Passover seder can be provided, Black Muslim prisoners were denied their requests to celebrate Ramadan, which lasts 30 days.[102] The specific request was to have meals before sunrise and after sunset during the Islamic month of Ramadan when followers of Islam fast during the daylight hours. Special dietary requests for the purchase of Akbar coffee and special pastries for Ramadan were turned down by prison officials who said the prison budget could not accommodate the items. The argument was also made that serving meals after dark created a greater security problem.[103] The court found the government had demonstrated "a substantial and compelling interest" but never went the additional step of seeing whether less restrictive means could be found.[104]

Hair Length, Beards, and Religious Vestments

The Bureau of Prisons does not issue regulations regarding the wearing of beards or particular hair length or hair style in connection with religious custom or mandate. However, prisons have generally had regulations that govern hair length and require prisoners to be clean shaven, usually without reference to possible religious requirements.

As in the case of attendance at religious services and meeting special religious dietary needs, the Bureau of Prison regulations regarding the wearing

[95] 396 F. Supp. at 695. The court also termed the act of depriving an observant orthodox Jew of the opportunity to follow his basic religious practices in light of his particular beliefs "cruel and unusual punishment." *Id.* at 703.

[96] *Id.* at 702–03.

[97] 394 F. Supp. 752, 762 (S.D.N.Y. 1975).

[98] 396 F. Supp. 687, 699 (E.D.N.Y. 1975).

[99] *Id.* at 702.

[100] Kahane v. Carlson, 527 F.2d 492, 495–96 (2d Cir. 1975). Without reaching the merits on appeal, the *Huss* decision was vacated by the second circuit for lack of district court jurisdiction. 520 F.2d 598 (2d Cir. 1975).

[101] Chapman v. Pickett, 586 F.2d 22 (7th Cir. 1978).

[102] Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).

[103] *Id.* at 25.

[104] *Id.* at 26.

of special headgear or various religious vestments do not resolve the tough issues:

g. An inmate may wear, during a religious service, appropriate personal, liturgical, or ceremonial apparel. An inmate may retain this apparel within the context of maintaining security, safety, and orderly conditions in the institution and it may be worn or used only during scheduled religious services, ceremonies or in private devotional observances. Personal liturgical and ceremonial apparel and items, such as robes, prayer shawls, prayer rugs, phylacteries, medicine pouches, beads, and medallions may be retained in accord with Program Statement 5500.1 (N.S.), Custodial Manual.

h. Within the context of maintaining security, safety, and orderly conditions in the institution, an inmate may wear within the institution religious headgear such as yarmulkes and kufis as prescribed by the respective faith groups.

A documented determination of a faith group's official prescriptions concerning religious headgear will be obtained by the institution chaplain from the national representatives of that faith group.

Secure storage space will be provided for ceremonial, liturgical, and sacramental group items, such as communion ware, sacred pipes, etc.[105]

Arguments advanced by prison administrators to justify regulation of hair length include hygiene (short hair is easier to keep clean); security (prisoners can hide contraband and weapons in long hair); identification (it is easier to identify prisoners if they are required to keep their hair length the same as it was when ID pictures were taken); safety (long hair presents a danger in working with machinery or fire); and sanitation problems caused when persons with long hair work with food. Most of these same arguments have been raised regarding the prohibition against growing beards, and some have been applied as well to the wearing of special headgear, robes, or shawls.

These arguments proved persuasive in *Brown v. Wainwright,*[106] where a prisoner alleged he was a demigod, that his moustache was a gift from his creator, and that to require him to shave infringed his religious liberty; in *Brooks v. Wainwright,*[107] where a prisoner claimed "divine revelation" commanding him not to shave or cut his hair; and in *Proffitt v. Ciccone,*[108] where a prisoner had made a religious vow not to cut his hair. In each of these cases the courts considered the prison regulations requiring haircut and shave to be justified by one or more of the governmental interests in safety, security, identification, or hygiene.

Prisoners have been more successful, however, in challenging hair and beard regulations on first amendment grounds if they are members of a particular religion or sect that has rules or traditions regarding the wearing of long hair or beards. *Burgin v. Henderson,*[109] a case brought by Sunni Muslims, was remanded to the district court for a hearing on whether the denial of the right to grow beards and to wear prayer hats violated their free exercise rights. In *Monroe v. Bombard,*[110] Sunni Muslim prisoners won the right to wear beards and mustaches. The court was not persuaded by the need for security or identification because less drastic means could be found. For example, the concealment of contraband could easily be met by beard searches, and it is possible to take new photos to reidentify a prisoner who has grown a beard or mustache: "While such an alternative may be administratively inconvenient or financially burdensome, such difficulties do not suffice to excuse the state from according basic constitutional rights to inmates."[111] The court concluded that institutional requirements could reasonably be met through other viable and less restrictive means than the absolute ban on beards and mustaches.[112]

In *Maguire v. Wilkinson,*[113] a regulation that permitted the wearing of beards for religious reasons *only* if inmates already had a beard when they entered prison was held unconstitutional because it implied that all religious beliefs acquired in prison were insincere and it violated equal protection and free exercise guarantees. As in *Monroe,* the court found alternative means to satisfy the interests asserted by the prison administration for hygiene, identification, and security. If these interests could be achieved with respect to those inmates already wearing beards when they entered prison, a way

[105] U.S., Department of Justice, Bureau of Prisons, Federal Prison System Program Statement No. 5360.4, secs. 3.g–h (June 3, 1980).
[106] 419 F.2d 1376 (5th Cir. 1970).
[107] 428 F.2d 652 (5th Cir. 1970).
[108] 506 F.2d 1020 (8th Cir. 1974).
[109] 536 F.2d 501 (2d Cir. 1976).
[110] 422 F. Supp. 211 (S.D.N.Y. 1976).
[111] *Id.* at 217.
[112] *Id.* at 218.
[113] 405 F. Supp. 637 (D. Conn. 1975).

could be found to achieve them for those who wanted to grow beards after they were in prison.[114]

Several cases have been brought by American Indians seeking recognition of a religious right to wear their hair long.[115] In *United States ex rel. Goings v. Aaron,*[116] an Oglala Sioux in Federal prison who had taken a religious oath to wear his hair long was punished for refusing to have his hair cut. In relying on a prior case that did not challenge the prison regulation on first amendment grounds, the court found the regulation "reasonable" and also questioned the prisoner's religious sincerity. Ignoring the fact that he had taken punishment for his beliefs, the court found him to be insincere because he had gone for 26 years without following Indian customs, because no other Indian at the same correctional institution wanted to pursue the same custom, and because he was to be released just 55 days from the trial date and could pursue his desired custom then:[117]

> The court respects him. . .that. . .he gave a promise and he kept it which is commendable. Nevertheless, the court cannot believe that in such short period of time the petitioner has become so devoutly religious in his own tribal ways that he cannot forego growing his hair to the desired length for another brief period.[118]

Other Plains Indians in *Teterud v. Gillman,*[119] however, were held to have a religion in which hair played a central role, and the "compelling interest" and "least drastic means" tests were employed to determine that prison authorities had to find less restrictive alternatives to the hair length regulations. Partly because prison officials had acknowledged his religious sincerity, the court found that the prisoner's interest in wearing the traditional Indian hair style was predicated on belief protected by the first amendment. The court suggested that hair nets or caps could be worn for safety, that long hair could be kept clean, that new identity photos could be taken with long hair, and that whenever searches are made for weapons or contraband a hair search could be included.[120]

On appeal the eighth circuit affirmed, saying it was not necessary to prove that the wearing of long hair is an "absolute tenet of the Indian religion practiced by all Indians. . . .Proof that the practice is deeply rooted in religious belief is sufficient."[121]

In *Crowe v. Erickson,*[122] Sioux prisoners won recognition that the first amendment protects their right to wear their hair in traditional Indian styles. Because hair length and style were found to be a tenet of Indian religion, State penitentiary officials were prohibited from enforcing hair regulations against the Sioux prisoners.

At a later stage in the litigation of *Crowe v. Erickson,* an agreement of settlement included a provision allowing American Indian inmates "to wear headbands, medicine pouches and other recognized Indian artifacts and paraphernalia, subject to legitimate security requirements" to express their culture and practice their religion.[123]

Black Muslims were permitted by the decision in *Fulwood v. Clemmer*[124] to wear religious medals on equal protection grounds because other religious groups wore medals without objection from the prison officials.[125] In *Long v. Parker,*[126] the third circuit remanded for an evidentiary hearing Black Muslim allegations of religious discrimination on a number of issues, including prison refusal to provide them with religious medals when such were routinely provided to Catholic prisoners.

In *Kennedy v. Meacham,*[127] however, inmates who professed to be members of a "satanic religion" were denied the right to retain articles they claimed were necessary to their religion such as symbols of Satan, bells, candles, sticks, gongs, incense, and black robes.[128]

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[114] *Id.* at 640–41.

[115] *See* Peggy Doty, "Constitutional Law: The Right to Wear a Traditional Indian Hair Style—Recognition of a Heritage," 4 *Am. Ind. L. Rev.* 105 (1976).

[116] 350 F. Supp. 1 (D. Minn. 1972).

[117] *Id.* at 3–4.

[118] *Id.* at 4–5.

[119] 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd,* 522 F.2d 357 (8th Cir. 1975).

[120] 385 F. Supp. at 157–60.

[121] 522 F.2d at 360.

[122] No. 72–4101 (D.S.D. Apr. 4, 1975), 2 Ind. L. Rep. 20 (May 1975).

[123] Crowe v. Erickson, No. 72–4101 (D.S.D. May 4, 1977), agreement in settlement item 2.(g), *reprinted in* 4 Ind. L. Rep. F–92 (June 20, 1977).

[124] 206 F. Supp. 370 (D.D.C. 1962).

[125] Muslims were also permitted to wear medals by the courts in Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968), and Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964). *See also,* Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).

[126] 390 F.2d 816 (3d. Cir. 1968).

[127] 382 F. Supp. 996 (D. Wyo. 1974).

[128] *Id.* at 998.

Preaching and Proselytizing

Prison rules often forbid speech and assembly activities that could lead to riots or disruption of prison security:

> It is against the law to engage in a demonstration, disturbance, strike, or act of resistance, either alone or in combination with others, which will tend to breach the peace or which constitutes disorderly conduct.[129]

Black Muslim prisoners in *Fullwood v. Clemmer*[130] and *Evans v. Ciccone*[131] were punished for what they called "preaching" their religions. The prisoner in *Fulwood* spoke of beliefs and practices in a loud voice from the bleachers of the recreation field, attracting attention and causing "tension and resentment among inmates of both races. . .tending to breach the peace."[132] The inmate in *Evans* disturbed other inmates by attempting to preach to them after hours.[133] Although in each case the court found the prisoners were punished not for their religion but for breaking prison rules, the *Fulwood* court found the punishment excessive and unreasonable: solitary confinement followed by 2 years of segregation, including transfer, because of his faith.[134] In *Long v. Katzenbach*[135] the desire of prison officials to discourage proselytizing among prisoners was given as the primary reason for "classification"—keeping lists of prisoners' religious affiliations and not permitting them to change their named religious preference during incarceration.[136]

The Bureau of Prisons regulates, within the context of the first amendment, the receipt of religious literature by prisoners:

> i. Each inmate who wishes to have religious books, publications, or materials must comply with the general rules of the institution regarding the retention and accumulation of personal property. Literature, publications or books about religion or religious teaching are permitted in accordance with the procedures governing incoming publications. A reasonable portion of the budget of the Chaplain should be devoted to the procurement of a variety of religious literature.[137]

A number of cases have litigated prisoners' rights to possess (or even to have supplied) sacred scriptures, to receive books and periodicals of a religious nature, to correspond with leaders of their sects out of prison, and to listen to religious radio broadcasts. Most of the cases concern Black Muslims and the presence of both political and religious content of the materials. The issue is often viewed in a free speech/free press context rather than free exercise, and the standard of "clear and present danger" is often used to determine whether the prison administration can regulate or restrict these rights.

In *Sewell v. Pegelow,*[138] an agreement between the parties was reached that allowed all Muslims to receive the Koran (or Qua'ran), the holy scripture of Islam, on the same basis as the Bible is made available to Christian inmates.[139] The agreement also permitted Muslim prayer books for prisoners who wanted them. The prison would not at the time allow prisoners to subscribe to the *Los Angeles Herald Dispatch,* which carried a column by Elijah Muhammed containing allegedly inflammatory material, although the denial was subject to reevaluation at a later time.[140]

In *Knuckles v. Prasse,*[141] it was held that since without proper interpretation by an ordained Muslim minister Black Muslim literature could be misinterpreted as urging rebellion against prison authorities, the government was not required to make such publications available to inmates because it could constitute a "clear and present danger" in prison.[142] Perhaps if the "less drastic means" test had been used, the court would have required instead that Muslim ministers be provided to assist in the accurate interpretation of the literature.

In *Abernathy v. Cunningham,*[143] it was held that the denial of the newspaper *Muhammad Speaks* and the book by Elijah Muhammad called *Message to the*

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[129] Rule in effect at Lorton prison, as quoted in Fullwood v. Clemmer, 206 F. Supp. 370, 378 (D.D.C. 1962.)
[130] *Id.*
[131] 377 F.2d 4 (8th Cir. 1967).
[132] 206 F. Supp. at 378.
[133] 377 F.2d at 6.
[134] 206 F. Supp. at 379.
[135] 258 F. Supp. 89 (M.D. Pa. 1966).
[136] *Id.* at 92.
[137] U.S., Department of Justice, Bureau of Prisons, Federal Prison System Program Statement No. 5360.4, sec. 3.i (June 3, 1980).
[138] 304 F.2d 670 (4th Cir. 1962).
[139] *Id.* at 671. Other cases ruling that Muslim prisoners were entitled to have Korans include Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964); and Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967).
[140] Sewell v. Pegelow, 304 F.2d 670, 671 (4th Cir. 1962).
[141] 435 F.2d 1255 (3d Cir. 1970).
[142] *Id.* at 1256.
[143] 393 F.2d 775 (4th Cir. 1968).

Blackman in America was not unconstitutional because teachings of hatred evident in the literature produced legitimate concern for maintenance of prison discipline. The court found the denial to be neither racially nor religiously discriminatory.[144] *Muhammad Speaks* was also found to be highly inflammatory in *Long v. Katzenbach,*[145] justifying its refusal by prison authorities.

In *Cooper v. Pate,*[146] the seventh circuit, remanding for a more complete record the issue of denial of Muslims' right to obtain and read publications, placed the burden on the prisoners to prove that the publications were basic to their faith and that censorship by prison authorities was an abuse of discretion. However, the court cautioned that equal protection would require Muslim prisoners to be treated no differently from inmates of other religions.[147]

The third circuit, in remanding *Long v. Parker*[148] for an evidentiary hearing that would require Muslim prisoners to show that *Muhammad Speaks* is basically religious literature and that it serves an important need in the understanding and practice of their belief, also placed on prison authorities the burden of justifying the withholding of such literature by proving it constitutes a "clear and present danger":

> Mere antipathy caused by statements derogatory of, and offensive to the white race is not sufficient to justify the suppression of religious literature even in a prison. Nor does the mere speculation that such statements may ignite racial or religious riots in a penal institution warrant their proscription. To justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution.[149]

The fifth circuit, in *Walker v. Blackwell,*[150] permitted both the possession of *Message to the Blackman in America* and subscription to *Muhammad Speaks.* The court found the newspaper filled with news and editorial comment that encouraged Black Muslim readers to improve themselves through work and study, and further found that it did not directly incite physical violence.[151] While terming the district court finding that *Muhammad Speaks* was inflammatory "clearly erroneous," the court said that the prison warden could "invoke security measures to screen out possible messages and contraband from the pages. . .[and] should the newspaper ever develop a substantially inflammatory effect on prison inmates, it is at the warden's discretion to take action designed to avoid imminent prison violence."[152]

At the same time, the *Blackwell* court refused prisoners' requests to listen to a weekly radio broadcast by Elijah Muhammad because the prison staff considered it inflammatory and the prisoners failed to demonstrate a denial of equal protection or that the broadcast was "essential to [their] spiritual well-being. . .rather than merely a source of '. . .spiritual rest and consolation and inspiration. . .' to them."[153]

The *Blackwell* court did, however, allow Muslim prisoners to correspond with their religious leader, Elijah Muhammad, for the limited purpose of seeking spiritual advice.[154] In *Long v. Katzenbach,*[155] Black Muslims were denied that right because no religious groups had permission to correspond with their religious leaders and because Elijah Muhammad was an ex-convict and his writings were "inflammatory." The court found that no action taken by the prison administrators was "arbitrary or capricious."[156] But in *Peek v. Ciccone,*[157] an inmate of the Springfield, Missouri, Federal Medical Center was given permission to write to the Pope, as no reason of prison security or discipline justified refusing permission:

> No question of prison discipline or administration is involved. There is no evidence or reason to suppose that the Pope needs the protection of the Medical Center. Therefore, the petitioner should be allowed to communicate his religious experience and claims to the Pope. To

[144] *Id.* at 779. One judge dissented, arguing that the particular prisoner's behavior could not be made any worse and that if the fear was that he might distribute the literature, there were less restrictive means of preventing this.

[145] 258 F. Supp. 89 (M.D. Pa. 1966).

[146] 382 F.2d 518 (7th Cir. 1967).

[147] *Id.* at 523. The plaintiffs in Cooper v. Pate also sought permission to purchase and read Arabic and Swahili grammar books, but they were unable to satisfy the court that these were necessary to the practice of their religion.

[148] 390 F.2d 816 (3d Cir. 1968).

[149] *Id.* at 822.

[150] 411 F.2d 23 (5th Cir. 1969).

[151] *Id.* at 28–29.

[152] *Id.* at 29.

[153] *Id.* at 28.

[154] *Id.* at 29.

[155] 258 F. Supp. 89 (M.D. Pa. 1966).

[156] *Id.* at 93.

[157] 288 F. Supp. 329 (W.D. Mo. 1968).

forbid this is an invidiously discriminatory and arbitrary denial of religious freedom.[158]

Cooper v. Pate[159] found no showing of a clear and present danger to justify prison denial of permission for Muslim prisoners to correspond with and receive visits from ministers of their faith, and prisoners were similarly given permission to correspond with their church leader by the court in *Fulwood v. Clemmer*[160] and by agreement in *Sewell v. Pegelow*[161] and *Abernathy v. Cunningham.*[162]

[158] *Id.* at 334.
[159] 382 F.2d 518 (7th Cir. 1967).
[160] 206 F. Supp. 370 (D.D.C. 1962).
[161] 304 F.2d 670 (4th Cir. 1962).
[162] 393 F.2d 775 (4th Cir. 1968).

Conclusion

The common thread that runs through the examination into such diverse areas as prisons, employment, and Indians is the clash that occurs and the attempt that must be made to balance individual and group rights under the religion clauses of our Constitution with other competing public interests.

Chapter 4 discussed state-imposed limitations on the free exercise of religion by prison inmates and some establishment of religion problems. Here a clash occurs when, for example, rights of prisoners to attend services, adhere to certain diets, observe special grooming and clothing requirements, and celebrate holidays must be weighed against the state's interest in maintaining security and protecting the public. As was pointed out in that chapter, some prison administrations make a serious attempt to accommodate the practices and beliefs of their inmates; others seem to believe that making a single chaplain available fulfills their obligation. The free exercise of religion should not be infringed within the prison setting unless the security of the institution is at stake.

Chapter 3 examined employment discrimination, including the perpetuation of discrimination through facially neutral practices within the corporate arena and accommodation problems of Sabbatarians and others with "incompatible practices." The balancing act pits the employer's interest in economy and administrative uniformity against the interests of those whose religious beliefs require them to observe "inconvenient" Sabbaths and holidays, wear certain "incompatible" garments, or refrain from joining unions. While the reasonableness of the accommodation is controlling, employers should be mindful of the constitutional framework under which these issues arise and not make "inconvenience" the test for religious practice.

Our conclusion, based on this report and our consultation, is that the Nation would be best served by an expansive interpretation of the free exercise clause. Although comparisons can be made between discrimination based on race, sex, or national origin and discrimination based on religion, the Supreme Court has noted that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth. . . ."[1] Membership in a religious group is treated differently, perhaps because the choice of joining and practicing a religion is largely voluntary. A basic difference among the groups is also that minorities and women are struggling to be treated equally while adherents of various religions are struggling to preserve their diverse differences and identities.

There is also room for difference of opinion, however, as to how "voluntary" religious belief is. Thomas Jefferson, in the first version of his Bill for Establishing Religious Freedom, wrote, "[T]he opinions and belief of men depend not on their own

[1] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

will, but follow involuntarily the evidence proposed to their minds. . . ."[2] And Robert G. Ingersoll has written:

> The brain thinks without asking our consent. We believe, or we disbelieve, without an effort of the will. Belief is a result. It is the effect of evidence upon the mind. The scales turn in spite of him who watches. There is no opportunity of being honest, or dishonest, in the formation of an opinion. The conclusion is entirely independent of desire.[3]

One may also question the voluntariness of religious beliefs that are held so strongly that the believer is willing to die for them. Whether religious belief is voluntary or not, the roots of religious practice are deep—probably as old as the human race itself.[4] The right to free exercise has been called "primordial":

> Liberty of Conscience, or, as it ought to be called more properly, the liberty of worship, is one of the primordial rights of man, and no system of liberty can be considered comprehensive, which does not include guarantees for the exercise of this right.[5]

Those in a capacity to balance free exercise rights against other legitimate public interests should give the free exercise of religion the widest possible latitude.

There should be caution, however, with respect to the establishment clause, not only to protect those sects that may not enjoy political power, but also to protect those without a religious persuasion. As Mr. Justice Jackson has observed, "The day that this country ceases to be free for irreligion, it will cease to be free for religion, except for the sect that can win political power."[6]

The history reviewed in chapter 1 of this report states the case for vigilance against an establishment of religion. Established religions were the cause of the grievous oppression that virtually all religious sects have suffered at some time or place.

With respect to establishment of religion, what is especially appropriate in this time of heightened national interest in religion is best expressed by the words of Thomas Jefferson with which we opened this report:

> It behooves every man who values liberty of conscience for himself to resist invasions of it in the case of others, or their cases may, by a change of circumstances, become his own.

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[2] Frank Swancara, *Thomas Jefferson versus Religious Oppression* (New York: University Books, 1969), p. 7, citing bill.

[3] Ibid., p. 16, citing Ingersoll.

[4] Anthropologist Clyde Kluckhohn has listed religion as one of three attributes separating man from other living things, the other two being the systematic making of tools and the use of abstract language. He has written, "The universality of religion (in the broadest sense) suggests that it corresponds to some deep and probably inescapable human needs." Kluckhohn, in William A. Lessa and Evon Z. Vogt, eds., *Reader in Comparative Religion: An Anthropological Approach* (New York: Harper and Row, 1979), 4th edition, p. v.

[5] Sanford H. Cobb, *The Rise of Religious Liberty in America* (New York: Burt Franklin, 1902, reprinted 1970), pp. 16–17, quoting Lieber.

[6] Zorach v. Clausen, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting).

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