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Report to the Attorney General

Religious Liberty under the Free Exercise Clause

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RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE

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The First Amendment to the U.S. Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". There are, perhaps, few topics in modern American constitutional thought that have occasioned as much discussion as the subject of Church and State. Indeed, the interface between government and religion remains, to a large degree, as controversial today as it was in an era when Thomas Jefferson, James Madison, George Mason, Patrick Henry and others debated the separation of the sectarian from the secular.

If time has not resolved the early debates, the expansion of the role of government in the past few decades has only heightened the need for continued discussion. This expansion of governmental influence over community, commercial, educational, and family affairs raises anew questions regarding the influence of religion in government and the role of government in religion.

These are difficult and perhaps intractable questions. But it is incumbent upon members of both the legal and the religious communities to work through the constitutional algorithms with diligence, tolerance, and good will.

This study, "Religious Liberty Under the Free Exercise Clause" makes a valuable contribution to our understanding of the Free Exercise Clause. Prepared by the Office of Legal Policy within the Department of Justice, this study is one of a series of analyses of contemporary legal issues undertaken by OLP.

I anticipate that this study will spark new thought on a topic of considerable importance to the nation, a topic about which there are several reasonable points of view. It should be of interest to anyone concerned about religious liberty.

Edwin Meese III

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Attorney General

Executive Summary

The First Amendment to the United States Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." There are few constitutional provisions about which more has been written and less understood than the religion clauses of the First Amendment. It is indeed ironic that the Framers of the Constitution, who sought to preserve religious liberty and to free a people from their history of sectarian disputes, should, by their very attempt to maintain religious peace, have fostered an equally turbulent dispute over the meaning of their words. The proper line between church and state remains, as Professor Kurland put it, an issue destined "to generate heat rather than light." P. Kurland, *Religion and the Law* 15 (1962).

It is widely agreed that the decisions of the Supreme Court in the area of church and state and freedom of religion evidence such a lack of a unifying theory as to be irreconcilable. Critics frequently claim that the Court's decisions are inconsistent with the language of the First Amendment, its history, and most obviously, with prior decisions of the Court itself. For example, Professor Kurland has explained that the Constitution has become the "excuse" for the Court's decisions, but not a reason for them. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court* 24 Vill. L. Rev. 3, 14 (1978-79). And more than twenty years ago Mark DeWolfe Howe complained of the apparent political compromises reflected in the Court's decisions and charged that "the Court has too often pretended that the dictates of the nation's history, rather than the mandates of its own will, compelled a particular decision. By superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer." M. Howe, *The Garden and the Wilderness* 4 (1965).

The inability to find a principled basis in the Constitution for the Court's decisions has led some scholars to complain that the decisions are *sui generis* and of little predictive value -- creating what Michael Malbin refers to as "judicial government by *ad hocracy*." M. Malbin, *Religion, Liberty, and Law in the American Founding* 3 (AEI Reprint 1981). In particular, there is an obvious tension in the cases between the Free

Exercise Clause and the Establishment Clause.[1] This confusion unfortunately leaves judges, legislators, and government administrators with little guidance for enacting or enforcing the law.[2]

The reasons for the tension between the Court's decisions and the Constitution and its history are numerous and complex. Certainly, incorporation of the religion clauses via the Fourteenth Amendment is unsupported by the plain language of the First Amendment, which is plainly drafted as a limitation on Congress alone. But once the Court could state that the First Amendment's disability on "Congress" included the states as well, further departure from the text and history of the religion clauses became of lesser moment.[3] Even assuming for purposes of this paper that incorporation is "*fait accompli*,"[4] we cannot overlook the fact that reverberations from incorporation may still be felt in this area, especially when we turn to the historical sources for an understanding of the Framers' intent. Because the First Amendment they drafted was not applicable to the states and was as much an assurance to the states of federal nonintervention as it was a guarantee of religious liberty to individuals, the Framers did not give the consideration to the religion clauses that they might had the Amendment been binding on the states also. We are thus left with a limited history of an important

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[1] Justice Rehnquist, noting the apparent conflict between the clauses, once described them as "the channel between Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting).

[2] The Department has felt the tension and the difficulty in reconciling the religion clause cases. Within the past two Terms the Department has participated directly or as *amicus* in numerous cases, including *Bowen v. Roy*, 54 U.S.L.W 4603 (U.S. June 11, 1986); *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326 (1986); *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986); *Aguilar v. Felton*, 105 S. Ct. 3232 (1985); *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985); *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985); and *Tony and Susan Alamo Foundation v. Donovan*, 105 S. Ct. 1953 (1985). The topic of religious liberty also has been of great concern to the Administration on a broader level and has been the subject of major addresses by the President and the Attorney General. *See, e.g.*, Ronald Reagan, Remarks at the Annual Convention of the National Religious Broadcasters (Jan. 31, 1983); Ronald Reagan, Remarks at the Annual Convention of the National Parent-Teacher Association (Jun. 15, 1983); Edwin Meese III, Address before the Knights of Columbus (Aug. 7, 1985).

[3] *See* Griswold, *Absolute is in the Dark -- A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 Utah L. Rev. 167, 170-71 (1963) (criticizing Justice Black's literal approach to the phrase "no law," but his acceptance of incorporation).

[4] Kurland, 24 Vill. L. Rev. at 11.

constitutional provision that through judicial interpretation has been transformed into a much broader -- and very different -- amendment. As a consequence, historical analysis, though by no means impossible, has been made more difficult.

A second reason for the difficulty in reconciling the Court's decisions with the history of the Free Exercise Clause and its text is the advance of the affirmative or welfare state and the increased opportunity for conflict between the activities of the churches and the sweeping regulations of the state. There were virtually no judicial references to the religion clauses in the first eighty-plus years following the adoption of the Bill of Rights. The Court did not address the Free Exercise Clause squarely until *Reynolds v. United States*, 98 U.S. 145 (1878), and no further major cases were decided by the Court until the 1940's. So the history of the Court's interpretation of the religion clauses is relatively short and -- more importantly -- very recent. We unfortunately do not have Supreme Court decisions contemporaneous with the generation of those responsible for promulgating the First Amendment. By and large the task of giving meaning to the First Amendment has fallen to modern jurists whose experience with revolutions in government is limited to the New Deal and the Great Society.

The so-called "Affirmative Age" of government has transformed the way in which we approach constitutional rights by emphasizing entitlements over responsibilities, equality over liberty, and positive over natural law. Our rights-based era has cast the government -- and particularly the courts -- in the role of guardian of our rights, and because the influence of the government is so widespread, the power to determine what rights it will guard has become the power to determine the rights themselves. The whole situation is reminiscent of Thomas Paine's comment on toleration: "Toleration is not the *opposite* of intolerance, but it is the *counterfeit* of it. Both are despotisms: the one assumes to itself the right of withholding liberty of conscience, the other of granting it." Thomas Paine, *The Rights of Man*, in *Representative Selections* 106 (H. Clark ed. 1944)(emphasis in original).

One purpose of this project is to remind us that the Free Exercise Clause of the First Amendment is a substantive restriction on the activities of the government; that the religion clauses are expressed as a disability on the government, commanding not merely restraint or accommodation but abstention; and that freedom of religion is not an affirmative claim against the government, but a grant of immunity for

religious beliefs and actions. A second purpose is to analyze carefully the text of the Free Exercise Clause, to harmonize the language with its history, and to propose a workable and principled scheme for the Free Exercise Clause that Department attorneys can rely upon to analyze the myriad religious liberty cases they are increasingly called upon to evaluate and handle.

This memorandum deals with the broad topic of religious liberty. It focuses primarily but not exclusively on the Free Exercise Clause and the cases decided under it. Section I reviews the history of the Free Exercise Clause, the constitutional debates, and commentary by the Founders. A significant portion of this Section is devoted to discussing how the states that ratified the Constitution viewed the free exercise of religion; this record is important because it has been overlooked elsewhere in the literature and because it adds significantly to our understanding of the extent of -- and limitations on -- free exercise at the time the First Amendment was drafted and ratified. In Section II, we analyze carefully the text of the Free Exercise Clause. The Section then demonstrates the harmony between the textual analysis and the views of the Framers and the ratifying states. Finally, the Section compares this interpretation of the text and history of the Free Exercise Clause with the most prominent theoretical approaches to the Clause -- the belief/action dichotomy, the neutrality theories, and the balancing test. Section III draws upon the conclusions reached in Section II to identify the principles we believe should be relevant in Free Exercise Clause cases, and considers how the courts should go about applying those principles to the cases. Section IV organizes the principles identified in Section III into an analytical scheme that courts and lawyers can use to think more clearly about Free Exercise Clause issues, and Section V describes how this approach might affect the premises used and the results obtained in the prominent Free Exercise Clause cases.

To summarize our conclusions briefly, we believe that the Free Exercise Clause, as evident from its text and supported by its history, prohibits the government from enacting any law that either forbids or prevents an individual or institution from expressing or acting upon its sincerely-held "religious" beliefs, which include beliefs that are based upon and emanate from either a duty to transcendent reality or an acknowledgement of extratemporal consequences for temporal actions. The Free Exercise Clause demands not only state neutrality toward religion and state abstention from regulation of religious belief, but also special protections for religion. According to the original understanding

of the Framers and the states that ratified the First Amendment, the only exception to the general rule that the government has no right to interfere with the free exercise of religion is when government action is necessary to prevent manifest danger to the existence of the state; to protect public peace, safety, and order; or to secure the religious liberty of others. Under these limited and compelling circumstances the government may interfere with religious liberty, but it may do so only by the least restrictive means necessary to protect these interests.

Figure 1 on the following page presents our conclusions in the form of a flow chart derived from the analytical model provided in Section III of the paper. We offer this chart and the analytical model reflected therein not as a cookbook solution to Free Exercise issues, but rather as a guide for addressing all the considerations relevant thereto in a principled and orderly fashion. The page references provided in Figure 1 indicate where in the text of the paper the principle in question is discussed more fully.

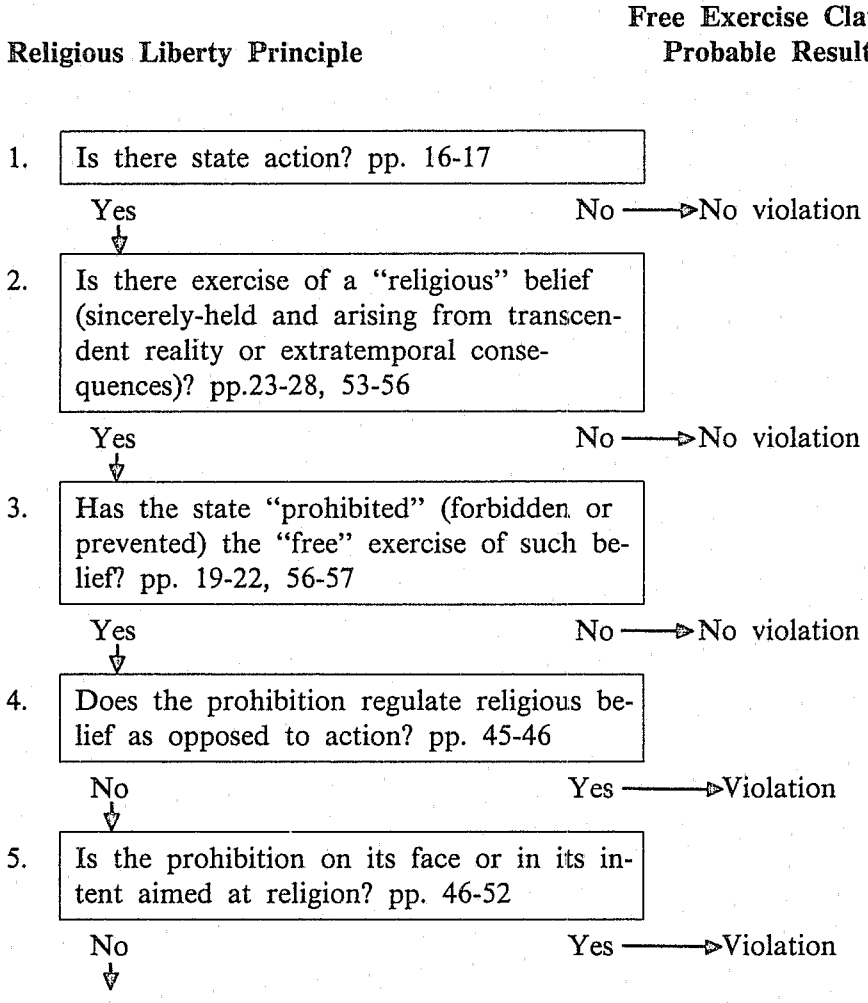
Finally, we note that the appendices to this paper provide substantial background materials in support of the body of the paper. In Appendix A we review the early commentaries by Story and Cooley and the early religion cases. In Appendix B we reproduce in full the religious liberty provisions of state constitutions as they existed when the Free Exercise Clause was drafted and ratified. In Appendix C we survey current problems in the area of religious liberty by analyzing the leading cases. Because of the number of cases that must be reviewed, Appendix C divides the cases by context. We first discuss the employment cases, then the education, armed forces, prison, and Native American cases. In the subsection on police power we review Free Exercise Clause claims as they have arisen with respect to zoning, solicitation, drug use, and licensing laws. Appendix C concludes with a discussion of fiscal regulation of churches and general regulation of domestic matters and health care. Appendices D and E, respectively, discuss permissive accommodation of religion and the impact of proposed *Grove City* legislation on religious liberty.

In no sense does this memorandum pretend to prescribe a definitive approach to the Free Exercise Clause. Rather, it is an attempt to point out some of the deficiencies in the current reasoning of the courts and to offer a different approach to the very difficult problems of reconciling religious conscience with the needs of a modern government. There has been much good thinking about the religion clauses in the past years, and

this memorandum has benefited greatly from the writings of others. Moreover, we are mindful of the struggles of the commentators and of the Court itself. So as we introduce our views, we so do modestly with the caveat that this is a preliminary study and that "the principle offered is meant to provide a starting point for solutions to problems brought before the Court, not a mechanical answer to them." Kurland, *Religion and the Law* at 18.

Figure 1

Thinking Clearly About Religious Liberty Under the Free Exercise Clause



Religious Liberty Principle	Free Exercise Clause Probable Result
6. Is the prohibition supported by a compelling state interest (preventing manifest danger to the existence of the state; protecting public peace, safety, and order; or protecting the religious liberty of others)? pp. 57-59	No ⟶ Violation
Yes ⇩	
7. Is the prohibition the least religion-restrictive alternative? pp. 57-59	Yes ⟶ No violation No ⟶ Violation

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RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE

I. Background on the Free Exercise Clause

A. Historical Context

The history of religion in the United States is inextricably woven into the history of the nation. The persecution of religious groups in Europe and subsequent emigration of early settlers; the founding of religious colonies in Massachusetts, Rhode Island, Connecticut, Pennsylvania, and Maryland; and the early struggles over religious tolerance are well documented.[1] By the time of the founding of the nation, nine of the thirteen states (Virginia, New York, Maryland, South Carolina, North Carolina, and Georgia [Anglican]; and Massachusetts, Connecticut, and New Hampshire [Congregational]) had established churches. But a new era of religious diversity was emerging, and between the start of the Revolutionary War in 1775 and the drafting of the Constitution in 1787, four of the nine states had disestablished their churches. R. Cord, *Separation of Church and State* 4 (1982).

Disestablishment, however, was not always synonymous with religious tolerance. At various times the states subjected religious believers to cruel choices, including compelling attendance at approved services under threat of fine or imprisonment, expelling people from communities or states because of their religious beliefs, and imprisoning members of unpopular sects for preaching in public. C. Antieau, A. Downey, & E. Roberts, *Freedom from Federal Establishment* 16-29 (1964). In 1787, although every state except Connecticut had some constitutional provision protecting the free exercise of religion, only Rhode Island, which had a long history of religious tolerance largely due to the influence of Roger Williams, and Virginia, which had disestablished the Anglican Church in 1786, had adopted complete legal guarantees for freedom of religion. The remaining states retained some restrictions on religious worship, even though they had no established church. New York, Delaware, North Carolina, and Georgia disqualified clergymen from holding public office, while New Jersey, North Carolina, and Georgia limited certain public offices to Protestants. Connecticut,

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[1] *E.g.*, C. Antieau, A. Downey, & E. Roberts, *Freedom From Federal Establishment* (1964); L. Pfeffer, *Church, State and Freedom* (1967).

which did not adopt a free exercise provision until 1818, exempted non-Congregationalists from supporting the Congregational church established by that state so long as they certified that they worshipped and supported another church. Pfeffer, *Church, State and Freedom* 116-18 (1967).

The state legislatures were not the only deliberative bodies enacting laws pertaining to religion. In 1774 the Continental Congress began the practice of starting its sessions with a prayer offered by its chaplain, a practice continued by the First Congress in 1789. The Continental Congress had designated July 20, 1775 as a day of fasting and prayer. In 1777 Congress imported 20,000 Bibles and later supported the idea of printing an American edition of the Bible. And, in 1787 Congress enacted the Northwest Ordinance in which it declared that religion and morality were necessary to good government.[2]

B. The History of the Free Exercise Clause

The history of the Free Exercise Clause, especially when compared with the debates over the Establishment Clause,[3] is less than abundant. As a result, to the extent it has looked to history at all as a means of understanding the religion clauses, the Supreme Court has relied most heavily on the history of religious liberty in Virginia and the writings of Madison and Jefferson.[4] What the Court -- and the commentators -- have missed, unfortunately, is the rich history of the understanding in the states of the phrase "free exercise."[5] While we might wish for a more complete legislative history of the Free Exercise Clause, the courts have failed to review even such records as do exist.

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[2] *See Marsh v. Chambers*, 463 U.S. 783, 786-90 (1983); Pfeffer, *Church, State and Freedom* at 120-21; Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and A Critique of the Reynolds and Everson Decisions*, 20 Wake Forest L. Rev. 569, 600 (1984).

[3] *See* Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 24 (1978-79).

[4] *See* e.g., *Everson v. Board of Education*, 330 U.S. 1, 33-41 (1947); *see also* M. Howe, *The Garden and the Wilderness* (1965).

[5] In other instances, members of the Court have looked to the parallel provisions in state constitutions that existed at the time of the drafting of the Bill of Rights as a guide to its meaning. *Green v. United States*, 355 U.S. 184, 200-02 (1957) (Frankfurter, J., dissenting) (double jeopardy); *Adamson v. California*, 332 U.S. 46, 88 & n.14 (1947) (Black, J., dissenting) (self-incrimination); *Murdock v. Pennsylvania*, 319 U.S. 105, 122-27 (1943) (Reed, J., dissenting) (freedom of the press).

1. The Adoption of the Free Exercise Clause

After the drafting of the Constitution at Philadelphia in 1787, the document was submitted to the states for their ratification. At that point the only mention of religion in the proposed Constitution was in Article VI, which provided that no religious test could be required as a qualification for federal office. When the absence of a guarantee against establishment and of an assurance of freedom of religion was raised, the delegates divided over the need for such provisions in the proposed Constitution. Some argued that the right to religious liberty was inalienable and thus beyond the power of the government; others expressed the opinion that the new national government could not establish a church because no such power was conferred upon it. Most probably felt that since the Constitution was silent, the power to deal with religious questions remained with the states. *See* Smith, 20 Wake Forest L. Rev. at 604.

In any event, many delegates insisted that a bill of rights, including enumerated religious rights, be included. Despite the assurances of Madison, Hamilton, and others that no such enumeration was necessary,[6] at least four states -- Virginia, North Carolina, New York, and New Hampshire -- submitted proposals. M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 3-4 (1978); Smith, 20 Wake Forest L. Rev. at 604-05. James Madison was finally convinced of the need for a bill of rights, became a member of the group considering amendments (the Committee of Eleven), and submitted a proposal that would have forbidden the abridgement of civil rights "on account of religious belief or worship." Smith, 20 Wake Forest L. Rev. at 605-08.

On August 15, 1789, the House of Representatives resolved itself into the Committee of the Whole and began consideration of the proposed amendments to the Constitution. One proposal provided that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 *Annals of Congress* 729 (Aug. 15, 1789). Rep. Sylvester expressed his fears that the amendment might "abolish religion altogether." Rep. Huntington voiced a similar objection. *Id.* at 730. To allay these concerns, James Madison suggested that the word "national" be inserted before "religion" and offered his opinion that the need for the

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[6] *See, e.g., The Federalist* No. 84 at 579-80 (J. Cooke ed. 1961) (A. Hamilton); 5 J. Madison, Writings 174, 176 (1904).

amendment lay in the people's fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731. The House finally agreed to a proposal, introduced by Rep. Ames, which read, "Congress shall make no law establishing religion, or to prevent the exercise thereof, or to infringe the rights of conscience." *Id.* at 766 (Aug. 20, 1789).

In the Senate, several amendments were considered. An early draft amendment, which provided that "Congress shall make no law establishing one religious sect or society in preference to others, nor to infringe on the rights of conscience," *Journal of the First Session of the Senate* 70 (Aug. 25, 1789), was rejected in favor of a much narrower amendment: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." *Id.* at 77 (Sept. 9, 1789). The conference committee agreed on the present language in the First Amendment, omitting any reference to the "rights of conscience."

2. The States and the Free Exercise of Religion

The concept of a guarantee of free exercise of religion was not unfamiliar to the states that ratified the First Amendment. By 1789 all of the states except Connecticut had adopted constitutions or declarations of rights granting religious freedom. *See* R. Rutland, *The Birth of the Bill of Rights, 1776-1791* 41-77 (1983). It is not surprising, therefore, that the historical records on the debates over the Free Exercise Clause -- either at the convention or in the states -- are sparse. But far from indicating that a free exercise clause was unusual or unnecessary, the lack of a more complete historical record suggests an unstated consensus in the states' understanding of the Free Exercise Clause as reflecting in large measure the meaning of their own guarantees of religious freedom.

The term "free exercise" appeared as early as 1663, when the Rhode Island Charter secured to its inhabitants "the free exercise and enjoyment of all their civil and religious rights" so long as "they behave[d] themselves peaceably and quietly . . . any law, statute, or clause . . . to the contrary thereof, in any wise, notwithstanding." Charter of Rhode Island and Providence Plantations (1663) (spelling modernized).[7] More modern usage can be traced to James Madison. At the Virginia Constitutional

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[7]The Rhode Island Charter and other colonial constitutions are compiled in B. Poore, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (1878). The religious liberty guarantees enacted by the states

Convention of 1776, George Mason proposed to protect religious liberty in the Declaration of Rights. Mason's draft stated that "all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience." Madison, who objected to the use of the term "toleration," offered instead that "all men are entitled to the full and *free exercise* of [religion] according to the dictates of conscience." Malbin, *Religion and Politics* at 21-22 (quoting G. Hunt, *Madison and Religious Liberty*, American Historical Association Annual Report 166-67 (1901)) (emphasis added).

The Virginia Assembly ultimately adopted James Madison's proposal. As finally promulgated, Section 16 of the Declaration of Rights provided in part:

> That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conscience, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience.

Despite this promise of not coercing the exercise of religion, Virginia maintained its established church, the Episcopal Church. Hostility to its establishment and various other restrictions caused the Baptists in Virginia to seek further protection through disestablishment. Joined by the Presbyterians, Methodists, and other minority religious groups, the Baptists opposed a "Bill Establishing a Provision for Teachers of the Christian Religion" introduced in 1784 by Patrick Henry. Initially passed by the legislature but then postponed until the following session, the bill spurred Madison in 1785 to write his "Memorial and Remonstrance Against Religious Assessments." The Virginia Assembly finally rejected the bill and instead enacted Jefferson's "Bill for Establishing Religious Freedom." *See* Malbin, *Religion and Politics* at 22-28; Pfeffer, *Church, State and Freedom* at 105-14; Rutland, *The Birth of the Bill of Rights* at 82-88.

The Virginia 1776 Declaration of Rights was widely distributed among the states and served as a model for other declarations of religious free exercise. Rutland, *The Birth of the Bill of Rights* at 44. Almost all of the other states quickly adopted some form of free exercise clause. At

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contemporaneous with the drafting of the First Amendment are provided in Appendix B.

least six other states had religious liberty guarantees containing the phrase "free exercise."[8] Other states, probably following Pennsylvania's phrasing, adopted provisions protecting the "natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding."[9] In either case, the majority of the states understood that the right to free exercise could not be abridged unless such exercise threatened the public peace or safety.

The qualification on the exercise of religion varied in the territories and from state to state. For example, the Northwest Ordinance of 1787 provided that "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments." The Georgia Constitution of 1777 simply stated that "All persons shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the state." The Maryland Constitution was much broader and provided in part that "no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the state, or shall infringe the laws of morality, or injure others in their natural, civil, or religious rights."[10] The remaining states placed

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[8] *See* Del. Decl. of Rights § 2 (1776); Ga. Const. art. LVI (1777); Ga. Const. art. IV, § 5 (1789); N.Y. Const. art. XXXVIII (1777); Pa. Decl. of Rights II (1776); S.C. Const. art. XXXVIII (1778); Va. Bill of Rights § 16 (1776); *see also* Del. Const. art. I, § 1 (1792); Vt. Const. chap. I, § III (1777).

[9] *See* Del. Decl. of Rights § 2 (1776); N.H. Const. art. V (1784); N.J. Const. art. XVIII (1776); N.C. Decl. of Rights XIX (1776); Pa. Decl. of Rights II (1776); *see also* Ky. Const. art. XII (1792); Tenn. Const. art. XI, § 3 (1796); Vt. Const. chap. I, § III (1777).

[10] Northwest Ordinance art. I (1787); Ga. Const. art. LVI (1777); Md. Const. art. XXXIII (1776); *see* Del. Decl. of Rights §§ 2, 3 (1776); Mass. Const. art. II (1780); N.H. Const. art. V (1784); N.Y. Const. art. XXXVIII (1777); R.I. Charter (1663); S.C. Const. art. XXXVIII (1778); *see also* Conn. Const. art. I, § 3 (1818).

In addition to the public peace and safety qualification, four states also reserved the right to interfere with religious worship if, under color of religion the laws of morality or licentiousness were violated. Md. Const. art. XXXIII (1776); N.Y. Const. art. XXXVIII (1777); R.I. Charter (1663); S.C. Const. art. XXXVIII (1778). Furthermore, Delaware provided that free exercise of religion could not disturb "the happiness" of society, while Massachusetts and New Hampshire added that no man acting under color of religion could disturb others in their religious worship. Del. Decl. of Rights § 3 (1776); Mass. Const. Decl. of Rights art. II (1780); N.H. Const. art. V (1784).

no such qualification on the free exercise of religion.[11]

Although many of the states sought to protect individual conscience, it is apparent that the free exercise clauses also protected institutional as well as personal beliefs and activities. It should be remembered that the Virginia Declaration of Rights, which served as model for the other states, was enacted at the behest of the minority Protestant sects in Virginia. Contemporaneous statements by Thomas Jefferson, James Madison, and others add further support to the notion that free exercise clauses secured the religious practices of religious institutions, and in particular, the minority sects, and that they alone could judge their own doctrines and affairs. Perhaps the plainest statement is found in Jefferson's 1808 letter to Reverend Samuel Miller:

> I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. . . . Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline has been delegated to the General Government. . . . Every religious society has a right to determine for itself the time for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.

11 *The Writings of Thomas Jefferson* 428-29 (A. Lipscomb, ed. 1904). He expressed a similar view in his second inaugural address:

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[11] Both Madison and Jefferson had previously recognized the necessity -- and the limited nature -- of some qualification on free exercise. In his redraft of the Virginia Declaration of Rights, Madision wrote that "no man or class of man ought on account of religion to be . . . subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty, and the existence of the state be manifestly endangered." Malbin, *Religion and Politics* at 21-22 (quoting Hunt, *Madison and Religious Liberty*, American Historical Association Annual Report 166-67 (1901)); *see also* Smith, 20 Wake Forest L. Rev. at 582-84. Jefferson, in his Bill for Establishing Religious Freedom, had written that "it is time enough for the rightful purposes of civil government for its officers to interfere when principles brake out into overt acts against peace and good order." *The Complete Jefferson* 946-47 (S. Padover, ed. 1943). He later wrote in his Notes on Virginia that the "legitimate powers of government extend to such acts only as are injurious to others." 2 *The Writings of Thomas Jefferson* 221 (A. Lipscomb, ed. 1903).

> In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the religious exercise suited to it; but have left them, as the Constitution found them, under the direction and discipline of state or church authorities acknowledged by the several religious societies.

The Complete Jefferson 412 (S. Padover, ed. 1943). In 1785 James Madison wrote in his well-known Memorial and Remonstrance that "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Memorial and Remonstrance Against Religious Assessments § 1 (1785), *reprinted in Everson v. Board of Education*, 330 U.S. 1, 64 (1947).[12]

The authors of the First Amendment and those who were part of the states' ratifying conventions had focused on the problem of protecting minority protestant sects, but there is evidence that they understood that the First Amendment would extend to sects not even found in America. In the debates in North Carolina, James Iredell recognized that under the proposed amendment Muslims, Hindus, and "pagans" might worship freely and even hold office. "But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?" 4 J. Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 194 (1836). In response, Governor Johnston agreed and noted that non-Christians would probably not be elected to public office unless either the people laid aside their Christianity or the candidates "acquire[d] the confidence and esteem of the people of America by their good conduct and practice of virtue." *Id.* at 199.[13]

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[12] *Cf.* 3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 330 (1836) ("[t]here is not a shadow of right in general government to intermeddle with religion. Its least interference with it would be a most flagrant ursurpation") (J. Madison); *id.* at 204, 469 (no power given over religion; general government cannot "take away or impair the freedom of religion") (E. Randolph).

[13] *Cf.* T. Cooley, *A Treatise on Constitutional Limitations* 662 n.1 (7th ed. 1903) ("all the liberty of conscience I ever pleaded for turns upon these two hinges: that none of the Papists, Protestants, Jews or Turks be forced to come to the ship's prayers or worship if they practice any") (quoting Roger Williams, as quoted in I *Arnold's History of Rhode Island* 254).

There is no direct evidence to demonstrate what the Founders would have considered to constitute a "religion" for First Amendment purposes. They obviously recognized the various Protestant sects, Quakers, Catholics, and Jews, all of which were represented in America. They were certainly aware of the great traditions outside of Judeo-Christianity such as the Muslims, Hindus, and Buddhists, but they still made no attempt to define "religion" other than operationally. Belief in a Supreme Being was, of course, prominent in their references to religion, but more important was the idea that religion embodied the fulfilling of duties that were beyond the jurisdiction of the state either to prescribe or to proscribe. Thus the Virginia Declaration of Rights referred to "religion, or the duty we owe to our Creator;" and Madison's Memorial and Remonstrance spoke of "the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him," a duty which was "precedent both in order of time and degree of obligation to the claims of Civil Society" and therefore "wholly exempt from its cognizance." He reasoned that "if religion be exempt from the authority of Society at large still less can it be subject to that of the Legislative body." Memorial and Remanstrance § 1, *reprinted in Everson v. Board of Education*, 330 U.S. 1, 64 (1947).[14]

Although the historical records on the First Amendment at the convention are sparse, at least these points are clear. First, it is clear that the phrase "free exercise" was a familiar term; that it meant something more than a "right of conscience;" that almost every state had guaranteed the free exercise of religion at the time the Bill of Rights was drafted and ratified; and that in a majority of the states that ratified the Bill of Rights, "free exercise" meant that the government had no right to interfere with religious activities until those activities threatened public peace and safety or infringed the rights of others. Second, "religion" referred to the beliefs and activities of individuals and religious sects and societies. Religion constituted the duties owed to the Creator which were beyond the reach and proper jurisdiction of the state. In the context of the Establishment Clause, it meant that the government was disabled

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[14] Jefferson wrote:

> Well aware that the opinions of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God had created the mind free, . . . that the opinions of men are not the object of civil government, nor under its jurisdiction . . . .

T. Jefferson, *The Complete Jefferson* 946-47 (S. Padover, ed. 1943).

from establishing any religious sect as the national religion;[15] in the context of the Free Exercise Clause, that the government might not infringe the religious exercises of any group or individual, and especially of dissenting or minority sects or individuals.

II. An Analysis of the Free Exercise Clause: Text, History, and Theory

Beginning with Chief Justice Waite's explanation in *Reynolds v. United States*, 98 U.S. 145 (1878), of the dichotomy between belief and action, the Court has wandered through the cases in search of a theory of the Free Exercise Clause. Judging by the fragmented views of the members of the Court and the response of the academic community, the search has not been entirely successful. Over the past century the Court has posited several different ways of approaching Free Exercise cases, and scholars have contributed still other views on the cases.

In this Section, we begin our analysis in Part A with a brief discussion of the idea of the Constitution as law, the need to interpret its text carefully, and the use of history as a means of understanding the text. In Part B we examine closely the text of the Free Exercise Clause: How does the language of the Free Exercise Clause differ from other First Amendment guarantees or from other rights and privileges? What do the words mean? And how does the structure of the Free Exercise Clause, the First Amendment, and the Bill of Rights help illuminate the meaning of the Free Exercise Clause? Part C examines the language in light of history to confirm that our understanding of the language of the Clause is consistent with that of its authors and the legislatures of the

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[15] In one sense, the immunity conferred by the Establishment Clause was conferred upon the states as well as the people. The Establishment Clause was a guarantee to the states that the national government would not interfere with state establishment of religion. The Establishment Clause prohibited the preference of any (majority) sect by, for example, taxing for its support, while the Free Exercise Clause provided that all minority sects would be secure in their religious worship, that is, that the government would not prohibit or otherwise interfere, which was an important guarantee irrespective of whether the government established a church. "The object, then, of the religion clauses was not to prevent general governmental encouragement of religion, . . . but to prevent religious persecution and to prevent a national establishment." *The Constitution of the United States of America*, S. Doc. No. 82, 92nd Cong., 2d Sess. 913 (1973); *see also* 3 J. Story, *Commentaries on the Constitution of the United States* § 1873 (1833); R. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 Harv. J.L. & Pub. Pol'y 129 (1986).

states that ratified it. In Part D we discuss three important theoretical approaches to the Free Exercise Clause -- the belief-action dichotomy, the neutrality theories, and the balancing test -- in light of the language and history of the First Amendment.

A. Interpretation of Constitutional Text and the Use of History

Taking the Constitution seriously requires that we start from the proposition that the Constitution is law. Its language is not precatory, aspirational, or merely descriptive of ethical or moral guidelines. We may hold the Constitution in special reverence, refer to it as a "document for the ages," or speak of its enduring principles, but in the end, we must regard it as law nonetheless. Once we accept this premise, discussion of its meaning must begin by examining its language, just as we do with other forms of law.[16]

Discussing the meaning of the Constitution can be an exercise in frustration over the richness and variety of meanings that can be given to ordinary English. Constitutional provisions with prohibitive norms such as "free exercise" or "equal protection" will inevitably raise more questions about their meaning than provisions containing quantitative norms such as the guarantee of a jury in common law suits involving more than twenty dollars or the requirement that the President be at least thirty five years old, which require no inquiry into the background or the history of the text.

Constitutional terms such as "free exercise" may be variously interpreted without straining the text. It is difficult to maintain that by examining the text alone we can discover one and only one meaning. Once we find that a particular passage of the Constitution is susceptible to reasonable alternative interpretations, we are then entitled to look to the Framers and ratifying states for their understanding of ambiguities in the passage. Obviously, turning to evidence of the authors' intent is an

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[16] As Judge Bork reminds us, "constitutional adjudication starts from the proposition that the Constitution is law," and thus "the words constrain judgment." Bork, *The Constitution, Original Intent, and Economic Rights* (n.d. Speech given at the University of San Diego Law School) at 4. Indeed, even Professor Tribe acknowledges that "[a]s a nation blessed with a written constitution, we of course must be bound by its words, must presume that they have meaning, and must understand that meaning in light of how those words were used by their authors." Tribe, *The Holy Grail of Original Intent*, Humanities Magazine (Feb. 1986) at 23.

admission of the ambiguity of the text standing alone and introduces the possibility that if the authors themselves disagree on the meaning, a unique meaning may be indeterminable. Nevertheless, because of the importance of correct constitutional exegesis, the risk is one that must be confronted.[17]

The major drawback to reliance on the historical record is that for many provisions of the Constitution, and for the Free Exercise Clause in particular, the historical record may not give us sufficient guidance to eliminate conclusively all ambiguities in the text.[18] A second problem is that because the historical record is often relatively sparse, and the views of the Founders, like those of most legislators, diverse, the historical record may be susceptible to manipulation and selective citation.[19] Thus,

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[17] As Professor McIntosh puts it:

> Once . . . we decide and settle the question of whether the Constitution is the law of the land, then we must confront the task of interpretation squarely. Thus,. . . we read the Constitution to find the verbal meaning it represents -- that which the authors meant by their use of a particular sign sequence. To re-echo Hirsch's words:
>
> > To banish the original author as the determiner of meaning is to reject the only compelling normative principle that could lend validity to an interpretation. . . . For if the meaning of a text was not the author's, then no interpretation can possibly correspond to the meaning of the text, since the text can have no determinate or determinable meaning.
>
> If interpretation does not rest on the same principle, then we live the specter of horrors that this portends: the courts, and not the legislatures, are the real legislators.

McIntosh, *Legal Hermeneutics: A Philosophical Critique*, 35 Okla. L. Rev. 1, 5-6 (1982) (quoting Hirsch, *In Defense of the Author*, in *On Literary Intention* 90 (D. Newton-de Molina ed. 1976)). For a contrasting view, see Brest, *The Misconceived Quest for the Original Understanding*, 60 Boston U. L. Rev. 204 (1980).

[18] Professor Summers noted the problem forty years ago:

> Regardless of what method is used to determine the intent, the historical argument [on the meaning of the Free Exercise Clause] is wholly inconclusive. It is impossible in most cases to determine the intent with sufficient accuracy to apply it to the particular facts before the court. The arguments in Congress on freedom of religion were very brief and extremely general. Very few of the framers ever fully expressed their beliefs in other writings, and those who did were far from agreement.

Summers, *The Sources and Limits of Religious Freedom*, 41 Ill. L. Rev. 53, 56 (1946).

[19] For example, Mark DeWolfe Howe argued years ago that the Court had relied exclusively on the views of Jefferson and Madison and ignored the remaining drafters of

rather than contributing to our enlightenment, the historical record of various constitutional provisions -- including the Free Exercise Clause -- may actually muddy the waters and disserve the purpose of constitutional exegesis when misused.

These problems may tempt some observers to ignore historical evidence concerning the original meaning of constitutional text entirely,[20] even where it is illuminating. Whether based on the belief that the Constitution is a living document with an evolving meaning or an exaggerated fatalism about the difficulty of determining original meaning, this view disregards the fact that the Constitution is a written document that has an ascertainable and permanent meaning binding upon judges. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Edwin Meese III, Address before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985); *see also* Berger, *Constitutional Law and the Constitution*, 19 Suffolk U.L. Rev. 1, 12-13 (1985). For example, Article V of the Constitution, which provides a formal mechanism for amending that document, clearly implies that any changes in constitutional meaning must be made through the democratic, and not the judicial, process. To the same effect is James Madison's statement that, if "the sense in which the Constitution was accepted and ratified by the nation . . . be not the guide in expounding, there can be no security . . . for a faithful exercise of its powers." 9 J. Madison, Writings 191 (G. Hunt ed. 1910).

Still, we must remember that the historical record should not be approached as literally as the words of the First Amendment itself since it is the Clause that was ratified, not its history. Critics of historicism frequently burlesque it by claiming that "many of today's problems were of course never envisioned by any of the Framers." Tribe, *American Constitutional Law* § 14-3 at 816 (footnote omitted); *see also Abington School District v. Schempp*, 374 U.S. 203, 237-41 (1963) (Brennan, J., concurring); Choper, *The Religion Clauses of the First Amendment:*

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the First Amendment. He further claims that the Court frequently confused Jefferson's and Madison's views on Virginia law with their views on the federal Constitution. M. Howe, *The Garden and the Wilderness* 5-11 (1965); *see also* W. Berns, *The First Amendment and the Future of American Democracy* 58-59 (1976); Gerety, *Legal Gardening: Mark DeWolfe Howe on Church and State: A Retrospective Essay*, 38 Stan. L. Rev. 595 (1986).

[20] *See, e.g.*, Summers, 41 Ill. L. Rev. at 50-57; L. Tribe, *American Constitutional Law* § 14-3 at 816 (1978).

Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 676-77 (1980); Summers, 41 Ill. L. Rev. at 57-58. The statement is, no doubt, literally true, but we suspect that such statements are more frequently used as rationales for ignoring constitutional principles with which the authors disagree. If the Constitution is to be honored as law, then we must take it and its history seriously -- the bad law with the good, the prescient and enduring principles along with the political compromises. At the same time, however, we should not confuse the history with the text.

In the same vein, we disserve the Founders by holding them too narrowly to their circumstances. To argue, for example, that only Protestant religions come within the protection of the Free Exercise Clause because those were the only religions mentioned by certain Founders, would strangle the Free Exercise Clause; instead we should recognize that the Founders had extended religious protection to all sects that were found in the United States at that time and that, most likely, any other religious denominations would have enjoyed protection in that day and are so protected today.[21] Thus, in short, we must identify operative constitutional principle according to its original understanding and apply it to contemporary circumstances.

Summarizing briefly, we must constantly remind ourselves that it is the Constitution that is law, and not its history. Text takes precedence over history. Extratextual sources are, without question, useful to help us understand the Constitution, but they should not be used as a substitute for understanding and declaring the meaning of the text.[22] Nevertheless, when the text is capable of multiple meanings we must turn to the history

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[21] *See* M. Howe, *The Garden and the Wilderness* 161-62 (1965); Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1060 (1978) (noting that the Framers considered "religion" as entailing a relationship with a Supreme Being, but that there is no evidence that protection extended only to theists). This conclusion is, of course, in keeping with the widely encompassing words of the Free Exercise Clause itself.

[22] *But see Reynolds v. United States*, 98 U.S. 145 (1878) (in effect adopting Jefferson's "wall of separation" metaphor as law). Jefferson was in France when the First Amendment was drafted. Jefferson first used the metaphor, which was borrowed from Roger Williams, in a letter written in 1802, eleven years after the adoption of the First Amendment. *See Wallace v. Jaffree*, 105 S. Ct. 2479, 2509 (1985) (Rehnquist, J., dissenting) (commenting based upon Jefferson's absence from Congressional debates concerning the Bill of Rights that "[h]e would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment").

as the key to the text and thus, a meaningful restraint on the range of interpretation that may be given to the Constitution.

B. Textual Analysis of the Free Exercise Clause[23]

The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This Amendment is unique in form among amendments to the Constitution, and the form itself is significant. Excluding the Ninth and Tenth Amendments, which are general provisions reserving nondelegated authority to the states and the people, seven of the first eight amendments contain provisions that specifically protect people from certain kinds of actions. The Fourth Amendment protects people against "unreasonable searches and seizures," the Fifth Amendment guarantees due process of law and just compensation for the taking of private property, and the Eighth Amendment ensures that no person will suffer cruel and unusual punishment. These enumerated rights, privileges, or immunities are granted to individuals, *e.g.*, "people" (Amend. II, IV, IX, and X), "person" (Amend. V), "owner" (Amend. III), and "accused" (Amend. VI).

Unlike its numerically subsequent guarantees in the Bill of Rights, the First Amendment is not stated as a right, privilege, or immunity granted to "people," a "person," an "owner," or an "accused." Instead it is a disability on Congress. It is a prohibition on certain kinds of laws, namely laws respecting an establishment of religion, prohibiting the free exercise of religion, or abridging the freedom of speech, press or right to assemble peaceably or petition for redress of grievances. None of the remaining amendments in the Bill of Rights specifically prohibit the passage of certain kinds of laws, only certain kinds of actions.

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[23] As far as we can determine, no structural or language-intensive analysis of the Free Exercise Clause has been made. *See* Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 Utah L. Rev. 309, 315 (little can be said about the meanings of the crucial terms of the Free Exercise Clause; the scope of the phrase "free exercise" is not known).

That the First Amendment was drafted as a disability and not as a privilege or immunity is relevant. In practical terms, a disability is the correlative of an immunity: that is, if Congress is disabled from making laws prohibiting the free exercise of religion, then the people are immune from such legislative action by Congress. It is nevertheless at least rhetorically significant that the Founders chose to express the First Amendment as a disability instead of a privilege or immunity (as they did for the remaining amendments) because the former appears to suggest that the rights of religion, speech, press, and assembly are pre-existent rights -- inalienable rights -- and not mere civil privileges conferred by a benevolent sovereign.

1. The Meaning of "Congress"

"Congress" is probably the least ambiguous of the words in the First Amendment, referring plainly to the legislative branch of the United States government. Thus, in *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833), the Court held that the Bill of Rights did not apply to the States. Chief Justice Marshall wrote: "Had the Framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the Framers of the original Constitution, and have expressed that intention." The Constitution could not have drawn a clearer distinction between Congress and the States.

Incorporation of the First Amendment through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), brought the states within the disability previously imposed only against Congress.[24] It is not the purpose of this paper to analyze the incorporation doctrine, although we do note that, because of what the Founders perceived as the different roles of the states and the national government with respect to religious freedom, and the apparent willingness of the

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[24]The incorporation doctrine held that the Due Process Clause of the Fourteenth Amendment absorbed the first eight amendments and made them applicable to the states. This argument is substantially weaker with respect to the First Amendment than with respect to the remaining seven. As pointed out above, the remaining seven are guarantees to individuals and make no reference to the governmental body -- whether federal or state -- that was thereby disabled. By contrast, the First Amendment plainly identifies the disabled governmental body as "Congress." To borrow Chief Justice Marshall's phrase in *Barron*, if the Framers of the Fourteenth Amendment intended a clause that disabled Congress to likewise disable the states, we should expect them to have expressed that intention clearly.

Court to recognize differences even in "incorporated rights" as between the states and the national government, *see Apodaca v. Oregon*, 406 U.S. 404 (1972), it is conceivable that the national government should be held to a higher standard than the states. See *infra*, p. 39 n.62

Because incorporation has so altered First Amendment calculus yet appears firmly entrenched in constitutional jurisprudence, this paper will proceed on the assumption that the term "Congress" in the First Amendment refers to the various branches of the national government[25] and the coordinate branches of the state governments. Consequently, we find that the first prerequisite for a Free Exercise claim is that the alleged infringement must be the result of "state action."[26]

2. The Meaning of "Prohibiting"

Just as the structure of the Bill of Rights was instructive, so the structure of the First Amendment is similarly revealing. Six separate disabilities are named. The government may enact no law *respecting* an establishment, *prohibiting* the free exercise of religion, or *abridging* speech, press, assembly or the right to petition the government. In the text "respecting" is merely referential; its function could be fulfilled by "about," "regarding," or similar terms. By contrast, "prohibiting" and "abridging" function substantively as part of the description of the categories of laws the government is disabled from enacting. Moreover, "prohibiting" and "abridging" are denotatively and connotatively distinct. "Prohibiting" means to forbid or prevent,[27] while "abridging" means to reduce or limit. Thus, "prohibiting" connotes a finality, certitude, or damning not present in "abridging", which connotes limitations falling short of the finality of prohibition or prevention.

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[25] Aside from the incorporation dilemma, one interesting question is whether "Congress" refers only to the legislative branch of the national government, or whether it includes the executive and judicial branches. *See* Meiklejohn, *What Does the First Amendment Mean?*, 20 U. Chi. L. Rev. 461, 465 (1953) ("The fact of governmental power is not, then, a proof of congressional power. . . . [T]he question before us is not, 'Has the government of the United States authority to nullify the First Amendment, wholly or in part?' Our very different question is, 'Has Congress that authority?'").

[26] *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

[27] *See, e.g.*, 7 *New English Dictionary* 1441 (J. Murray, ed. 1909); *The Random House Dictionary of the English Language* 1149 (1966); N. Webster, *American Dictionary of the English Language* (1828); S. Johnson, 2 *A Dictionary of the English Language* (1755).

By its terms, the Free Exercise Clause thus precludes the government from enacting a category of laws -- prohibitory laws -- that have the effect of forbidding or preventing the free exercise of religion.[28] While laws may be variously characterized, a schemata devised by Professor Garvey is insightful in this regard. Garvey describes four categories of laws and provides a First Amendment case as an illustration of each. In Figure 2, P stands for an individual or group, X refers to something that P has a religious duty not to do, and Y refers to something that P has a religious duty to do.

Fig. 2

(1) P must do X. (*Wisconsin v. Yoder*, 406 U.S. 205 (1972) (law requiring parents to send their children to school));

(2) P must not do Y. (*Reynolds v. United States*, 98 U.S. 145 (1878) (law forbidding plural marriage));

(3) P is encouraged to do X. (*Cf. Harris v. McRae*, 448 U.S. 297 (1980) (Hyde Amendment encouraging childbirth));

(4) P is encouraged not to do Y. (*Sherbert v. Verner*, 374 U.S. 398 (1963) (law denying unemployment compensation for terminating employment for personal reasons); *Thomas v. Review Board*, 450 U.S. 707 (1981) (same)).

Garvey, *Freedom and Equality in the Religion Clauses*, 1981 Sup. Ct. Rev. 193, 198-99. Only laws in categories (1) and (2) actually forbid or prevent religionists from fulfilling what they regard as their religious duties. A Category (2) law is a clearly prohibitory law; on its face it forbids an action that religionists have a duty to do. A Category (1) law is prohibitory indirectly, though not on its face, in that it prohibits religionists from doing anything except X, which is contrary to their

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[28]The distinction between forbidding and preventing -- both accepted meanings of "prohibiting" -- is important to note here. Forbidding in this context simply means to make an act unlawful, while preventing means to make the performance of an act impossible. For example, the government may prohibit attendance at college by either making it unlawful to attend school (forbidding) or by compelling would-be students to do something else in its place, for example, enter the armed forces (preventing). The first use is a direct prohibition on attending college. The second, though indirect, has the same effect: while it is not unlawful in the second case to attend college, it is unlawful to fail to answer a draft notice, and it is no excuse that one is engaged in a lawful activity, *i.e.*, attending school.

religious beliefs. Under either Category (1) or (2) laws, religionists are forced to choose between obeying their religious conscience and suffering the lawful civil or criminal penalty, or following the law and violating their religious duty.

Laws in categories (3) and (4) occasion no such irremediable conflict between religious duty and the law. To be sure, category (3) and (4) type laws may tempt religionists to forgo the fulfilling of their religious duties, but the laws do not forbid or prevent it in any sense. Under this view, neither *Sherbert* nor *Thomas* involved prohibitory laws because no law in either case prevented the free exercise of religion. Thus, the second requirement for stating a Free Exercise Clause claim is to identify state action "prohibiting" -- forbidding or preventing -- the exercise of religion as opposed to merely discouraging it.

3. The Meaning of "Free Exercise"

The first and most obvious conclusion with respect to the words "free exercise" is that those words mean more than advocacy of belief: by definition, the words denote action or activity.[29] Further evidence in support of this conclusion may be found in the remaining guarantees in the First Amendment, which protect freedom of speech, freedom of assembly, and the right to assemble peaceably and to petition the government. If the free exercise of religion were only a right to express religious beliefs, then the Free Exercise Clause would add nothing to the First Amendment, since that right is fully protected by the right to assemble, speak, and publish.[30]

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[29]The origin of "exercise" comes from the Latin *exercere* meaning to drive out (*ex*-- out; *arcere*-- to enclose). According to the *New English Dictionary*, predecessor to the *Oxford English Dictionary*, the etymology of "exercise" is obscure, but it means to employ or set to work. Accepted definitions of "exercise" include the "practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observances (of a religion)" and religious observances such as public worship, preaching, and prophesying. 3 *New English Dictionary* 401-02 (J. Murray, ed. 1897).

[30]The Department recently made this argument in *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326:

> The guarantees of freedom of speech and free exercise of religion, though obviously not identical, fit together in an altogether coherent way. Much religious expression is also protected as free speech: religious discussion, teaching, and persuasion are protected both as speech and as exercise of religion. To hold otherwise would invite an inadmissible distinction in terms of the contents of the expression. It would be strange indeed if because religious expression is doubly protected by the

Acknowledging that the Free Exercise Clause protects religious actions still leaves open the question of what "free" adds to "exercise." At first glance "free" appears to be surplusage, since it would seem sufficient to forbid laws that prohibited the exercise of religion. Indeed, in one sense, the phrase "prohibiting the free exercise" is an oxymoron. One cannot prohibit something that is free; conversely, one cannot freely exercise something that is prohibited.

Professor Garvey discusses at some length the idea of freedom and offers a possible explanation for the term "free." He distinguishes between freedoms and rights on the basis that freedoms protect choices while rights (such as the 8th Amendment guarantee against cruel and unusual punishment) are mandated. Freedom of religion means we are free to be religious, to be irreligious, or to refrain from holding any beliefs at all.[31] In contrast, we are not free to choose cruel and unusual punishment. In Garvey's view, freedom is "choice proceeding from a motive which is either actively desired or is unaffected by state action." 1981 Sup. Ct. Rev. at 203. If we return to the categories described in Figure 2, we would argue in categories (1) and (2) that the individual may do what the government wants, but he does not do it freely,[32]

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constitutional text it should therefore be less protected in practice. Prayer, whether individual or group prayer, is no less speech merely because the speakers may speak together, and surely not because those praying may believe that as they speak together they speak also to God. Even religious ceremonials -- so long as they are confined to speech, song, or gesture -- must be indistinguishable in the eyes of the state from other forms of protected expression. As speech, religious expression is as protected as -- and has no need to be more protected than -- other forms of expression.

Br. for United States at 7-8 (footnotes omitted).

[31] Michael Malbin would concur. He states that the clause protects not only the exercise of religion, but the freedom of its exercise. Under his view, the government may not enact laws prohibiting the choice of practicing or not practicing religion. Malbin, *Religion, Liberty, and Law in the American Founding* 10 (AEI Reprint 1981).

[32] In this context "freely" means that one has freedom of choice. We have neither freedom nor choice if we must choose X. We have choice but no freedom if we must choose either X or Y. We have freedom of choice when we may choose X or Y or neither. As one example an early Connecticut law commanded financial support of the state-established Congregational Church unless it could be shown that support was made to another denomination. *See* L. Pfeffer, *Church, State and Freedom* 116-18 (1967). In Connecticut there was choice but no freedom of choice since people could not abstain from contributing to some church.

because he will suffer some kind of sanction if he fails to do it.[33] There is no freedom, because in either case the government provides the motive (avoidance of sanctions) for the action. In categories (3) and (4) however, the individual acts both voluntarily and freely because either the individual acts from a motive which is enhanced by the government, as in (3), or is unaffected by the government because there is no sanction, as in (4). *See id.* at 200-03.

The schemata described by Professor Garvey, although perhaps not the final word with respect to the idea of freedom in the Free Exercise cases, is logical because, among other reasons, it offers an interpretation of "free" that is consistent with our previous interpretation of the word "prohibiting," and our application of that interpretation to the cases. Thus, if the Free Exercise Clause prohibits laws in categories (1) and (2), but not laws in categories (3) and (4), we would probably disagree with the results in *Reynolds*, *Sherbert*, and *Thomas*, but agree with the results in *Yoder* and *Braunfeld*. Using the foregoing analysis, Ms. Sherbert and Mr. Thomas voluntarily and freely chose to give up their employment rather than violate their religious beliefs. The government did not supply either Sherbert or Thomas with the motive for their actions. Braunfeld, too, was not in any sense forbidden by the government to practice his religious beliefs. On the other hand, Reynolds and Yoder, facing criminal sanctions, did not give up their beliefs freely.

One could argue that *Sherbert* and *Thomas* are really category (2) cases because Ms. Sherbert and Mr. Thomas, relative to other workers, were penalized in the amount of their unemployment compensation and that that penalty is as real and substantial to them as the criminal sanctions were in *Reynolds* (and, indeed, more substantial than the $5 fine levied in *Yoder*). As pointed out previously, however, there are qualitative distinctions between the laws involved in *Sherbert* and *Thomas* on the one hand, and *Reynolds* and *Yoder* on the other. In particular, there is a difference between the government's compelling an action and its persuading (by encouraging or discouraging) completion of the same act, which may be readily seen in the remedies available in each case. If an individual fails to comply with laws in categories (1) or (2), the government may seek sanctions such as fines, imprisonment, or injunc-

[33]The distinction between categories (1) and (2) and categories (3) and (4) cannot be reduced simply to a distinction between criminal and civil cases. There are civil rules that are just as binding on individuals as are criminal laws and for which injunctive relief is available. These certainly would be category (1) and (2) laws.

tions. The consequences for failure to comply are adverse and inevitable and the result will be the loss of freedom to practice one's religion. The failure to conform with the laws in categories (3) and (4) means lost opportunity costs (in the form of benefits being withheld), but the government has no right -- and thus no remedy -- to compel behavior. Government actions in categories (3) and (4) may tempt and even persuade us to compromise our religious principles -- just as television, football, a career, or other pursuits may entice us to turn from our religious devotions -- but these temptations (whether government-sponsored or not) do not deprive us of the freedom to choose to practice our religion. Believers remain free men and women, free to choose, albeit at some opportunity cost. The above argument also fails because it depends on a highly questionable premise, that Sherbert and Thomas were somehow "entitled" to unemployment compensation when they resigned from their jobs voluntarily and, therefore, would be penalized if it were not paid them. This notion of "entitlement" is a fairly late development in American jurisprudence, *see, e.g.*, Reich, *The New Property*, 73 Yale L.J. 733 (1964) and is a welfare state notion.[34] They would not be "entitled" to unemployment compensation if they had resigned for any number of other reasons, no matter how compelling. Thus, the second conclusion we can reach with respect to the words "free exercise" is that they confirm our previously articulated understanding of the term "prohibiting."

Finally, we note that the term "free exercise," when combined with the absolute language that Congress shall pass "no law" in that regard, does not necessarily mean that individuals and institutions have an unqualified right to make religious claims against the state. Rather, as we explain more fully at pp. 37-38, *infra*, the better conclusion appears to be that the term "free exercise" was originally understood to refer to a limited scope of liberty bounded by certain compelling state interests.

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[34]One consequence of the "new property" theory was to herald the demise of the right-privilege distinction. Justice Holmes' formulation that public benefits were privileges and not rights, *see Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895), *aff'd*, 167 U.S. 43 (1897); *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), would seem to answer *Sherbert* and *Thomas* without resorting to First Amendment analysis. *See also* Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

Exactly which interests were originally understood to be compelling in this context is a matter we will consider further at pp. 59-68, *infra*.

4. The Meaning of "Religion"

Understanding the term "religion" is problematic because of the spectrum of nontraditional beliefs and practices that today might be classified as "religion." The Court has never really made a serious attempt to define "religion," and the cases suggest that the Court has far to go to reach a consensus.[35]

The religious life of our society has become more complex since the drafting of the First Amendment. Where colonial America embraced its own form of Protestantism, accepted some diversity in the beliefs of other Protestants, and barely tolerated Catholicism and Judaism, modern America has become home to increasing numbers of Muslims, Hindus, Buddhists, and others. Extending constitutional protection to these groups seems logical because they are world religions with identifiable traditions, tenets, and rituals. More difficult to classify are the less traditional practices such as Yoga or Transcendental Meditation, and it is virtually impossible adequately to describe groups such as Scientology or Synanon. With some groups we recognize immediately their honest religious belief, but with the others we question their practices: Is the Bhagwan Shree Rajneesh an authentic religious leader or a religious front for indulging in life's excesses? And what about more familiar institutions: Is Rev. Ike a traditional Bible preacher and entitled to the solemn protection of the First Amendment, or merely a modern American huckster? Challenges under one or the other of the religion clauses indicate the variety of beliefs, most sincere, but some patently

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[35] *Compare Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961) (suggesting that Ethical Culture and Secular Humanism are religions), *with Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (suggesting that Thoreau's philosophy is not a religious belief). One commentator has suggested that, at a minimum, the Court has adopted in the conscription cases an operational definition of religion for modern America that would protect any belief that "occupies 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." *United States v. Seeger*, 380 U.S. 163, 184 (1965) (statutory construction). *See* Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1064 (1978) (arguing that *Seeger* has become the constitutional standard). The problem with *Seeger* is that it begs the question. If we want to know what "X" is, it is helpful to assert that it is equivalent to 'Y" only if we know what "Y" is. We are still left to define the place of theistic religion in an individual's life.

fraudulent, that people are willing to claim.[36]

Since the term "religion" is not defined in the Constitution and there is little direct evidence in the writings of the Framers as to any limitations on the term, courts and commentators have presumed that for Establishment Clause purposes, "religion" refers to the religion of the majority, while in Free Exercise cases it means the religion of the minority.[37] They also emphasize that the Establishment Clause deals with the institutionalization of religion; the Free Exercise Clause, with matters of conscience.[38]

Though we regard the opening phrase of the First Amendment as two separate clauses, both turn around the single use of the word "religion." Grammatically and structurally, there is no justification whatsoever for supposing that "religion" should mean one thing in Free Exercise cases and another in Establishment cases. In fact to do so would seem to violate principles of construction so basic as to be beyond dispute.[39] Nevertheless the obvious is often elusive, and no less a scholar

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[36] *See e.g., United States v. Daly*, 756 F.2d 1076 (5th Cir.) (denying religious claim of church organized for sole purpose of avoiding personal income taxes), *cert. denied*, 106 S. Ct. 574 (1985); *Theirault v. Silber*, 391 F. Supp. 578 (W.D. Tex. 1975), *vacated and remanded*, 547 F.2d 1279 (5th Cir.) (prisoner-organized religion dedicated to destroying prison authority and requiring sacrament of steak and wine), *cert. denied*, 434 U.S. 870 (1977); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (claiming rites require adherents to use marijuana and LSD and sing the official hymns -- "Puff, the Magic Dragon" and "Row, Row, Row Your Boat").

[37] *See Sheldon v. Fanin*, 221 F. Supp. 766, 775 (D. Ariz. 1963); Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 Wis. L. Rev. 217, 266-68.

There have been various proposals for defining religion, but most depend on a bifurcated definition of religion with the word meaning one thing for Free Exercise purposes and another for Establishment purposes. *See e.g.*, Choper, *Defining "Religion" in the First Amendment*, 1982 U. Ill. L. Rev. 579; Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. Chi. L. Rev. 805 (1978); Comment, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056 (1978). *But see* Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. Chi. L. Rev. 533 (1965) (advising the use of one definition).

[38] Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clause*, 75 W. Va. L. Rev. 213, 241 (1973).

[39] As Justice Rutledge wrote in his dissent in *Everson v. Board of Educ.*, 330 U.S. at 32:

> "Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader for securing "the free

than Dean Choper has written that "close examination of the operative doctrine for the religion clauses suggests that a duel definition of religion may be required." Choper, *Defining "Religion" in the First Amendment*, 1982 U. Ill. L. Rev. at 605. Why we should defer to the "operative doctrine" of the First Amendment instead of relying on its text[40] -- as though the First Amendment was something other than its text -- is not clear.

In a similar *non sequitur* Professor Tribe argues that "changed circumstances" have made it necessary to give an expansive definition to religion for the Free Exercise purposes but a narrower definition in the Establishment context. Tribe, *American Constitutional Law* § 14-6 at 827-28. Such an approach is unjustified because it ignores the text of the Constitution; and the exercise of judicial power unrestrained by the text is an open invitation to rewrite the First Amendment. *See Bowers v. Hardwick* 54 U.S.L.W. 4919 (U.S. June 30, 1986). Furthermore, the bifurcated approach is asymmetrical, meaning that a nontraditional group could claim to be a religion and entitled to Free Exercise protection, while at the same time receive government support and not violate the Establishment Clause. *See* Tribe, *American Constitutional Law* § 14-6 at 828-29 (suggesting that Transcendental Meditation is a religion for Free Exercise purposes, but could be taught in the schools without violating the Establishment Clause). Thus, the burden of the bifucated approach will inevitably fall on traditional religions, including the minority religious sects the Clause was originally intended to protect (see pp. 7-10, *supra*), because they are the only groups that would be subject to the Establishment Clause disability.[41]

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exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

[40] *Cf.* Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1084-85 (1978) (arguing that we must either adopt a consistent definition of "religion" and change substantive Establishment Clause doctrine, or adopt a bifurcated definition of "religion;" proposing the latter).

[41] *See also* D. Oaks, *Religious Freedom and the Supreme Court* 115 (Ethics and Public Policy Center Reprint 1981). On the basis of *Seeger*, Professor Gianella, ever prescient, described the modern theological trends that have pressured us to adopt dual definitions of religion. In the first, we move from finding meaning in the transcendental and supernatural to looking to nature for answers. In the second, we emphasize our anthropocentrism over theocentrism. Gianella says that "[b]oth of these developments tend to erode the distinction between the sacred and the secular, between religion and

Defining "religion" consistently between the two clauses may well require some rethinking of cases such as *Seeger* and *Torcaso*. In *Seeger*,[42] the Court, taking a tortuous view of the statutory exemption for conscientious objectors, relied on progressive theologians such as Paul Tillich and held that ethical and moral beliefs, of whatever origin, theistic or nontheistic, qualified as religion. It does not strain credulity to see that this kind of approach might ultimately enshrine materialism, narcissism, or even nudism as the ethical or moral motivation for personal action, and hence, "religion" -- a step that seems wholly inconsistent with the intent of the religion clauses. In addition, it would be impossible to protect non-theistic beliefs as a religion for Free Exercise purposes and know the limits to which the government could espouse nontheistic principles without violating the Establishment Clause. So even if a unitary definition of religion were adopted, the definition must have some limitation, lest the Establishment Clause's disability prevent the government from addressing any problem of moral or ethical dimensions.[43]

We believe that a principled definition of religion should take account of the fundamental and historical premises for the religion clauses: that God and Caesar operate in different realms, that each must be respected within its sphere, that religious men owe a duty to God (or to something greater than themselves), and that the state should not interfere with the fulfilling of that duty unless and until that duty becomes an overt act against the rights of others. See pp. 8-10, *supra*; p. 29, *infra*. Drawing upon the salient aspects of this historical evidence, we believe that, as a minimum requirement, the term "religion" in the First

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culture; they also highlight the ethical context of religion." Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development -- Part I: The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1426 (1967).

[42] *United States v. Seeger*, 380 U.S. 163 (1965); *see also Welsh v. United States*, 398 U.S. 333 (1970).

[43] The government may well have a strong motive to seek a narrow definition of religion. The First Amendment protects freedom of religion and freedom of speech and press, and it also forbids the establishment of religion. But it does not forbid the government from establishing speech or press. To the extent that the courts defined religion broadly, it would bring a larger subject matter with the government's Establishment Clause disability, thus limiting the matters on which the government might speak or write. D. Oaks, *Religious Freedom and the Supreme Court* at 121 ("If the current doctrinaire rules against establishment were applied in combination with the broad non-theistic definition of religion, the First Amendment could become the scourge of any government involvement in questions of philosophy or value").

Amendment must be defined as a system of beliefs, whether personally or institutionally held, prompted by the acceptance of transcendent realities or acknowledging extratemporal actions.[44]

To elaborate further on this definition, we find that the basis for the distinction between the religious realm and the realm of the state is almost one of jurisdiction. A belief in a duty arising from "transcendent reality" or "extratemporal consequences" distinguishes the truly religious belief from sincerely held, but clearly temporal, philosophical systems such as Humanism or Ethical Culture.[45] Religion, which deals with extratemporal realities, operates in a different sphere from the state, which must concern itself with more tangible trappings. But religion exists precisely because people believe that there is some connection between extratemporal realities and this life. The Free Exercise Clause ensures that within the area of overlap between the religious sphere and the state's sphere, religion has as much leeway as possible, consistent with the rights of others.

In addition to being historically sound, the proposed definition of religion also has a number of positive collateral advantages. First, it is broad enough to include nontheistic religions, other non-traditional religions, minority religions, and emerging religions -- groups that have not always enjoyed the solicitude of the First Amendment.[46] Second, the

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[44] *See, e.g.*, 8 *New English Dictionary* 410 (S. Murray, ed. 1914); *The Random House Dictionary of the English Language* 1212 (1966); *Webster's New International Dictionary* 2105 (2d ed. 1958); N. Webster, *American Dictionary of the English Language* (1828); S. Johnson, 2 *A Dictionary of the English Language* (1755).

Sacred time and space, and the universality of these notions in religion, are well documented by religious historians such as Mircea Eliade. *See, e.g.*, M. Eliade, *The Sacred and the Profane* 30-95 (1959).

[45] Choper, 1982 U. Ill. L. Rev. at 597-604; *cf. Wisconsin v. Yoder* 406 U.S. at 215-16 (Amish beliefs based on religious, not secular concerns; in contrast, "Thoreau's choice was philosophical and personal rather than religious, and such belief does not give rise to the demands of the Religion Clauses").

[46] *E.g., Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 49-50 (1890) (stating that Mormons practiced polygamy on the "pretense of religious conviction"); *Duro v. District Attorney*, 712 F.2d 96, 98 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984) (family not entitled to *Yoder* exemption because they were not members of a religious community with a long history). *But see United States v. Ballard*, 322 U.S. 78 (1944) (reversing conviction of leaders of "I Am" movement for mail fraud; Ballard claimed to be Jesus and to possess healing power); *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) (teaching Transcendental Meditation in

definition does not in any way diminish the relevance of introducing rites, rituals, creeds, and ceremonies, which are traditional indicia of religions. Ceremonies and rites by themselves are not sufficient to constitute a religion, but they are relevant to the extent that they are evidence of beliefs in a transcendent reality or the otherworldly nature of the duties claimed to be religious. Third, and perhaps most important, the definition can be applied consistently to the Establishment Clause and to the Free Exercise Clause. If applied flexibly and not mechanically, it will satisfy both, because both start from the same premise about the separate nature of the state and religion: If the state government cannot interfere with the fulfilling of extratemporal duties, neither should it coerce the performance of those duties. To effect either is *ultra vires*, and beyond the proper jurisdiction of the state.

In addition to providing a principled definition of "religion", the above-mentioned historical purposes of the Free Exercise Clause also suggest that the word religion probably was originally understood not to include insincere or fraudulent religions and religious beliefs. As discussed more fully at pp. 53-56, *infra*, insincere religious beliefs do not give rise to the genuine dilemma between fulfilling inconsistent civil and religious duties that the Framers sought to relieve religionists from having to confront. By contrast, the historical purposes of the Free Exercise Clause do not suggest that the term "religion" was meant only to protect fundamental or central religious practices, or to protect only religious practices shared by others or by an established church. For a more complete discussion of this matter, see pp. 56-59, *infra*

Finally, the use of the term "religion" in the Free Exercise Clause has important ramifications with respect to the notion of religious exceptions from laws of general applicability. In particular, the Free Exercise Clause is decidedly not neutral with respect to religion; the Clause is peculiarly about religion, and religionists are its special beneficiaries. Thus, the language of the Clause suggests that at least under certain circumstances, religionists may be entitled to special exceptions from laws of general applicability that prohibit their free exercise of religion.

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high school, including recitation of mantras, constituted religious activity and violated Establishment Clause).

C. Harmonizing History and Text

A number of important principles emerge from this analysis of the text and structure of the Free Exercise Clause. First, Congress acts unconstitutionally when it enacts any law that forbids or prevents the free exercise of religion. The Free Exercise Clause does not disable Congress from enacting laws that indirectly place pressure on particular religious practices, only from enacting laws that would prohibit a religious practice or that command an act that would prevent the fulfilling of a religious duty. Second, the Free Exercise Clause protects religious actions as well as beliefs. It protects individuals and institutions in their choice to be religious, irreligious, or nonreligious, and prohibits the government from supplying a motive to act against one's religious beliefs. Finally, the religion clauses demand a consistent definition of religion; what is treated as religion for Establishment Clause purposes is entitled to protection under the Free Exercise Clause, and what is protected by Free Exercise, the government is prohibited from establishing. The granting of a special exemption for religion is based on the idea that religion is motivated by a transcendent reality and extratemporal consequences for failure to fulfill a religious duty, and to the extent possible, the government should not interfere with such beliefs or duties.

These principles are fully harmonious with the history of the Free Exercise Clause found in the writings of its authors and the debates and history of its ratifying states. Without recounting the entire history summarized in Section I, *supra*, we can take a couple of examples as signposts to indicate that these principles are consistent.

Perhaps pre-eminent among all pre-Free Exercise Clause documents is Section 16 of the Virginia Declaration of Rights, see pp. 4-5, *supra*, which reads:

> That religion, or the duty we have to our Creator, and the manner of discharging it, can be directed only by reason and conscience, not force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience.

Several familiar themes run through this Declaration. To begin, religion is recognized as being a duty, owed to a creator, and beyond the jurisdiction of government. Free exercise is not just the maintaining of one's beliefs, but "the manner of discharging" one's duty to the Creator.

And government cannot interfere with that duty through "force or violence" -- thereby affirming our understanding of the term "prohibiting" in the Free Exercise Clause.

Moreover, as demonstrated more fully in Appendix B, the states in enacting their own "free exercise" clauses -- the majority of which antedate the First Amendment -- clearly intended to ensure the protection of religious exercise so long as the practice did not threaten public peace or safety. In all other respects people were guaranteed the right of worshipping "according to the dictates of their own consciences and understanding." See pp. 4-7, *supra*.

The plain language of the Free Exercise Clause, though somewhat more cryptic than the parallel clauses enacted by the states, nevertheless reflects well the prevailing views of the era in which it was drafted. That era considered the protection of religion from government to be of paramount importance -- as the Pennsylvania Declaration of Rights titled it, a "natural and inalienable right." The language is more than sufficiently clear for us to understand that the Free Exercise Clause is a substantive restriction on the growth of government. The Free Exercise Clause, unlike the Free Speech Clause, is unquestionably content-based. To accept this fact is to reject the significance of the notion that the Framers could not possibly have "dream[ed] of a society as pervasively regulated by the state as is ours."[47] Indeed, it is just as likely that the Framers did foresee the possibility that government -- whether moved by

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[47] Tribe *American Constitutional Law* § 14-3 at 816 n.5. *See also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 676-77 (1980) (Framers could not have foreseen public schools, unemployment insurance, antidiscrimination laws or labor matters).

It is not difficult to demonstrate why even prescriptive public welfare laws are restricted by the Free Exercise Clause. Just as tax increases can reach a tipping point where the tax becomes confiscatory and a taking, so at some point prescriptive legislation so regulates our lives as, in a metaphysical sense, to confiscate our freedom. If, for example in the education context, the state increased the school day from six hours to ten or fourteen, at some point as parents we would object that the state so dominated our children's lives as to have supplanted us entirely, and we might well assert that the state, by failing to inculcate our children with our religion, had both denied the family's free exercise rights and established some other form of religion (or nonreligion) in its place. *See Abington School District v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting). In such a situation the argument that the Framers could not have conceived of such a situation is at once descriptive as a statement and misbegotten as a legal argument. The religion clauses -- and in particular the Free Exercise Clause -- protect us from just such paternalism.

sectarian concerns, as had been the colonialists' experience, or by more secular promptings -- would encroach on religious freedom.

D. Theoretical Approaches to the Free Exercise Clause

1. The Belief/Action Dichotomy

In *Reynolds v. United States* Chief Justice Waite set forth the first judicial theory of the First Amendment. "[T]he true distinction between what properly belongs to the church and what to the State," wrote the Court, is that "while [laws] cannot interfere with mere religious belief and opinions, they may with practices." 98 U.S. at 163, 166. The rule was a crisp, clean package: whatever was belief was protected from the advances of the State, but once belief went beyond advocacy to practice, the State was within its rights to regulate it.

The belief/action dichotomy would be largely academic today but for the fact that as prominent a scholar as Michael Malbin has argued that Jefferson was indeed the author of the distinction and, moreover, that he even regarded speech itself as action, and capable of regulation by the state. Malbin, *Religion and Politics* at 28, 33-36. If Malbin's view of history is correct, then a return to original meaning might lead us once again to the belief/action distinction.[48]

The belief/action distinction proves deficient as an approach to the Free Exercise Clause in two respects. First, it is inconsistent with the language of the Clause, as previously discussed at pp. 19-28, *supra*, and similarly at odds with the greater weight of the history of the Clause, which demonstrates that the Framers clearly did intend to exempt from regulation religious activities that did not endanger public peace and safety, see pp. 4-7, *supra*. Second, a belief/action distinction would emasculate the Free Exercise Clause and make it nothing more than a second-class Free Speech Clause, since the speech and assembly clauses are sufficient to protect religious speech. Moreover, it would trivialize the idea of religion by separating thought from life, faith from works. The Framers recognized that there must be some limits on conduct, even religious conduct, but that a right to believe something in one's mind

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[48] In *McDaniel v. Paty*, 435 U.S. at 626-27 & nn. 5, 7, a plurality of the Court relied on the belief/action distinction and characterized *Torcaso v. Watkins*, 367 U.S. 488 (1961), as a case consistent with the distinction.

without the freedom to utter it, advocate it, or even translate it into life is a right deprived of substance.

The failings of the belief/action approach can be documented by the very cases that announced it. In *Reynolds*, and subsequently in *Davis v. Beason* and *Late Corporation of the Church of Jesus Christ of Latter-day Saints*, the government took purposeful action against an unpopular religious sect, yet the Supreme Court could find no violation of the First Amendment because, it held, the laws could reach actions, even religious activities. Despite its adoption of Jefferson's "wall of separation" metaphor, which has become the byword for those espousing strict separation and neutrality, the Court failed to articulate either neutral principles in the First Amendment or to recognize that laws prohibiting the practices of a particular religious body, disincorporating the church, and claiming that its property escheated to the state were laws prohibiting the free exercise of religion.[49] The demise of the belief/action dichotomy was signalled in *Cantwell* when the Court observed that the freedom to believe was absolute, and though the freedom to act was not, the government's power to regulate conduct was similarly not without limitations. 310 U.S. at 303-04.

2. Neutrality

Among the most important and resilient approaches to the religion clauses are the neutrality theories. The neutrality principle is derived from what its defenders see as the single mandate of the Establishment Clause and the Free Exercise Clause: that government may not use

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[49] For example, when the Morrill Act of 1860, the Poland Act of 1874, and the Edmunds Act of 1882 failed to force the Mormons to abandon the practice of polygamy, Congress passed the Edmunds-Tucker Act of 1887 which, among other things, dissolved the LDS Church, instructed the Attorney General to begin forfeiture proceedings against church property, and required that voters swear that they would not directly or indirectly counsel anyone to violate the anti-polygamy laws. The law was upheld in its entirety in *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890); *see* Linford, *The Mormons and the Law: The Polygamy Cases* (pts. I & II), 9 Utah L. Rev. 308 (1964); 9 Utah L. Rev. 543 (1965). This action by Congress legislating against a named sect is virtually unparalleled, although from time to time other legislative and prosecutorial acts have allegedly been directed at particular groups. *E.g.*, *Larson v. Valente*, 456 U.S. 228 (1982) (Minnesota statute directed at groups soliciting funds; allegedly directed at Unification Church); *Moon v. United States*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984) (alleged selective prosecution of Rev. Moon).

religion as a basis for action.[50] Unlike other approaches, neutrality is a comprehensive approach to both religion clauses. Two forms of neutrality are considered here: strict separation and strict neutrality.

a. Strict Separation

The first form of neutrality, known as the strict separation theory, can be explained and dismissed summarily. Simply stated, strict separation holds that government must have nothing to do with religion or religious institutions whatsoever. A current example of this approach can be found in the arguments in the *Witters* case. The State of Washington provided rehabilitation grants for the education of the blind but refused to give money to Witters, who was otherwise qualified, when it became apparent that he wanted to use the funds at a Bible college to prepare for the ministry. The Washington Supreme Court held that the First Amendment forbade the state from assisting Witters because of the religious purpose for which he wished to use the funds.[51] Adoption of the Washington court's reasoning would mean that the state would discriminate in providing aid to an otherwise qualified student simply because he might seek a religious education.

The strict separation theory, as applied (including the Court's *Lemon* test), has been characterized by many religious groups and even

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[50] From time to time the Court has certainly announced that neutral principles govern its decisions. Typical of its statements is its declaration in *Everson v. Board of Educ.*, 330 U.S. at 15:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion.

See also id. at 25 (Jackson, J., dissenting). This approach has led the Court, on occasion, to employ an equal protection analysis. See Justice Harlan's concurrence in *Walz v. Tax Comm'n*, 397 U.S. 664, 694-96 (1970): "Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of government categories to eliminate, as it were, religious gerrymanders." Neutrality has not yet become firmly embedded in religion clause jurisprudence.

[51] 102 Wash.2d 624, 689 P.2d 53, 56 (1984), *rev'd*, 54 U.S.L.W. 4135 (U.S. Jan. 28, 1986). A similar line of reasoning was followed by the Third Circuit in *Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 551-55, 561 (3d Cir. 1984) (finding that allowing a student religious group to meet during club time would serve a religious purpose and would segregate students along religious lines), *vacated on other grounds*, 106 S. Ct. 1326 (1986).

by members of the Court as evidencing hostility towards religion. *See e.g., Wallace v. Jaffree*, 105 S. Ct. 2479, 2505 (1985) (Burger, C.J., dissenting). Strict separation, if it can be called neutral at all, is perversely neutral -- a sort of reverse accommodation in which the government may favor everything but religion. Carried to its extreme, strict separation not only does not approach religion neutrally -- in the sense of ignoring religion as a basis for classification, treating religious people as it does all other people, and religious organizations as it does all other organizations -- but it instead makes government acutely aware of everything religious and disfavors anything that admits to being religious. Indeed, in theory, the strict separationists would have to argue that the Free Exercise Clause violated the Establishment Clause.[52]

b. Strict Neutrality

An approach worthy of more serious consideration is the strict neutrality theory of Professor Kurland.[53] Kurland argues that "The freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden." P. Kurland, *Religion and the Law* 18 (1962). Thus, the "underlying proposition" of strict neutrality is the "assurance of equality of treatment" between religion and non-religion. 24 Vill. L. Rev. at 24. Kurland thus substitutes "equality" for "freedom" in the Free Exercise Clause, transforming the Clause into an equal protection clause for religion. Garvey, 1981 Sup. Ct. Rev. at 219; Pfeffer, *Book Review*, 15 Stan. L. Rev. 389, 392 (1963).

In its purest form the strict neutrality theory would admit of no religious exceptions to laws of general application. Religious accommodation laws, such as the conscientious objector exemption from the military conscription laws and the religious exemptions from Titles VII, VIII, and IX, would be unconstitutional, because, as Kurland puts it: "To permit individuals to be excused from compliance with the law solely on the basis of religious beliefs is to subject others to punishment for failure to subscribe to those same beliefs." *Religion and the Law* at

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[52] *See* Br. for United States at 27, *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985).

[53] Kurland notes, however, that his recommendation has "met with almost uniform rejection." *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 24 (1978-79).

22.[54] The laws or programs at issue in *Witters* and *Bender*, however, would be constitutional under strict neutrality since the programs themselves were not created or maintained to promote religion and all applicants were treated alike.[55]

Strict neutrality as an approach to the religion clauses is an efficient, reasonably objective theory. It is efficient because it is comprehensive with respect to both religion clauses and it is a simple rule employing the familiar classification analysis of the equal protection cases. Furthermore, as a predictive rule, strict neutrality has a distinct advantage over balancing formulas, which require the courts to engage in more subjective analysis of legislative and societal priorities.

Despite these commendable characteristics, strict neutrality suffers from at least two major drawbacks. The first of these -- one of particular interest to the Department -- is that the theory ultimately must ignore the history of the religion clauses. The Founding Fathers may not have agreed among themselves as to the meaning of the religion clauses, but we can be relatively confident that they did not envision strict neutrality. Even Jefferson, who was responsible for building the "wall of separation" higher than Roger Williams intended, sponsored legislation as a Virginia legislator that furthered religion, and in his post-presidential days advocated accommodation of religion.[56] Other evidence of the Founders'

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[54] Walter Berns seems to accept Kurland's thesis to a point, but he argues that Congress may, but is not constitutionally compelled to, grant exemptions from otherwise valid laws. As he expresses it: "Congress does not have to grant an exemption to someone who follows the command of God rather than the command of the law because the Congress established by the Constitution denies . . . *that God issues any such commands.*" W. Berns, *The First Amendment and the Future of American Democracy* at 48 (emphasis in original). For Berns, there is no constitutional right, such as that found in Yoder, to an exemption from laws of general applicability. *Id.* at 38.

[55] It is not clear whether Kurland would consider laws that prohibit discrimination on the basis of religion (such as Title VII or religious crimes laws) to be laws that employ religion as a basis for classification. Analogy might be made to the Fourteenth Amendment, which has been held to forbid racial classifications, and Title VII, which prohibits discrimination based on race (and, *inter alia*, religion).

[56] *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. Rev. 645, 662-72.

intentions can be adduced,[57] as well as the views of the early commentators on the Constitution. As one modern scholar has commented:

> [O]ur whole constitutional history refutes the argument that what is meant by religious liberty is a principle directed against preferential or discriminatory treatment on religious grounds. Rather, it supports the conclusion that religious liberty is an independent liberty, that its recognition may either require or permit preferential treatment on religious grounds in some instances, and that it does not necessarily preclude discrimination on religious grounds in certain situations.

P. Kauper, *Religion and the Constitution* 17 (1964).

Even more importantly, the strict neutrality theory, while claiming to be derived from both religion clauses, discounts the plain language of the Free Exercise Clause that the government has a duty to refrain from making laws -- even neutral laws -- if the laws prohibit the free exercise of religion. Strict neutrality is particularly unsuitable as an approach when we attempt to apply it in the context of expanding government operations. As the government continues to displace religion in areas such as employment and education, it simply must affirmatively accommodate religious beliefs and practices or else it will secularize activities over which religion has historically exercised its influence.[58]

3. Balancing

At least since *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court has evaluated claims under the Free Exercise Clause by applying the following two-part inquiry. First, the individual claimant must prove that the state has interfered with the exercise of a sincerely-held religious belief. Second, the government must then prove its regulation is the least

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[57] *See, e.g., Wallace v. Jaffree*, 105 S. Ct. 2479, 2512 (1985) (Rehnquist, J., dissenting) (Madison, the most influential of the drafters of the First Amendment, did not believe that neutrality between religion and irreligion was required); *Marsh v. Chambers*, 103 S. Ct. 3330, 3332-34 (1983) (historical evidence that the hiring of chaplains did not contravene the First Amendment). *See also infra*, Appendix B.

[58] The danger is, to paraphrase *Seeger*, that government will come to occupy the same place in the life of the citizen as religious beliefs hold in the life of one not so regulated.

restrictive means necessary to achieve a compelling state interest.[59] This two-part inquiry is generally referred to as the balancing test.

There are three principal assumptions underlying the balancing approach that are unique among theories of the Free Exercise Clause: (1) that generally applicable, religiously-neutral statutes can prohibit the free exercise of religion, (2) that religious liberty interests will inevitably conflict with the state's secular interests at least under certain circumstances, and (3) that courts should resolve those conflicts by accommodating both interests to the greatest extent possible. Whether and to what extent "balancing" should be a proper part of Free Exercise Clause analysis depends on whether these ideas have adequate support.

a. Arguments in Support of Balancing

As the following discussion will demonstrate, each of the above-identified unique aspects of balancing are consistent with, and in certain ways supported by, the language, history, and purposes of the Free Exercise Clause.

(1). *Language.* The First Amendment states that Congress shall pass no law "prohibiting" the "free exercise of religion." As previously mentioned, this language clearly refers to the free exercise of religion as an important substantive value that the state may not prohibit.[60] By contrast, this language does not suggest that it matters whether a state-imposed burden on religious choice arises from a law aimed at religion or from a law neutral toward religion on its face or in its intent. Thus, the language of the Free Exercise Clause supports the first aspect of the

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[59] *See Thomas v. Review Bd.*, 450 U.S. 707, 714-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 406-08 (1963). *See also United States v. Lee*, 455 U.S. 252, 257-58 (1982) (state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion).

[60] *See, e.g.*, J. Ely, *Democracy and Distrust* 88-101 (1980) (Free Exercise Clause is one of the major Constitutional exceptions: a "substantive value" selected by the Framers for inclusion in a procedural document); *cf.* McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 9 (text of First Amendment itself singles out religion for special protections); Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 Utah L. Rev. 309, 347 n.171 (error of strict neutrality theory is perceiving religion not as inherently valuable, vulnerable, and worthy of special protection, but as of no intrinsic importance but subject historically to abuse and persecution and therefore inherently suspect as a basis for government classifications).

balancing approach identified above, namely, the idea that generally applicable statutes can violate the Clause by placing a prohibitive burden on the free exercise of religion.

The language of the Free Exercise Clause also supports the notion that religious liberty will inevitably conflict with the state's interests at least in certain circumstances. Although there is no explicit mention of this concept in the Clause, the concept is implicit in the very fact that there is such a Clause: without at least the theoretical possibility for conflict between religious liberty and the state, a Free Exercise Clause would be pointless.

On the other hand, the language of the Free Exercise Clause does not explicitly refer to the third aspect of the balancing test noted above, that courts should resolve conflicts between religious liberty and the state's interests by "balancing" the two. One might conclude from this fact that the Free Exercise Clause bars *all* state prohibitions on religious liberty. This interpretation would render the Free Exercise Clause logically inconsistent, however, because it would require the state to protect religiously-motivated actions that would threaten the existence of the state, and thereby the whole of religious liberty as a legal protection. Consequently, we believe the better conclusion is that the term "free exercise of religion" in the First Amendment refers to an assumed scope of liberty that is not to be "prohibited,"[61] and that balancing is appropriate in defining that scope of liberty.

(2). *Historical Evidence of Original Meaning.* The historical record suggests that there was substantial agreement among those of the founding generation that religious liberty would sometimes conflict with the state's interests and that the law should resolve such conflicts by resort to a standard that would "balance" the two in a manner that would accommodate both interests to the greatest extent possible. In particular, various formulations of the balancing test are found in the writings of Madison, Jefferson, and Mason; in the Northwest Ordinance of 1787, which was re-enacted in 1789 by the same First Congress that drafted the Free Exercise Clause; and in the majority of the state

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[61] *Cf.* Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 21 (1971) (words are not necessarily absolute; thus, "Freedom of Speech" as used in First Amendment may very well be a term referring to a defined or assumed scope of liberty, and it may be this area of liberty that is not to be "abridged").

constitutions as they existed at that time. *See* pp. 4-9, *supra*.[62]

(3). *Purposes of the Free Exercise Clause*. Finally in this regard, the balancing test is directly related to, and necessary to the full implementation of, the historical purposes underlying the Free Exercise Clause. Described generally, the Free Exercise Clause was designed to protect and accommodate the development, expression, and exercise of religious belief by individuals and institutions in public life to the greatest extent possible.

With respect to individuals, the Framers believed it was fundamentally unfair to require them to choose between following their religious convictions and performing their civil duties.[63] Although the Framers did not articulate any particular examples of impermissible state burdens on religious conscience, colonial history was replete with a variety of

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[62] On the other hand, one might reasonably argue based on the above historical evidence that since the Framers were aware of language that would provide for balancing in the religious liberty context, their omission of such language from the Free Exercise Clause signifies that balancing was not a part of the original meaning of the Clause, at least as applied against Congress. It might be further argued from the historical record that the Fourteenth Amendment incorporated against the states the Free Exercise balancing principles found in the state constitutions at the time the Free Exercise Clause was ratified, but left the federal Congress absolutely interdicted from prohibiting free exercise. For the reasons given at pp. 37-38, *supra*, however, we believe the better conclusion is that balancing is permissible with respect to both Congress and the states.

The First Congress's decision not to include in the Second Amendment a clause exempting religious conscientious objectors from military duty does not necessarily mean that the Framers thought special religious exemptions from generally applicable laws were always a matter of discretion rather than right. *But see* Malbin, *Religion and Politics* at 39-40 & n.4. Instead, the Founders may very well have thought military exemptions *in particular* were an inappropriate context to provide for a religious exemption as a matter of constitutional right because of the state's compelling interest in providing for the common defense, without prejudice to the possibility that other special religious exemptions might be required as matter of right. In addition, the First Congress' rejection of Representative Benson's motion to strike the conscientious objector provision (which he based on the argument that such was not a natural right, but ought to be left to the discretion of the government) seriously undermines the argument that the Framers believed religion-based exceptions could never be a matter of constitutional right. *See* McConnell, 1985 Sup. Ct. Rev. at 22-23.

[63] *See* McConnell, 1985 Sup. Ct. Rev. at 26 (historical purpose of religious accommodation is to relieve the believer -- where it is possible to do so without sacrificing significant civic or social interests -- from the conflicting claims of religion and society). *See generally* Gianella, 80 Harv. L. Rev. at 1386; Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327, 337 (1969).

religious burdens the Framers may have had in mind, including laws that compelled attendance at state-approved public worship services under threat of fine or imprisonment, laws that expelled people from certain communities or even from entire states because of their religious belief, and laws that subjected members of unpopular religious sects to imprisonment for daring to preach their beliefs in public.[64]

With respect to religious institutions, the Framers intended that the First Amendment provide a wide degree of autonomy in matters of internal governance, discipline, and doctrine, *inter alia*.[65] In the view of the Framers, such matters were wholly beyond the competence of the secular state.[66]

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[64] *See* C. Antieau, A. Downey & E. Roberts, *Freedom from Federal Establishment* 16-29 (1964) (describing these and other examples of oppression of religious believers by the colonies).

[65] *See* pp. 7-8, *supra*. *See generally* Laycock, *Towards a General Theory of The Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1373, 1389-92 (1981) (churches have a constitutionally protected interest in managing their own institutions free of government interference).

The Framers also may have been influenced in this regard by the fact that religion is most often, although not always, associational. *See generally* D. Kelly, *Why Churches Should Not Pay Taxes* 54-56 (1977) ("Religion exists as a functioning reality only to the degree that it is embodied in an ongoing community -- a 'church'"); Esbeck, *Establish ment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 374 (1984) ("Religious belief is almost always expressed in some sort of communal way").

[66] For example, in his Memorial and Remonstrance, Madison described the proposition that "the Civil Magistrate is a competent Judge of Religious truth" as an "arrogant pretension falsified by the contradictory opinion of Rulers in all ages, and throughout the world." Memorial and Remonstrance § 5, *reprinted in Everson v. Board of Educ.*, 330 U.S. at 67. For other examples of the Framers' beliefs in this regard, see pp. 3-9, *supra*.

Religious institutions might be protected under the Establishment Clause as well as under the Free Exercise Clause. Although most of the Supreme Court cases addressing religious liberty claims of institutions do so under the First Amendment generally, see Appendix C, pp. 152-54 *infra*, at least one recent case has explicitly evaluated the autonomy claim of a religious institution under the "excessive entanglement" prong of the tripartite Establishment Clause test. *See Tony and Susan Alamo Foundation v. Secretary of Labor*, 106 S. Ct. 1953, 1964 (1985). *See generally* Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 Pub. L.F. 325, 337-40 (1985) (state intrusions into autonomy of religious institutions violates Establishment Clause).

The balancing approach reflects these purposes of the Free Exercise Clause by recognizing that laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon the activities and beliefs of religious institutions just as effectively as laws aimed at religion.[67] For example, the government could effectively prohibit the free exercise of religion by banning all consumption of alcohol without excepting Sacramental consumption.[68] Similarly, the state could ban entire religions, if not all religion, by deciding that in order to prevent fraud, only "scientifically" verifiable statements may be taught or expressed.[69]

Acknowledging that laws not aimed at religion can prohibit the free exercise thereof is particularly important in light of the extreme and ever-growing extent to which modern government (federal, state, and local) regulates the private sphere. As Professor Gianella cogently points out:

> In a political society characterized by significant governmental disability and wide personal autonomy, religious interests need not make special claims to achieve a wide zone of immunity. But in a society where governmental regulation is pervasive and individual freedom generally limited, religious interests must make special claims vis-a-vis the state if they are to enjoy an equally wide ambit of action.

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[67] *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish parents who kept children out of school after the eighth grade from generally applicable state compulsory attendance laws because of disproportionate impact of state laws on religious beliefs of Amish). The Supreme Court has also recognized that generally applicable laws can produce an unequal and unconstitutional burden on Free Speech rights. *See Anderson v. Celebrezze*, 460 U.S. 780, 792-94 (1983) ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment" even if burden results from a generally applicable statute); Nesser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 291 & n.191 (1985) (citing other Free Speech cases).

[68] *See* Gianella, 80 Harv. L. Rev. at 1388.

[69] Certain legislative responses to the recent proliferation of religious cults are not too far removed from such a rule. *See, e.g.*, Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. Cal. L. Rev. 1, 73-78 (1977) (discussing suggested remedies for cult "brainwashing," including requirement of identification, cooling-off period, public education, prohibitions of proselytizing, licensing of proselytizers).

Gianella, 80 Harv. L. Rev. at 1388.[70] Thus, balancing principles appear necessary to preserve religious liberty as a meaningful reality against the extensive and ever-expanding claims of the modern affirmative state, not because the meaning of the First Amendment has changed, but because balancing is necessary to implement that meaning under current circumstances.[71]

b. Criticisms of Balancing

Judges and scholars have leveled a number of criticisms at the Supreme Court's current balancing approach. The following discussion will address several of the most frequently cited criticisms and responses thereto.

(1). *Unequal Treatment of Religion and Non-Religion.* A first criticism of the balancing approach is that requiring special exemptions from generally applicable laws for religious individuals and institutions is unfair toward the non-religious.[72] This argument ignores the language of the First Amendment, which quite plainly identifies religion as a matter deserving of special constitutional protection. The Framers thought such special protection necessary and appropriate because, among other reasons, they understood religious conscience as being unusually compelling and unusually sensitive to even the slightest government pressure.[73] For example, during the debates in the First Congress concerning various proposals for the Religion Clauses, Representative Carroll remarked that "rights of conscience are, in their nature, of peculiar delicacy, and will

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[70] *Cf.* Smith, 20 Wake Forest L. Rev. at 594 ("[w]ith the increasingly pervasive nature of the public sector in contemporary society, it would strain credulity to assert that Madison would have prohibited the state from permitting any voluntary expressions of religious devotion in public," since Madison's primary concern was with "furthering the potential for the uninhibited exercise of one's religion").

[71] *See* McConnell, 1985 Sup. Ct. Rev. at 23 (to maintain vitality and independence of religious life as it was in 1789 in light of modern welfare-regulatory state requires, even more clearly than it did at that time, a recognition of the special character and needs of religion).

[72] *See, e.g.*, Kurland, *Religion and the Law* at 22; Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 586 (1983).

[73] *See* Malbin, *Religion and Politics* at 20-27 (discussing statements of Jefferson, Mason and Madison); Smith, 20 Wake Forest L. Rev. at 579-80, 589-91. Religious duties arguably are materially distinct from non-religious duties because religious obligations are imposed on the believer from an external source and accompanied by unusually severe penalties for non-compliance. *See* pp. 23-28, *supra*.

little bear the gentlest touch of governmental hand." 1 Annals of Congress 730 (Aug. 15, 1789). Therefore, the response to this first criticism is that it is appropriate to treat religion differently under certain circumstances because the text, history, and purposes of the First Amendment suggest that religion *is* different.

(2). *Unequal Treatment Among Religions.* Another criticism of balancing is that allowing religious exemptions from generally applicable laws improperly requires the state to discriminate among religions. Justice Stevens advanced this argument recently in his concurring opinion in *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986), where he said that if the military should allow a Jewish individual to wear a yarmulke in violation of generally applicable headgear regulations, it would inevitably face similar claims with respect to Rastafarian "dreadlocks" and Sikh turbans. Justice Stevens argued that the military could not deny such forms of headgear as materially more obtrusive than a yarmulke without being unfair to Rastafarians and Sikhs. 106 S. Ct. at 1316 (Stevens, J., concurring).[74]

Although the Establishment Clause generally does forbid discrimination among religious sects,[75] presumably distinctions between sects or religious actions based on compelling *secular* interests would be permissible.[76] Consequently, although the balancing test will sometimes require the state to distinguish between religions on the basis of their practices, such distinctions are not always improper or unfair, and should be evaluated on their own terms.

(3). *Conflict Between the Free Exercise and Establishment Clauses.* Much has been written about the conflict between the Free Exercise and Establishment Clauses under their current Supreme Court interpreta-

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[74] Justice Stevens made the same point in his concurring opinion in *United States v. Lee*, 455 U.S. 252 (1982), where he argued that the Establishment Clause was designed to keep government out of the business of evaluating the merits of differing religious claims because of the risk that governmental approval of some claims and disapproval of others will be perceived as favoring one religion over another. *Id.* at 262 n.2.

[75] *See Larson v. Valente*, 456 U.S. 228 (1981).

[76] There is no reason to believe that among all of the fundamental liberties included in the Bill of Rights, only the Establishment Clause is so important that it may not yield to a compelling state interest. Even the Supreme Court's most preferred right (abortion) at least theoretically must yield to the state's compelling interest in protecting the fetus after the second trimester. *See Roe v. Wade*, 410 U.S. 133 (1973).

tions. Justice Rehnquist, among others, has charged that the conflict is the result at least in some circumstances of the Court's improper application of the Free Exercise Clause balancing test to require religious exemptions from generally applicable statutes and regulations.[77]

There are a number of potential resolutions of this controversy that would be less destructive of Free Exercise Clause values than to abandon a balancing test. Justice Brennan for example, has argued that the Establishment Clause should be understood as permitting the "application of legislation having purely secular ends in such a way as to alleviate burdens upon the Free Exercise rights of an individual religious believer."[78] Alternatively, the Establishment Clause could be reinterpreted to permit non-preferential aid to religion, which some persuasively suggest was its original meaning.[79]

(4). *The Standardless Nature of Determining What is a "Compelling" State Interest.* Scholars have severely criticized the Supreme Court's failure to identify any useful guidelines for determining what state interests are sufficiently compelling to override religious liberty interests.[80] A related criticism is that balancing necessarily requires a case-by-case evaluation of religious claims which probably could never be made perfectly predictible under any principled standard, and which thus at least partially disables the legislative and administrative branches from making laws and rules with any certainty concerning how those laws and rules will operate in practice.

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[77] *See Thomas v. Review Bd.*, 450 U.S. 707, 720-27 (1981) (Rehnquist, J., dissenting). Such special treatment of religion arguably has the primary effect of benefitting religion in violation of the second prong of the Supreme Court's tripartite test for evaluating Establishment Clause questions. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[78] *See Abington School District v. Schempp*, 374 U.S. 203, 295 (1963) (Brennan, J., concurring); *see also Wisconsin v. Yoder*, 406 U.S. at 220-21 ("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 by the right of free exercise").

[79] *See, e.g., Wallace v. Jaffree*, 105 S. Ct. 2479, 2509-16 (1985) (Rehnquist, J., dissenting); Malbin, *Religion and Politics* at 1-19; McConnell, 1985 Sup. Ct. Rev. at 14-21.

[80] *See, e.g.*, Malbin, *Religion and Politics* at 3; T. Emerson, *Toward a General Theory of the First Amendment* 54 (1963); Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327, 330 (1969); Summers, *The Sources and Limits of Religious Freedom*, 41 Ill. L. Rev. 53, 54 (1946).

As the following Section will demonstrate, it is possible to devise a standard for balancing that provides a principled rule of law for courts and a useful framework for legislators in investigating whether proposed laws may require religious exceptions to one degree or another. Even more importantly, whatever uncertainty in the law that results from balancing is insufficient to outweigh the text, history, and purposes of the Free Exercise Clause, which, as previously discussed, suggest that balancing is necessary at least under certain circumstances.[81]

III. Proposed Theoretical Principles and Suggested Application

As the discussion in Section II demonstrates, the alternative theories of the Free Exercise Clause discussed above, though helpful in several respects, are incomplete in and of themselves to explain fully how the Free Exercise Clause should be interpreted and applied. Nevertheless, we believe each of these theories has certain useful aspects that can contribute to a better understanding of the Clause. The following discussion will focus on identifying the principles we believe should be adopted from the various Free Exercise Clause theories, explaining why they are useful, and suggesting how they should be applied to Free Exercise Clause disputes. Once this task is accomplished, we will then be in a position to outline in Section IV, *infra*, a more or less comprehensive approach for resolving Free Exercise Clause disputes that combines the conclusions derived from the language of the Free Exercise Clause in Section II with the principles extracted from the general Free Exercise Clause theories in Section III and that aligns those principles in proper order.

A. Belief/Action Dichotomy

The belief/action dichotomy is a useful concept because it reminds us that the state has no sound reason for regulating religious belief as opposed to religiously-motivated action. Arguably no matter how dangerous a belief may be, it produces no demonstrable social harm until acted upon, at which point the state may seek to regulate its secular effects as necessary to further a compelling interest. By contrast, the effectiveness of state regulation of belief is inherently suspect since people may believe what they desire without revealing whether their actions are

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[81] See pp. 36-42, *supra*.

based thereupon. For all for these reasons, we believe that state action which forbids or prevents the holding of religious belief should be impermissible.

State attempts to regulate religious belief may be direct or indirect. An example of regulating religious belief directly would be a law making it illegal to hold a particular faith, such as Catholicism, or a particular belief, such as in the virgin birth of Christ.[82] The government may attempt to regulate religious belief indirectly by regulating conduct so closely tied to pure belief that, at least for Free Exercise Clause purposes, it is functionally indistinguishable therefrom. Examples of indirect regulation of beliefs would include government attempts to compel the expression or affirmation of an oath, pledge, or other manifestation that conflicts with an individual's religious belief.[83]

B. Neutrality

The neutrality theory suggests it is important to scrutinize the language and intent of the statute, regulation, or other state action in question. This is correct for at least two reasons.

First, focusing on statutory language and intent acknowledges that the Free Exercise Clause, unlike most of the other fundamental liberties included in the Bill of Rights, is stated expressly as a limitation on state action. The historical evidence suggests that the Framers meant for the

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[82] Another example of a direct regulation of religious belief would be the Food and Drug Administration's attempt several years ago to destroy various religious pamphlets and other materials as falsely and misleadingly labeled, which regulation would have required the civil courts to determine the truth of the groups' religious beliefs. *See Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969). *See also Presbyterian Church v. Hull Church*, 393 U.S. 440, 450 (1969) (holding unconstitutional Georgia "departure from doctrine" rule with respect to church property trust law because rule would involve civil courts in direct regulation and determination of religious doctrine); *Gay Rights Coalition of Georgetown v. Georgetown Univ.*, 496 A.2d 567, 577 (D.C. App.) (permissible under Free Exercise Clause for District of Columbia to require private religious university to affirm that it "respects the personal dignity" of the gay lifestyle by requiring university to grant official recognition to homosexual student group), *reh. en banc ordered*, 496 A.2d 587 (D.C. App. 1985).

[83] *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (public secondary school requirement that students must salute American flag and recite pledge of allegience held unconstitutional as applied to child or Jehovah's Witness faith who objected to those requirements on religious grounds).

state to stay out of religion not only in order to secure religious liberty as a substantive value, but also because they understood religion as being completely beyond the competence of the state. See pp. 23-28, *supra.* Focusing on statutory language and intent is helpful in determining when the state has departed from this historical purpose of the Free Exercise Clause by seeking to regulate religion *qua* religion.

Second, scrutinizing statutory language and intent under the Free Exercise Clause may provide critical information concerning the substantiality of the state's interest. For example, a statute that draws a religious classification on its face is suspect because, if there is a compelling secular interest at stake, we should reasonably expect the legislature to have drafted the statute in terms of that interest so that all relevant conduct, religious and non-religious, could be regulated. Similarly, a statute aimed at religion in its intent is suspect because any secular interests that might have justified the statute did not in fact provide the motivation for the legislature's actions. For all the above reasons, and because the state has precisely *no* valid secular interest in prohibiting religion *per se,* we believe that state action non-neutral toward religion on its face or in its intent and which forbids or prevents the free exercise of religion probably should be unconstitutional.[84]

In determining how neutral principles can be applied to Free Exercise Clause cases, we begin with the understanding that neutrality is not a substantive provision of law. Rather, neutrality defines characteristics of a relationship; it is a term which by nature requires comparison between at least two parties. Thus, when we speak of a law being neutral we mean that the government has dealt even-handedly or disinterestedly with two or more distinct groups.

As we have learned from the civil rights debates over equality, describing relationships between groups also depends on the characteris-

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[84] Obviously, reading the Free Exercise Clause to disallow only those non-neutral laws that "prohibit" religion leaves open the prospect that purposeful discrimination against religion that burdens but does not forbid or prevent free exercise would not violate the Free Exercise Clause. Although constitutional protection against such state action might in most cases be available under the Establishment Clause and/or the Equal Protection Clause (among other constitutional provisions), we are not entirely comfortable with the idea that the Free Exercise Clause would not disallow such action under our interpretation. Nevertheless, we believe the only principled approach is to follow the text of the Constitution as we are able to best comprehend its original meaning, despite any misgivings we may have about the results of that approach.

tics being compared. For example, "equality" defined as equality of opportunity requires comparison of characteristics very different from the characteristics compared when "equality" is defined as equality of result.

In similar fashion, whether a given law is "neutral" depends on the point at which the parties are compared. The Court has employed three different points of comparison for determining whether a law is neutral with respect to religion. First, we look at its plain language. Objectively, is the law about religion or religious practice? A good example of a law non-neutral on its face is a statute authorizing teachers to lead students in a prescribed prayer, *see Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *aff'd mem., Wallace v. Jaffree*, 104 S. Ct. 1704 (1984), while a law requiring attendance at school is an example of a statute that is neutral on its face.

Second, we may look at legislative intent. Although often it is difficult if not impossible to determine the intent of the legislature, the courts have relied heavily on legislative intent in the Establishment Clause context in the moment of silence cases, *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985); *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), *pet. for cert. filed sub nom. Karcher v. May*, 54 U.S.L.W. 3650 (U.S. Apr. 1, 1986) (No. 85-1551), and in cases involving allegations of attempts by the state to discriminate between religious sects, *e.g., Larson v. Valente*, 456 U.S. 228 (1982).

The third point of contact is, obviously, the effect that the law has on the parties. *Braunfeld*, *Witters*, and *Goldman* are good examples of challenges to facially neutral laws based on the benefit or burden that results.

With these three different points of comparison, there are eight separate combinations by which we might judge a statute's neutrality. These eight combinations, representing different classes of laws, are provided in Figure 3.

Fig. 3

	Benefits Religion	Burdens Religion[85]
Neutral Face Neutral Intent	I	II
Neutral Face Non-neutral Intent	III	IV
Non-neutral Face Neutral Intent	V	VI
Non-neutral Face Non-neutral Intent	VII	VIII

With Figure 3 we can identify the areas in which neutrality principles help clarify the analysis of Free Exercise Clause issues as well as the areas in which further analysis may yet be required. By dividing laws into two columns, those that benefit religion and those that burden religion, we have roughly separated Establishment Clause cases from Free Exercise cases, as the examples of cases I (neutral face, neutral intent, benefits religion),[86] III (neutral face, non-neutral intent, benefits

[85]The columns have been labeled "Benefits Religion" and "Burdens Religion," both of which represent non-neutral effects. To be logically consistent, the columns should have been labeled "Neutral Effects" and "Non-neutral Effects," but it would make little practical sense to do so. If a statute is non-neutral on its face or was enacted with non-neutral legislative intent, presumably it will have non-neutral effects; if it has a neutral effect -- that is, religionists and non-religionists are indifferent to the law -- then there is no harm that can be claimed, no case or controversy, and presumably no party interested in challenging the law. Similarly, even a statute that is neutral on its face and was passed with neutral intent will only be challenged if there are non-neutral effects, that is, burdens or benefits to religion.

[86]*E.g.*, *Witters v. Washington Dep't of Services for the Blind,* 106 S. Ct. 748 (1986) (blind student sought to use state grant for the handicapped for training for Christian ministry); *Mueller v. Allen*, 463 U.S. 388 (1983) (tuition tax credits allowed for tuition paid to private, non-profit secondary school; substantial number of schools church-affiliated).

religion),[87] V (non-neutral face, neutral intent, benefits religion),[88] and VII (non-neutral face, non-neutral intent, benefits religion)[89] demonstrate. Leaving discussion of the Establishment Clause cases for another day, we will examine the four classes of cases in which the law in some way prohibits the free exercise of religion by forbidding or preventing it. *See* pp. 17-19, *supra.*

Taking the examples in reverse order, we should have little difficulty in agreeing that Class VIII laws (non-neutral face, non-neutral intent, burdens religion)[90] will be unconstitutional. These laws are transparent, demonstrating on their face and through the circumstances of their passage that they were designed to single out and impede religious beliefs and practices. Class VI laws (non-neutral face, neutral intent, burdens religion) are probably trivial[91] and merit no further discussion here.

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[87] *E.g., Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) (legislature enacted moment of silence statute to encourage prayer in the public schools); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (legislature prohibited teaching evolution to aid fundamentalist Christianity).

[88] *E.g., Stone v. Graham*, 449 U.S. 39 (1980) (legislature required schools to post the Ten Commandments); *Friedman v. Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc) (County seal displaying Latin cross and the words "*Con Esta Vencemos*"; used to differentiate Bernalillo County from Albuquerque since 1925), *cert. denied*, 54 U.S.L.W. 3809 (U.S. June 9, 1986).

[89] *E.g., Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985) (Connecticut law forbidding employers from requiring employees to work on their Sabbath).

[90] *E.g., Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) (Edmunds-Tucker Act revoked charter of Mormon Church and directed Attorney General to begin forfeiture proceedings against church property); *Davis v. Beason*, 133 U.S. 333 (1890) (Idaho Territorial law disfranchised anyone who advocated or was a member of a group that advocated "celestial marriage" [Mormon polygamy]).

[91] These cases may be trivial since it is unlikely that a statute that was non-neutral on its face and burdened religion could have been enacted with neutral intent. *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983), could be such a case if it were characterized as involving an IRS decision directed at the school but done without any intention of burdening the religious practice. However, it is difficult to characterize *Bob Jones* properly for the same reason it is difficult to deal with *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934). All of these cases involve government entitlements, so from the outset we are dealing with privileges instead of rights and are not dealing with prohibitory or otherwise mandatory laws, which is what the Free Exercise Clause forbids. *See* pp. 17-19, *supra.*

Laws in Class IV (neutral face, non-neutral intent, burdens religion)[92] are generally unconstitutional. These laws must be scrutinized carefully on a case-by-case basis, however, because we may be prepared to say under certain circumstances that the passage of time has effectively erased the memory and significance of the legislature's improper religious motivation.[93]

Under the strict neutrality theory, laws in Class II (neutral face, neutral intent, burdens religion)[94] would generally be constitutional.[95]

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[92] *E.g.*, *Larson v. Valente*, 456 U.S. 228 (1982) (extending religious exemption from solicitation reporting requirement generally applicable to all charitable organizations only to religious organizations that receive more than 50 percent of their funds from nonmembers).

[93] The best examples are Establishment Clause cases. A case in point is the Utah death penalty statute, which permits the prisoner to elect the method of execution. When the statute was first enacted in 1851, the choice was firing squad, hanging, or beheading. Laws of Utah, Title XII, § 125 (1852). The current codification gives the prisoner a choice of the firing squad or lethal injection. Utah Code Ann. § 77-18-5.5 (1982 & 1985 Supp.). The history of the statute makes it clear that the territorial legislature enacted such a provision because of the early Mormon belief that a murderer had to spill his own blood to atone for his crime. While the Mormons generally no longer hold to this doctrine, the statute remains. At least one commentator has argued that the statute violates the First Amendment. *See* Gardner, *Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause -- A Case for Consideration: The Utah Firing Squad*, 1979 Wash. U.L.Q. 435. Assuming *arguendo* that the legislature was religiously motivated and that such motivation would be grounds for overturning the statute (a highly questionable proposition, *see Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984)), surely the passage of time removes any religious taint from an otherwise neutral statute in this situation.

[94] Cases in Class II include *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986) (Air Force refused to permit officer to wear yarmulke while on duty and in uniform); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Old Order Amish refused to send children to school after eighth grade in violation of compulsory education law).

[95] An immediate problem for consideration is that accommodation provisions in statutes, such as the Title VII exemption or the conscientious objector exception, are non-neutral on their face, were enacted with non-neutral intent and further religious practice. We must somehow distinguish accommodation clauses analytically or otherwise one might believe that an accommodation provision was unconstitutional under the Establishment Clause but mandated by the Free Exercise Clause. *See Thomas v. Review Bd.*, 450 U.S. at 724-25 (Rehnquist, J., dissenting); *Sherbert v. Verner*, 374 U.S. at 414-16 (Stewart, J., concurring).

One possible solution is to divide laws analytically into first-tier and second-tier laws. First-tier laws are statutes of general applicability such as Title VII or a conscription law. An exemption from that law based on religion (or any other relevant

We must reject this result in our proposed use of the neutrality theory, however, because the text and history of the Free Exercise Clause demonstrate that prohibitory laws may violate the Clause even if they are religiously neutral. In our view, cases in this Class should be resolved by applying the balancing principles described in the following section.

In sum, neutrality principles suggest that a law is unconstitutional if it is non-neutral toward religion on its face or in its intent and if it prohibits (forbids or prevents) the free exercise of religion. A law is non-neutral toward religion on its face if it draws a religious classification either directly, such as by using the term religion or some variation thereof, or indirectly, such as by referring to a religious practice that has no secular relevance evident from the plain meaning of the law or its statutory context.[96] Similarly, a law is non-neutral toward religion in its intent if it is passed with religious animus, or the specific intent to burden religion.[97]

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classification) would be a second-tier law. Since a first-tier law frequently means that the government intends to occupy a field (such as employment) in which religious institutions have an interest, and that occasionally the law displaces religion, the second-tier law merely accommodates religious practice by restoring religion to its pre-regulation position. In essence, a first-tier law establishes the government in the field. Thus, if the first-tier law prefers religion, then it violates the Establishment Clause; a second-tier law preferring religion avoids a conflict with the Free Exercise Clause.

This analysis is consistent with the Court's approval of second-tier exemptions but disapproval of first-tier laws such as the Connecticut law at issue in *Estate of Thornton v. Caldor*. The law in *Caldor* failed because the government had not "occupied the field" -- which could have been shown if, for example, the government had forced employees to work on days that some of them might consider sacred -- but instead established a state-protected day of worship.

[96] *See McDaniel v. Paty*, 435 U.S. 618, 634 (1978) (Brennan, J., concurring) (clergy disqualification statute unconstitutional under Free Exercise Clause because, although occupation has some secular relevance, singling out of *religious* occupation for burdensome treatment without reference to secular aspects of regulating occupations in general amounted to religious classification).

[97] Thus, a statute banning polygamy would not be non-neutral toward religion in its intent merely because the legislature became aware of the practice through the religious activity of Mormons; in this case, there clearly would be no reason to suspect the legislature of any religious animus against Mormons, at least absent evidence to that point. As Prof. Ely has remarked with respect to the question of legislative purpose, "what should be required is not simply proof of a desire to . . . hinder religion, but proof of a desire *comparatively* to . . . disfavor religion with respect to others." Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1315 (1970) (emphasis in original). *See generally City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 929-30 (1986) (zoning ordinance addressed to adult motion picture theatres is

C. Balancing

The balancing approach reveals that in order to secure religious liberty in a meaningful way, we must be concerned not only with the language and purpose of statutes, but also with their actual effect on religious liberty; generally applicable statutes with religiously neutral intent can effectively prohibit the free exercise of religion in an endless variety of ways. See pp. 40-41, *supra*.

The balancing approach also reveals that a general willingness to except religion from statutes of general applicability will necessarily give rise to conflicts between religious liberty and the secular interests of the state, and that some standard must be developed to provide an appropriate resolution of those conflicts. The following discussion will present our views concerning how balancing principles should be applied to Free Exercise Clause disputes.

1. Religious Claimant's Initial Burden: Sincerely-Held Religious Belief and Government Prohibition of the Free Exercise of That Belief

To begin, we agree with the Supreme Court's current teaching that the individual or institutional claiment should bear the initial burden of proving that the state has interfered with the free exercise of religion. In particular, we believe the claimant should be required to prove that (1) the religious belief is sincerely-held, and (2) the state has prohibited the free exercise of that belief.

a. The Religious Belief is Sincerely-Held

There is no direct evidence in the language or history of the Free Exercise Clause that the First Amendment protects the exercise of insincere religious beliefs. Neither would such protection further the purposes underlying the Free Exercise Clause, since insincere religious beliefs do not implicate the genuine religious conscience that the Framers meant to protect from undue state interference. Also, as Professor Tribe has noted, protecting insincere religious beliefs would go far toward making the Free Exercise Clause a "limitless excuse for avoiding all unwanted legal obligations," Tribe, *American Constitutional Law* §

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neutral with respect to content of speech because aimed at secondary effects of such theatres on the surrounding community).

14-11, at 859, mocking the salutary purposes of the First Amendment.[98]

As a necessary means for assisting the court in its determination of the sincerity of a claimant's religious belief, we believe that a Free Exercise Clause claimant should be required to make a *prima facie* explanation of the nature of the religious belief and the source of the duty.[103] The government should then be required to prove that the belief is not sincerely-held, either by demonstrating that the claimant has an ulterior motive (such as greed or immorality)[104] or that he otherwise does not in fact hold the belief (perjury).[105]

In determining whether a religious belief is sincerely-held, it is important not to mistake the difficulties inherent in holding religious beliefs for the affectation of belief. For example, a religious belief should not be judged insincere based on "simplistic state demands which would hold the religious claimant to some imaginary standard of impeccably perfect conduct in adherence to doctrine."[106] As one attorney prominent in the First Amendment area has remarked:

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[98] *See also* Gianella, 80 Harv. L. Rev. at 1417 (minimal inquiry into sincerity of claimant's expressed religious beliefs "necessary to avoid making a mockery of both religion and government"); Killilea, *Standards for Expanding Freedom of Conscience*, 34 U. Pitt. L. Rev. 531, 548 (1973) (without a sincerity test, religious exemptions would be unmanageable and unsupportable because there would be no way to distinguish between conscientious and fraudulent claims).

[103] *Cf.* Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. Chi. L. Rev. 805, 834 (1978) ("If an individual asserts that his conduct is unrelated to religious expression, or if he does not choose to claim that his conduct is religiously motivated, then the broad protection of the free exercise clause should simply not be made available to him"); Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 Yale L.J. 593, 605 (1964) ("when a man acts publicly in a domain where the normal expectations are of secular contentions, he must make it clear that his claims are made as elements of a faith which describes the nature of things about which he is making the claims").

[104] *See, e.g., United States v. Daly*, 756 F.2d 1076, 1081 (5th Cir. 1985) (use of personal churches as tax avoidance scheme); *United States v. Kuch*, 288 F. Supp. 439, 445 (D.D.C. 1968) (rejecting free exercise claim of member of Neo-American "church" with respect to drug use as obvious hoax).

[105] *See Int'l Soc'y for Krishna Consciousness, Inc., v. Barber*, 650 F.2d 430, 444 (2d Cir. 1981) (discussing proper order of proof and permissible types of evidence state may rely upon to prove insincerity of religious beliefs); *Van Schaick v. Church of Scientology*, 535 F. Supp. 1123, 1144-45 (D. Mass. 1982) (same).

[106] Ball, *Religious Liberty in 1984: Perils and Promises*, 5 Christian Legal Soc'y Q., No. 1, at 4, 6 (1984).

> The valid religious experience is often otherwise, often a troubled and groping one, *especially* where the religious party has been brought suddenly up against the enormous power of modern government. Religious people are usually law-abiding people, and -- especially where not acquainted with their religious civil rights -- they may have taken some steps as good citizens to conform, which steps may appear to be at variance with their later declared convictions. Or (and this is often the case) they may have only gradually realized the theological implications of, for example, seeking a governmental permit to carry out God's ministry.[107]

A religious belief is not insincere merely because the believer admits he is "struggling" with it.[108]

Similarly, because of the inherently abstract and other-worldly nature of religious beliefs, religious claimants should not be expected to articulate and explain the depth and ramifications of their religious beliefs with the understanding of the great theologians. As the Supreme Court explained in *United States v. Ballard*, 322 U.S. 78, 86-87 (1944), "[m]en may believe what they cannot prove." *See also Thomas v. Review Board*, 450 U.S. 707, 715 (1981) ("[c]ourts should not undertake to dissect religious beliefs because . . . [the] beliefs are not articulated with the clarity and precision that a more sophisticated person might employ").

Furthermore, the Supreme Court has properly held that a religious claimant should not be required to prove that his religious belief is shared by others in his religious community or, for that matter, by anyone other than himself.[109] The Framers understood that religious conscience --

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[107] *Id.* (emphasis in original); *see* Howe, *The Garden and the Wilderness* at 49 ("religious belief is not a fixed conviction but an evolving commitment").

[108] *Thomas v. Review Bd.*, 455 U.S. 707, 715 (1981).

[109] *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) ("guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect"). Several lower court cases decided prior to *Thomas* hold to the contrary. *See, e.g., Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1164-65 (6th Cir.) (rejecting Free Exercise Clause claim of Cherokee Indians because religious belief not shared by an organized group), *cert. denied*, 449 U.S. 953 (1980); *In re Nissen*, 138 F. Supp. 483 (D. Mass. 1955) (member of church which did not teach pacifism does not qualify under provisions of Naturalization Act as conscientious objector by reason of religious training and belief).

which is at the heart of the Free Exercise Clause -- is an individual matter. For example, Madison's Memorial and Remonstrance quite plainly stresses the essential individuality of religious belief by stating that it is "the duty of every man to render the Creator such homage, and such only, *as he believes to be acceptable to him.*"[110]

b. The State Has Prohibited the Free Exercise of Sincerely-Held Religious Beliefs

Second, the religious claimant must prove that the state has prohibited the free exercise of a sincerely-held religious belief. As discussed more fully at pp. 17-27, *supra*, the Free Exercise Clause protects individuals and institutions only against (1) acts of the state (2) that forbid or prevent (3) the exercise of "religion."

To assist the courts in determining whether the above elements are present in any given case, we believe the religious claimant should have the initial responsibility to explain how the state's action "prohibits" (forbids or prevents) the free exercise of his religious belief as opposed to merely burdening it. See pp. 17-19 and p. 47 n.84, *supra*. The state should then be required to prove the absence of a nexus between the government's prohibitory action and the claimant's religious exercise. For the reasons stated at pp. 53-56, *supra*, we believe this inquiry should be a subjective one designed to reveal whether the religious claimant sincerely believes his ability to perform his religious duty is threatened by action of the state, or whether he instead is engaging in fraud or perjury.

Significantly, we believe the religious claimant should not be required to prove that the religious principle the state has prohibited is one of the most important or fundamental parts of his religious system of belief.[111] There is no support for such a requirement in the language or history of the Free Exercise Clause, and the requirement is contrary to the central purpose of the Clause, which is to protect the exercise of any religious belief motivated by sincere religious conscience. *See* pp. 38-42, *supra*. Moreover, requiring courts to distinguish more important religious beliefs from less important ones would improperly invite courts to

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[110] Memorial and Remonstrance § 1 (1785) (emphasis added), *reprinted in Everson v. Board of Educ.*, 330 U.S. at 64.

[111] For discussion of cases holding to the contrary in the contexts of zoning laws, drug laws, and laws relating to Native Americans, see *infra*, Appendix C.

interpret matters of religious doctrine;[112] indeed, the very idea that the strength of religious conscience is variable is itself a doctrine-laden decision not necessarily reflective of all religions.

2. State's Burden: Least Restrictive Alternative and Compelling State Interest

Once the religious claimant has shown that the state has prohibited the free exercise of a sincerely-held religious belief, the burden should shift to the state to prove its regulation is the least restrictive means necessary to further a compelling state interest. The following discussion will identify the constitutional justification for those elements and suggest how they should be applied.

a. Least Restrictive Alternative

(1). *Constitutional Justification.* The least restrictive alternative requirement, although not immediately apparent from the language of the Free Exercise Clause, is nonetheless justifiable as necessary and proper to effectuate the purposes of the Clause. Very simply, allowing the state to pursue its goals through means that prohibit the free exercise of religion when it could achieve those goals reasonably as well through less restrictive means would be to infringe religious liberty without sufficient justification. See pp. 37-42, *supra*.

As thus defined, the least restrictive alternative test would not require the government to adopt the alternative that is most favorable toward religion regardless of the cost to the state's interest. Instead, the state would be allowed to forgo any less religion-restrictive alternative that would impose an unreasonable burden on a compelling state interest.[113]

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[112] *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976) (civil courts may not decide matters of religious doctrine, governance, or discipline); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 450 (1969) (holding unconstitutional Georgia "departure from doctrine" rule with respect to civil determination of ownership of church property).

[113] In order to avoid unnecessary deprivations of religious liberty, the state should be permitted to satisfy this burden only by presenting evidence of the above elements based on facts demonstrated in the record, and not on mere speculation. *See, e.g., Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508-10 (1969) ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"); *Country Hills Christian Church v. Unified School Dist.*

Moreover, in evaluating the cost of a proposed less restrictive alternative, due deference should be given to the judgments of the legislative and administrative branches. As in other areas of the law, the courts should not second-guess legislative and administrative findings of fact, ignore legislative and administrative expertise, or nit-pick statutes and regulations.[114] This is especially so in contexts such as military and prison regulations, where the need for deference to the legislative and administrative branches is at its zenith.[115]

(2). *Application of Least Restrictive Alternative Standard.* We believe the cost of a proposed less restrictive alternative should be determined by analyzing how it would apply to the individual claimant at hand and other similarly situated claimants who are reasonably likely to seek similar treatment.[116] The opposite rule -- applying the less restrictive alternative to the populace as a whole without regard to the likely number of actual claimants -- would tend to exaggerate the actual cost of granting a religious exemption and threaten the denial of an exemption

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No. 512, 560 F. Supp. 1207, 1216 (D. Kan. 1983) (rejecting as "speculative and unsupported by empirical evidence" school district's argument that students would misperceive equal access for religious speech as state sponsorship of religion).

[114] *See, e.g., Regents of Univ. of Mich. v. Ewing*, 106 S. Ct. 507, 513 (1985) (courts may not overrule genuinely academic decision unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment); *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069, 3072 (1984) (requirement under Free Speech Clause that government regulation of expressive conduct be narrowly tailored to serve a significant governmental interest does not "assign to the judiciary the authority to replace the [National] Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained").

[115] *See Goldman v. Weinberger*, 106 S. Ct. 1310, 1314 (1986) (deferring to professional judgment of Air Force with respect to regulations designed to promote military discipline and espirit de corps); *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (since problems that arise in day-to-day operation of corrections facility are not susceptible of easy solutions and since prison administrators have developed substantial expertise in this context, prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and to maintain institutional security).

[116] *See Callahan v. Woods*, 736 F.2d 1269, 1274 (9th Cir. 1984) (exemption of one person not as harmful to government interest absent evidence that others hold similar beliefs requiring exemption).

where such is not necessary to accommodate the state's interests.[117] This, in turn, would be inconsistent with the purposes of the Free Exercise Clause to accommodate religious conscience whenever such would not unduly undermine compelling state interests.

In order to accommodate fully both religious liberty and the state's interests and to relieve the government of having to prove a negative (the non-existence of a less restrictive alternative), we suggest the following order of proof with respect to the least restrictive means requirement. First the religious claimant should be required to identify a less religion-restrictive alternative that on its face would reasonably satisfy the state's interest. The state should then be allowed to rebut the claimant's *prima facie* demonstration by showing that it would place an unreasonable cost on the state's interests, that the alternative proposed is unnecessary to alleviate any state prohibition on the free exercise of the claimant's sincerely-held religious beliefs, or that the alternative will be ineffective to that end.

b. Compelling State Interest

(1). *Constitutional Justification.* The Supreme Court has never explained why the compelling state interest standard is appropriate in the Free Exercise Clause context. Certainly there is no magic in the words "compelling state interest." Indeed, these words in themselves provide no useful standard for determining which state interests should prevail over religious liberty interests, other than to imply that some state interests will not do so.

As the following discussion will demonstrate, however, the meaning of the words "compelling state interest" can be particularized into a useful analytical standard in the Free Exercise Clause context by reference to the history and purposes of that provision. The constitutional justification for the "compelling state interest" standard resides not in

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[117] *See, Roy v. Cohen*, 590 F. Supp. 600, 611-13 (M.D. Pa. 1984), *rev'd on other grounds sub nom. Bowen v. Roy*, 54 U.S.L.W. 4603 (U.S. June 11, 1986); Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 Wis. L. Rev. 217, 284 (a religious exemption may be harmless precisely because few people avail themselves of it). There is nothing unfair in denying constitutional protection to widely-held religious practices that substantially impair significant state interests while granting protection to religious practices that have only a remote impact on state interests, nor is it unreasonable to have a constitutional rule that may change as relevant circumstances change.

those words themselves, but instead in the particular meaning we attribute to them by reference to the history and purposes of the Free Exercise Clause. Consequently, we believe the "compelling state interest" terminology should be retained in the analysis of Free Exercise Clause claims simply because this is the terminology used by the Supreme Court and because there is no substantive reason to discard it.[118]

(2). *Threshold Considerations.* A threshold consideration with respect to the compelling state interest test is that courts should require the state to articulate its purported compelling interest with *particularity.* Conversely, the state should not be permitted to articulate its asserted interest in unduly broad terms, such as the state's interest in "providing education" or "preventing discrimination." As Professor Fried (now Solicitor General of the United States) has noted, the inevitable result of the opposite rule is to tip the scales in favor of the state before the balancing has even begun, leading to decisions unnecessarily hostile to religious liberty.[119]

A second threshold consideration is that courts should require the state to demonstrate a reasonable degree of consistency in pursuing its asserted interest. This rule is justifiable because we may reasonably question the importance of the state's asserted interest if the state is not

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[118] Additionally, we note that it would be anomolous not to use the least restrictive alternative/compelling state interest test in the Free Exercise Clause area but to continue using it in the Free Speech, Equal Protection, and other contexts in which it is presently employed. *See, e.g., Widmar v. Vincent,* 454 U.S. 268, 274 (1981) (Free Speech Clause); *City of Cleburne v. Cleburne Living Center,* 105 S. Ct. 3249, 3255 (1985) (Equal Protection Clause).

[119] *See* Fried, *Two Concepts of Interest: Some Reflections on the Supreme Court's Balancing Test,* 76 Harv. L. Rev. 755, 763 (1963). According to Professor Fried:

> One thing is perfectly clear, that under no circumstances should the Court formulate the conflict in a particular case, or identify elements of the balance to be struck, in such a way that the statement itself prejudices the decision. It would, indeed, be begging the question to purport to balance some highly generalized and obviously crucial interest, such as the right of the legislature to inform itself on matters bearing on national security, against some rather particular and narrowly conceived claim such as the right of a particular individual to withhold a particular, perhaps trivial, item of information from a committee on this occasion.

See id.; *see also* Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause,* 1981 Utah L. Rev. 309, 341 (the level of generality at which the competing interests have been defined by the Supreme Court in Free Exercise Clause disputes often has determined the outcome of those disputes).

concerned with any intrusions against that interest other than religious ones. For example, it is reasonable to question the importance of zoning regulations barring organized religious activity from an area when local officials permit organized social, political, educational, and recreational activities.

Third, in proposing a standard for determining what is a compelling state interest, we believe the goal should not be the unattainable and unsound one of devising principles that can be applied mechanically to arrive at results which are predictable with complete assurance. Instead, the proper goal should be to propose a standard that is *reasonably* predictive of the result of future religious liberty conflicts and that is *reasonably* derived from legitimate underlying principles.[120]

(3). *Proposed Standard and Explanation.* We believe the following standard substantially meets the goals described in the preceding paragraph.

> It is permissible for the state to burden the exercise of sincerely-held religious beliefs when necessary to:
>
> a. Prevent manifest danger to the existence of the state.
>
> b. Protect public peace, safety, and order.

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[120]Professor Gianella, who authored the seminal article on the Free Exercise Clause balancing test, had the following to say in this regard:

> The more recent free exercise cases frankly adopt a balancing of competing interests test. But this approach involves certain hazards, since a balancing test tends to substitute subjective judgment for objective standards. The choice, however, need not be between an inflexible, formalistic approach and an unprincipled, wholly intuitive process of decision making. Ad hoc judgment can be subjected to more or less objective criteria. The human values and political objectives influencing our constitutional ideals can be defined with some degree of clarity; the means whereby these values and ends are to be attained can undergo critical analysis and rationalization; guidelines can be established to direct the accommodation of competing ends and values; and in those hopefully few cases where head-on conflict is unavoidable, a hierarchy of values and ends can be elaborated. If subjected to this analysis, prevailing judicial decisions interpreting the free exercise clause can fit into a more or less rational pattern.

Gianella, 80 Harv. L. Rev. at 1384 (footnote omitted). *See also* P. Freund & R. Ulrich, *Religion and the Public Schools* 12 (1965) ("[a] course of decisions may be principled without being doctrinaire").

c. Protect the religious liberty of others.

These categories delimit the interests the state may advance as against religious liberty. Thus, if the state can point to one of these interests as justifying a generally applicable law that prohibits free exercise, its interest will prevail (as long as the law is the least restrictive means of achieving that interest) without any further need for "balancing of interests." By contrast, if a prohibitory law falls outside the above categories, the state's interest fails even if the law is the least religion-restrictive alternative.

The following discussion will elaborate on and identify the bases for each of these categories seriatim.

(a). *Preventing Manifest Danger to the Existence of the State.* This first standard draws directly upon Madison's idea that religious liberty may be limited when "the existence of the state is manifestly endangered." *See* pp. 7-8 & n.11, *supra*. This principle also is at least implicit in the statements of Mason and Jefferson -- paralleled in the majority of state constitutions when the Free Exercise Clause was adopted -- that religious liberty may be restricted in order to protect public peace and safety, since the state must exist in order to pursue those goals. See pp. 7-8 & n.11, *supra*. Furthermore, this principle is logically necessary from the text and purposes of the Free Exercise Clause, since allowing religious liberty to threaten the existence of the state would also threaten religious liberty.

Although determining which state interests are necessary to maintain the existence of the state is by no means beyond dispute, the ability of the federal government to maintain a national defense[121] and to protect its borders,[122] and the ability of national, state, and local governments to raise revenue[123] would appear to fall within this category.

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[121] *See Gillette v. United States*, 401 U.S. 437, 462 (1971) (military draft).

[122] *See United States v. Elder*, 601 F. Supp. 1574, 1580 (S.D. Tex. 1985) (rejecting Free Exercise Clause defense to criminal prosecution of religious believers who provided sanctuary to illegal aliens).

[123] *See United States v. Lee*, 455 U.S. 252, 259-61 (1982) (rejecting Free Exercise Clause challenge of Old Order Amish to mandatory social security contribution on behalf of employees); *Murdock v. Pennsylvania*, 319 U.S. 105, 112-13 (1943) (income and property taxation of churches and religious individuals permissible).

Additionally, because our government is a constitutional democracy, maintaining the continued existence of the state might include preserving the fundamental attributes of that system.[124] In this regard, the Supreme Court has implied that some minimal degree of basic education is compelling because it is necessary to prepare citizens for meaningful participation in democracy.[125] We question the extension of the "existence of the state" category in this manner because, among other reasons, it is difficult to envision a principled basis for determining what would and would not qualify as "fundamental attributes of the state" and what interests sufficiently promote such "fundamental attributes."[126]

(b). *Protecting Public Peace, Safety, and Order.* This second principle draws directly upon Jefferson's statement -- reflected in the majority of state constitutions when the Free Exercise Clause was adopted -- that religious liberty may be regulated when it "break[s] out into overt acts against peace and good order." See pp. 7-8 & n.11, *supra.* This principle also comports with the religious liberty standard included the Northwest Ordinance of 1787 (reenacted by the First Congress in 1789) that "no person, *demeaning himself in a peaceable and orderly manner*, shall ever be molested on account of his mode of worship, or religious sentiments . . . ." Northwest Ordinance art. I (1787).

As a general rule, the historical evidence suggests that the state's compelling interest in protecting "public peace, safety, and order" was originally understood as applying only to the protection of *others* rather than the individual himself.[127] For example, Thomas Jefferson said that "[t]he legitimate powers of government extend to [religious] acts only as are injurious to *others*."[128] Similarly, George Mason's original proposal for the 1776 Virginia Declaration of Rights provided that religious

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[124] *See* Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U. L. Rev. 462, 479 (1977) (using phrase "continued survival of the constitutional democratic state").

[125] *See Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

[126] For example, if a basic education is compelling because necessary to prepare citizens for participation in democracy, then why not also a particular diet and exercise schedule that prepares the child for receiving and achieving a basic education?

[127] *Cf.* Tribe, *American Constitutional Law* § 14-10, at 857 (interpreting Supreme Court's decision in *Wisconsin v. Yoder* as standing for principle that state may not restrict religious liberty in order to provide individuals with what the state considers to be the "best possible life").

[128] *See* 2 *The Writings of Thomas Jefferson* 221 (A. Lipscomb, ed. 1903).

liberty could be restricted only when "under color of religion any man disturb the peace, happiness, or safety *of society*."[129] Also, the majority of state constitutions at the time of the adoption of the First Amendment provided in various terms that religious liberty could be infringed only when it threatened *public* (as opposed to *private*) peace or safety. See pp. 4-9, *supra*.

Several types of state regulation appear to fall within the state's compelling interest in protecting public peace, safety, and order. First, the state should be entitled to protect the physical health of others, such as to require religious objectors to be vaccinated against communicable disease,[130] to hold religionists criminally and civilly responsible for harming others physically,[131] and to enforce building codes and fire regulations.[132] On the other hand, it is much less clear that a state should be able to order a blood transfusion for a minor over the religious objections of his parents;[133] the rights of children is a difficult issue that we have not attempted to resolve here as a general matter.[134]

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[129] *See* Malbin, *Religion and Politics* at 21 (quoting G. Hunt, *Madison and Religious Liberty*, American Historical Association Annual Report 163, 166 (1901) (emphasis added)).

[130] *See, e.g., Jacobsen v. Massachusetts*, 197 U.S. 11, 127 (1905).

[131] *See, e.g., Kirk v. Commonwealth*, 44 S.E.2d 409, 419 (Va. 1947) (pastor may be convicted of involuntary manslaughter for handing poisonous snake to wife during religious ceremony); *O'Moore v. Driscoll*, 28 P.2d 438 (Cal. App. 1933) (civil cause of action against priest for religiously motivated false imprisonment).

[132] *See, e g., Congregation Beth Yitzchok v. Town of Ramapo*, 593 F. Supp. 655, 658-63 (S.D.N.Y. 1984).

[133] *See generally Jehovah's Witnesses v. King County Hospital*, 278 F. Supp. 488, 504-05 (W.D. Wash.), *aff'd*, 390 U.S. 598 (1967) (per curiam).

[134] For the same reasons the state should be allowed to restrict religious liberty in order to secure the physical safety of others, the state probably also should be permitted to do so in order to secure the psychological and emotional health of others. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (Free Exercise claim of Amish parents to hold their children out of school after the eighth grade succeeded in part because state submitted no evidence that such would result in physical or emotional harm to Amish children); *Nally v. Grace Community Church*, 204 Cal. Rptr. 303, 308-09 (Cal. App. 1984) (Church and clergy may be sued for tort of intentional infliction of emotional distress based on religious counseling). Nevertheless, because almost any action potentially can cause some degree of emotional harm, the state's compelling interest in securing emotional well-being probably should be limited to the most extreme cases of emotional distress, and special defenses and protections for religiously-motivated actions would need to be developed and strictly adhered to. *See, e.g.*, R. Hammar,

Significantly, allowing the state only to protect the physical health of *others* would prevent it from protecting the individual from harming himself for religious reasons. The result of this rule would be to disable the state from preventing, for example, the Hindu practice of Suttee, wherein wives throw themselves on their husbands' funeral pyre. Adopting the opposite rule would lead to equally distasteful results, however, such as by permitting the state to administer a blood transfusion to an objecting Jehovah's Witness who sincerely believes that a transfusion will result in his eternal damnation even if he receives it involuntarily.[135] Even more importantly, whatever discomfort we may feel about the results of following our best understanding of the original meaning of the Constitution is not a sufficient reason for abandoning that meaning in favor of our own perceived wisdom.

In addition to preventing physical harm to others, it seems reasonable that the state also should be allowed to protect the *property* of others under the "public peace, safety, and order" standard. Thus, the state should be allowed to prosecute individuals for theft, robbery, larceny, and other similar crimes, and to find individuals liable for conversion, fraud, and other similar torts, even though such acts may be done in the name of religion.[136] Unlike the issue of preventing physical harm, however, we are less troubled in concluding that the state probably should not be allowed to restrict religious liberty in order to protect the believer's own property, at least where the believer is competent to make a decision in that respect.

Finally it appears that state regulations of the time, place, and manner of religious expression and exercise would be justifiable under the "public peace, safety, and order" standard.[137] Examples of such

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Pastor, Church, and Law 65-68 (1983) (discussing tort of defamation against pastors and defenses thereto); Note, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 Cal. W.L. Rev. 507, *passim* (1983) (discussing religious liberty issues in context of tort liability based on pastoral counseling).

[135] *See In re Osborne*, 294 A.2d 372, 375 (D.C. App. 1972) (Jehovah's Witness has Free Exercise Clause right to decline blood transfusion under above circumstances).

[136] *See, e.g., SEC v. World Radio Missions*, 544 F.2d 535, 537-39 (lst Cir. 1976) (obtaining injunction against violation of antifraud provisions of federal securities laws by a church and its pastor). *See generally* R. Hammar, *Pastor, Church, & Law* 252-55 (1983) (citing cases).

[137] *See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 645-47 (1980) (restricting soliciting at state fair to booths).

regulations would be nuisance laws, laws against disturbing the peace, laws limiting solicitation and proselytizing to reasonable hours of the day, and traffic control laws.[138]

(c). *Protecting the Religious Liberty of Others.* This standard also is derived from the statements of the Framers, most notably those of Madison. For example, in his Memorial and Remonstrance, Madison said that "[w]hilst we assert for ourselves the freedom to embrace, to profess, and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."[139]

In addition, the Free Exercise would be internally inconsistent if it were to grant one individual the right to have the government prohibit another individual from engaging in the free exercise of religion. Similarly, the Free Exercise Clause would be inconsistent with the Establishment Clause if the Free Exercise Clause were interpreted to grant one individual the right to have the government coerce another individual to engage in the exercise of religion. Therefore, we believe the Free Exercise Clause probably does not entitle one individual to have the government either (1) prohibit another individual from engaging in the free exercise of religion or (2) coerce another individual to engage in the exercise of religion.

Protecting one person's religious liberty by exempting him from a statute of general applicability also might indirectly influence another individual to express adherence to the religious belief in question in order to take advantage of the special religious exception. This kind of indirect pressure probably is not what the Framers had in mind when they sought to protect the religious liberty of others, however. For one thing, this kind of indirect pressure would not violate the Free Exercise Clause

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[138] *See, e.g., McMurdie v. Doutt*, 468 F. Supp. 766, 776 (N.D. Ohio 1979) (regulation limiting public solicitation to time period between 9 A.M. and 6 P.M. constitutional as applied to religious objector); *Howard v. City of Tulsa*, Crim. No. M-83-783 (Okla. Crim. App. Jan. 7, 1986) (upholding criminal conviction of preacher for disturbing the peace by holding outdoor revival services with an electronically amplified five-piece band that could be heard several blocks away); *Assembly of God Church v. Bradley*, 196 S.W.2d 696 (Tex. 1946) (church that conducted lengthy revival services punctuated by shouting and singing that could be heard more than a mile away found guilty of permitting a nuisance).

[139] Memorial and Remonstrance § 4 (1785), *quoted in Everson v. Board of Educ.*, 330 U.S. at 66. See also pp. 4-12, *supra.*

because it would not be "prohibitory" in the sense that this term has been defined. See pp. 17-19, *supra*. This being the case, such indirect pressure probably would not violate the Establishment Clause either, since it is doubtful that the Framers intended to grant the non-exercise of religion any greater protection than the exercise of religion.

(d). *Non-Compelling State Interests: Protecting Public Morality and Promoting the General Welfare.* Having thus described the interests that would qualify as compelling under the above proposed standard, it is apparent that two otherwise legitimate state interests -- protecting public morality and promoting the general welfare -- would not qualify in their own right, but only as related to one of the compelling interests described above. This is true for a number of reasons.

First, there is insufficient historical support that the Framers intended the state to be able to restrict religious liberty in order to pursue these interests. In particular, there is no evidence that either of these interests were considered compelling by Madison, Jefferson, or any of the other Framers, and these interests were conspicuously omitted from the Northwest Ordinance of 1787 (ratified by the First Congress in 1789) and from the majority of state constitutions. See pp. 4-9, *supra*.

Second and even more significantly, accepting the protection of public morality and the general welfare as compelling would be inconsistent with the principal purpose of the Free Exercise Clause -- to secure religious liberty meaningfully free from government intrusion. Because the state can essentially define anything it wants as harmful to public morality or the general welfare, neither of those interests is subject to any principled intrinsic limitation.[140] Consequently, accepting those interests as compelling would effectively remove all principled protection

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[140] Professor Tribe made a similar point in the following comment on *Wisconsin v. Yoder*:

> The children in *Yoder*, it might have been argued, were harmed by the deprivation of post-secondary education; instead, the Court signaled its refusal to permit the state to define as harmful anything it might deem desirable. Certain widely recognized harms -- such as physical injury -- can be prevented even at the cost of infringing religious freedom, but the state cannot impose its ideal of the "best possible life" as a way of justifying intrusion upon the religious autonomy of a citizen.

Tribe, *American Constitutional Law* § 14-10 at 857. *See also* Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 Utah L. Rev. 309, 373 n.259 ("generalized abstract harms to societal interests can be seen as the motivation for almost any governmental action").

of Free Exercise Clause rights.[141]

Significantly, rejecting public morality and general welfare as compelling interests *per se* would still leave room for the government to pursue these important goals as they relate to interests that are recognized as compelling. For example, the government could regulate religiously-motivated *public* nudity under the public peace and order interest by adopting time, place, and manner restrictions relevant thereto. Similarly, the government could forbid religiously-motivated homosexuality, prostitution, drug use, and pornography to the extent it can show a nexus between these practices and physical or emotional harm to others.

D. Conclusion

We believe the concepts and principles of application proposed above, though obviously not the final word on Free Exercise Clause jurisprudence, are at least a useful starting point in analyzing claims brought under that Clause. Significantly, the proposed analysis is sufficiently similar in terminology to that currently employed by the Supreme Court that it can be easily applied to future cases without calling for a wholesale revision of Free Exercise law. On the other hand, the proposed principles and guidelines modify and supplement the currently prevailing Free Exercise Clause analysis in several important respects. For example, the proposed principles and guidelines formally incorporate concepts from the belief/action and neutrality theories that the Supreme Court has hinted are relevant without explaining how or why this is so. Additionally, the proposed principles fill out the broad and undefined contours of the present Supreme Court balancing test, and

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[141] For example, the government theoretically could decide to prohibit priests from wearing vestments under a morality-based standard by finding that public morality requires rigidly distinct sexual roles and that only women may wear clothing that resembles a dress. Or, in a modern context, the government might decide that morality requires that there be *no* distinctions in the sacred vestments -- or in the sacramental roles -- of men and women. Although these examples are admittedly unlikely, it does illustrate the point made above, *i.e.* that there are no principled limits to what the government might define as necessary to serve public morality or the general welfare.

Significantly, a pragmatic line preventing the state from infringing religious liberty in the pursuit of interests not subject to principled limitation is not itself arbitrary or unprincipled; rather, it is justified by the need to develop a rule of law that provides a meaningful degree of protection for religious liberty as a substantive value protected by the Constitution.

provide a principled rule of law for determining which state interests are sufficiently compelling to outweigh Free Exercise rights.

Notably, the foregoing analysis also illuminates a number of areas in which further research and analysis would be profitable. In particular, some of these areas include the relationship between the Free Exercise Clause and the Free Speech Clause, the proper amount of judicial deference due to legislative and administrative bodies in various circumstances, the scope of a religious institution's right of autonomy, the religious rights of children vis-a-vis those of their parents, and the religious rights of the mentally incompetent.

IV. Summary of Propose Principles: Thinking Clearly About Religious Liberty Under the Free Exercise Clause

In Sections II and III we identified the concepts we believe should be relevant in addressing Free Exercise Clause issues and presented our views concerning how those concepts should be applied. The purpose of the following discussion is to summarize the conclusions reached in those Sections and to synthesize those conclusions into an analytic framework.

The analytic framework we have in mind would prescribe six general areas of inquiry, each of which would involve various sub-inquiries. These six general areas of inquiry are divisible into threshold and secondary considerations.

A. Evaluation of Religious Claimant's Interest

Analysis of a Free Exercise Clause dispute should begin by addressing three threshold considerations that relate to evidentiary burdens the claimant must successfully bear in order to establish a *prima facie* claim. These threshold questions need not be considered in the order presented, especially, for example, if one of the latter considerations would be dispositive and one of the former would not.

1. State Action

The first question in evaluating a Free Exercise Clause claim is whether there is any government -- federal or state -- action that prohibits the free exercise of religion. If there is no state action, there is no valid Free Exercise Clause claim.

Because state action is not unique to the religious liberty context, we have not provided any detailed analysis with respect to this first concept. Instead, we suggest that the Department can refer to the substantial body of case law that has been developed concerning this subject.

2. Religion

The second question to consider is whether the government has prohibited the free exercise of "religion." If there is no government regulation of "religion," there can be no valid Free Exercise Clause claim.

We believe the term "religion" for Free Exercise Clause purposes means a personally or institutionally held system of beliefs that is based upon and emanates from either a duty to transcendent reality or the acknowledgement of extratemporal consequences for temporal actions. For reasons previously stated, we believe this definition is consistent with the language, history, and purposes of the Free Exercise Clause.

Additionally, the historical purposes of the Free Exercise Clause suggest that the Clause protects only sincerely-held religious beliefs. In determining whether a claimant's religious belief is sincerely-held, we believe the claimant should be required to make a *prima facie* explanation of the nature of the belief and the religious duty arising therefrom. Once this showing is made, the state should be given the opportunity to prove that the belief is not sincerely-held, such as by proving that the claimant is lying about the matter. The state's burden would not be met by showing that others in the claimant's religious group do not subscribe to the belief, that the belief is not "fundamental" or "essential" to his religion, that he is "struggling" with the belief, or that his explanation of the belief is not a perfect model of coherent exposition.

3. Prohibition/Free Exercise

The third question is whether there is any government action "prohibiting" the "free" exercise of religion. If there is no such government action, any Free Exercise Clause claim must fail because there is no real conflict between religious and civil duties.

Under the proposed principles set forth in Section II of this Paper, government action "prohibits" the "free" exercise of religion when it either forbids the exercise of religion (by positive pronouncement of law) or prevents the exercise of religion (by making it impossible). This

conclusion is based principally on a linguistic analysis of the meaning of the terms "prohibit" and "free.'

B. Evaluation of the State's Competing Interests

Once a Free Exercise Clause claimant has met each of the evidentiary burdens outlined above, it is proper to scrutinize the nature of the state's justifications for its action. In this context, we believe it is proper to begin by asking whether the state's prohibitory action against religion is against religious belief (as opposed to action) and whether it is aimed at religion on its face or in its intent (as opposed to being religiously-neutral). If the state's prohibitory action regulates religious belief or is aimed at religion, we believe it is probably unconstitutional without any need to consider the "balancing" principles outlined in heading 3 below because the state has no valid interest in pursuing such goals.

1. Belief/Action

The first question concerning the state's justification for prohibiting the free exercise of religion is whether the state is regulating or seeking to regulate religious belief as opposed to action. Because the state has no valid interest in regulating religious belief, we believe such action probably is unconstitutional. State action may regulate religious belief directly, such as by regulating religious belief denoted as such, or indirectly, such as by regulating action so closely tied to belief as to be functionally indistinguishable therefrom.

2. Neutrality

If the state's action regulates action as opposed to religious belief, the next question is whether the state's action is aimed at religion either on its face or in its intent. If so, and if it prohibits the free exercise of religion, we believe it probably is unconstitutional.

A law is non-neutral toward religion on its face if it draws a religious classification either directly, such as by using the term religion or some variation thereupon, or indirectly, such as by referring to a religious practice that has no secular relevance evident from the plain language of the law and its statutory context. A law is non-neutral toward religion in its intent if it is passed with religious animus, or with the specific intent to burden religion.

3. Balancing

Finally, if a state law prohibiting the free exercise of religion regulates conduct as opposed to religious belief and is neutral toward religion on its face and in its intent, it will still be unconstitutional unless it is the least restrictive alternative necessary to serve a compelling state interest.

The first question in this context should be whether the state has a compelling interest justifying the prohibition of free exercise. As a preliminary matter, the state should be required to articulate its alleged compelling interest with particularity and to demonstrate some degree of consistency in its pursuit of that interest. Based upon the language, history, and purposes of the Free Exercise Clause, we believe compelling interests include (1) preventing manifest danger to the existence of the state, (2) protecting public peace, safety, and order, and (3) protecting the religious liberty of others. By contrast, we believe the state's otherwise legitimate interests in promoting the general welfare and protecting public morality do not qualify as compelling in their own right.

If the state has articulated a compelling interest in support of a law prohibiting the free exercise of religion, the state should then be required to prove its law is the least restrictive alternative necessary to achieve that interest. The state should not be required, however, to adopt any alternative that would impose an unreasonable cost on or significantly diminish the effectiveness of the state's efforts in achieving its objectives. In determining the cost or effect of a proposed less restrictive alternative, we should ask how the proposed alternative would apply to the individual claimant and to other similarly situated claimants who are reasonably likely to seek similar treatment. Due deference should be given to the judgments and expertise of the legislative and administrative branches in assessing the cost and effect of a proposed less restrictive alternative.

V. Application of Proposed Analytical Framework to Free Exercise Clause Cases

The purpose of this Section is to apply the analytical framework proposed in Section IV to the contextual organization of Free Exercise Clause cases provided in Appendix C. For the sake of brevity, we will comment only on the more important cases in each of the contexts and

suggest areas in which the proposed analytical framework would have its greatest impact on the current state of the law.

As a preliminary matter, it is important to note that the proposed analytical framework operates uniformly in each of the contexts. The differences between those contexts principally concern whether the state's interest is sufficiently compelling to justify a government prohibition on the exercise of sincerely-held religious beliefs.

A. Employment

1. Individual Liberty

The most important Supreme Court cases in this area are *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Braunfeld v. Brown*, 366 U.S. 599 (1961). As previously suggested, we believe *Sherbert* and *Thomas* were wrongly decided because the government's denial of unemployment benefits in those cases was not "prohibitory;" the government did not use the coercive power of the state to impair as a matter of positive law the claimants' ability to choose whether to exercise their religious beliefs. For the same reason, we believe *Braunfeld* was correctly decided: there was no law "prohibitory" of free exercise in *Braunfeld* because the government's action did not as a matter of positive law forbid him from operating his business in accordance with his religious beliefs.

We also would reach the same conclusion in *Hobbie v. Unemployment Appeals Comm'n*, No. 85-993, *juris. postponed until hearing on merits*, 54 U.S.L.W. 3697 (U.S. April 22, 1986), where the state of Florida denied unemployment compensation to an employee who was fired after she converted to the Seventh-day Adventist Church and refused to work on Saturdays. Again there is no "prohibitory" law in *Hobbie* because Florida did not forbid or prevent Hobbie from refusing to work on Saturdays. Instead, the state merely applied its laws that denied benefits to anyone who declined work.

2. Institutional Liberty

In *United States v. Lee*, 455 U.S. 252 (1984), the Supreme Court held that the Free Exercise Clause did not exempt an Amish employer from paying social security taxes on behalf of his employees. Lee had argued that both the receipt of benefits and payment of taxes violated the Amish duties to care for one's own. Under the proposed analytic

framework, Lee's claim that the payment of social security taxes for his employees violated his religion fails because there is no law prohibiting him from exercising his religion since neither Lee nor his employees were compelled to accept government assistance.

Lee's claim that his religious beliefs forbid him from supporting or otherwise participating in the social security system also was properly rejected insofar as the Court correctly concluded that granting a religious exemption for the Amish would jeopardize not only the social security system in particular, but also more generally the government's ability to raise revenue through taxation, since raising revenue is a compelling state interest under the proposed framework.

In *Tony and Susan Alamo Foundation v. Secretary of Labor*, 105 S. Ct. 1953 (1985), there was no law prohibitory on free exercise, and thus no Free Exercise Clause violation, because the Supreme Court found that the foundation members could comply with the Fair Labor Standards Act without violating their religious beliefs by accepting payments for their services and then returning them to the Foundation.

B. Education

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court held that the Free Exercise Clause immunized Old Order Amish parents from criminal penalties for keeping their children out of school after the eighth grade in order to train them adequately for participation in Amish community life. As previously mentioned, we believe this case was rightly decided under the proposed analytic framework because the law in question was "prohibitory" in that it required the Amish to forgo the religious training of their children by positive command of law and because the state failed to prove that the additional schooling was necessary to prepare Amish children for adequate participation in the democratic process.

More generally under the proposed framework, we question whether the state's interest in education is compelling at all. If so, we believe, as the Court in *Yoder* held, that it should be compelling only with respect to a basic education (however that is defined). In the private school context, assuming that some basic education is compelling, we question whether teacher certification and curriculum requirements are the least restrictive alternative necessary to achieve that interest, since

other means (such as yearly or semester testing) would appear to do so reasonably as well.

C. Special Government Responsibilities

1. Armed Forces

In *Gillette v. United States*, 401 U.S. 437 (1971), the Supreme Court held that the Free Exercise Clause does not exempt an individual from military conscription merely because he is religiously objected to participating in unjust wars. Under the proposed framework, this decision probably is correct because providing for the common defense is a compelling state interest related to protecting the existence of the state and because there probably are no less restrictive alternatives that would adequately achieve the military's needs.

Goldman v. Weinberger, 106 S. Ct. 1310 (1986), in which the Supreme Court held that the Free Exercise Clause did not require the Air Force to permit a Jewish psychologist to wear a yarmulke in violation of generally applicable military headgear requirements, may not involve a law "prohibitory" on religion in that Goldman may not have been compelled to continue serving in the military subject to criminal or quasi-criminal penalties (i.e. dishonorable discharge) for leaving. See Appendix C, pp. 128-30 & n.26, *infra*. In other respects, the Court in *Goldman* correctly treated the Air Force's judgment concerning the importance of uniform application of its military headgear requirement with the most substantial deference because of the paramount national interest in maintaining a strong national defense, although we note that the military presented a weak case on the record for the proposition that allowing one Jewish psychologist to wear a yarmulke on base would disrupt military discipline.

2. Prisons

The Supreme Court has not had an opportunity to discuss squarely religious freedom in prisons. The *O'Lone* case recently decided by the Third Circuit *en banc* held that maintaining order and discipline in prison was a compelling interest, so that the state could justify its actions by demonstrating that a challenged regulation was the least restrictive alternative. *See Shabazz v. O'Lone*, 782 F.2d 416 (3d Cir. 1986) (en banc), *pet. for cert. filed*, 54 U.S.L.W. 3730 (U.S. May 6, 1986) (No. 85-1722).

More generally, we note that state restrictions on religious liberty in prisons can effectively prevent, and thereby "prohibit," free exercise because the prisoner, though confined because of his own voluntary misdeeds, is nevertheless obviously not free to leave confinement in order to practice his religion. Prison regulations also can "prohibit" free exercise by forbidding it, such as by making religious practices unlawful under penalties of more restrictive confinement, loss of privileges, or forfeiture of good time credits, *inter alia*.

Of course, whether a prison regulation "prohibits" free exercise is only one of the threshold questions in determining whether the prisoner has a valid Free Exercise Clause claim. Although prisoners do not automatically surrender all their rights upon entering confinement, those rights -- including their religious rights -- are properly limited to the extent necessary to maintain peace, safety, and order within correctional institutions; to impose just punishment; and to effect the rehabilitation of prisoners -- all of which interests go to society's protection of innocent citizens and which would be compelling under the proposed Free Exercise Clause analysis. Moreover, because of the unique exigencies of prison administration, especially substantial deference should be afforded to the professional judgments of prison administrators with respect to whether accommodating various religious claims put forward by prisoners would unreasonably undermine the above compelling interests. *See Bell v. Wolfish*, 441 U.S. at 547-48.

D. Police Power

1. Zoning Restrictions

Although the Supreme Court has not decided a case in this area, we believe zoning restrictions on churches and other religious institutions as a general matter are properly understood as "time, place, and manner restrictions" related to the compelling state interest of securing public peace, safety, and order. Consequently, such restrictions would be generally permissible under the proposed framework as long as they are neutral toward religion and as long as they leave open reasonable alternatives for churches to locate elsewhere.

2. Solicitation Restrictions

The Supreme Court has never decided a religious solicitation case on Free Exercise Clause grounds alone. Most of the recent lower court

cases in this area involve objections by religious groups to solicitation licensing, information, and reporting requirements. Under the proposed analytical framework, such requirements might be related to the state's compelling interest in protecting the public from fraudulent solicitation, but might not be the least restrictive alternative available because the state probably can achieve that interest adequately by prosecuting such actions after the fact under criminal laws. Reasonable time, place, and manner restrictions on religious solicitation would be permissible, however, as long as they are religiously-neutral.

3. Drug Use

The Supreme Court has never decided a case in this area. Under the proposed framework, the government would be permitted to regulate drug use to the extent such is demonstrated to pose a risk of physical or emotional harm to others or to threaten the existence of the state. By contrast, if the government presents no evidence that a particular type of drug use is physically or emotionally harmful to others, such as in the landmark case of *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), the Free Exercise Clause may require a religious exemption under narrowly circumscribed terms from generally-applicable drug laws.

4. Driver's License Photographs

The driver's license photograph cases raise principally three questions under the proposed framework. First, with respect to whether there is a law prohibiting the free exercise of religion, these cases may be analyzed with *Sherbert* and may work a hardship on the religious claimant but not forbid or prevent the practice of his religion because he presumably could forgo driving. Second, if there were a religious duty to drive, the question would be whether the state's interest in obtaining a quick and accurate identification of a motorist is sufficiently related to the compelling interest of protecting public peace, safety, and order (such as traffic safety and/or protection of property). Third, the state would need to consider whether there are any less restrictive alternatives. This question would depend, *inter alia*, on whether the statistics previously included on drivers' licenses (license number, height, weight, eye and hair color) are adequate to achieve the government's interests reasonably well.

5. Social Security Registration

In *Bowen v. Roy*, 54 U.S.L.W. 4603 (U.S. June 11, 1986), the Supreme Court held that the government may use a child's social security number already in its possession in processing applications for the receipt of public benefits on behalf of the child despite a parent's claim that such use would adversely affect the child's religious status. Five members of the Court also appeared to suggest that the state may not require an individual to obtain and provide a social security number as a condition for receipt of social security benefits. Under the proposed principles, the Free Exercise Clause would not require a religious exemption with respect to either of the above issues because there is no state action "prohibiting" the claimant from freely exercising his religious beliefs with respect to either issue.

6. Oaths

In none of the oath and public office cases decided under the religion clauses -- *Davis v. Beason*, 133 U.S. 333 (1890), *McDaniel v. Paty*, 435 U.S. 618 (1978), and *Torcaso v. Watkins*, 367 U.S. 488 (1961) -- was there a conflict between religious duty and civil law since the religious claimants did not claim a religious duty to do what the state forbade in those cases. Thus, there was no prohibition on the free exercise of religion in those cases, and no Free Exercise Clause violation.[142] As previously discussed, however, the religious claimants in these cases may well have been entitled to relief under the Establishment Clause and/or the Equal Protection Clause based on the states' discrimination against them because of their religious beliefs. Moreover, we note that protection under Article VI of the Constitution would be available for an individual denied access to federal public office because of his religious beliefs; this limitation of the Article VI protection to federal office seekers is, of course, consistent with the words of the First Amendment, written and understood originally to apply only against the federal "Congress".

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[142] A similar problem is found in *Wooley v. Maynard*, 430 U.S. 705 (1977). *Wooley*, in which a Jehovah's Witness objected to the New Hampshire motto "Live Free or Die" on his license plate, is distinguishable from *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, the school children had no choice but to (1) attend school and (2) recite the pledge of allegiance. In *Wooley*, the objector would have to bear the state motto on his license plates, but he is under no obligation to drive an automobile in New Hampshire. Wooley was free to choose; the children in *Barnette* were not.

E. Regulation of Monetary and Property-Related Religious Matters

1. Taxation and Fiscal Regulation

In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Supreme Court in *dicta* stated that the Free Exercise Clause does not bar the government from taxing the income or property of an individual or organization engaged in religious activity. Under the proposed framework, this proposition is correct because taxation is related to maintaining the existence of the state; i.e., through raising revenue to pursue, *inter alia*, the state's other compelling interests. Taxation might infringe free exercise, however, if the tax rate was so high that it became confiscatory and if the state could meet its fiscal needs by a less religion-restrictive alternative, such as by increasing taxation against secular corporations.

In *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983), the Supreme Court held that the Free Exercise Clause did not forbid the IRS from revoking Bob Jones University's tax-exempt status because of the University's policy against interracial dating. Under the proposed framework, *Bob Jones* was rightly decided because the IRS action was not "prohibitory:" Bob Jones University had no right to receive a federal income tax deduction for most of the same reasons that the plaintiffs in *Sherbert* and *Thomas* had no free exercise right to employment compensation.

2. Civil Resolution of Intra-Church Disputes

In a series of cases, the Supreme Court has held that civil courts may not decide matters of church doctrine or governance in the course of resolving intra-church disputes. The result of this general rule has been to require civil courts to defer to the authoritative church decision-making body in disputes concerning church doctrine, discipline, or polity; and to require either similar deference or else the use of neutral principles of law in disputes concerning church property. Under the proposed framework, these general rules are correct because church doctrine and governance are essentially matters of religious belief that the government is absolutely foreclosed from regulating.

Addendum

Subsequent to the submission of this Report, the Supreme Court decided the case of *Hobbie v. Unemployment Appeals Comm'n,* 107 S. Ct. 1046 (1987). In *Hobbie,* the Court held that the Free Exercise Clause forbids the state from refusing to provide unemployment compensation benefits to an otherwise-qualified individual who, for religious reasons, cannot work on Saturdays as her employer required. *Id.* at 1047-52. In so ruling, the Court reaffirmed its prior holdings in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Thomas v. Review Board,* 450 U.S. 707 (1981), that the Free Exercise Clause as a general matter applies to any state action that "substantially burdens" an individual's exercise of religion.

The Supreme Court's decision in *Hobbie* is inconsistent with the analysis put forward in this Report. Based on the language of the Free Exercise Clause, this Report argues that the Clause applies only to state action that "prohibits"(forbids or prevents) rather than "burdens" an individual's exercise of religion. See pp. 17-27, *supra.* The Report argues that in *Hobbie,* as in *Sherbert* and *Thomas,* there was no government "prohibiting" of the plaintiffs religious exercise because the government's denial of unemployment benefits to the plaintiffs because they could not satisfy religiously-neutral eligibility requirements neither forbade nor prevented the plaintiffs from exercising their religion.

Appendix A

Early Commentaries and Cases Concerning the Free Exercise Clause

A. Early Commentaries on the Constitution

The two major nineteenth century commentaries on the Constitution, one by Supreme Court Justice Joseph Story and the second by Michigan Supreme Court Justice Thomas Cooley, paint a very different picture of the First Amendment landscape than we have seen under the modern Supreme Court. In contrast to modern theories -- and perhaps even to the views of the Founders -- Story maintained that "the right of a society or government to interfere in matters of religion will hardly be contested by any persons who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice." 3 J. Story, *Commentaries on the Constitution* § 1865, at 722 (1833).

He unabashedly opined that "distinct from . . . the right of private judgment in matters of religion, and freedom of public worship according to the dictates of one's conscience, . . . it is the especial duty of government to foster, and encourage [Christianity] among all the citizens and subjects." *Id* § 1865, at 723. Story makes it very clear that at the time of the adoption of the First Amendment, "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." *Id.* at § 1868. "The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of nature, as well as of religion." *Id* at § 1870. He concluded that both clauses were necessary, but made it clear that both operated against the national government only:

> [The Establishment Clause] alone would have been an imperfect security, if it had not been followed up by a declaration of the right to the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the

> Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.

Id. at § 1873, at 731.

In his analysis Cooley listed two actions prohibited by the religion clauses:

> Restraints upon the free exercises of religion according to the dictates of conscience. No external authority is to place itself between the finite being and the Infinite when the former is seeking to render the homage that is due, and in a mode which commends itself so his conscience and judgment as being suitable for him to render and acceptable to its object.
>
> Restraints upon the expression of religious belief. An earnest believer usually regards it as his duty to propagate his opinions, and to bring others to his views. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation.

T. Cooley, *A Treatise on the Constitutional Limitations* 665 (7th ed. 1903). Cooley's treatment of establishment and religious liberty considered state constitutional provisions, as well as the federal constitution, so it was a more general commentary, and he did not value the federal cases or constitution over those of the states. Furthermore, as with Story and more modern commentators, his primary discussion related to the Establishment Clause. He did, however, foresee certain Free Exercise cases.[1]

B. Early Cases

The first major case[2] in the Supreme Court in which the Free

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[1] For example, he observed that Jewish people are indirectly punished for their beliefs when they are forbidden by the state from working on the Christian Sabbath, and by their tenets from working their own Sabbath. *Id.* at 675. *See Braunfeld v. Brown*, 366 U.S. 599 (1961), and discussion *infra*, Appendix C, pp. 108-11.

[2] The topic of religion and the First Amendment had arisen previously in several cases. In *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815), the Court stated that "the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by

Exercise Clause was interposed as a defense was *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, George Reynolds appealed his conviction under the Morrill Act of 1862, making bigamy a crime in the territories. Reynolds claimed that his taking of plural wives constituted a religious duty as a Mormon. Chief Justice Waite for a unanimous Court, characterized the issue broadly: "what is the religious freedom which has been guaranteed[?]" *Id.* at 162. Quoting Jefferson's statement to the Danbury Baptist Association about the "wall of separation" and expressing a belief that man "has no natural right in opposition to his social duties," the Court accepted Jefferson's metaphor as an "almost authoritative declaration of the scope and effect of the amendment thus secured." *Id.* at 164.[3] The Court then adopted a belief-action dichotomy under which laws "cannot interfere with mere religious belief and opinions, [but] may with practices," and upheld the conviction. *Id.* at 166.[4]

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establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. . . . While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations." Despite reference to "free exercise" and "constitutional principles," the Court did not cite the U.S. Constitution, but the Virginia Constitution and Bill of Rights.

Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589 (1845), apparently contains the first reference in any Supreme Court decision to the First Amendment. Appellants claimed that a New Orleans municipal statute prohibiting Catholic Churches from exposing a corpse at a funeral service was unconstitutional. The Court dismissed the First Amendment question because "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties." *Id.* at 609; *see also Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 197-201 (1844) (devise creating a college in Philadelphia provided that no ecclesiastics, missionaries, or ministers of any sect might hold any position or visit the college; devise did not violate the common law or the public policy of Pennsylvania). Then in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), a Catholic priest was convicted of preaching without having first subscribed to an oath imposed by the Missouri Constitution. The State argued that the First Amendment did not apply to Missouri. *See id.* at 303-05. The Court reversed the conviction on the basis of the *ex post facto* and bill of attainder provisions; the dissenters believed that *Cummings* was, nevertheless, inconsistent with *Permoli*. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 398 (1866) (Miller, J., dissenting).

[3] For a discussion of the "wall of separation" in the context of Jefferson's other writings and actions see Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. Rev. 645.

[4] The Court never confronted squarely the meaning of "free exercise," although implicit in the decision is the idea that free exercise extended only to beliefs, not actions. This understanding is not only contrary to the plain language of the phrase, but seems to

The belief-action distinction articulated by the Court in *Reynolds* was blurred significantly in *Davis v. Beason*, 133 U.S. 343 (1890). Appellant Davis was convicted of conspiracy to obstruct the administration of an Idaho Territorial law by registering to vote and swearing that he was not a member of any organization that taught plural (or "celestial") marriage as a doctrine. Davis, a Mormon, was not himself a polygamist. The Court upheld the conviction. Of the Free Exercise Clause, the Court wrote:

> It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.

Id. at 343. The Court never discussed the fact that Davis had not committed any overt act, other than to swear falsely that he was not a Mormon, nor did the Court question the constitutionality of the disenfranchising provision. Davis -- and any other Idaho Mormons who were not polygamists -- was disenfranchised solely because of his religious beliefs and thus denied the most fundamental of civil rights because of his refusal to disavow those beliefs.[5]

Davis is important for another reason. For the first time the Court attempted a definition of religion. "The term 'religion' has reference to one's opinions of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confused with the *cultus* or form of worship of a particular sect, but it is distinguishable from the latter." 133 U.S. at 342.

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conflict with its usage in other laws. For example, Section 6 of the Enforcement Act of 1870, 16 Stat 141, made it a felony for two or more persons to conspire "to prevent or hinder [a citizen's] free exercise and enjoyment of any right or privilege quoted or secured to him by the institution or laws of the United States," or "because of his having exercised the same." The Court did not question that in this context, "free exercise" referred to actions and not beliefs. *See United States v. Cruikshank*, 92 U.S. 542 (1875).

[5] In a case decided the same term, *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890), the Court upheld the constitutionality of the Edmunds-Tucker Act of 1887, which in part revoked the corporate charter of the Mormon Church, resulting in the forfeiture of most the Church's assets to the United States.

The Court then repeated that the First Amendment protected the right "to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience." *Id.*[6]

The modern era in Free Exercise cases was ushered in by *Cantwell v. Connecticut*, 310 U.S. 296 (1940).[7] The Cantwells, members of the Jehovah's Witnesses, were arrested in New Haven for violating a statute prohibiting the solicitation of money or services on behalf of any religious, charitable, or philanthropic cause without approval of the secretary of the public welfare council. Building on *Reynolds* and *Davis*, the Court wrote that

> Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. . . . Thus the Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

Id. at 303-04. The Court held that the general regulation involved no religious test and was constitutional, but struck down the licensing requirement insofar as it made the secretary of the public welfare council the judge of religious causes. The Court also struck down Cantwell's breach of peace conviction on the basis of the clear-and-present danger test used in free speech cases. *See Schenck v. United States*, 249 U.S. 47 (1919).

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[6] Subsequent cases have taken a less traditional, broader view of religion. *See United States v. Seeger*, 380 U.S. 163, 184 (1965); *Torcaso v. Watkins* 367 U.S. 488, 495 & n.11 (1961), discussed *infra*, Appendix C, p. 127.

[7] *Cantwell* is generally considered to signal the start of the modern Free Exercise cases because it held that the Free Exercise Clause applied to the states, 310 U.S. at 304, thus enlarging the opportunities for Supreme Court review. It might be argued that the first case applying the religion clauses to the states was *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), in which the Court upheld the right of the University of California to require military service courses even of students who objected on religious grounds. Although the Court decided the case on Fourteenth Amendment grounds, it clearly treated the case as though the terms "liberty" and "privileges and immunities" incorporated the First Amendment guarantees. Concurring, Justice Cardozo explicitly assumed that the Fourteenth incorporated the First. 293 U.S. at 215 (Cardozo, J., concurring).

The most striking thing about the early cases is that until *Cantwell*, the Supreme Court had upheld the government in virtually every case. *See Late Corporation; Davis; Reynolds*; *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934) (military service course required as privilege of attending state university); *see also Prince v. Massachusetts*, 321 U.S. 158 (1944) (child solicitation law enforced against child engaged in religious solicitation). *But see*, *Rector of Holy Trinity Church v. United States*, 143 U.S. 457 (1892).[8] *Cantwell*, as well as *Prince*, are readily understood as each involved the nondiscriminatory enforcement of (neutral) statutes affecting public peace and safety so typical of the exercise of the police power. *Reynolds* and especially *Davis* and *Late Corporation* are far more difficult to reconcile with the Free Exercise Clause since in those cases the Court sustained Congress' power to direct legislation at a particular, albeit unpopular, sect, and the authority of a U.S. territory to disenfranchise its citizens solely for holding certain religious beliefs.

The first real victory for the proponents of religious freedom came in 1943 in a case that need not be characterized as a Free Exercise case at all. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), which overruled an earlier decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), the West Virginia Board of Education, responding to *Gobitis*, had ordered all students, upon penalty of expulsion, to participate in the flag salute and pledge of allegiance. Emphasizing the state's compulsory attendance requirement and the possibility that the state could expel a child, then find him delinquent and prosecute his parents, the Court struck down the West Virginia statute. The Court characterized the flag salute as a symbol of speech and, therefore, a tacit declaration of beliefs.

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[8] In *Holy Trinity Church*, the church had contracted with an English minister to become pastor of the church in New York. The church was accused of violating a federal law forbidding persons or corporations from assisting or encouraging the emigration of aliens to the United States. On appeal, the Supreme Court held that although the church came within the literal language of the statute, its purpose was to prevent cheap foreign labor from displacing U.S. workers. Quoting at length from federal and state constitutional provisions, the Court found that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people." 143 U.S. at 465-70. The Court held that the statute did not apply and reversed the conviction. It did not note any of its prior religion cases except to quote briefly from *Vidal v. Girard's Executors.*

The Court might have found the students exempt on religious grounds. However, the Court found that the state had no power to make the salute a legal duty, in essence treating the case as involving a broader right to free speech rather than limiting the right to religious freedom; while religion motivated these students to resist the law, it might as easily have been politics or philosophy. 319 U.S. at 634-35. The Court thus found that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish terms as legal principles to be applied by the courts." *Id.* at 638. The Court concluded: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith, therein." *Id.* at 642. While the Court protected the students religious beliefs, at its base, *Barnette* may be a free speech case and not religion clause case at all.[9]

[9] *Cf.* Br. for United States at 7-9, *Bender v. Williamsport Area School District*, 106 S. Ct. 1326 (1986) (arguing that religious expression is free speech and that only when speech becomes action does the Free Exercise Clause become relevant).

Appendix B

The Free Exercise Clause: The Record in the States

The state constitutions enacted roughly contemporaneously with the U.S. Constitution are an important, but largely ignored, textual source for the Free Exercise Clause of the First Amendment to the U.S. Constitution. Compiled below are the Free Exercise provisions of the thirteen original states and three territories that became states before 1800 (Vermont, Kentucky, and Tennessee). With the exception of Connecticut, which did not adopt a free exercise provision until its constitution of 1818, all of the states had enacted some kind of guarantee of religious liberty, and most had done so before 1789 when the First Amendment was drafted.

The primary source for the state constitutions is Benjamin Perley Poore's *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, published by the Government Printing Office in 1878 (2 volumes). The source for the Virginia Bill for Religious Liberty is 2 *The Papers of Thomas Jefferson* 545-52 (J. Boyd, ed. 1950).

Connecticut

Conn. Const. art. I., §§ 3, 4 (1818):

The exercise and enjoyment of religious profession and worship without discrimination, shall forever be free to all persons in this State, provided that the right hereby declared and established shall not be so construed as to excuse acts of licentiousness or to justify practices inconsistent with the peace and safety of the State.

No preference shall be given by law to any Christian sect or mode of worship.

Delaware

Del. Const. art. 29 (1776):

There shall be no establishment of any one religious sect in this State in preference to another; and no clergyman or preacher of the gospel of any denomination shall be capable of holding any civil office in

this State, or of being a member of either of the branches of the legislature, while they continue in the exercise of the pastoral function.

Del. Decl. of Rights §§ 2, 3 (1776):

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner control the right of conscience in the free exercise of religious worship.

That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society.

Del. Const. art. I, § 1 (1792):

Although it is the duty of all men frequently to assemble together for the public worship of the Author of the universe, and piety and morality, on which the prosperity of communities depends are thereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate that shall in any base interfere with or in any manner control, the rights of conscience in the free exercise of religious worship, nor a preference be given by law to any religious societies, denominations or modes of worship.

Georgia

Ga. Const. art. LVI (1777):

All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent support any teacher or teachers except those of their own profession.

Ga. Const. art. IV, § 5 (1789):

All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.

Ga. Const. art. IV, § 10 (1798):

No person within this State shall upon any pretense be deprived of the inestimable privilege of worshipping God in a manner agreeable to his own conscience nor be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tithes, taxes or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or that voluntarily engaged to do. No one religious society shall ever be established in this State, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles.

Kentucky

Ky. Const. art. XII (1792):

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship.

That the civil rights, privileges, or capacities of any citizen shall in no ways be diminished or enlarged on account of his religion.

Ky. Const. art. X, §§ 3, 4 (1799):

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship.

That the civil rights, privileges, or capacities of any citizen shall in no ways be diminished or enlarged on account of his religion.

Northwest Territories

Northwest Ordinance art. I (1787):

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Maryland

Md. Const. art. XXXIII (1776):

That, it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights; nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry; yet the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county; but the churches, chapels, glebes, and all other property now belonging to the church of England, ought to remain to the church of England forever.

Md. Const. art. II, as amended (1795):

That every person being a member of either of the religious sects or societies called Quakers, Menonists, Tunkers, or Nicolites, or New Quakers, and who shall be conscientiously scrupulous of taking an oath on any occasion, being otherwise qualified and duly elected a senator, delegate, or elector of the senate, or being otherwise qualified and duly appointed or elected to any office of profit or trust, on making affirmation instead of taking the several oaths appointed by the Constitution and form of government, and the several acts of assembly of this State now in force, or that hereafter may be made, such persons may hold and exercise any office of profit or trust to which he may be appointed or elected, and may, by such affirmation, qualify himself to take a seat in the legislature, and to act therein as a member of the same in all cases whatsoever, or to be an elector of the senate, in as full and ample a manner, to all intents and purposes whatever, as persons are now competent and qualified to act who are not conscientiously scrupulous of taking such oaths.

Md. Const. art. V, § 1, as amended (1798):

That the people called Quakers, those called Nicolites, or New Quakers, those called Tunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, shall be allowed to make their solemn affirmation as witnesses, in the manner that Quakers have been heretofore allowed to affirm, which affirmation shall be of the same avail as an oath, to all intents and purposes whatever.

Massachusetts

Mass. Decl. of Rights arts. II, III (1780):

Art. II. It is the right as well as the duty of all men in society, publicly and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.

Art. III. As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality, and as these cannot be generally diffused through a

community but by the institution of the public worship of God, and of public instructions in piety, religion, and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature, shall from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily.

And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects and attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided notwithstanding, That the several towns, parishes, precincts, and other bodies politic, or religious societies, shall at all times have the exclusive right of electing their public teachers and of contracting with them for their support and maintenance.

And all moneys paid by the subject to the support of public worship and of the public teachers aforesaid shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid toward the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

New Hampshire

N. H. Const. pt. I, arts. IV, V, VI (1784):

IV. Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.

V. Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD in the manner and season most agreeable to

the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their religious worship.

VI. As Morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection; and as the knowledge of these, is most likely to be propagated through a society by the institution of the public worship of the DEITY, and of public instruction in morality and religion; therefore, to promote these important purposes, the people of this state have a right to impower and do hereby fully impower the legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this state to make adequate provision at their own expense, for the support and maintenance of public protestant teachers of piety, religion and morality:

Provided notwithstanding, that the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no person of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination.

And every denomination of Christians, demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another, shall ever be established by law.

And nothing herein shall be understood to affect any former contracts made for the support of the ministry; but all such contracts shall remain, and be in the same state as if this constitution had not been made.

N.H. Const. Pt. I, arts. 4, 5, 6 (1792):

Art. 4: Among the natural rights, some are in their every nature unalienable, because no equivalent can be given or received for them. Of this kind are the *rights of conscience.*

Art. 5: Every individual has a natural and unalienable right to worship God according to the dictates of this own conscience and reason;

and no person shall be hurt, molested, or restrained in his person, liberty, or estate for worshipping God in the manner most agreeable to the dictates of his own conscience, or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship.

Art. 6: As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection; and as a knowledge of these is most likely to be propagated through a society by the institution of the public worship of the Deity, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this State have the right to empower, and do hereby fully empower, the legislature to authorize, from time to time, the several towns, parishes, bodies-corporate, or religious societies within this State, to make adequate provisions, at their own expense, for the support and maintenance of public protestant teachers of piety, religion, and morality.

Provided notwithstanding, That the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no person, or any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect, or denomination.

And every denomination of Christians, demeaning themselves quietly and as good subjects of the State, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.

And nothing herein shall be understood to affect any former contracts made for the support of the ministry; but all such contracts shall remain and be in the same state as if this constitution had not been made.

New Jersey

N.J. Const. arts. XVIII, XIX (1776):

XVIII. That no person shall ever, within this Colony, be deprived of the inestimable privilege to worshipping Almighty God in a manner

agreeable to the dictates of his own conscience; nor, under any pretense whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.

XIX. That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office or profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.

New York

N.Y. Const. arts. XXXVIII, XXXIX (1777):

XXXVIII. And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance where with the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

XXXIX. And whereas the ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, ought not to be diverted from the great duties of their function; therefore, no minister of the gospel, or priest of any denomination whatsoever, shall, at any time hereafter, under any presence or description whatever, be

eligible to, or capable of holding, any civil or military office or place within this State.

North Carolina

N.C. Const. art. XIX (1776):

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.

Pennsylvania

Pa. Decl. of Rights art. II (1776):

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.

Pa. Const. art. IX, §§ 3, 4 (1790):

Sec. 3: That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with their rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or modes of worship.

Sec. 4: That no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.

Rhode Island

R.I. Charter (1663):

. . . *Now know yee,* that wee beinge willinge to encourage the hopefull undertakenge of oure sayd loyall and loveinge subjects, and to secure them in the free exercise and enjoyment of all theire civill and religious rights, appertaining to them, as our loveing subjects; and to preserve unto them that libertye, in the true Christian ffaith and worshipp of God, which they have sought with soe much travaill, and with peaceable myndes, and loyall subjectione to our royall progenitors and ourselves, to enjoye; and because some of the people and inhabitants of the same colonie cannot, in theire private opinions, conforme to the publique exercise of religion, according to the litturgy, formes and ceremonyes of the Church of England, or take or subscribe the oaths and articles made and established in that behalfe; and for that the same, by reason of the remote distances to those places, will (as wee hope) bee noe breach of the unitie and unifformitie established in his nation: Have therefore though ffit, and doe hereby publish, graunt, ordeyne and declare, That our royall will and plaesure is, that no person within the sayd colonye, at any tyme hereafter, shall be any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and ode not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme and at all tymes thereafter, freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; they behaving themselves peaceblie and quietlie, and not using this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others; and lawe, statute, or clause, therin contayned, or to bee contayned, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding.

South Carolina

S.C. Const. arts. XXI, XXXVIII (1778):

XXI. And whereas the ministers of the gospel are by their profession dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their function, therefore no minister of the gospel or public preacher of any religious persuasion, while he continues in the exercise of his pastoral function, and for two years after, shall be eligible either as governor, lieutenant-governor, a member of the senate, house of representatives, or privy council in this State.

XXXVIII. That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian protestants in this State, demeaning themselves peaceable and faithfully, shall enjoy equal religious and civil privileges. To accomplish this desirable purpose without injury to the religious property of those societies of Christians which are by law already incorporated for the purpose of religious worship, and to put it fully into the power of every other society of Christian Protestants, either already formed or hereafter to be formed, to obtain the like incorporation, it is hereby constituted, appointed, and declared that the respective societies of the Church of England that are already formed in this State for the purpose of religious worship shall still continue incorporate and hold the religious property now in their possession. And that whenever fifteen or more male persons, not under twenty-one years of age, professing the Christian Protestant religion, and agreeing to unite themselves in a society of the purposes of religious worship, they shall, (on complying with the terms hereinafter mentioned,) be, and be constituted, a church, and be esteemed and regarded in law as of the established religion of the state, and on a petition to the legislature shall be entitled to be incorporated and to enjoy equal privileges. That every society of Christians so formed shall give themselves a name or denomination by which they shall be called and known in law, and all that associate with them for the purposes of worship shall be esteemed as belonging to the society so called. But that previous to the establishment and incorporation of the respective societies of every denomination as aforesaid, and in order to entitle them thereto, each society so petitioning shall have agreed to and subscribed in a book the following five articles, without which no agreement or union of men upon pretence of religion shall entitle them to be incorporated and esteemed as a church of the established religion of this State:

1st - That there is one eternal God, and a future state of regards and punishments.

2nd - That God is publicly to be worshipped.

3rd - That the Christian religion is the true religion.

4th - That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice.

5th - That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth.

And that every inhabitant of this State, when called to make an appeal to God as a witness to truth, shall be permitted to do it in that way which is most agreeable to the dictates of his own conscience. And that the people of this State may forever enjoy the right of electing their own pastors or clergy, and at the same time that the State may have sufficient security for the due discharge of the pastoral office, by those who shall be admitted to be clergymen, no person shall officiate as minister of any established church who shall not have been chosen by a majority of the society to which he shall minister, or by persons appointed by the said majority, to choose and procure a minister for them; nor until the minister so chosen and appointed shall have made and subscribed to the following declaration, over and above the aforesaid five articles, viz: "That he is determined by God's grace out of the holy scriptures, to instruct the people committed to charge, and to teach nothing as required of necessity to eternal salvation but that which he shall be persuaded may be concluded and proved from the scripture; that he will use both public and private admonitions, as well to the sick as to the whole within his cure, as need shall require and occasion shall be given, and that he will be diligent in prayers, and in reading of the holy scriptures, and in such studies as help to the knowledge of the same; that he will be diligent to frame and fashion his own self and his family according to the doctrine of Christ, and to make both himself and them, as much as in him lieth, wholesome examples and patterns to the flock of Christ; that he will maintain and set forwards, as much as he can, quietness, peace, and love among all people, and especially among those that are or shall be committed to his charge. No person shall disturb or molest any religious assembly; nor shall use any reproachful, reviling, or abusive language against any church, that being the certain way of disturbing the peace, and of hindering the conversion of any to the truth, by engaging them in quarrels and animosities, to the hatred of the professors, and that profession which otherwise they might be brought to assent to. No person whatsoever shall speak anything in their religious assembly irreverently or seditiously of the government of this State. No person shall, by law, be obliged to pay towards the maintenance and

support of a religious worship that he does not freely join in, or has not voluntarily engaged to support. But the churches, chapels, parsonages, glebes, and all other property now belonging to any societies of the Church of England, or any other religious societies, shall remain and be secured to them forever. The poor shall be supported, and elections managed in the accustomed manner, until laws shall be provided to adjust those matters in the most equitable way.

S.C. Const. art. VIII, § 1 (1790):

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind: Provided, That the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

Tennessee

Tenn. Const. art. VIII (1796):

Whereas the ministers of the gospel are, by their professions, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore no minister of the gospel, or priest of any denomination whatever, shall be eligible to a seat in either house of the legislature.

Tenn. Const. art. XI, §§ 3, 4 (1796):

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with their rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or modes of worship.

That no religious test shall ever be required as a qualification to any office or public trust under this State.

Vermont

Vt. Const. chap. I, art. III (1777):

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding, regulated by the work of God; and that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience; nor can any man who professes the protestant religion, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiment, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by any power whatsoever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship: nevertheless, every sect or denomination of people ought to observe the Sabbath or Lord's day, and keep up and support some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Vt. Const. chap. I, art. III (1793):

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to, or of right can, be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience; nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship; and that no authority can or ought to be vested in or assumed by any power whatever, that shall in any case interfere with or in any manner control the rights of conscience in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the Sabbath, or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Virginia

Va. Bill of Rights § 16 (1776):

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 forbearance, love, and charity towards each other.

Va. Bill for Establishing Religious Freedom (1786):

Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author or our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependance on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intende his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of

judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

We, the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.

Appendix C

Conflict Between Government and Religious Freedom: A Contextual Analysis of the Cases

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Appendix C

Conflict Between Government and Religious Freedom: A Contestual Analysis of the Cases

The purpose of this Appendix is to review the case law with respect to religious liberty under the Free Exercise Clause in order to ascertain where we now stand. A subsidiary purpose of this Appendix is to highlight areas in which we believe the courts have gone astray in applying the Free Exercise Clause and to identify important religious liberty issues that remain unresolved by the courts. For organizational purposes, the discussion of the case law is divided into general contexts in which religious liberty has come into conflict with the interests of the state.

A. Employment and The Free Exercise of Religion

Economic interdependency, spawned by rapid technological changes, specialization, and a shift in emphasis from agriculture to industry to services, has encouraged commerce in goods, services, labor, and information to a degree never known before.[1] With few exceptions, the time has long passed when we can sustain ourselves from our own stores. The ideal of self-reliance so diligently sought in the nineteenth century has been replaced with a quest for financial independence, an acquiescence in our economic interdependence, and a perception among many in society that we need some regulation of commerce, exports and imports, labor and money.

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[1]To some extent the transformation from an agricultural society to an industrial and professional, largely urban, state may have affected the collective sense of need for religion and, hence, diminished our willingness to accord greater respect to religious devotion. The transformation also marks the rise of rationalism (*vis-a-vis* the Enlightenment), naturalism, and realism and the concommitant decline of religion, the occult, and other philosophical systems holding beliefs in the supernatural or some kind of extratemporal reality. An agricultural society, tied to a mother earth and absolutely dependent on the caprices of the seasons undoubtedly recognized quickly its dependence on forces beyond itself, while a high technology society with its emphasis on utilization of the physical sciences seems more inclined to rely on itself. Modern society surely values the measure of control it believes it has over its own processes; it is more willing to regulate its markets which society thinks it understands and perhaps less disposed to accommodate "mystical" religious practices over which it has no control and which it cannot adequately explain.

Among the enumerated powers of Congress in the Constitution is the authority to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . .; [t]o borrow Money . . . ; [t]o regulate Commerce . . . and [t]o Coin Money [and] regulate the Value thereof." Art. I, § 8. An expansive reading of this clause has given Congress the power to regulate almost any activity that in any way affects commerce in the United States. *See, e.g., Daniel v. Paul,* 395 U.S. 298 (1969); *Wickard v. Filburn,* 317 U.S. 111 (1942).

Two different kinds of questions arise in the intersection between religious liberty and commercial employment. The first arises when an employment law in some way affects the religious belief or practices of an individual. The second class of employment cases are those in which the government has exercised jurisdiction over an industry, organization, or enterprise that is religiously affiliated.

1. Individual Liberty: The Unemployment Insurance and Sunday Closing Cases

Sherbert v. Verner, 374 U.S. 398 (1963), and *Thomas v. Review Board,* 450 U.S. 707 (1981), are two of the most important Free Exercise cases ever decided by the Court. In *Sherbert,* appellant Adell Sherbert, a member of the Seventh-day Adventist Church, had been employed in the textile mills of South Carolina. After two years, her employer changed its policy and required all employees to work a six-day week, including Saturday, which would have violated her religious principles. Mrs. Sherbert quit her job and, when she could not obtain other textile-related employment, applied for unemployment compensation. The state denied her application on the ground that she had failed, without good cause (under South Carolina law), to accept suitable work. *Thomas* presented a similar situation. The appellant, a Jehovah's Witness, was transferred by his employer from its foundry to a section that produced tank turrets. Thomas claimed that his religious beliefs prohibited him from producing war materiel and quit his job. The Indiana Employment Security Review Board denied his claim because he had terminated his employment for personal reasons and not for good cause as defined by the statute.

In each case, the Supreme Court held that the state must pay unemployment compensation to an employee who had quit rather than compromise his religious beliefs. Justice Brennan, writing for the Court in *Sherbert,* found that the state had to show either (1) that its action did

not actually infringe free exercise, or (2) that the burden was justified by a compelling state interest. 374 U.S. at 403. The Court held that Sherbert had been burdened by South Carolina's refusal to pay unemployment compensation because "[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. The denial of benefits "penalize[d]" her free exercise and "constrain[ed]" her to abandon her religious convictions. 374 U.S. at 406, 410. The Chief Justice used a similar analysis in *Thomas*. Acknowledging that Indiana had not "*compel[led]* a violation of conscience," the Court nevertheless held that it was impermissible for the state to force "a choice between fidelity to religious belief or cessation of work." 450 U.S. at 717 (emphasis in original). The Court concluded:

> Where the State conditions receipt of an important benefit upon conduct prescribed by a religious faith or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be inherent, the infringement upon free exercise is nonetheless substantial.

450 U.S. at 717-18.

Justice Harlan, joined by Justice White, dissented in *Sherbert*; Justice Rehnquist, in *Thomas*. Both argued essentially the same points: there may be economic pressure on Sherbert and Thomas to violate their beliefs on Sabbath employment, but the government had not required them to work, had not purposefully excluded religionists from unemployment compensation, and had enforced the law equally. Justice Harlan noted the inequity in the Court's decision. "The State . . . must *single out* for financial assistance those whose behavior is religiously motivated even though it denies such assistance to others whose identical behavior . . . is not religiously motivated." 374 U.S. at 422 (Harlan, J., dissenting) (emphasis in original).[2] Justice Rehnquist agreed with Justice Harlan's

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[2] A case cited in the dissent demonstrates the dilemma. In *Judson Mills v. South Carolina Unemployment Compensation Comm'r* 204 S.C. 37, 28 S.E.2d 535 (1944), the claimant had to quit because she had four children and her employer required her to work the night shift. She was denied unemployment compensation because she had left for personal reasons. The claimant in *Judson Mills* surely felt the economic pressures as

analysis and noted that Indiana had not discriminated against Thomas because he was a Jehovah's Witness, in particular, or because he held religious beliefs in general. 450 U.S. at 723 (Rehnquist, J., dissenting).

The dissenting opinions each asserted that *Sherbert* and *Thomas* were inconsistent with an earlier decision in *Braunfeld v. Brown*, 366 U.S. 599 (1961) (opinion per Warren, C.J.), in which the Court rejected the claim of an Orthodox Jew that Pennsylvania's Sunday closing law violated his free exercise rights because his religion forbade his opening his store on Saturday and because it would work a hardship to be closed both Saturday and Sunday.[3] In contrast to the finding of an unconstitutional burden in *Sherbert* and *Thomas*, the court in *Braunfeld* found no such burden on free exercise. "[T]he statute at bar does not make unlawful any religious practices of appellant; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday." 366 U.S. at 605 (footnote omitted).

Justices Brennan and Stewart dissented on the grounds that the statute required Braunfeld to chose between his faith and his economic survival. 366 U.S. at 611 (Brennan, J., dissenting); Justice Douglas also dissented, finding the Sunday statutes fraught with potential for religious persecution. 366 U.S. at 576-77 (Douglas, J., dissenting). Justice Frankfurter wrote a lengthy dissent in the four Sunday cases, but ultimately protested *Braunfeld* on the limited grounds that the lower court should not have summarily dismissed the suit for failure to state a claim. 366 U.S. at 542-43 (Frankfurter, J., dissenting).

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keenly as did Ms. Sherbert, and she was moved, if not out of religious duty, certainly by worthy ethical and moral considerations. Yet Ms. Sherbert was compensated, while the claimant in *Judson Mills* was turned away.

[3]The same day that *Braunfeld* was decided, the Supreme Court rejected claims that Sunday closing laws -- or "blue" laws -- violated the Establishment Clause. *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961). Justice Frankfurter, who was joined by Justice Harlan, and Justice Douglas dissented in all four cases.

Braunfeld, Sherbert, and *Thomas* are an important line of cases, and *Sherbert* and *Thomas* in particular retain a great deal of vitality.[4] *Braunfeld*, as a practical matter, is not as significant because it has been limited to the narrow context of the Sunday closing laws. The cases are also significant because, as the dissenters of *Sherbert* and *Thomas* point out, either *Braunfeld* or *Sherbert* may be correct, but both cannot be. The cases are simply too close to be profitably distinguished. In neither of these cases was someone forbidden to follow or otherwise directly penalized for obeying his or her religious tenets; rather, the claimants suffered comparative economic harm because of the choice they made to practice their religion. The religionists argued -- and obviously the Court in *Sherbert* and *Thomas* agreed -- that they would be better off financially by not adhering to their religious beliefs, and that unless unemployment compensation was paid, they would be tempted to violate their principles.[5]

We might well ask what law in *Sherbert, Thomas,* and *Braunfeld* prohibited the free exercise of religion if all of the religionists were free to practice their religion without fear of persecution, termination, or diminution of any civil rights, privileges, or immunities? The problem in each case was that the religionists wished to practice their religion *and* do something else -- something either forbidden (*e.g.*, transact business on Sunday) or not offered (*e.g.*, receive unemployment compensation) by the government. But neither of these can be claimed by constitutional right. Of the three cases, Mr. Braunfeld makes the strongest case for infringement of religious liberty because he was clearly at a comparative disadvantage *vis-a-vis* non-sabbatarians when he voluntarily closed his shop on Saturday for religious reasons (while others remained open) and was threatened with criminal penalties if he opened on Sunday (while others were closed). If opening only five days during the week was not economically feasible, then Braunfeld's only option would be to close

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[4]The Supreme Court will hear *Hobbie v. Unemployment Appeals Comm'n, consideration of jurisdiction postponed until hearing on the merits*, 106 S. Ct. 1633 (1986), next term. In *Hobbie*, an assistant manager of a jewelry store was fired after she converted to Seventh-Day Adventism and refused to work during her Sabbath, which was one of the busiest times for the store with time required of all managerial employees. Florida refused to pay her unemployment compensation.

[5]*But cf. Bob Jones University v. United States*, 461 U.S. 574, 604 (1983) ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets").

permanently.[6]

In contrast, *Sherbert* is less compelling because Ms. Sherbert was not encumbered with a fixed plant, like Braunfeld's store. She enjoyed greater freedom to take her salable goods, her labor, and work in an industry that did not require Saturday work (a point not discussed by the Court). *Thomas* is even less defensible. At least in *Sherbert* there was a state statute prohibiting Ms. Sherbert's employer from keeping the textile mill operating on Sunday, but Thomas was perfectly free to pursue employment in a non-defense industry.[7] Indeed, unlike *Braunfeld* or *Sherbert,* there was no state law that facilitated the conflict between Thomas and his employer. The situation might have been different if the government -- perhaps in a time of national emergency -- had somehow ordered a nondefense plant to begin producing war materiel.

2. Institutional Liberty: The Social Security and Labor Cases

A second line of employment cases involves resistance by religiously-affiliated commercial institutions to government efforts to regulate activities that the institutions claim are related to their religious mission. Prominent in these cases are the social security and labor cases.

The most important social security case is *United States v. Lee*, 455 U.S. 252 (1982). In *Lee* the Court held an Old Order Amish farmer and carpenter had to pay employer's social security taxes and withhold social security taxes from his Amish employees. Lee believed that it was his

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[6]The irony of the situation is that Sherbert wanted government intervention; Braunfeld sought to avoid it. *Cf.* Pfeffer, *The Supremacy of Free Exercise*, 61 Geo. L.J. 1115, 1139 (1973) ("in a major respect *Sherbert* goes further than *Braunfeld*: in *Braunfeld*, the Sabbatarian asked only to be left alone; in *Sherbert*, she demanded that the state pay her money, and the Court held that she was entitled to it"). Mr. Braunfeld perhaps could take solace in the fact that in the event that he went out of business because he was forbidden to open on Sunday and refused to work on Saturday, he probably would be entitled to unemployment compensation under *Sherbert.*

[7]The cases are also significant for their view of the nature of freedom, and especially freedom in the marketplace. In *Sherbert* and *Thomas* the Court treated the petitioners as laborers trapped between the market and their religion; they were not mobile, either horizontally across industries or geographically within the industry, and because they were at a disadvantage and unable to earn a living in their chosen line of work, the state was obligated to act as insurer against the conflict between the market and the worker's religion. Braunfeld, for reasons not entirely clear, was treated less sympathetically -- perhaps because he was the owner of the shop and thus not at the mercy of an employer.

religious duty not to contribute to or accept from the social security fund because this would violate the Biblical injunction to take care of one's own. The Department argued that it did not contravene Amish principles for Lee to pay the taxes, but only to receive government money, and therefore, there was no conflict. The Court nevertheless assumed *arguendo* that even the *payment* of taxes violated his beliefs. A unanimous Court found that the government had a compelling interest in providing for the care of people through the social security system, and that exceptions would undermine the system. The Court thus held that Congress was not constitutionally compelled to make religious exceptions from the social security system.[8]

Twice in recent years the Court has considered the reach of the labor laws with respect to religious institutions. In the 1984 term, the Court upheld application of the Fair Labor Standards Act to laborers at gas stations, retail stores, farms, and electrical contractors, all operated by a religious foundation. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 105 S. Ct. 1953 (1985). The foundation asserted that minimum wage, overtime, and reporting requirements would entangle the government in the foundation's religious activities, which consisted in part of operating the businesses to rehabilitate the workers, and that it would violate the workers' religious sensibilities to receive wages. A unanimous Court had little difficulty finding that there was no burden on the free exercise rights of either the foundation or its member/workers, because the reporting requirements were minimal and the workers were free to return their wages to the foundation or to continue to receive them as room and board. 105 S. Ct. at 1963. Unlike *Lee* the Court neither presumed nor found religious infringement and did not determine whether FLSA represented a compelling state interest.

The more difficult labor cases deal with the right of the NLRB to exercise jurisdiction over employees of religiously-affiliated institutions. The only decision from the Court, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), is inconclusive on the religion clause question, and the issue is likely to come before the Court again. In *Catholic Bishop*, the NLRB ordered Catholic school districts to recognize a teachers union as the bargaining representative for its lay teachers. The Court, recognizing the unique and important role that teachers play in parochial education,

[8] Congress had, in fact, provided for religious exemptions from social security taxes if (1) the individual was self-employed and (2) the Secretary for HHS certified that the religious group provided for its members. 26 U.S.C. 1402(g) (1).

construed the National Labor Relations Act very strictly and found no evidence that Congress intended teachers at church schools to be covered. 440 U.S. at 504. That strained construction avoided the First Amendment question. *See*, e.g., 440 U.S. at 502.

The subsequent decisions on NLRB jurisdiction go both ways, although the vast majority of decisions are in favor of the NLRB.[9] The decisions emphasize that church-affiliated institutions are run as businesses and are not being used for evangelical, educational, or proselyting purposes. *Catholic Bishop* may be an anomaly because of its educational setting. *See infra* pp. 123-24. *But see Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985). The difficulty with these cases is that the courts have had a hard time distinguishing between church-affiliated commercial operations that have strictly a secular mission and those that are an integral part of the religious mission. As Professor Laycock has written:

> [S]ome church-owned commercial business are owned for intrinsically religious reasons or run in intrinsically religious ways. A church may run a large business on a non-profit basis as a charity; hospitals are common examples. A church may run a business to provide a religious working environment for its members, persons it hopes to proselytize, or persons in need of work. A monastery of contemplative monks should not forfeit its protection under the free exercise clause because it supports itself by selling sausage.

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[9] *Compare Catholic Bishop v. NLRB*, 559 F.2d 1112 (7th Cir. 1977) (NLRB did not have jurisdiction to order parochial system to bargain with lay teachers' union), *aff'd on other grounds*, 440 U.S. 490 (1979) *with NLRB v. Salvation Army*, 763 F.2d 1 (1st Cir. 1985) (NLRB has jurisdiction over employees of religiously-affiliated day care center); *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board has jurisdiction over parochial school employees; any intrusion justified by compelling interest in collective bargaining); *Volunteers of America-Minnesota-Bar-None Boys Ranch*, 752 F.2d 345 (8th Cir.), *cert. denied*, 105 S. Ct. 3502 (1985) (NLRB has jurisdiction over employees of religiously-affiliated treatment center); *Denver Post of the National Soc'y of the Volunteers of America v. NLRB*, 732 F.2d 769 (10th Cir. 1984) (same); *St. Elizabeth Hosp. v. NLRB*, 715 F.2d 1193 (7th Cir. 1983) (same; hospital); *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302 (3d Cir. 1982) (same; nursing home); *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (same: home for neglected children); *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349 (9th Cir. 1981) (same; church-affiliated hotel complex).

Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1410 (1981) (footnote omitted).

In sum, the courts have been hesitant to uphold Free Exercise claims by religiously-affiliated institutions. The decisions of the institutions, even in a cottage industry case such as *Lee* inevitably affect numerous employees and their families. The cases further demonstrate the reluctance of the courts to recognize a religiously-affiliated business as anything other than a business like any other business. The difference in the results of *Alamo* and *Catholic Bishop* may demonstrate that the exception to this general rule is the enterprise that is closely related to the activities or mission of the religion, such as a school.

3. Religious Accommodation in Employment

The accommodation cases differ from other employment cases because the claim to religious liberty is based on statutory accommodation and not on the First Amendment. Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (a) (1). The statute defines religion to include "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." 42 U.S.C. § 2000e (j). The only exception to Title VII is for religious corporations, associations, or educational institutions that wish to hire employees of a particular religion. 42 U.S.C. § 2000e-1.

In the majority of the cases coming under Title VII, a secular institution must defend itself against an individual's claim that the institution discriminated against him because of his religion or failed to accommodate his religious practices. The Court's main pronouncement in this area is *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), where it held that TWA was not obligated to accommodate a Sabbatarian employee where such accommodation would have disrupted the seniority system. *See also* Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World*

Airlines v. Hardison, 53 Fordham L. Rev. 839 (1985) (collecting cases). Recently, the Supreme Court granted certiorari in *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985), *cert. granted*, 54 U.S.L.W. 3484 (U.S. Jan. 21, 1986) (No. 85-495) to consider whether Title VII requires a school board to provide a teacher with paid leave for church holy days. In *Philbrook*, the collective bargaining agreement allowed up to three days off for religious reasons; for additional days the school district permitted the teacher to take the time off, but without pay. Philbrook contended, and the Second Circuit agreed, that Philbrook's proposed accommodation was reasonable -- that he use personal business leave permitted under the agreement or that he pay the actual cost of the substitute -- and that the school board had to accept it unless it caused undue hardship. *Philbrook* is contrary to the decision in *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984), which held that under Title VII the school district's policy -- which allowed Christmas off -- did not constitute religious discrimination against Jewish teachers, who had to use personal or unpaid leave for their holy days.[10]

The second, but less common situation pits an individual's claim that a religiously-affiliated institution has discriminated against him against the institution's defense under § 2000e-1 that any discrimination was religiously based. *See, e.g., EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (female employee alleged pay discrimination and retaliation; Seventh Day Adventist press claimed pay differences based on religious philosophy and demotion for violating beliefs by contacting an attorney); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (refusal to file EEO reports), *cert. denied*, 456 U.S. 905 (1982); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980) (female faculty member alleged sex discrimination in promotions; college claimed preference given to Baptists), *cert. denied*, 453 F.2d 912 (1981). These cases are particularly vexing when, for example, the institution admits discriminating on the basis of sex but the

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[10] *See also American Postal Workers Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986) (per curiam) (reasonable accommodation of USPS employees who, for religious reasons, could not process draft registrations need not be made exclusively on the employee's terms); *United States v. Baldwin*, 770 F.2d 1550 (11th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3697 (U.S. Apr. 27, 1986) (attorney convicted of contempt of court for failing to give adequate notice of conflict between Jewish holidays and start of criminal trial and did not show up for trial).

action was plainly tied to the institution's religious beliefs.[11] This was the case in *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932 (6th Cir. 1985), *reversed on procedural grounds*, 54 U.S.L.W. 4843 (U.S. June 27, 1986) where the Sixth Circuit ruled that the Free Exercise Clause prevented the Ohio Civil Rights Commission from exercising jurisdiction over a private Christian school that terminated a teacher because (1) she was pregnant and, according to the Bible, should remain home with her child, and (2) she contacted an attorney, in violation of a Bible-based school policy.[12]

Philbrook and *Dayton Christian* are important cases, although they represent different sides of a problem. *Philbrook* is a clash between the needs of a secular institution and the religious practices of an employee; *Dayton Christian*, a conflict between the religious needs of a religious institution and what it regards as the secular practices of an employee. In both cases the courts have favored accommodation of the religious practices. But the religious liberty at issue in these cases is qualitatively distinct. *Dayton Christian* involves the prohibition of a religious practice -- namely the religious institution's decision to discipline one of the members of its group by depriving her of her religion-sponsored employment -- while in *Philbrook* no such prohibition is involved. As in *Braunfeld*, Philbrook faces an economic incentive to compromise his religious principles, but the incentive is part of the structure of the employment which Philbrook himself chose and maintains. Philbrook's -- to borrow Bonhoeffer's phrase -- "cost of discipleship" is a real cost to him, but it may simply be the price of modern religious martyrdom. The Dayton Christian School, by contrast, cannot pay the price because the price is to compromise its religious principles; its so-called "cost of discipleship" is, as the school administration and directors understand it, discipleship itself. A decision against the school will effectively prohibit their free exercise; a decision against Philbrook will inconvenience him, but it will not "prohibit" his exercise of religion.[13] Nevertheless, because

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[11] *See, e.g., Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (pastoral position in church is barred by First Amendment), petition for cert. filed, 54 U.S.L.W. 3463 (U.S. Jan. 14, 1986).

[12] The Supreme Court reversed the Court of Appeals' holding in *Dayton Christian* on *Younger* abstention grounds because it found that the school could raise its Free Exercise Clause claim in state judicial appeals contesting any adverse ruling by the state Civil Rights Commission.

[13] Moreover, affirming *Philbrook* would give substantial power to employees to determine the terms of their employment.

Philbrook is a Title VII case -- in which proof that the government has "prohibited" the free exercise of religion is not necessary -- acceptance of the religious employee's proposed accommodation may be necessary as a matter of statutory law.[14]

B. Education

In contrast to the employment context, in which Congress and the states have a constitutional basis for regulating commerce, government regulation of education represents a wholly different context. To be sure, schools purchase materials and employ administrators, teachers, clerical workers and maintenance personnel and so, to some extent are involved in commerce. But the education cases cannot be approached the same way that we approached the cases discussed in Part A. Even in cases ostensibly involving labor relations, *see NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), or employment discrimination claims, *see Dayton Christian Schools v. Ohio Civil Rights Comm'n, supra*, we cannot analyze the cases as we would other employment cases because in private religious schools, for example, the employees involved are teachers who exercise almost pastoral influence over their students.

Education-related cases are also problematic because they inevitably raise the problem of content analysis or regulation. The education cases broach intervention into the marketplace of ideas, an area that has always enjoyed greater protection than other kinds of marketplaces. In this sense religious freedom may be seen as a form of intellectual freedom, and we frequently approach the religion-in-education cases under the free speech or free assembly clauses rather than under the Free Exercise or an Establishment Clauses. *E.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981); Br. for United States at 7-9, *Bender v. Williamsport Area School District*, 106 S. Ct. 1326 (1986).

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[14] Statutory religious accommodation cases are not treated in detail here because they are not decided on constitutional grounds. Where the cases have been decided on constitutional grounds, it has been by reference to the Establishment Clause. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (Connecticut law mandating accommodation for religious day of worship); *Anderson v. General Dynamics Convair Aerospace Div.*, 648 F.2d 1247 (9th Cir. 1981) (reversing district court decision that accommodation violated the Establishment Clause), *cert. denied*, 454 U.S. 1145 (1982). *But see Amos v. Corporation of the Presiding Bishops Office*, 594 F. Supp. 791 (D. Utah 1984) (holding that the religious exemption in Title VII excepts even purely secular church businesses and violates the Establishment Clause).

1. State Interest in Education

Education in the United States has long been tied to religion. Under Article III of the Northwest Ordinance of 1787, enacted under the Articles of Confederation, Congress declared that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." The declaration was more than precatory. At the time of the founding there were few public schools in the states or territories. Schools, particularly rural schools, were usually home schools or else church-sponsored; the public school and the idea of universal education were 19th century developments. *See Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 213-14 (1948) (Frankfurter, J., concurring); *Everson v. Board of Education, 330 U.S. 1, 23-24 (1947) Jackson, J., dissenting); Rice, Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U. L. Rev. 847, 849-53.

The transformation during the 19th century from an agrarian to an industrial society, a rural to urban shift, made educational skills more important. As society came to regard education as essential to responsible participation in self-government -- to paraphrase Montesquieu, the tyranny of a prince in an oligarchy was not as dangerous to the public welfare as the ignorance of a citizen in a democracy -- ensuring the minimal education of its citizens became an act of self-preservation and self-propagation for the state. The Court has recognized the state's strong interest in education. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. Va. L. Rev. 213, 213-18 (1973).

At the same time, the Court has recognized the right -- "coupled with the high duty" -- of parents to educate their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). Differences between these two interests have lead inexorably to conflicts between the state and parents over educational matters -- matters which, even when they do not involve religious beliefs or practices, are protested nonetheless with religious fervor. *E.g., Island Trees Union School District v. Pico*, 457 U.S. 853 (1982); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). If there is a conflict between what the state perceives is its need and what parents believe is their duty, how much education must the state have to ensure its own viability, and what means can it use to enforce it?

2. The Compulsory Education and Accreditation Cases

The major means by which the state has attempted to protect its interest is by compelling attendance at an accredited school, whether public, private, or home. The cases in which parents, churches, or schools claim immunity from state or federal law because it abridges their Free Exercise rights result primarily from the compulsory attendance requirements. Relatively few cases are a direct attack on the compulsory attendance requirements; rather compulsory attendance becomes the backdrop for parents' objections to accreditation requirements, use of certain textbooks, teaching methods, or teacher employment. For example, most states require that students attend accredited secondary schools, where the state monitors teacher certification, curriculum, and textbooks. Parents who object on religious grounds to certain courses or texts or to the morals of the instructor may try to withdraw their children. But the state does not merely mandate that *if* students choose to go to school they must attend an accredited institution, rather it ordains that students *must* attend some school and that the school be accredited.[15] Thus, from the parents' perspective they have no choice but to disobey the law by violating the attendance requirement or else send their children to a school that offends their religious sensibilities. State regulation of education is regulation both of students and of institutions.

The standard-bearer in the compulsory education cases is, of course, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Court held that the Free Exercise Clause immunized Old Order Amish parents from criminal penalties for keeping their children out of school after the eighth grade, an action which would otherwise violate Wisconsin's compulsory attendance laws. The Court recognized the state's interest in universal education, but balanced against it the "traditional interest of parents with respect to the religious upbringing of their children so long as they . . . 'prepare [their children] for additional obligations.' " *Id.* at 214 (*quoting Pierce* 268 U.S. at 535). Finding in favor of the Amish, the Court held

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[15] For higher education institutions, public or private, attendance is voluntary. Even though it seems that the state's compelling interest in education is not as great once students have completed their elementary and secondary education, many states regulate higher education institutions, and refusal to accredit can be disastrous for the school. *See New Jersey-Philadelphia Presbytery v. New Jersey State Bd. of Higher Educ.*, 514 F. Supp. 506, 509-10 (D.N.J. 1981); Durrant, *Accrediting Church-Related Schools: A First Amendment Analysis*, 38 Ark. L. Rev. 598 (1985).

that religious beliefs and practices were protected by the Free Exercise Clause, and though not absolute, could be overcome only by "interests of the highest order." *Id.* at 215. Significantly, in dicta the Court limited Free Exercise immunity to traditional religious belief and indicated that the Free Exercise Clause would not extend even to the personal (but not religious) philosophy of Thoreau. 406 U.S. at 215-16.[16]

In subsequent attendance and accreditation cases the courts have manifested great reluctance to create *Yoder* exceptions, giving the impression that *Yoder* may be limited to the Amish.[17] Significantly, the state courts tend to view the interests asserted by the state uncritically, assuming as a matter of course that the state has an overriding interest in education and that compulsory education and accreditation procedures are the only means of preserving the state's interest. For example, in a much celebrated case in Nebraska,[18] a church school refused to cooperate with state officials to provide attendance reports, certify teachers, or accredit the curriculum -- even though identical programs had been accredited at other Christian schools in the state. The state supreme court held that the state's interest in promoting education was sufficiently compelling to overcome the school's claim that state regulation in any form violated their religious tenets. The court cited, but did not adequately distinguish *Yoder*, and it gave no consideration to the

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[16] *See Delconte v. State*, 65 N.C. App. 262, 308 S.E.2d 898 (1983) (parents failed to prove that they withdrew their children on the basis of their religious beliefs); *State v. Kesuboski*, 87 Wis.2d 407, 275 N.W.2d 101 (Ct. App. 1978) (same).

[17] Iowa, for example, has adopted an "Amish exception" to its compulsory attendance law for parties who can prove that their educational philosophy differs substantially from the state's philosophy. In *Johnson v. Charles City Community Schools Bd. of Educ.*, 368 N.W.2d 74 (Iowa), *cert. denied*, 474 U.S. 1033 (1985), the Iowa Supreme Court upheld the lower court's refusal to apply the Amish exception to a Christian school. *See also Fellowship Baptist Church v. Benton*, 620 F. Supp. 308 (S.D. Iowa 1985). And in *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984), the Fourth Circuit reversed a district court decision that a Pentecostal couple, who had strong objections to local public and church-affiliated schools, should be permitted to keep their children at home to educate them. The appellate court stated that the case before it was distinguishable from *Yoder* because the Duro's were not members of a distinct community with a long history and would not consent to have their children educated in public schools until the eighth grade.

[18] *See* Shugrue, *An Approach to Mutual Respect: The Christian Schools Controversy*, 18 Creighton L. Rev. 219 (1985); Comment, *Douglas v. Faith Baptist Church Under Constitutional Scrutiny*, 61 Neb. L. Rev. 74 (1982); Note, *State v. Faith Baptist Church: State Regulation of Religious Education*, 15 Creighton L. Rev. 183 (1981).

means that the state had chosen to secure its interests. *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, *app. dismissed*, 454 U.S. 803 (1981); *cf. State v. Shaver*, 294 N.W.2d 883 (N.D. 1980) (conviction affirmed of fundamentalist Baptist group that refused to obtain accreditation). Ironically, the court noted evidence admitted at trial that the students involved in the *Faith Baptist* case were receiving an adequate education. *E.g.*, 301 N.W.2d at 574-75. Thus the controversy in the case centered around the bureaucratic concerns for reports and filing requirements rather than substantive concerns over curricular or pedagogical methods.[19]

In contrast to *Faith Baptist Church* is the thoughtful opinion in *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). In *Whisner* the Supreme Court of Ohio held that Ohio's regulations prescribing in detail the courses to be taught, the activities to be held, and the form of cooperation between the school and its community, so enmeshed the State in the minute operation of the non-public religious school as to "effectively eradicate the distinction between public and non-public education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children." 351 N.E.2d at 768. The court found that the regulations both violated the religious rights of the students and their parents and infringed parental rights to direct the religious education of their children, in violation of the First and Fourteenth Amendments.[20] The

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[19]The affair has taken on a decided air of civil disobedience reminiscent of the tax protester cases. Contempt proceedings have been held against the pastor, *In re Contempt of Sileven*, 219 Neb. 34, 361 N.W.2d 189 (1985), and parents, *In re Contempt of Liles*, 217 Neb. 714, 349 N.W.2d 377 (1984).

An unrelated, but far more egregious case is *Singer v. Wadman* 595 F. Supp. 188 (D. Utah 1982) *aff'd*, 745 F.2d 606 (10th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985), in which John Singer, an idiosyncratic polygamist, refused to send his children to school or have the state oversee in any way his home school. In what the district court described as nothing less than a "Tolstoyan epic," the state attempted repeatedly to get Singer's cooperation. In the end Singer was found in contempt, the state threatened to remove his children, and Singer was shot and killed in front of his own home by troopers on snowmobiles attempting to arrest him. Query whether any state's interest in education could ever be so compelling as to warrant the ultimate termination of parental rights in order to get the children to an accredited school.

[20]In an unusual case, *Kentucky State Bd. of Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), the Kentucky Supreme Court -- on the basis of surprisingly prescient legislative debates held in 1890 -- ruled that Section 5 of the Kentucky Constitution ("nor shall any man be compelled to send his child to any school to which he may be

court further stated that the state could overcome the constitutional concerns if it could show that it had an overriding interest and that the regulations used the minimal means required to satisfy the interests; no such proof was offered in this instance. 351 N.E.2d at 771.

3. The Textbook Cases

The compulsory education laws also enter into public school curricular disputes. Since students must attend some school and sectarian education is not always available, religiously-conscientious public school students have challenged the use of certain textbooks as violative of the First Amendment because the textbooks offer views that conflict with the students' religious beliefs. In *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985), sophomore students and parents claimed that a required book, *The Learning Tree*, offended their religious beliefs. The Ninth Circuit held that there was no violation of the students' Free Exercise rights where they were assigned an alternate book and allowed to leave class during the discussions. 753 F.2d at 1534; *see also*, 753 F.2d at 1542-43 (Canby, J., concurring).

The common-sense accommodation reached in *Grove* was not made in *Mozert v. Hawkins County Public Schools*, 765 F.2d 75 (6th Cir. 1985). Parents and students objected to the use of a Holt, Rhinehart and Winston reader, which was prescribed for all elementary school students by the school board, on the grounds that the values in the text violated their religious beliefs. The parents and students proposed an opt-out program and an alternative reader, but the school board refused and evidently indicated that students who refused to participate might be expelled. The Sixth Circuit remanded to the district court for findings as to whether the parents and students' beliefs were sincere, whether the beliefs were offended by the reader, and whether there was a reasonable alternative. 765 F.2d at 78.

4. The Teacher Cases

A final important area of conflict between government regulations and religious freedom is the right of private schools to control the terms of employment of their faculty. To date the Court's sole foray in this area is *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), which was

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conscientiously opposed") permitted a compulsory attendance law but forbade the Commonwealth from prescribing minimal standards for teachers and curriculum.

discussed briefly at, pp. 113-14. Although the Court refrained from deciding *Catholic Bishop* on the basis of the First Amendment, it clearly signalled that it believed that there was potential for conflict between the labor laws and the Free Exercise rights of the Catholic schools if the NLRB attempted to force the schools to bargain with lay faculty unions. The Court "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school," 440 U.S. at 501, and acknowledged that "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." *Id.* at 504. *See also Meek v. Pittinger*, 421 U.S. 349, 370 (1975).[21]

Important religious liberty interests are at stake in the teacher cases. Even religious schools that are not affiliated with a particular church often acquire an orthodoxy of their own (thereby attaining quasi-church status) and firmly believe that any interference with or regulation of the school-teacher relationship is analogous to interferring with the church-minister relationship; and in fact as we saw in *Dayton Christian Schools*, aspects of the employment relationship itself are predicated on certain religious doctrines.[22] The school as a religious institution has an interest in maintaining the religious integrity of the school as a means of governing the education of their children. For many parents, *who* teaches their children is inseparable from *what* is taught them. In order to guarantee the religious fidelity of the faculty, the schools must be able to hire and discharge teachers on the basis of their religious beliefs and practices.

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[21] It would certainly be ironic if, having held that church-affiliated schools are religious enterprises and not eligible for government aid because of the Establishment Clause, the Court turned around and deemed the schools sufficiently secular for Free Exercise purposes to permit extensive regulation. *Compare Lemon v. Kurtzman*, 403 U.S. 602 (1971) (aid to parochial school violates Establishment Clause) *with State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d. 571, *app. dismissed*, 454 U.S. 803 (1981) (state may regulate course content and teacher qualifications at private church-sponsored school without violating the Free Exercise Clause).

[22] *See also EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (school compensated married females at a lesser rate than married males or unmarried females considered heads of household; school justified the difference by religious belief in male as head of the household).

C. Special Government Responsibilities

This section of the memorandum focuses on institutions that the government operates or concerning which the government has particular charge. Three areas are discussed, the armed forces, prisons, and Native Americans. In cases discussed in the previous sections on employment and education the conflict between the religious practice and the law frequently arose in the context of regulation of a private activity such as employing workers, operating a business, or sponsoring a private school. In this section, however, the government finds itself in the position of operating the enterprise or institution. The armed forces and prisons are obvious examples of traditional governmental activities, while the national government has assumed a unique responsibility for Native Americans.

1. Armed Forces

Article I, Section 8 of the Constitution grants Congress the power to raise an army and navy, to provide for calling forth the militia, and to make rules for regulation of the armed forces. The same section further grants the authority to make all laws "necessary and proper" to exercise its power over the armed forces. The Court has stated that Congress has plenary authority over the military, and that "perhaps in no other area has the Court accorded Congress greater deference." *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981); *see also Chappell v. Wallace*, 462 U.S. 296 (1983). Nevertheless, military personnel retain certain fundamental rights, although such rights may be circumscribed by the exigencies of military service. *See Parker v. Levy*, 417 U.S. 733 (1974). In this section we review three areas of conflict.

a. The Military Conscription Cases

Apparent conflict between the government's power to raise and regulate armed forces and the individual's privilege of free exercise was noted in the debates on the Bill of Rights. On August 17, 1789, the House considered the following amendment: "A well regulated militia, composed of the body of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." 1 Annals of Congress 749 (Aug. 17, 1789). In the ensuing debate representatives suggested providing that only members of certain sects be excused, or that only members of sects that were "scrupulous of bearing arms" could be exempted, or that men might be excused by "paying an

equivalent." *Id.* at 750. Finally, Rep. Benson moved that the whole exemption be struck and the matter left to the legislature:

> [M]odify it as you please, it will be impossible to express it to such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore, ought to be left to the discretion of the Government. If this stands part of the Constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the malitia, whether it comports with this declaration or not.

Id. at 751. The House voted 24 to 22 against Rep. Benson's motion to strike. *Id.*; *see also id.* at 766-67 (Aug. 20, 1789). Evidently Rep. Benson finally prevailed, as the Second Amendment was adopted without an exemption for conscientious objectors.

Congress has readily adopted the exemptions contemplated by the Founders. The current codification, 50 U.S.C. App. § 456(j), excepts from service any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." The phrase "religious training and belief" is defined so as to exclude "essentially political, sociological, or philosophical views, or a merely personal moral code." The broad power of Congress to set the conditions for exemption from military service was upheld in *Gillette v. United States*, 401 U.S. 437 (1971). Gillette appealed the requirement that he object to war "in any form," arguing that his religious scruples against participation in unjust wars such as Vietnam should entitle him to exemption. The Court decided that, although the statute granted special status to religiously motivated objectors to all wars and not to objectors to certain wars, the distinction had a rational basis and did not offend the Establishment Clause. Furthermore, the Court held that the Free Exercise Clause was not violated by conscription of persons holding religious scruples against certain wars: "The conscription laws . . . are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position." *Id.* at 462. The Court further noted that the country had a substantial interest in conscription for military service.

Because the religious exemption to the draft law is statutory, there are few constitutional cases dealing with conscientious objectors besides

Gillette.[23] Nevertheless, *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163 (1965), are notable because of their expansive reading of the term "religion." In *Seeger* the Court interpreted broadly the then-current statute's reference to religion as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." Despite the exemption's apparent limitation to those who believed in God, the Court took a more cosmic view of religion and ultimate reality. It held that the test was whether "the claimed belief occup[ied] 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?" 380 U.S. at 184. Building on *Seeger*, a plurality in *Welsh* went one step further and stated that the section exempted "all those whose consciences, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become an instrument of war." 398 U.S. at 344.

The cases are important because the Court took the conscientious objector exemption -- a type of Free Exercise Clause for draftees -- and enlarged it to accommodate more than traditional religionists, and in fact expanded it to accommodate people who might not even describe themselves as religious. *See also Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961). If the Court's broad reading of the statutory "religious training and belief" or "belief in relation to a Superior Being" were carried over to Establishment Clause cases, the Clause would cover a panoply of beliefs and practices, beliefs which have been recognized as religion for Free Exercise but not Establishment purposes. In short, *Seeger* and *Welsh* seem inconsistent with the Court's view of religion for Establishment purposes.[24]

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[23] We have already noted *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934). One significant conscription case which might escape notice is *Johnson v. Robinson*, 415 U.S. 361 (1974), which appears to be inconsistent with *Sherbert v. Verner*. In *Johnson*, a conscientious objector who completed alternative service was denied veteran's benefits. In an 8-1 decision the Court held that the burden on free exercise was incidental -- if it existed at all. *Id.* at 385. The majority did not mention *Sherbert*; however, Justice Douglas based his dissent on it. In his view, "[w]here Government places a price on the free exercise of one's religious scruples it crosses the forbidden line." *Id.* at 389 (footnote omitted) (Douglas, J., dissenting). For a discussion of *Sherbert* and the nature of freedom see pp. 108-12 *supra*.

[24] See discussion at p. 26, *supra*. Realists might ascribe the Court's expansive reading of the draft exemption cases to the fact that the exemptions being sought were Vietnam-era. Such a view would be consistent with the earlier conscientious objector cases, which narrowly construed the Constitution and the statute and which were decided in

b. The Military Regulation Cases

If the conscription cases are somewhat difficult, it is because conscription marks the transition between civilian and military life. The regulation cases are not so burdened and are nearly uniform in upholding military regulations. The Courts have recognized that the military need for discipline requires a uniformity and regimentation unknown in any other context. It has, therefore, been very deferential to the military's own regulations, as well as to the role accorded Congress.

Undoubtedly the most important case in this area is *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986). In that case Simcha Goldman, an Orthodox Jew and an Air Force psychologist, claimed that Air Force regulations prohibiting the wearing of visible religious garb (including a skullcap or "yarmulke") infringed his First Amendment rights. The Supreme Court decided against Goldman in a 5-4 decision in which five separate opinions were submitted. Writing for the majority, Justice Rehnquist noted that the military had drawn a distinction between visible and non-visible religious garb and had decided that uniformity of dress was necessary to discipline and esprit de corps, a decision that was to be accorded great deference. "The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." 106 S. Ct. at 1314. In a concurring opinion, Justice Stevens emphasized that the rule was neutral with respect to religion and that any exception for Goldman might create severe line-drawing problems as the military would have to prohibit Rastafarian dreadlocks or Sikh

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the World War I and World War II milieu. *See, e.g., Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934) (upholding University rule requiring military training course of all male students); *United States v. MacIntosh*, 283 U.S. 605 (1931) (denying naturalization to Yale divinity professor who refused to swear that he would be willing to bear arms in any conflict he considered morally unjustified), *overruled, Girouard v. United States*, 328 U.S. 61 (1946).

The change in the Court's views can be seen when the more modern cases are contrasted with *Sicurella v. United States*, 348 U.S. 385 (1955), in which the primary dispute between the majority and the dissent was whether a Jehovah's Witness -- who objected to serving in the armed forces at any time because it would constitute desertion of his position in Jehovah's army -- actually objected to war. The Court finally resolved the case in favor of the Witness by assuming that when Congress referred to war it meant "real shooting wars . . . -- actual military conflicts between nations of the earth in our time" and not Armageddon. *Id* at 391.

turbans in the interest of discipline and safety.[25]

In dissent, Justice Brennan rejected the "slippery slope" argument: "It is not enough to say that Jews cannot wear yarmulkes simply because Rastafarians might not be able to wear dreadlocks." And he concluded that the Air Force had "failed utterly to furnish a credible explanation why an exception to the dress code permitting Orthodox Jews to wear neat and conservative yarmulkes while in uniform is likely to interfere with its interest in discipline and uniformity." 106 S. Ct. at 1320 (Brennan, J., dissenting); *cf. id.* at 1323 (Blackmun, J., dissenting) (Air Force failed to show that there were a significant number of religious exemptions that could not be denied on neutral, relevant grounds). Justice O'Connor assailed the majority for failing to attempt any balancing of the competing interests, and noted that the dissenting opinions did not offer a standard for judging the competing claims. Borrowing language from *Sherbert*, *Thomas*, and *Yoder*, Justice O'Connor offered two criteria for judging: First, has the government shown an overriding or compelling interest, and second, has the government proven that an exemption would harm that interest, or in other words, is the chosen means essential or the least restrictive alternative. 106 S. Ct. at 1325 (O'Connor, J., dissenting). This test, she argued, is equally applicable in the military as well as the civilian context, although the military would clearly require additional leeway to fulfill its mission. *Id.*

The *Goldman* opinions are revealing because all of the opinions seem to agree that a neutral line needed to be drawn, but they disagreed as to where the line of demarcation should be.[26] Justice O'Connor's opinion is notable because it can be applied equally well in a variety of contexts, while at the same time it has the flexibility to account for

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[25] The problem is not mere conjecture. The courts have generally upheld military denial of requests to wear beards, long hair, or head gear not authorized by military rules. *See, e.g., Khalsa v. Weinberger*, 759 F.2d 1411 (9th Cir. 1985) (Sikh: facial hair and turban); *Sherwood v. Brown*, 619 F.2d 47 (9th Cir.) (same), *cert. denied*, 449 U.S. 919 (1980); *Bitterman v. Secretary of Defense*, 553 F. Supp. 719 (D.D.C. 1982) (Orthodox Jew: yarmulke). *But see Geller v. Secretary of Defense*, 423 F. Supp. 16 (D.D.C. 1976) (Orthodox Jew allowed to keep beard worn in military for seven years).

[26] A difficult problem that was not raised in any of the opinions is whether Goldman was compelled to serve, or to continue serving, in the military. If Goldman is not compelled to serve, then in one sense there is no prohibition on the free exercise of his religion. If, however, Goldman were conscripted or would suffer some penalty, such as a dishonorable discharge, then there is a more serious conflict between the dress code and Goldman's religious beliefs.

differences in the various interests at stake. An approach similar to the one proposed by Justice O'Connor was employed in an unusual military case in the Seventh Circuit. In *Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985), servicemen challenged a Navy order making a church off-limits to personnel at all times because the church's ministers had privately encouraged desertion and homosexuality. The court concluded that the Navy had an interest in the off-base religious practices of its personnel where those practices worked to the detriment of discipline and order, but that the Navy bore the burden of showing why some less restrictive alternative was not feasible such as restricting Navy personnel to attendance at regular worship services only. *See* 758 F.2d at 1180, 1183-84. Such an accommodation seems to serve both the security interests of the Navy and the religious interests of its personnel.

c. The Chaplain Cases

There are few cases involving challenges to the hiring or use of chaplains that are based on the Free Exercise Clause. More often, the chaplaincy programs in the armed forces have been challenged on Establishment Clause grounds. In the process, however, the government has defended the chaplaincy programs on the grounds that they are, at the least, a permissive accommodation of religion, and quite possibly required by the Free Exercise Clause.

The earliest references to this tension between the Establishment Clause and the Free Exercise Clause are found in Justice Brennan's concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203 (1963), and Justice Stewart's dissent in the same case. Justice Brennan had stated:

> There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments of those in the armed services may afford one such example.

374 U.S. at 296 (Brennan, J., concurring) (footnote omitted). He reasoned that "[s]ince government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be." *Id.*

at 297-98.[27]

Justice Stewart followed in the same line of thinking: "Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet, a lonely soldier stationed at some far-away outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion." 374 U.S. at 309 (Stewart, J., dissenting).

In a recent challenge to the Army's chaplaincy program, the Second Circuit adhered to the dicta in *Schempp* and upheld the program. *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985). The court found that "[u]nless the Army provided a chaplaincy it would deprive the soldier of his right under the Establishment Clause to practice his freely chosen religion." *Id.* at 234. The court reasoned that there was no Free Exercise violation because a serviceman's decision to worship or to consult a chaplain was strictly voluntary. On the other hand, because of the nature of the military commitment, military life without a chaplaincy program might displace any opportunity for the serviceman to exercise his religious beliefs, thereby threatening his free exercise. The court found that the need for the chaplaincy program was particularly great in overseas and otherwise isolated posts, and that the Army's failure to provide chaplains might affect the willingness of citizens to serve. *Id.* at 228, 237.[28]

Free exercise challenges to chaplaincy programs have not matured yet into either a large or a developed body of law. We can anticipate that future challenges will not focus so much on the fact that chaplains are maintained by the government, but on the denominational allocation of chaplains[29] and on military rules that chaplains believe to be in conflict

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[27] He noted that this reasoning would also extend to the prison context. 374 U.S. at 297.

[28] The court remanded the case to the district court for findings on the need for chaplains in large areas such as Washington, D.C., where military personnel live off base, enjoying a commuter schedule, and have full access to local, civilian clergy and services. 755 F.2d at 238. Judge Meskill dissented with respect to the remand, opining that "the fringe activities of the chaplaincy program . . . are not of constitutional magnitude." *Id.* (Meskill, J., concurring and dissenting).

[29] *See Thompson v. Kentucky*, 712 F.2d 1078, 1080-81 (6th Cir. 1983) (Muslim prison inmates complained of restricted use of chapel facilities and failure to hire a Muslim chaplain; the three prison chaplains were Baptists); *see also Katcoff*, 755 F.2d at 226-27 & n.1 (listing religious preferences of servicemen and distribution by denomination of

With their ministerial duties.[30]

2. The Prison Cases

Prisons, like the military, have a paramount interest in maintaining order, discipline, and safety. Through experience the courts have learned that the Judiciary is ill-equipped to operate the nation's prison system, and the Court has warned that the courts should not "trench[ ] too cavalierly" on administrative and disciplinary matters. *Bell v. Wolfish*, 441 U.S. 520, 534 (1979).

Incarceration does not mean, however, that prisoners relinquish all rights of citizenship. "A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objections of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). The Court has specifically recognized that prisoners retain their rights to religious liberty. *See Cruz v. Beto*, 405 U.S. 319 (1972); *Cooper v. Pate*, 378 U.S. 546 (1964).

Despite the frequency and breadth of prisoners' claims[31] the Supreme Court has not issued a definitive standard by which to judge cases involving prisoners' First Amendment rights. On the one hand, the Court has emphasized the deference to be given to prison administrators and has required only that the regulation or action be reasonable. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125-26, 130 (1977); *Pell v. Procunier*, 417 U.S. 817, 826 (1974). On the other hand, the Court suggested in *Procunier v. Martinez*, 416 U.S. 396 (1974), that restrictions

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chaplains: although 1 percent of enlisted personnel expressed a preference for the Moslem religion, there were no Moslem chaplains as of 1981).

[30] *See Baz v. Walters*, 782 F.2d 701. *See Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (affirming dismissal of suit by former V.A. chaplain who was fired for proselyting at V.A. hospital containing primarily psychiatric patients).

[31] The prisoner cases arise in a variety of contexts, many of which are similar to claims raised in the military context. *See, e.g., Shabazz v. O'Lone*, 782 F.2d 416 (3d Cir. 1986) (en banc) (restrictions on attendance at weekly religious services), *pet. for cert. filed*, 54 U.S.L.W. 3730 (U.S. May 6, 1986) (No. 85-1722); *Childs v. Duckworth*, 705 F.2d 915 (7th Cir. 1983) (satanist requested use of candles and incense); *Madyun v. Franzen*, 704 F.2d 954 (7th Cir.), *cert. denied*, 464 U.S. 996 (1983) (Muslim prisoner objected to frisk by female guard); *Thompson v. Kentucky*, 712 F.2d 1078 (6th Cir. 1983) (Muslim objected to exclusive hiring of Christian chaplains); *Jihaad v. O'Brien*, 645 F.2d 556 (6th Cir. 1981) (Sunni claimed beard was religious requirement). *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (Cree Indian claimed long hair was religious requirement); *Prushinowski v. Hambrick*, 570 F. Supp. 863 (E.D.N.C. 1983) (request for special diet).

on First Amendment rights are justified if the regulations further an important government interest and the limitation imposed is not greater than necessary. *Id.* at 413.

The lower courts have clearly moved to adopt the latter, more government-restrictive approach. Recently, in *Shabazz v. O'Lone*, 782 F.2d 416 (3d Cir. 1986) (en banc), *pet. for cert. filed*, 54 U.S.L.W. 3730 (U.S. May 6, 1986) (No. 85-1722), the Third Circuit modified its previous standards set forth in *St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir. 1980). In *St. Claire* the court had outlined a three-step inquiry. An inmate first had to prove that his constitutional rights had been violated. The state could defend by showing that the regulation or practice served a security concern. This showing could be overcome only if the inmate could demonstrate that the regulation was irrational. 634 F.2d at 119.

In *O'Lone*, a decision that seems consistent with decisions in other circuits,[32] the Third Circuit placed a much heavier burden on the state. First, specifically, the Third Circuit held that once an inmate proves that prison officials have impinged on his religious rights, the state must show that the challenged regulations were intended to serve, and do serve, an important penological goal and that no reasonable method exists by which the inmate's religious rights can be accommodated without creating bona fide problems with respect to the state's important penological goal. As the court explained further, "where it is found that reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights." 782 F.2d at 420.

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[32] *See, e.g., Childs v. Duckworth*, 705 F.2d 915, 920 (7th Cir. 1983) (restrictions must be scrutinized to ascertain the extent to which they are necessary to effectuate the policies of the prison system); *Teterud v. Burns*, 522 F.2d 357, 359 (8th Cir. 1975) (court will strike regulations that are more restrictive than necessary and that do not serve the system's objectives); *see also Madyun v. Franzen*, 704 F.2d 954, 959-60 (7th Cir.), *cert. denied*, 464 U.S. 996 (1983) (regulation must have an important objective and be "reasonably adapted" to achieving the objective; modifying requirement of reasonable accommodation adapted in *Arsberry v. Sielaff*, 586 F.2d 37, 44 (7th Cir. 1978)); *LaReau v. MacDougall*, 473 F.2d 974, 979 (2d Cir. 1972) (regulation must be reasonably adapted to achieving an important state objective), *cert. denied*, 414 U.S. 878 (1973).

3. The Native American Cases

One of the most difficult contexts for Free Exercise claims is the area of conflict between government policies and the religious practices of Native Americans. In this section, three topics are discussed: Indian protests over federal land use, claims to the right to use prohibit efforts to protect Indian practices through the American Indian Religious Freedom Act.

a. Federal Land Use

The conflict between the government and the Indians' religious practices is most apparent in cases involving land use or the taking of endangered species. In *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); and *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983), Indians protested federal decisions to allow land use that the Indians claimed would interfere with their religious practices. In *Badoni*, Navajos claimed that the creation of Lake Powell adjacent to the Rainbow Bridge Monument had drowned Indian gods, denied them access to a sacred location, and desecrated the area by bringing more tourists to the site. In *Sequoyah*, the Cherokees similarly claimed that the construction of the Tellico Dam in Tennessee would flood sacred burial sites. And in *Wilson*, Navajos and Hopis argued that extension of the ski area on the San Francisco Peaks in Arizona would destroy the spiritual aspects of the mountains, which had long been regarded as sacred.

Although in all three cases[33] the courts held against the claims by the Indians,[34] the courts did not agree on the reasons for denying the claims. In *Sequoyah* and *Wilson* the courts focused on the centrality or

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[33] Other cases involving land use include *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982) (Indians failed to prove that construction of road and parking lot near ceremonial grounds would interfere with practices), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983); *Inupiat Community of Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982) (off-shore drilling did not interfere with religion of Inupiat who hunted and fished in the area), *aff'd*, 746 F.2d 570 (9th Cir. 1984) (per curiam), *cert. denied*, 106 S. Ct. 68 (1985).

[34] *But see Northwest Indian Cemetery Protective Ass'n v. Peterson*, No. 83-2225, slip op. at 6-15 (9th Cir. Jul. 22, 1986) (affirming issuance of injunction against construction of road for harvesting timber where activities would disrupt solitude of sacred "high country" and where government had not shown that its interests in road construction

indispensability of the Native American practice interfered with. For example, in *Sequoyah* the court found that the flooding resulting from the Tellico Dam would only affect the cultural traditions of certain tribal members rather than a central religious practice of the tribe. And in *Wilson* the court found that the Indians would not be prevented by the construction from collecting ceremonial objects from the San Francisco Peaks, and thus there was no burden.[35] By contrast, in *Badoni* the court gave little consideration to whether or not the creation of Lake Powell interfered with the Navajos practices, focusing instead on the importance of the project to the government.

Interestingly, all three courts refused to accept the argument that the Indians had no claim of religious infringement because they had no right to unconditional access to the land. Although this argument was the basis for the district courts' decisions in *Sequoyah* and *Badoni*, 480 F. Supp. 608 (E.D. Tenn. 1979); 455 F. Supp. 641 (D. Utah 1977), the Sixth Circuit found it relevant but not determinative, 620 F.2d at 1164, the Tenth Circuit rejected it, 638 F.2d at 176, and the D.C. Circuit held that "[t]he government must manage its land in accordance with the constitution, which nowhere suggests that the Free Exercise Clause is inapplicable to government land," 708 F.2d at 744 n.5 (citation omitted); *cf. Bowen v. Roy*, 54 U.S.L.W. 4603 (U.S. June 11, 1986) (no Free Exercise right to dictate to government how to conduct its affairs). For the most part the courts were at least willing to look at the Indian claims to use of government land and not dismiss them outright, although in the end result the courts were deferential to the government's proposed use of the land.[36] No court has endeavored to explain why Indian religious

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and timber harvesting were compelling or that means it chose to achieve those interests were least restrictive available).

[35]The court, however, gave no weight to the claim that expanding the ski areas would destroy the spirit of the mountain as a whole, thus making sacred ceremonies conducted on the mountains or sacred objects collected from the peaks ineffective.

[36]It appears that the sole exceptions are *Northwest Indian Cemetery Protective Ass'n v. Peterson*, No. 83-2225, slip. op. at 6-15 (9th Cir. Jul. 22, 1986), *aff'g in relevant part*, 565 F. Supp. 586 (N.D. Cal. 1983), and *United States v. Means*, 627 F. Supp. 247 (D.S.D. 1985). In *Northwest Indian Cemetery* the district court granted an injunction against constructing an access road for harvesting timber in Six Rivers National Forest. Within the Blue Creek area was a region known as the "high country" that was considered sacred to Karok, Tolowa, and Yurok Indians. The court of appeals confirmed the issuance of an injunction because road construction would interfere with the Indian's religious practices and because the state failed to prove road construction was the least religion-restrictive means necessary to achieve any compelling state interest.

practices should merit special accommodation in the context of federal land use, but the unstated premises may well be that the Indians worshipped these areas long before the advent of Western colonizers, that the Indians have never had a strong concept of property rights and that, therefore, they may be deserving of special consideration.

b. Prohibited Practices

Perhaps the most direct conflict between Native American religious practices and federal and state laws involves the use of protected species in religious ceremonies. Prominent here are the cases where Indians have taken bald or golden eagles. The courts have upheld conviction of Native Americans where the taking was for commercial sale, even though the sale was to Native Americans for religious use.[37] But where the taking was for personal religious use and on Indian lands, the courts have found that the taking is protected by the Free Exercise Clause.[38] Exemptions from general laws have also been created for the taking of a moose, and the use of peyote for ceremonial, but not commercial, purposes.[39]

c. The American Indian Religious Freedom Act

In 1978 Congress enacted the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996, which provides that it is "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditions

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In *Means*, the Court held that Lakota Sioux were entitled to a special use permit to conduct religious ceremonies in the Black Hills National Forest. The Court found that Forest Service rules (including charging a $25 camping fee) burdened the Indian's practice of their native religion and that accommodation would not materially impair management of the park. The Court further held that accommodation was mandated by the Free Exercise Clause. 627 F. Supp. at 264.

[37] *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985), *rev'd on other grounds*, 54 U.S.L.W. 4614 (U.S. Jun. 11, 1986); *United States v. Fryberg*, 622 F.2d 1010 (9th Cir.), *cert. denied*, 449 U.S. 1004 (1980); *United States v. Top Sky*, 547 F.2d 486 (9th Cir. 1976).

[38] *United States v. White*, 508 F.2d 453 (8th Cir. 1974); *United States v. Abeyta*, Crim. No. 85-79-JB (D.N.M. Apr. 10, 1986).

[39] *Frank v. State*, 604 P.2d 1068 (Alaska 1979) (killing moose for Athabascan funeral potlach allowed); *Peyote Way Church of God v. Smith*, 556 F. Supp. 632 (N.D. Tex. 1983) (peyote use in Native American Church); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (same); *but see State v. Soto*, 21 Or. App. 794, 537 P.2d 142 (1975) (upholding conviction for possession of peyote), *cert. denied*, 424 U.S. 955 (1976).

of 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 to worship through ceremonials and traditional rites." By its language, the statute grants no right to any tribe or individual, nor does it specifically limit the application of any statute or instruct government agencies. One court has stated that AIRFA requires nothing beyond the strictures of the Free Exercise Clause. *Crow v. Gullet*, 541 F. Supp. 785, 794 (D.S.D. 1982), *aff'd.*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983). The D.C. Circuit has held, however, based on the legislative history, that AIRFA at least requires agencies to evaluate their policies to avoid unnecessary conflicts with Native American religious practices, but it does not require federal deference to Indian religious claims. *Wilson v. Block*, 708 F.2d at 746. So far, AIRFA has had little effect on Indian free exercise claims. *See* Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion*, 71 Iowa L. Rev. 869, 870 (1986).

D. Police Power

1. Zoning Restrictions

Zoning laws are a relatively recent phenomenon that can result in unusually severe intrusions on the free exercise of religion because they involve public control of the private use of land. For example, a zoning official in Canton, Michigan recently informed a local pastor that any regular Bible study in his home would be a violation of the local zoning ordinance. Similarly, local officials in Los Angeles warned homeowners that, even if one non-resident entered one of their homes for a religious service, a cease and desist order would issue.[40]

The United States Supreme Court has never decided a religious liberty case in the zoning context,[41] and there have been only a few such

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[40] *See* Comment, *Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion*, 76 Nw. U.L. Rev 786, 786-88 (1981); P. Cunningham and S. Ericsson, *Zoning Ordinances, Religious Uses of Land, and the Free Exercise of Religion* (unpublished manuscript) (copy on file at OLP).

[41] In 1949, before the Court's adoption of the compelling state interest test for evaluating free exercise claims, the Court refused to hear an appeal from a California decision holding that a local community may exclude churches entirely from a residential area. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. City of Portersville*, 90 Cal. App. 2d. 656, 203 P.2d 823, *appeal dismissed*, 338 U.S. 805

cases decided in the lower federal courts. The two most important of these cases are discussed below.[42]

First, in *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1984), the Eleventh Circuit held that local officials could prohibit organized home religious services in a single family neighborhood because the city's interest in maintaining the residential quality of the area outweighed the religious interest at issue. *Id.* at 738-39. The court's analysis in support of its holding is troublesome in at least two respects. First, the court accepted without any factual basis that allowing the religious use in question would have disrupted the existing residential quality of the neighborhood. Second, the court neglected to analyze whether the state's failure to bar organized activities other than religious activities either (1) fatally undermined the state's asserted interest in maintaining the residential quality of the single-family zone, or (2) violated the Free Speech Clause, the Free Exercise Clause, and/or the Establishment Clause by discriminating against religious speech.[43]

(1949). The Court later explained the dismissal by stating that the effect of [the] statute or ordinance upon the exercise of First Amendment freedoms [was] relatively small and the public interest to be protected [was] substantial." *American Communications Ass'n v. Douds*, 339 U.S. 382, 397 (1950). *See also Tony and Susan Alamo Foundation v. Secretary of Labor*, 105 S. Ct. 1953, 1964 (1985) (dicta) ("[t]he Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning restrictions") (*citing Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

[42] State cases considering the zoning/religious liberty conflict are notable for their inconsistency and failure to apply Supreme Court precedent. *See* Comment, *Zoning Ordinance Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. Pa. L. Rev. 1131, 1136-43 (1984); P. Cunningham and S. Ericsson manuscript, *supra*. *See generally* Reynolds, *Zoning the Church: The Police Power Versus the First Amendment*, 64 B.U.L. Rev. 767 (1985) (recommending application of free speech principles to religion cases involving zoning restrictions).

[43] *See Widmar v. Vincent*, 454 U.S. 263 (1981) (Free Speech Clause prohibits content-based discrimination); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (Establishment Clause prohibits state hostility toward religion). The court in *Grosz* also devalued the residence-owner's religiously motivated desire to worship in his home by holding that, because he could worship elsewhere, the burden to him of complying with the zoning ordinance did not rise to the level of criminal liability, loss of livelihood, or denial of a basic income-sustaining public welfare benefit. 721 F.2d at 738-39. The First Amendment does not permit courts to inquire into the relative importance of activity motivated by sincerely-held religious beliefs. *See* discussion of *Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), at p. 139, *infra*.

Second, in *Lakewood Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), the Sixth Circuit held that it would not infringe the religious beliefs of a church for local officials to prevent it from constructing a sanctuary in a residential area because constructing and owning a church building was not a "fundamental tenet" or a "cardinal principle" of the church's beliefs. *Id.* at 307 (*quoting Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), respectively).[44] Such a limitation, questionably derived by negative implication from the *Yoder* and *Sherbert* cases, is completely at odds with the central purpose of the Free Exercise Clause -- to protect from unnecessary state intrusion any religious practice motivated by sincere religious conscience. Moreover, such a limitation would improperly invite courts to decide what is important and/or required in a particular religion.

2. Solicitation Restrictions

The Supreme Court has ruled that hand distribution of literature, sales of literature, solicitation of funds, and similar activities (all referred to hereinafter generally as "solicitation") are protected not only by the Free Speech Clause, but also by the Free Exercise Clause when motivated by sincere religious beliefs.[45] Therefore, the state may restrict such activities only by adopting the least restrictive means available to serve a compelling government interest.[46]

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[44]The Fourth Circuit was similarly unimpressed with a church's free exercise claim in *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984) (no violation of free exercise rights of church occurred when state revoked church's special use permit for violations of conditions of permit because state neither attacked church's religious beliefs nor sought to regulate its conduct). *See generally Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo*, 593 F. Supp. 655, 663 (S.D.N.Y. 1984) (upholding zoning ordinance against free exercise challenge); *Holy Spirit Ass'n v. Town of New Castle*, 480 F. Supp. 1212 (S.D.N.Y. 1979) (same).

[45]*See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 645-47 (1981) (Krishna practice of Sankirtan); *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943) (Jehovah's Witnesses' practice of distributing literature and soliciting purchase of books); *Cantwell v. Connecticut*, 310 U.S. 296, 301-03 (1940) (same). *See generally Marsh v. Alabama*, 326 U.S. 501 (1946); *Tucker v. Texas*, 326 U.S. 517 (1946); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

[46]*See Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 650-54 (1981) (holding that state could limit solicitation at state fair to booths because that limitation

The Supreme Court also has held unconstitutional local ordinances that condition the right to solicitation upon acquiring a license or permit, the issuance of which is left to the discretion of public officials.[47] Faithful to this rule, the federal courts have repeatedly struck down local solicitation licensing ordinances that do not contain narrow, precise, and objective standards sufficient to render the decision whether to grant or deny the license virtually a ministerial one.[48] Courts also have held a number of local ordinances unconstitutional because the standards therein for denying or revoking a solicitation permit were not narrowly tailored to serve the government's interests.[49]

By contrast, the courts have struggled with implementing the Supreme Court's statement in *Cantwell* that "a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Cantwell v. Connecticut*, 310 U.S. at 306. For example, the courts are divided on whether local governments

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was least restrictive alternative available to achieve compelling interest in maintaining crowd control). *See also Larson v. Valente* 456 U.S. 228, 244-48 (1982).

[47] *See Largent v. Texas*, 318 U.S. 418, 422 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 306-07 (1940).

[48] *See Conlon v. City of North Kansas City*, F. Supp. 88, 91 (D. Kan. 1978). *See also Fernandes v. Limmer*, 663 F.2d 619, 631-32 (5th Cir. 1981); *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832 (5th Cir. 1979); *Int'l Soc'y for Krishna Consciousness v. Rochford* 585 F.2d 263, 268 (7th Cir. 1978); *Taylor v. City of Knoxville*, 566 F. Supp. 925, 932 (E.D. Tenn. 1983); *Sylte v. Metropolitan Government of Nashville*, 493 F. Supp. 313 (M.D. Tenn. 1980); *Walker v. Wegner*, 477 F. Supp. 648, 652 (D.S.D. 1979). *See generally Espinosa v. Rusk*, 634 F.2d 477, 481-82 (10th Cir. 1980) (holding that administrative determination of what is religious or religion is objectionable, at least in the absence of defining standards).

[49] *See Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (holding unconstitutional various presumptions that past conduct such as fraud, false statements and criminal offenses necessarily require denial of future solicitation permits); *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832 (5th Cir. 1979) (same); *Holy Spirit Ass'n for Unification of World Christianity v. Hodge* 582 F. Supp. 592, 597-77 (N.D. Tex. 1984) (same); *McMurdie v. Doutt*, 468 F. Supp. 766 (N.D. Ohio 1979) (holding unconstitutional presumption that if one member of group violates valid solicitation regulations, entire group may be denied permit); *Troyer v. Town of Babylon*, 483 F. Supp. 1135, 1137 (E.D.N.Y. 1979) (holding unconstitutional ordinance that solicitation proper only with prior consent of homeowner); *Int'l Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49, 53 (E.D. La. 1978) (holding unconstitutional requirement that solicitor must submit statement from doctor that solicitor is free from communicable disease).

may require solicitors to comply with extensive reporting and registration requirements[50] or to wear an identification badge.[51]

Finally, the courts have held that the state may impose reasonable time, place, and manner restrictions on religious solicitation as long as such restrictions are content-neutral and leave open ample alternative methods of communication.[52] Similarly, courts have required solicitation licensing regulations that place a prior restraint on speech to provide certain procedural safeguards, including but not limited to prompt judicial review of a decision denying a license.[53] These cases highlight the broader issue of the relationship between the Free Exercise and Free

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[50] *Compare Int'l Soc'y for Krishna Consciousness v. City of Houston*, 689 F.2d 541, 554-57 (5th Cir. 1982) (requirements permissible); *and Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 603 (N.D. Tex. 1984) (same); *with Cherris v. Amundson*, 460 F. Supp. 326, 328 (E.D. La. 1978) (holding unconstitutional local ordinance requiring solicitors to submit "plethora of information" as condition for obtaining permit).

[51] *Compare Int'l Soc'y for Krishna Consciousness v. City of Houston*, 689 F.2d at 556-57 (badge requirement permissible); *and McMurdie v. Doutt*, 486 F. Supp. 466, 776 (N.D. Ohio. 1979) *with Int'l Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49, 53 (E.D. La. 1978) (badge requirement unconstitutional because chills First Amendment freedom).

[52] *See Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 645-47 (1981) (upholding limitation of solicitation at state fair to booths); *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 477 (2d Cir. 1980) (limitations on demonstrations in front of Russian Mission to United Nations were valid as time, place, manner restrictions); *Int'l Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263, 268 (7th Cir. 1978) (regulations barring solicitation at airport in security areas and in areas where space is limited are constitutional; limiting time for accepting and evaluating license applications to period from 9:00 A.M. to 9:30 A.M. is unreasonable time, place, and manner restriction); *Int'l Soc'y for Krishna Consciousness v. City of New York*, 501 F. Supp. 684, 692 (S.D.N.Y. 1980) (restrictions on solicitation on sidewalks adjacent to United Nations building permissible); *McMurdie v. Doutt*, 468 F. Supp. 766, 776 (N.D. Ohio 1979) (limiting solicitation to time period between 9 A.M. and 6 P.M. valid). *See also Jaffe v. Alexis*, 659 F.2d 1018 (9th Cir. 1981) (holding unconstitutional regulations of California Department of Motor Vehicles banning all speech and fund solicitation conducted by religious groups from public premises under free speech, content-neutrality principle).

[53] *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) (outlining necessary procedural safeguards); *Fernandes v. Limmer*, 663 F.2d 619, 628 (5th Cir. 1981) (applying safeguards to religious solicitation case); *Int'l Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263, 268 (7th Cir. 1978) (same); *Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 597 (N.D. Tex. 1984) (same); *Walker v. Wegner*, 477 F. Supp. 648, 652-53 (D.S.D. 1979) (same).

Speech Clauses and the extent to which principles valid under one of the clauses should be applicable under the other.[54]

3. Drug Use

In the landmark case of *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), the Supreme Court of California held that members of the Native American Church ("NAC") could not be prosecuted under California drug laws for using peyote during weekly religious ceremonies because prosecution would violate the Free Exercise Clause. In particular, the court held that the interests underlying California's drug laws were insufficient to justify prohibiting the religiously-motivated, ceremonial use of peyote by NAC members because the state failed to prove that such use adversely effects NAC members or that allowing such use would substantially undermine the state's interest in enforcing its drug laws. 394 P.2d at 817-21.[55]

Subsequent federal and state cases have consistently refused to extend the religious liberty recognized in *Woody* beyond the precise facts of that case. For example, a number of cases have held that the Free Exercise Clause does not protect the unrestricted personal use of drugs because such an exemption would substantially undermine the enforcement of drug laws.[56] Similarly, courts have rejected free exercise claims

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[54] *See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. at 659 n.3 (religious speech entitled to no greater constitutional protection under Free Exercise Clause than under Free Speech Clause); *Int'l Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982) (applying free speech, public forum analysis to Free Exercise claim).

[55] Although some states have adopted the California Supreme Court's position concerning use of peyote by the Native American Church, some refuse to provide such an exemption. *Compare* 5 Colo. Rev. Stat. § 12-22-317(3) (Supp. 1985) (exempting use of peyote by any bona fide peyotist religion from state narcotics laws); *and* N.M. Stat. Ann. § 30-31-6(D) (Supp. 1980) (same); *and Whitehorn v. State*, 561 P.2d 539, 544-547 (Okla. Cr. 1977) (providing religious exemption for ceremonial use of peyote by members of Native American Church); *and State v. Wittingham*, 504 P.2d 950, 954 (Ariz. App. 1973) (same); *with State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 (1966) (no exemption for peyote use); *and State v. Big Sheep*, 75 Mont. 219, 243 P. 1067 (1926) (same).

[56] *See United States v. Rush*, 738 F.2d 497, 512-513 (1st Cir. 1984) (rejecting free exercise claim of members of Ethiopian Zion Optic Church to use marijuana in unrestricted manner because recognizing claim would render enforcement of law concerning marijuana a "nullity"); *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982) (same); *United States v. Spears*, 443 F.2d 895, 895 (5th Cir. 1971) (denying exemption

that involve drug use by minors[57] or that are obviously insincere.[58]

Other courts have denied Free Exercise claims by distinguishing *Woody* as a case where drug use was essential and central to the religion in question.[59] Similarly, the Department of Justice has denied an exemption from Federal drug laws to the Church of the Awakening based on a finding that, unlike the Native American Church in *Woody*, the Church of the Awakening would continue to exist if a religious exemption were denied. *See* 35 Fed. Reg. 14789, 14790 (1970). As discussed above with respect to zoning laws, *see supra* p. 139, requiring proof that a practice is essential or central to a religion appears to conflict with the purposes of the Free Exercise Clause and to be without support in the language of the Clause or in Supreme Court precedent.

The Department also has adopted a regulation making the Federal Controlled Substances Act inapplicable "to the nondrug use of peyote in bone fide religious ceremonies of the Native American Church." 21 C.F.R. § 1307.31 (1984).[60] The courts are divided on whether this exemption extends to non-Indians and to non-members of the Native American Church,[61] and at least two courts have questioned the

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for individuals of Black Muslim faith); *United States v. Hudson*, 431 F.2d 468, 469 (5th Cir. 1970) (denying exemption for individuals of Moslem or Islam religions); *Leary v. United States*, 383 F.2d 851, 861 n.11 (5th Cir. 1967) (distinguishing personal use of marijuana from ceremonial use of peyote); *Randall v. Wyrick*, 441 F. Supp. 312, 315-16 (W.D. Mo. 1977) (following *Leary*); *Town v. State ex rel. Reno*, 377 So.2d 648, 650 (Fla. 1979) (distinguishing unrestricted use of marijuana from ceremonial use of peyote in a secluded place).

[57] *See Town v. State ex rel. Reno*, 377 So.2d 648, 649-51 (Fla. 1979).

[58] *See United States v. Kuch*, 288 F. Supp. 439, 445 (D.D.C. 1968) (rejecting Free Exercise claim of member of Neo-American Church as "obvious hoax").

[59] *See Leary v. United States*, 383 F.2d 851, 860 (5th Cir. 1967); *United States v. Warner*, 595 F. Supp. 595, 601 (D.N.D. 1984); *cf. Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193, 200-01 (5th Cir. 1984).

[60] 21 C.F.R. § 1307.31 (1986) provides as follows:

> The listing of peyote as a controlled substance in schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

[61] *Compare United States v. Rush*, 738 F.2d 497, 513 (1st Cir. 1984) (regulation applicable only to Indians and members of Native American Church); *and United States v.*

constitutionality of the regulation if it applies to the Native American Church but not to similarly situated religions.[62]

4. Driver's License Photographs

The courts are divided concerning whether a state may refuse to issue a driver's license to an individual whose religion prevents him from complying with a state requirement that all drivers must have their photographs taken and affixed to their licenses. The courts that have ruled in favor of the state have found that the state's interest in allowing police to obtain the automatic and certain identification of automobile drivers made possible by driver's license photographs outweighs the religious liberty interests of those who object to the photograph requirement on religious grounds.[63]

By contrast, in *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225 (Ind. 1978), the court held that the state's interest in obtaining a quick and accurate identification of automobile drivers is not compelling because "the statistics which are traditionally included on a driver's license, such as license number, height, weight, eye and hair color, have long proven adequate to enable the [State Bureau of

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Warner, 595 F. Supp. 595, 597 (D.N.D. 1984) (same); *with Native American Church of New York v. United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979) (regulation applicable to any bona fide religion that uses peyote for sacramental purpose and regards it as a deity), *aff'd* 633 F.2d 205 (2d Cir. 1980).

[62] *See Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193, 200-01 (5th Cir. 1984) (remanding for factual determination concerning importance of asserted federal interest in prohibiting peyote use by Peyote Way Church given that Church's use of peyote is substantially similar to use by Native American Church and that federal regulation exempting Native American Church tends to negate existence of compelling state interest in prohibiting such use); *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415, 416-417 (9th Cir. 1972) (holding it would be unconstitutional under equal protection clause to grant exemption to Native American Church and not to similarly situated religions). *Contra United States v. Rush* 738 F.2d 497, 513 (1st Cir. 1984) (rejecting equal protection attack by Rastafarians on regulation because of *sui generis* legal status of Indians); *United States v. Warner*, 595 F. Supp. 595, 600 (D.N.D. 1984) (same).

[63] *See Dennis v. Charnes*, 571 F. Supp. 462, 464 (D. Colo. 1983) (mem.); *Johnson v. Motor Vehicle Department*, 593 P.2d 1363 (Colo. 1979). *See also Quaring v. Peterson*, 728 F.2d 1121, 1128 (8th Cir. 1984) (Fagg, J., dissenting), *aff'd by equally divided Court sub nom. Jensen v. Quaring*, 105 S. Ct. 3492 (1985). *See generally* Note, *Free Exercise of Religion - State May Require a Photograph on a Driver's License Though the Licensee's Religious Beliefs Prohibit Photographs of Any Type*, 1980 B.Y.U. L. Rev. 471 (1980).

Motor Vehicles] to fulfill its important duties." *Id.* at 1229. More recently, in *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by equally divided Court sub nom. Jensen v. Quaring*, 105 S. Ct. 3492 (1985), the Eighth Circuit found the same state interest not compelling because the state in question had exempted a number of other groups of individuals from the photograph requirement for a variety of reasons. 728 F.2d at 1127.[64]

5. Social Security Registration

In *Bowen v. Roy*, 54 U.S.L.W. 4603 (U.S. June 11, 1986), the Supreme Court held that the Free Exercise Clause does not forbid a state to use a child's social security number which is already in its possession merely because the child's parent sincerely believes for religious reasons that such use might harm the child's spirit. Eight members of the Court agreed that there was no religious compulsion in the government's use of the child's social security number because such use did not place any restriction on what the parent could believe or do. *Id.* at 4605.[65]

A second issue in the case -- whether the government could force the parent to produce his child's social security number as a condition for receiving social security benefits -- produced an interesting and novel dispute among the Court concerning the proper standard for evaluating Free Exercise claims in the context of public welfare legislation. Chief Justice Burger, writing for himself and Justices Powell and Rehnquist, said that as long as a challenged requirement for governmental benefits is neutral toward religion, it need only be a reasonable means of promoting a legitimate public interest in order to survive Free Exercise Clause scrutiny. 54 U.S.L.W. at 4607.[66] Justice O'Connor, writing for herself

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[64] The court in *Quaring* also rejected the state's argument that exempting the plaintiff from the photograph requirement would create an undue administrative burden because the state failed to prove that so many religious objectors would seek exemptions that the result would be to make the entire regulatory scheme unworkable. *Id.*

[65] Only Justice White dissented from this conclusion.

[66] Chief Justice Burger considered this less strict standard appropriate in *Roy* because "government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." 54 U.S.L.W. at 4607. Chief Justice Burger also noted that the above Free Exercise claim in *Roy* was "far removed from the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First

and Justices Brennan and Marshall, would have applied the traditional compelling state interest/least restrictive means standard. *Id.* at 4613 (O'Connor, J., concurring and dissenting). Justices Blackmun and White, in separate opinions, appeared to agree with Justice O'Connor on this point. *Id.* at 4610 (Blackmun, J., concurring); *id.* at 4614 (White, J., dissenting).[67]

Significantly, the Supreme Court's ruling in *Roy* left unresolved at least three difficult issues with respect to the least restrictive means analysis typically employed in Free Exercise Clause cases. First, must a less restrictive alternative satisfy the government's interests altogether equally as well as the regulation challenged, or are some minor losses of efficiency acceptable? Second, to what degree should courts defer to the judgments of legislative and administrative bodies with respect to the existence of less restrictive alternatives? Third, is the proper question whether a less restrictive alternative would significantly impair the state's interests as applied to the individual claimant and however many other like-minded individuals the state can prove are likely to request similar special treatment, or is the proper question whether the alternative would significantly impair the state's interest as applied to the populace as a whole without regard to the number of individuals who are likely to request special treatment?[68]

The district court in *Roy* feared that ruling in favor of the government on these issues would effectively terminate the rights of

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Amendment. *Id.* at 4606 (citing M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978)).

[67] Justice Blackmun and Justice White both expressed the view that resolution of Roy's Free Exercise claim required nothing more than a straightforward application of *Sherbert v. Verner* and *Thomas v. Review Bd.*, each of which employed the compelling state interest/least restrictive means test. *See* 54 U.S.L.W. at 4610 (Blackmun, J., concurring in part); *id.* at 4614 (White, J., dissenting).

[68] The Supreme Court's previous attempts to address these issues in the Free Exercise and Free Speech areas have produced inconsistent results. *Compare Thomas v. Review Bd.*, 450 U.S. 707 (1980) (question is whether granting religion-based exemption would present threat sufficient in size to compromise orderly administration of state or national welfare program); *and Sherbert v. Verner*, 374 U.S. 398 (1963) (same); *with United States v. Lee*, 455 U.S. 252 (1982) (refusing to recognize limited exemption for Amish from social security taxation); *and Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (evaluating adequacy of less restrictive alternative by viewing alternative as applied to all persons at state fair, not just those actually seeking religious exemption).

individuals to seek religion-based exemptions from statutes of general applicability. *See Roy v. Cohen*, 590 F. Supp. at 611. The district court's concerns are not without some foundation, given that it is unlikely any less restrictive alternative will ever serve the government's interests equally well as the government's chosen method of regulation, especially if the government's perspective on the matter is accepted without scrutiny and if a proposed less restrictive alternative must always be evaluated as applied not only to the individual claimant and like-minded individuals but to the populace as a whole.

6. Oaths

The Supreme Court has considered two types of issues with respect to the constitutionality of government-required recitation of religious oaths. The first issue is whether the state may require an individual or group to affirm statements made by the government under the threat of criminal penalties for noncompliance. The Supreme Court addressed this question in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), where the Court held that the state of West Virginia could not require public school children to salute the American flag under the threat of expulsion and treatment as a delinquent for non-compliance. *Id.* at 629, 642.[69] Relying on the First Amendment in general as opposed to the Free Exercise Clause in particular, the Court eloquently explained that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matter of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642.[70]

The Supreme Court subsequently followed the above analysis in *Wooley v. Maynard*, 430 U.S. 705 (1977), where the Court enjoined the criminal prosecution of certain Jehovah's Witnesses who for religious

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[69] In so ruling, the court overruled its prior decision in *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

[70] By contrast, the Supreme Court has suggested in *dicta* that the State may encourage public school children to recite statements from historical documents that contain references to the Deity -- such as the Declaration of Independence or the Pledge of Allegiance -- without violating the Establishment Clause. *See Abington School Dist. v. Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962). *See also Smith v. Denny*, 280 F. Supp. 651, 653-54 & n.1 (E.D. Cal. 1968); *Sheldon v. Fannin*, 221 F. Supp. 766, 774 (D. Ariz. 1963). *See generally Zorach v. Clausen*, 343 U.S. 306, 313 (1952) (use of phrase "so help me God" in courtroom oaths does not violate First Amendment).

reasons unlawfully covered the words "Live Free or Die" on their automobile license plates. *Id.* at 717. Again relying on the First Amendment in general, the Court held that the state could not require individuals to use their private property as a "mobile billboard" for the State's ideological message or suffer a penalty for refusing to do so. *Id.* at 1435.[71]

The second issue in this context is whether the state may condition the enjoyment of a public benefit on an individual's agreement fronted this question in *Torcaso v. Watkins*, 367 U.S. 488 (1961), where the Court with little explanation held unconstitutional a state statute that required an individual to declare his belief in the existence of God as a qualification for holding any office of profit or trust in the state. *Id.* at 489.[72]

Several years later, the Court confronted a similar issue in *McDaniel v. Paty*, 435 U.S. 618 (1978), where it held unconstitutional a Tennessee statute barring clergy members from being elected to certain state public offices. Chief Justice Burger argued that while state regulation of religious *belief* is absolutely prohibited by the Free Exercise Clause, state regulation of religious *conduct* is permissible when necessary to promote a compelling state interest. *Id.* at 626-29. Applying the above analysis and the Court's previous holding in *Sherbert v. Verner*, Chief Justice Burger found that the Tennessee statute violated the Free

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[71] Because the plaintiffs in *Wooley* could have avoided criminal prosecution and maintained their fidelity to their religious principles by foregoing the opportunity to own an automobile, the case conceivably also could be analyzed as one where the state conditions the enjoyment of a civil benefit on the relinquishment of an important constitutional right. *See supra*, pp. 108-112 (discussing *Sherbert v. Verner* and its progeny); *infra*, pp. 148-49 (discussing *McDaniel v. Paty*, 435 U.S. 618 (1978)).

[72] *See generally Nicholson v. Board of Comm'rs*, 338 F. Supp. 48, 57-59 (N.D. Ala. 1972) (state statute requiring bar applicants to recite oath that includes phrase "so help me God" violates Free Exercise Clause). *But see Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir. 1985) (per curiam) (federal statute requiring individuals to sign verification on federal income tax form declaring that statements made therein are true under penalties of perjury is constitutional as applied to individual who objected to signing form based on religious grounds); *Biklen v. Board of Educ.*, 333 F. Supp. 902 (N.D.N.Y. 1971) (state may require teachers to take oaths to support federal and state constitutions), *aff'd* 406 U.S. 951 (1972).

With respect to the federal government, Article VI of the Constitution provides that "no religious test shall ever be required as a Qualification to any Office or Public Trust under the United States."

Exercise Clause because it conditioned the availability of a civil right -- the opportunity to run for state delegate -- upon an individual's willingness to surrender his religious ministry, and because it was not justified by any compelling state interest. *Id.* at 625-26.

Justice Brennan's concurring opinion in *McDaniel*, joined by Justice Marshall, rejected the plurality's action-belief dichotomy and argued instead that any law which draws a religious classification and burdens the exercise of sincerely-held religious beliefs is absolutely prohibited by the Free Exercise Clause. *See* 435 U.S. at 631-33. Applying this rule to the facts in *McDaniel*, Justice Brennan found the Tennessee statute absolutely prohibited by the Free Exercise Clause because it contained a religious classification that burdened religious liberty by requiring the petitioner to purchase his right to engage in the ministry by sacrificing his candidacy for public office. 435 U.S. at 634.[73]

E. Regulation of Monetary and Property-Related Religious Matters

1. Taxation and Fiscal Regulation

In *Murdock v. City of Pennsylvania*, 319 U.S. 105 (1943), the Supreme Court held that the government may not impose a flat license tax on religious activity *per se* because, as a general principle of constitutional law, "a state may not impose a charge for the enjoyment of right granted by the federal constitution." *Id.* at 113.[74] By contrast, the

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[73] Justice Brennan also found that the Tennessee statute violated the Establishment Clause because, in his view, exclusion of clergy from the lawmaking process amounts to hostility toward religion. *See id.* at 636.

Justice Stewart concurred in the result in *McDaniel* because he, like Justice Brennan, rejected the plurality's belief/action distinction and thus found *Torcaso* controlling. *See* 435 U.S. at 642-43. Justice White concurred in the judgment in *McDaniel* because, in his view, the Tennessee statute violated the Equal Protection Clause. *Id.* at 643-44. Justice White thought the petitioner suffered no free exercise deprivation in *McDaniel* because "certainly he has not felt compelled to abandon the ministry as a result of the challenged statute, nor has he been required to disavow any of his religious beliefs." *Id.* at 643-44.

[74] *See also Follett v. Town of McCormick*, 321 U.S. 573, 575-578 (1944) (local ordinance imposing flat license tax on agents selling books within town limits unconstitutional as applied to minister who went "from house to house presenting the gospel of the Kingdom in printed form"); *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1982) (public airport permit fee unconstitutional as applied to Krishna members because state

Court stated that a nominal fee imposed as a regulatory measure to defray the expenses of policing solicitation activities would be constitutionally permissible. *Id.* at 113-14.[75]

The Court in *Murdock* also noted that the First Amendment does not bar the government from taxing the income or property of an individual or organization engaged in religious activities. 319 U.S. at 112; *see Follett v. Town of McCormick*, 321 U.S. at 577-78 (restating above rule).[76] The Supreme Court recently reaffirmed this principle in *United States v. Lee*, 455 U.S. 252 (1982), where the Court held that the federal government's interest in assuring mandatory and continuous participation in and contribution to the social security system justifies requiring Old Order Amish to pay employer social security taxes in opposition to their religious beliefs. *Id.* at 259-61.

Similarly, in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 105 S. Ct. 1953 (1985), the Supreme Court recently held that applying the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA") to a religious foundation whose members objected on religious grounds to receiving "wages" for their services did not violate the members' Free Exercise rights. *Id.* at 1963-64.[77] The Court found that the members could comply with the FLSA without violating their religious beliefs by accepting payments for

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failed to prove nexus between fee and cost of regulating solicitation in airport); *Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 604 (N.D. Tex. 1984) (solicitation license fee unconstitutional); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lentini*, 461 F. Supp. 49, 53 (M.D. Fla. 1979) (holding solicitation license fee at airport unconstitutional).

[75] *See also Jones v. City of Opelika*, 316 U.S. 584-597 (1942) (holding that when religious sect uses ordinary commercial methods of sales of articles to raise propaganda funds, it is proper for the state to charge reasonable fees for the privilege of canvassing); *International Soc'y for Krishna Consciousness, Inc. v. City of Houston*, 689 F.2d 541, 550 (5th Cir. 1982) (upholding constitutionality of nominal fee on solicitation at public airport for purposes of covering valid administrative cost).

[76] *See also United States v. Sun Myung Moon*, 718 F.2d 1210, 1227, 1241 (2d Cir. 1983) (upholding conviction of Rev. Moon for tax evasion; rejecting defense that Moon's property not taxable because held in trust for Unification Church), *cert. denied*, 466 U.S. 971 (1984); *Lull v. Commissioner*, 602 F.2d 1166, 1167 (4th Cir. 1979) (conscientious objectors to war not entitled to withhold income tax payments proportional to federal military expenditures); *Graves v. Commissioner*, 579 F.2d 392, 393 (6th Cir. 1978) (per curiam) (Quakers not entitled to withhold payment of income tax payments proportional to amount of tax used to support military).

[77] The Supreme Court also held that application of the recordkeeping requirements of the

their services and returning the payments to the Foundation.[78]

Lower federal courts have unanimously held that the government is entitled to obtain documents, records, and other information from religious institutions, ministers, and church officers if the information sought is reasonably related to determining the tax status of churches and individuals.[79] The courts are divided, however, concerning whether the state may require religious solicitors to comply with extensive identification, registration, and reporting requirements.[80]

Finally, in *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983), the Supreme Court held that the state's compelling interest in preventing racial discrimination in education justified revoking the tax-exempt status of a private university even though the government's action infringed on the university's sincerely-held religious beliefs prohibiting interracial dating. *Id.* at 2035. The Supreme Court's opinion in *Bob Jones* leaves open a number of important questions, including: (1) whether preventing other forms of discrimination in education, such as sex, handicap, and national origin discrimination also constitute compelling state interests, and (2) whether preventing race discrimination is a compelling state interest in contexts other than education, such as with respect to employment or church membership.

FLSA to the Foundation in *Alamo* did not give rise to excessive entanglement between government and religion in violation of the Establishment Clause. 105 S. Ct. at 1964.

[78] The Court based the above conclusion on an admission of counsel for the foundation members that they would either fail to claim back pay due them under the Court's decision or simply return it to the foundation. *Id.* at 1963 n.29. The Court failed to recognize, however, possibly because the argument apparently was not made, that the duty of foundation members to return wages might have been separate and distinct from the duty to refuse payment in the first instance, and that performance of the former duty may not have satisfied the latter.

[79] *See, e.g., United States v. Norcutt*, 680 F.2d 54, 55 (8th Cir. 1982) (per curiam) (upholding IRS summons to church and pastor); *United States v. Dykema*, 666 F.2d 1096, 1098 (7th Cir. 1981) (upholding IRS summons to pastor for church records pertaining to tax-exempt status of church, unrelated business income of church, and pastor's personal tax liability); *United States v. Grayson County State Bank*, 656 F.2d 1070, 1076 (5th Cir. 1981) (upholding IRS summons to bank for records pertaining to tax liability of church and minister); *United States v. Freedom Church*, 613 F.2d 316, 320 (lst Cir. 1979) (upholding IRS summons designed to provide information concerning tax-exempt status of church); *Assembly of Yahveh Beth Israel v. United States*, 592 F. Supp. 1257, 1261 (D.Colo. 1981) (IRS entitled to access to church information in order to determine tax-exempt status of minister).

[80] See pp. 140-41, *supra.*

2. Civil Resolution of Intra-Church Disputes

Whether and in what manner a civil court may resolve intra-church disputes of various types is an exceedingly complex matter, although the broad themes involved are easily understood. On the one hand, allowing civil courts to decide matters of religious doctrine and church governance would strike at the very heart of religious liberty. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872). On the other hand, the state has an "obvious and legitimate interest in the peaceful resolution of intra-church disputes and in providing a civil forum in which such disputes can be determined conclusively." *See Jones v. Wolf*, 443 U.S. 595, 602 (1979).

There are essentially two types of intra-church disputes that find their way into civil courts. The first type of dispute concerns core ecclesiastical matters such as church doctrine, discipline, and government. The Supreme Court has rightly held that civil courts may resolve this type of dispute only by deferring to the decision of the authoritative church decision-making body. *See Serbian Eastern Orthodox Diocese v. Milivojevich* 426 U.S. 696, 724-25 (1976) (defrocking of priest and reorganization of church were core ecclesiastical matters beyond authority of civil court to review for substantive or procedural violations of internal church rules).[81] Although the Supreme Court in *Serbian Orthodox Diocese* applied the rule of deference to a hierarchical church, the rationale underlying the rule appears equally applicable to a congregational church.[82]

A second type of intra-church dispute concerns rights that arise within the sphere of the state, such as rights to own, use, and control church property. The Supreme Court has held that civil courts may resolve this type of dispute not only by deferring to the authoritative

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[81] *See also Kral v. Sisters of the Third Order Regular of St. Francis of the Congregation of our Lady of Lourdes*, 746 F.2d 450, 451 (8th Cir. 1981) (per curiam) (First Amendment precludes civil court review of decision of Order of Catholic Sisters to expel nun); *Kaufman v. Sheehan*, 707 F.2d 355 (8th Cir. 1983) (defrocking of priest); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 494 (5th Cir. 1974) (dismissal of pastor).

[82] *See First Baptist Church v. Ohio*, 591 F. Supp. 676, 681-83 (S.D. Ohio 1983); *Nunn v. Black*, 506 F. Supp. 444, 445-48 (W.D. Va. 1981).

A hierarchical church is one in which the local church is an integral and subordinate part of a larger general church and is under the authority of the general church. A congregational church is one in which authority rests entirely in the local congregation or some body within it. *See Jones v. Wolf*, 443 U.S. at 619 (Powell, J. dissenting).

church decision-making body, but also by applying "neutral principles of law," as long as such application does not require the court to draw conclusions with respect to church doctrine or policy or otherwise violate the Free Exercise or Establishment Clauses. *See Jones v. Wolf*, 443 U.S. 595, 602-03, 608 (1979).[83] Thus, a court may resolve a church property dispute by examining in purely secular terms church documents such as deeds, corporate charters, and constitutions for language of ownership or trust. *See Jones v. Wolf*, 443 U.S. at 603-05. Similarly, a civil court may determine the identity of a church for property law purposes by applying a statutory presumption that a church is represented by a majority of its members, as long as church is permitted to provide for a different method of ascertaining its representative identity. *See Jones v. Wolf*, 443 U.S. at 603-05.

At least two difficult questions remain unresolved in this area. First, what measures may a civil court properly take in determining the identity of the authoritative church decision-making body in order to apply the principle of judicial deference? Given that the purpose of judicial deference is to avoid civil resolution of core ecclesiastical matters such as church governance, it would be ironic if courts were allowed to impose an elaborate set of procedural due process rules on a church in order to determine to whom it should defer. *See Serbian Orthodox Diocese*, 426 U.S. at 714 ("[c]onstitutional concepts of due process involving secular notions of 'fundamental fairness' or 'impermissible objectives' are . . . hardly relevant . . . to matters of ecclesiastical cognizance").[84]

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[83] *See also Presbyterian Church v. Hull Church*, 393 U.S. 440, 441, 450 (1969) (holding unconstitutional Georgia common law rule that implied a trust on the property of a local church for the benefit of the general church, conditional on the general church's continued adherence to tenets of faith and practice it held at time local church chose to affiliate with it because rule would require courts to interpret and decide meaning of church doctrines and assess relative religious significance of religious tenets from which general church is alleged to have departed); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107, 125-26 (1952) (holding unconstitutional New York statute that awarded control of church property to local church rather than mother church based on legislative finding that governing body of mother church was controlled by Soviet government and thus no longer capable of functioning as a true religious body); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 137-40 (1872) (civil courts may inquire into identity of church for purpose of adjudicating church property dispute; pre-*Erie* case applying common law).

[84] Recent state cases highlight the difficulty of this issue. *See Townsend v. Teagle*, 467 So.2d 772 (Fla. App. 1985); Ellman, *Driven from the Tribunal: Judicial Resolution of*

Second, does the state have a sufficiently compelling interest in preventing fraud and collusion to justify civil intrusions in core ecclesiastical matters such as church doctrine, discipline, and government?[85] In answering this question, courts should bear in mind the Supreme Court's holdings in *Serbian Orthodox Diocese*, 426 U.S. at 714 (secular notions of fundamental fairness are irrelevant to core ecclesiastical matters) and *Watson v. Jones*, 80 U.S. at 729 (because individuals who voluntarily join a religious organization have thereby implicitly consented to its internal governance, they generally should be bound by the same).

F. Health and Family Matters

1. Polygamy

Since *Reynolds v. United States*, 98 U.S. 145 (1878), and related cases,[86] it has been well-settled that the government has the power to forbid plural marriage, and the Supreme Court has upheld the convictions of polygamists without further consideration of the Free Exercise question.[87] The Court reaffirmed its position that religiously motivated polygamy is not protected by the Free Exercise Clause in *Cleveland v.*

Internal Church Disputes, 69 Calif. L. Rev. 1380, 1381 (1981) (discussing state cases); Oaks, *Trust Doctrines in Church Controversies*, 1981 B.Y.U. L. Rev. 805 (discussing California's use of charitable trust doctrine to justify intrusive regulation of church decision-making).

[85] The Supreme Court has left open this question on a number of occasions. *See Jones v. Wolf*, 443 U.S. at 609 n.8; *Serbian Orthodox Diocese*, 426 U.S. at 713; *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929).

[86] *Davis v. Beason*, 133 U.S. 333 (1890) (denying habeas for Mormon convicted of swearing that he was not a member of an organization that taught plural marriage); *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) (upholding constitutionality of one of the anti-polygamy laws, the Edmunds-Tucker Act).

[87] *See, e.g., Chatwin v. United States*, 326 U.S. 455 (1946) (reversing conviction for kidnapping on grounds that there was no evidence that 15 year old girl taken to Mexico for polygamous marriage was unlawfully restrained); *Clawson v. United States*, 114 U.S. 477 (1885) (upholding federal statute that allowed prospective jurors who believe in polygamy to be excluded for cause from grand jury); *Murphy v. Ramsey*, 114 U.S. 15 (1885) (upholding federal statute disenfranchising polygamists in Utah); *Musser v. Utah*, 333 U.S. 95 (1948) (upholding conviction for advocating the practice of polygamy).

United States, 329 U.S. 14 (1946),[88] where the Court (Justice Douglas writing for the majority) upheld the conviction of polygamists under the Mann Act or "White Slave Traffic Act." 329 U.S. at 20; *see also id.* at 21 n.1 (Rutledge, J., concurring). Citing *Reynolds* and *Late Corporation*, the Court wrote that "[t]he establishment or maintenance of polygamous households is a notorious example of promiscuity." 329 U.S. at 19. Justice Murphy, in dissent, argued that because polygamy was a basic form of marriage, sanctioned by the Old Testament, and still found in many cultures, it could not be treated "in the same category as prostitution or debauchery." *Id* at 26 (Murphy, J., dissenting).

The Court had the opportunity, but refused to revisit the question this term. In *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 145 (1985), a Murray City, Utah, policeman was fired on the ground that as a practicing polygamist he could not obey and defend the Utah constitution and the state anti-polygamy statute. The court of appeals rejected the argument that *Wisconsin v. Yoder* implicitly overturned *Reynolds*, noting that *Reynolds* has been frequently cited with approval and that the Supreme Court has stated in dicta that "[s]tatutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973). *See* 760 F.2d at 1069. In conclusion, the court stated that the state had a compelling interest in prohibiting monogamous relationships as the "bedrock upon which our culture is built." 760 F.2d at 1070.

2. Compulsory Medical Treatment

The courts have held that the state's interest in protecting the health, safety, and welfare of third parties justifies abridging religious liberty in order to require compulsory vaccinations against communicable disease,[89] compulsory blood transfusions for minor children over the religious objections of their parents,[90] and compulsory blood transfusions

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[88] *See also State v. Barlow*, 107 Utah 292, 153 P.2d 647 (1944), (rejecting Free Exercise defense and affirming conviction for cohabitation), *appeal dismissed for want of a substantial federal question*, 324 U.S. 829 (1945) (per curiam).

[89] *See Jacobsen v. Massachusetts*, 197 U.S. 11, 27 (1905).

[90] *See, e.g., Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488, 504-05 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (per curiam); *Sampson v. Taylor*, 328 N.Y.S.2d 686, 687 (Ct. App. 1972).

for the parents of minor children,[91] including the parents of unborn children.[92] The courts also have held that the state's *parens patriae* interest[93] justifies compulsory medical treatment for individuals who are not competent to make that choice.[94]

By contrast, the courts have held that when the interests of third parties are not appreciably implicated, the state's interest in protecting life and health does not justify compulsory medical treatment of a competent individual who objects to treatment on religious grounds.[95]

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[91] *See Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *In re Winthrop University Hosp.*, 490 N.Y.S.2d 996, 997 (Sup. Ct. 1985); *cf. Holmes v. Silver Cross Hosp. of Joliet*, 340 F. Supp. 125, 128 (N.D. Ill. 1972) (remanding for finding concerning state's *parens patriae* interest in protecting welfare of wife and child of individual who objected to blood transfusion on religious grounds). *But cf. In re Osborne*, 294 A.2d 372, 374 (D.C. App. 1972) (mother of two minor children permitted to refuse blood transfusion on religious grounds because children would be adequately cared for financially and emotionally by other family members).

[92] *See Application of Jamaica Hosp.*, 491 N.Y.S.2d 898, 899 (Sup. Ct. 1985); *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964); *Jefferson v. Griffin Spaulding City Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981). *See generally* Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus The Preservation of Life*, 26 Rutgers L. Rev. 228 (1973); Note, *The Refusal of Life-Saving Medical Treatment v. the State's Interest in the Preservation of Life: A Clarification of the Interests at Stake*, 58 Wash. U.L.Q. (1980).

[93] *Parens patriae* is a concept of state standing used to protect quasi-sovereign interests such as the health, comfort, and welfare of citizens. The concept of *parens patriae* originated in the power of the sovereign to act as "the general guardian of all infants, idiots, and lunatics." *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (quoting 3 W. Blackstone, Commentaries 47).

[94] *See Application of President and Directors of Georgetown College, Inc.*, 331 F.2d at 1008; *cf. Rogers v. Okin*, 634 F.2d 650, 657 (lst Cir. 1980) (state may administer psychotropic drugs to incompetent patient under *parens patriae* powers).

By contrast, the courts have largely rejected or ignored the argument that the state has a compelling interest in protecting hospital staff from having to become involved in a patient's decision to reject treatment. *See, e.g., Matter of Conroy*, 486 A.2d 1209, 1225 (N.J. 1985); *Satz v. Perlmutter*, 362 So.2d 160, 163-64 (Fla. App. 1978). *But see Application of President and Director of Georgetown College, Inc.*, 331 F.2d at 1009.

[95] *See Matter of Melideo*, 390 N.Y.S.2d 523, 524 (Sup. Ct. 1976); *In re Osborne*, 294 A.2d 372, 374 (D.C. App. 1972); *In re Brooks Estate*, 205 N.E.2d 435, 441-42 (Ill. 1965); *cf. Winters v. Miller*, 446 F.2d 65, 68-70 (2d Cir. 1971) (state may not administer medical treatment, including drug therapy, to religious objector in non-life threatening cases under *parens patriae* power absent specific finding of incompetence). *See also Osgood v. District of Columbia*, 567 F. Supp. 1026 (D.D.C. 1983) (remanding for additional fact

The courts have found the state's interest in preventing suicide[96] inapplicable in this context because suicide involves self-inflicted injury specifically designed to bring about physical harm, while the refusal of medical treatment typically involves a pre-existing injury caused by external forces and specific intent to avoid the particular form of treatment rather than to produce physical harm.[97]

The above issues also arise in cases involving the religiously-motivated handling of poisonous snakes. The courts have unanimously held that the state may prohibit this practice during church worship services in order to protect the health and safety of guests and children.[98] On the other hand, the courts have never decided whether the state should be able to prohibit snake-handling by a competent individual when the interests of third parties are not appreciably implicated.[99] Although snake-handlers, like blood transfusion objectors, do not act with the specific intent to harm themselves, the state's interest in protecting public morality is arguably stronger in the former situation because snake-handlers, like suicide victims, initiate harmful activity themselves.

Finally, it bears mention that in *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965), the state was allowed to administer a life-saving blood transfusion over a patient's religious objections because the

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finding on free exercise claim to refuse treatment). The only case holding to the contrary, *John F. Kennedy Memorial Hospital v. Heston*, 279 A.2d 670, 672-73 (N.J. 1971), was overruled in pertinent part. *See Matter of Conroy*, 486 A.2d 1209 (N.J. 1985).

[96] *See Late Corporation of Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 49-50 (1890) (right to free exercise of religion does not include right to suicide) (dictum); *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

[97] *See Matter of Conroy*, 486 A.2d at 1224; *Foody v. Manchester Memorial Hospital*, 482 A.2d at 720; *Satz v. Perlmutter*, 362 So.2d at 162.

[98] *See State ex rel. Swann v. Pack*, 527 S.W.2d 99, 113 (Tenn. 1975); *Hill v. State*, 88 So.2d 880, 884-86 (Ala. 1956); *State v. Massey*, 51 S.E.2d 179, 180 (N.C. 1949), *appeal dismissed for want of substantial fed. question*, 336 U.S. 942 (1949); *Harden v. State*, 216 S.W.2d 708, 710 (Tenn. 1949); *Kirk v. Commonwealth*, 44 S.E.2d 409, 412 (Va. 1947); *Lawson v. Commonwealth*, 291 Ky. 437, 438 (1942).

[99] *See also Mayock v. Martin*, 157 Conn. 56, 245 A.2d 574, 578 (1968)(approving continued involuntary confinement in mental institution of patient who had in past removed an eye and a hand because directed to do so by God, and who testified that he might remove a foot in the future as a free will offering to God), *cert. denied*, 393 U.S. 1111 (1969).

individual admitted that his conscience would not be violated if the transfusion was performed against his will. *Id.* at 753. Though such an admission may in reality be an indirect disavowal of belief in the religious practice in question (as may have been the case in *George*), such an admission should not automatically vitiate a Free Exercise Clause claim. For the state to force an individual to participate in an act forbidden by his religion surely "prohibits" him from exercising his religious beliefs whether or not his conscience is violated thereby.[100]

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[100] *See* Garvey, *Freedom and Equality in the Religion Clauses,* 1981 Sup. Ct. Rev. 193, 199 n.28. *But see* Clark, *Guidelines for the Free Exercise Clause,* 83 Harv. L. Rev. 327, 347-48 (1969).

Appendix D

Permissive Accommodation of Religion

Aside from whether government accommodation of sincerely-held religious beliefs may be required as a matter of constitutional law, the Supreme Court has ruled that the state may choose to accommodate religion under certain circumstances as a matter of public policy. The seminal case with respect to permissive accommodation of religion is *Zorach v. Clausen*, 343 U.S. 306 (1952), in which the Court held that a public school may release students during the school day to participate in off-campus religious instruction and observances. Other current examples of permissive accommodation of religion include special exemptions for religious institutions with respect to federal employment and education anti-discrimination laws,[1] government recognition of the religious traditions of the American people through religious symbolism,[2] and military draft exemptions.[3]

In *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985), the Supreme Court held that a Connecticut statute that provided private employees an absolute and unqualified right not to work on their Sabbath violated the Establishment Clause because it impermissibly advanced religion by taking no account of the convenience or interest of the employer or of other employees who do not observe a Sabbath.[4] More generally, the Supreme Court has never adequately explained why permissive government accommodation of religion does not *always* have the primary effect of benefitting religion, which would violate the Establishment Clause under its current interpretation. This question is currently being litigated in the case of *Amos v. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, 594 F. Supp. 791 (D. Utah 1984), where the district court has ruled that Title VII's

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[1] *See* 42 U.S.C. § 2000e-1 (Title VIII religious exemption); 20 U.S.C. § 1681(a) (3) (Title IX religous exemption).

[2] *See Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (creche in public park permissible religious symbol; referring to other permissible religious symbols including terms "Anno Domini" and "In God We Trust," declarations of days of prayer and thanksgiving, and paintings and friezes within Supreme Court building depicting Jesus, Moses, the Ten Commandments, and Thomas Aquinas).

[3] *See* 50 U.S.C. App. § 456(j).

[4] For an interesting argument challenging the Supreme Court's holding in *Thornton*, see McConnell, 1985 Sup. Ct. Rev. at 50-58.

religious exemption violates the Establishment Clause insofar as it accommodates religious institutions in ways not mandated by the Free Exercise Clause. We believe the district court's ruling in *Amos* is subject to serious question because the court made no effort to distinguish the *Zorach* case, in which religious accommodation was held permissible without any finding that accommodation was required by the Free Exercise Clause, and because recent scholarship persuasively suggests that according to its original understanding, the Establishment Clause permits the state to accommodate religion as long as in so doing it does not coerce the exercise of religion or discriminate between religious sects.[5]

[5] *See, e.g.*, McConnell, 1985 Sup. Ct. Rev. 1, *passim*.

Appendix E

Impact on Religious Liberty of Proposed Grove City Legislation

In *Grove City College v. Bell*, 104 S. Ct. 1211 (1984), the Supreme Court issued two important rulings with respect to the scope of Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 373, 20 U.S.C. § 1681 et. seq. First, the Court held that a private college was the recipient of federal financial assistance, and thus subject to Title IX, merely because some of its students received basic educational opportunity grants from the federal government and even though the college itself did not receive any direct federal financial assistance. *See* 104 S. Ct. at 1216-20. Second, the Court held that the receipt of federal financial assistance by one department or program of a private college triggers the application of Title IX only to that particular department or program, and not to other programs or to the entire institution. *Id* at 1220-23.

Legislative responses to the *Grove City* decision seek generally to extend the first holding by broadly interpreting the concept of "federal financial assistance" to include even the smallest, remotest, and most fleeting contact by an institution with federal dollars. The legislative proposals also seek to reverse the second holding in *Grove City* by making the full panoply of federal civil rights laws applicable to all of the programs and activities of an institution or association of institutions even if only one program receives federal financial assistance.[1]

If the proposed *Grove City* legislation were to become law, the result would be to deliver a potentially mortal blow to the religious liberty and autonomy of religious institutions. This is true because of the potentially limitless scope of the proposed legislation and because of the substance of the relevant civil rights laws at issue as those laws have been interpreted by the courts.

The following is a brief outline of several specific areas in which the proposed *Grove City* legislation would infringe on religious liberty. Without deciding whether the effect of the *Grove City* legislation in these

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[1] Materials concerning the proposed legislative responses to the *Grove City* case are on file at OLP. These materials, as well as most of the substantive points discussed in this Appendix, were developed by Senator Hatch and his staff on the Senate Judiciary Committee, Subcommittee on the Constitution.

areas would be unconstitutional under the First Amendment, we believe that effect would be profoundly unwise as a matter of public policy.[2]

1. Title IX Religious Exemption

Title IX currently contains an extremely narrow exemption for schools "controlled" by a church. Such schools are exempted from Title IX only to the extent that their curriculum, discipline, counselling, dress code, or residence policies may conflict with Title IX. Even this limited exception is available to no more than a handful of institutions, however, because although several hundred colleges and universities possess a clear religious purpose and mission, only a few are "controlled" directly by a church. Extending the scope of Title IX in line with the proposed Grove City legislation would greatly exacerbate the present ineffectiveness of the Title IX religious exemption by increasing substantially the number of "non-controlled" (as well as "controlled") institutions.

The proposed Grove City legislation also would leave church-controlled institutions with the burden of proof to convince the Department of Education that there is a "specific tenet of the religious organization" at stake in any particular situation when it seeks to take advantage of the Title IX religious exemption. Such a burden of proof is problematic because it would invite, if not require, courts to scrutinize and determine matters of religious doctrine and belief.[3]

2. Abortion

The pending Grove City legislation would explicitly ratify existing Education Department regulations that prohibit covered institutions from treating abortion any differently than other medical procedures for the purpose of student and employee health and leave policies. Indeed, the problem would be made far worse than at present. Under *Grove City's* programmatic interpretation of Title IX, abortion policies would be implicated only in highly unusual circumstances, such as if federal assistance were to go directly to a campus health clinic. Under the amended act, however, any time that any organization of a school received federal assistance, directly or indirectly, for any purpose, the policies and practices of the entire school would be under the thumb of

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[2] For a more extended discussion of permissive accommodation of religion as a matter of public policy, *see* Appendix D, *supra*.

[3] For a discussion of why such would be improper, *see* p. 139, *supra*.

federal direction. Unless the religious tenet exemption is substantially broadened, or specific exceptions on abortion are set forth, it is difficult to see how we would avoid imposing upon hundreds of colleges and universities, with deep religious convictions on the matter, a uniform federal policy that abortion be treated in an indistinguishable manner from other "ailments and diseases."

3. Breadth of Coverage

Another issue integral to Grove City is just how far the often-heavy hand of the federal government is to follow each dollar of its largesse. In the religious context, it has been suggested that participation by a single parish in a senior citizen lunch program might result in federal coverage of every other parish within a particular dioscesan structure. Similarly, there is a real possibility that even separately incorporated Catholic dioceses would be treated as a single "entity" merely because of the civil control a Diocesan biship can exercise over such dioceses through his *ex officio* position as president of each of those dioceses.

Thus, in sum, the Grove City legislation would sharply increase federal regulation of church practices while paying little or no respect for the operational integrity of individual religious institutions, parishes, and other subordinate units of churches that receive no direct federal financial aid. In fact, the Grove City legislation would affirmatively encourage churches to decentralize their form of government, such as by moving from a hierarchical to a congregational structure, contrary at least as a matter of policy to Free Exercise Clause cases holding that the state should respect the independent decisions of churches concerning such matters. *See* p. 152, *supra*.

4. Campus Organizations

Still another concern under the proposed Grove City legislation is whether student religious organizations would continue to be permitted under the law if they adopted policies inconsistent with the inflexible mandates of Title IX and other cross-cutting civil rights laws. It is not hard to envision conflicts between the structures of these laws and the policies of such voluntary organizations as Jewish Hillel groups, Newman centers, and Mormon stake groups on college campuses. Each of these have been known to have an understanding of equality of rights at variance with approved federal public policies.

5. School Systems

The proposed Grove City legislation includes explicitly within its coverage public schools "or other school systems". It is difficult to see how this can be understood to mean anything other than expanded coverage of parochial school systems. If one school within a diocesan structure participated in a public lunch program, that would seem to trigger federal coverage of every other school within that structure.

6. Tax Exemptions

Given the unprecedently broad interpretation of what constitutes "federal financial assistance" for purposes of triggering federal regulatory coverage under the proposed Grove City legislation, serious questions have been raised about whether the existence of a tax benefit or exemption would constitute "federal financial assistance." For example, the president of the American Association of Independent Colleges and Universities testified last year that "the utter disregard [in the Grove City bill] for the lines that have traditionally marked the boundaries between the public and public and private sectors . . . makes it irresistible to conclude that this law, if enacted, surely brings the nation a step closer to the day when tax-exempt status may be conditioned upon compliance with federal public policies."

7. Non-schools

The proposed legislation would also cover, for the first time, *non-schools* which only happened to have incidental education functions. For example, a teaching hospital associated with a religious order would be required to abide fully by federal Title IX regulations, including its abortion regulations. No religious exemption would be applicable, in even a limited form, to such institutions.

8. Constitution

Finally, the Grove City bill raises the most serious constitutional questions in its premise that schools are to be treated as receiving "federal financial assistance" merely by virtue of the fact that they may have individual students in attendance who themselves receive federal student aid. If such aid to a student attending a religious school is transformed into aid to the school *itself*, would such assistance even be constitutionally *permissible* under the Establishment Clause of the First Amendment? In this respect, the Association of Presidents of Indepen-

dent Colleges and Universities has said that the proposed Grove City bill "will cast serious doubt on the constitutionality of *all* student aid programs that affect church schools."

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