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CREATION-SCIENCE AND EVOLUTION-SCIENCE IN PUBLIC SCHOOLS: A CONSTITUTIONAL DEFENSE UNDER THE FIRST AMENDMENT

By Wendell R. Bird*

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This article discusses reasons public schools constitutionally may and indeed must present creation-science along with evolution-science in science and other classes. That instruction would consist of scientific evidence supporting creation-science and evolution-science, and not of religious doctrines or concepts that clearly may not be taught in science classes. The author suggests that balanced presentation of creation-science with evolution-science does not violate the Establishment Clause of the first amendment, because creation-science is at least as scientific and as non-religious as evolution-science. Hence, the primary effect and legislative purpose of dual instruction is simply presentation of all of the scientific evidence about the origin of the world and life, and consequently is an expansion of academic freedom.  

The author also discusses how exclusive presentation of evolution-science violates the Establishment Clause, freedom of religious exercise, and freedom of belief provisions of the first amendment. Thus, public schools must present creation-science if they present evolution-science.
CREATION-SCIENCE AND EVOLUTION-SCIENCE IN PUBLIC SCHOOLS: A CONSTITUTIONAL DEFENSE UNDER THE FIRST AMENDMENT

It is "bigotry for public schools to teach only one theory of origins."
—Clarence Darrow during the Scopes trial

Introduction

A national controversy has raged for several years over indoctrination in evolution in public schools and over presentation of creation in the classroom. It differs diametrically from the controversy that culminated in the Scopes trial because creation, rather than evolution, is currently excluded from the classroom and because scientific evidence for creation, rather than religious objection to evolution, is the issue.

Currently, many individuals are complaining about instruction in evolution alone, just as many individuals complained in years past about instruction in creation alone. In fact, recent surveys show that, nationwide, seventy-six percent of the public and a majority of school board members favor public school instruction in both creation-science and evolution-science, with another ten percent of the public favoring instruction in creation-science alone. Presentation of all the evidence about the origin of the world and of life clearly advances academic freedom, giving students new information and a genuine choice, while ending censorship and indoctrination in evolution-science.

Louisiana has enacted legislation requiring balanced treatment of creation-science and evolution-science that is now being challenged in federal court, in Keith v. Louisiana Department of Education. In this case, science professors, legislators, parents, and teachers have sued for a declaratory judgment that the Louisiana Balanced Treatment for Creation-Science and Evolution-Science Act is constitutional in terms of the academic freedom and establishment provisions of the first and fourteenth amendments. Arkansas, which had passed different legislation, has not appealed

4. Id., Second Amended Complaint at 1-3.
the recent overturning of its act. Similar bills were under consideration in nearly a third of the states in 1982 alone. Many public school boards have adopted, and many others are considering resolutions for, dual instruction.

Nearly three million students in public high schools study biology each year, and comparable numbers study chemistry, physics, life science, social studies, world history, anthropology, sociology, and other subjects. Nearly all biology students use textbooks that present only evolution-science, interweaving it from cover to cover, and most students in other courses that touch on origins also confront only evolution-science as the explanation for the inception of the world, life, and man. Nearly all of those public school students come to believe in evolution as the only scientific explanation of origins. Many parents and others are concerned that public schools may be inculcating evolution-science upon impressionable students, while censoring evidence for creation-science.

Part I of this article considers whether public schools contravene separation of church and state if they present creation-science along with evolution-science. Part II assesses whether public schools violate the first amendment by presenting only evolution-science, and then whether they must teach creation-science if they teach evolution-science and vice versa.

I. SEPARATION OF CHURCH AND STATE PERMITS NEUTRAL INSTRUCTION IN CREATION-SCIENCE ALONG WITH EVOLUTION-SCIENCE

The first amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” This prohibition against “establishment of religion” is often referred to imprecisely as a requirement for “sep-

6. E.g., Bird, 87 YALE L.J. at 516 n.8 (Columbus, Ohio; Dallas, Texas; and Charleston, West Virginia).
8. E.g., Bird, 87 YALE L.J. at 25 (leading four biology texts); id. at 521-22 nn. 26-30 (extensive & exclusive presentation of evolution-science); id. at 537 nn. 104-05 (pervasive treatment of evolution-science).
paration of church and state." Historically, the phrase derives from Roger Williams, who was concerned about the wilderness of the state encroaching upon the garden of the church. The use of the phrase by Thomas Jefferson (who was in France during the constitutional debate) and James Madison (who did not write the Establishment Clause) came nearly a decade after the ratification of the first amendment, when they wrote of the danger of the church interfering with the state. The historical intent of the Establishment Clause was not to place a barrier between church and state, but simply to prohibit erection by the federal government of a national church. Although some constitutional extremists have spoken of "an absolute wall of total separation," the Supreme Court has clearly stated that the Establishment Clause does "not call for total separation of church and state," and that the clause's require-

13. Madison was not the author of the establishment clause; Saul Livermore was. 1 A. Stokes, Church and State in the United States 543-49 (1950); P. Kauper, Religion and the Constitution 50 (1964).
15. T. Cooley, The General Principles of Constitutional Law 224-25 (3d ed. 1898); M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment 1-18 (1978); see J. Storey, Commentaries on the Constitution § 986-992 (1833). Thus the Northwest Ordinance of 1789, enacted by the very Congressmen who drafted and adopted the Establishment Clause, and re-enacted in 1791 just after ratification of the Establishment Clause, provided 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." 1 Stat. 52.
17. They base this on Everson v. Board of Education, 330 U.S. 1, 16 (1947). The separation of church and state language there was dictum, because in Everson, the Supreme Court upheld government provision of transportation to parochial schools along with public schools, and the Court has backed away from the literal meaning and consequence of that dictum. Note 18 infra.
ment, "far from being a 'wall,' is a blurred, indistinct, and variable barrier."18

Courts confronting an establishment of religion issue look at two factors in construing this clause:

(A) Religion—the religion toward which government is said to be unneutral,19 and

(B) Unneutrality—governmental unneutrality toward that religion by advancing or opposing it.20

Unneutrality is assessed by a tripartite test that focuses on the primary effect, secular purpose, and any excessive entanglement.21

Section A discusses whether creation-science is itself religious in nature or is merely consistent with some religions, and defines creation-science and evolution-science. Section B then analyzes whether balanced presentation of creation-science and evolution-science is unneutral toward any religion or toward religion generally.


A. No Religion of which Creation-Science Is a Part

The religious doctrine of creation may be distinguished from the scientific evidence for creation, just as the religious doctrine of evolution may be distinguished from the scientific evidence for evolution. There are religions that hold to creationist tenets, just as there are religions that hold to evolutionist tenets (such as Religious Humanists, Theological Liberals, and Buddhists). Nonetheless, it is possible to articulate scientific evidences and related inferences for creation (termed creation-science and defined below), just as it is possible to state scientific evidences and related inferences for evolution (termed evolution-science). With religious faiths and scientific evidences on both sides of the issue, it is a peculiar sort of academic intolerance or intellectual bigotry that causes some otherwise well informed individuals adamantly to characterize creation as wholly religion and evolution as wholly science.

A religious doctrine of creation, such as the Genesis version, may not be taught in the public school science classroom, as several court decisions have made clear. Such instruction clearly is inherently unneutral and advances religion in the same way that compulsory Bible reading and compulsory classroom prayer do. Similarly, a religious doctrine of evolution, such as the Humanist Manifesto, may not be taught in the science classroom in public schools.

This section suggests that the scientific evidence for creation (creation-science) constitutionally may be taught in public schools as long as the scientific evidence for evolution (evolution-science) is also offered in order to guarantee neutrality. The reasons creation-science does not constitute a religion are discussed in two aspects:

(1) Creation-science is at least as scientific as evolution-science, and

(2) Creation-science is at least as nonreligious as evolution-science.

22. For evolutionist religions, see infra text accompanying notes 115-42. For creationist religions, see infra text accompanying notes 149-54.


25. For incisive discussion of Humanism in public schools, see Whitehead & Conlan, The Establishment of the Religion of Secular Humanism and Its First Amendment Implications, 10 TEX. TECH. L. REV. 1, 37-46 (1979); see also Bird, 1979 HARV. J.L. & PUB. POL’LY at 177-80, 182-83.
Similarly, evolution-science constitutionally may be taught in the science classroom as long as creation-science is also presented to ensure neutrality.

1. **Creation-Science Is at Least as Scientific as Evolution-Science**

The two scientific explanations of origins might be defined as follows. Creation-science includes the scientific evidence and the related inferences suggesting:

1. Creation of the universe (cosmic creation);
2. Creation of the first (biochemical creation);
3. Creation of plant and animal types, recognizing genetic variation in all types within narrow limits and extinction of some types (biological creation); and
4. All reliable measures of the age of the universe and life.

Examples of scientific evidence for creation-science are the abrupt appearance of complex living types in the fossil record, the systematic gaps between types in the fossil record up to the present, and the pleochroic halos in the earth’s crust.

Evolution-science includes the scientific evidence and the related inferences suggesting:

1. Evolution of the universe through the big bang theory (cosmic evolution);
2. Evolution of the first life from nonlife (biochemical evolution);
3. Evolution of plant and animal types all from one or more common ancestors, so that single-celled organisms evolved into fish, then amphibia, then reptiles, then mammals, then higher mammals, then man (biological evolution); and
4. A time scale of 15-20 billion years since the universe emerged, 4-6 billion years since the earth emerged, and 3-4 billion years since life emerged.

Examples of the scientific evidence for evolution are apparent.
transitional forms such as *Archaeopteryx* and the *Eohippus* series, and experiments regarding the origin of life that have synthesized amino acids from simpler molecules, proteins from amino acids, and living cells from component parts.

a. *Scientific Evidence.* It is possible to adduce scientific evidence and related inferences suggesting creation, just as it is possible to list scientific evidences and related inferences indicating evolution. The following general examples are based on the testimony of scientific expert witnesses in *Keith v. Louisiana Department of Education.*

Affirmative evidence supporting biological creation of plants and animals includes (1) an abrupt appearance of complex types in the fossil record, (2) systematic gaps between different types in the fossil record, (3) general similarity of living types to non-extinct fossil types, and (4) systematic gaps between living types. Other affirmative evidence includes (5) substantial molecular differences between allegedly closely related organisms and substantial molecular similarities of organisms allegedly distantly related, (6) interdependent structures in organisms that independently have no survival value, (7) symbiosis between pairs of organism types, (8) the complex order of organisms generally, (9) the high mathematical probability of creation corresponding to the low probability of evolution of living types, and (10) limitations on beneficial mutations and progressive evolution from the second law of thermodynamics.

Affirmative evidence supporting biochemical creation of the first life includes (1) the chemical tendency away from life rather than toward life, (2) the complex order of the most simple cell and its components, (3) the complex order of the genetic code and related enzymes, and (4) the interdependency of the genetic code and the related enzymes. Further affirmative evidence is (5) the presence of only twenty amino acids in proteins of the nearly hundred possible amino acids, (6) the geometric isomer preferences for L-amino acids in proteins and D-sugars in nucleic acids, etc., (7) the optical isomer preferences of E-amino acids and other organic molecules, (8) the mathematical probability of biochemical creation and the corresponding improbability of biochemical evolution arising from the complexity of biomonomers, biopolymers, protocells, cells, and the genetic code, and (9) the thermodynamic probability of bio-

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31. See *supra* text accompanying notes 3-4.
chemical creation and the corresponding improbability of biochemical evolution of the first life or of biomonomers, biopolymers, and protocells.

Affirmative evidence supporting cosmic creation of the universe and earth includes (1) the first and second laws of thermodynamics, which respectively preclude the universe having brought itself into being yet preclude the universe having existed eternally; and (2) the complex order of the universe, containing a hundred billion galaxies each averaging a hundred billion stars with orderly orbits of predictable path. Other evidence is (3) the angular momentum of the universe, which would not result from a big bang event; and (4) the existence of pleochroic halos in the earth’s crust, with very short half lives, that could not have been formed in molten rock, without any trace of uranium present.

b. Scientists. There are numerous scientists with earned doctorates who believe that the scientific evidence about origins supports creation-science better than evolution-science. For example, many scientists are listed as expert witnesses to present scientific evidence for creation in *Keith v. Louisiana Department of Education,* and they include not just Protestant but Catholic, Jewish, Muslim, Buddhist, and Agnostic experts. The Institute for Creation Research comprises eight full-time scientists with earned doctorates in various fields. The Creation Research Society is a membership organization that includes more than 700 scientists.

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32. These creationist scientists include Dr. Dean H. Kenyon, professor of biology at San Francisco State University, with a Ph.D. degree in biophysics from Stanford; Dr. R. Terry Spohn, assistant professor of biology at University of South Carolina, with a Ph.D. degree in biosystematics from Texas Tech University; Dr. Frank L. Lyon, with a Ph.D. degree in taxonomy from Kansas State University; Dr. Carl B. Fliermans, with a Ph.D. degree in microbiology from Indiana University; Dr. James W. Hugg, with a Ph.D. degree in nuclear physics from Stanford, professor of biology at San Francisco State University; Dr. Harold S. Slusher, assistant professor of physics at University of Texas at El Paso, with a Ph.D. degree in geophysics from Columbia Pacific University; Dr. W. Scot Morrow, associate professor of chemistry at Wofford College, with a Ph.D. degree in biochemistry from University of North Carolina at Chapel Hill; and Dr. N. Chandra Wickramasinghe, professor and chairman of applied mathematics at University College in Wales, collaborator with astronomer Sir Fred Hoyle, with a Ph.D. degree in astronomy from University of Cambridge (Buddhist, and neither creationist nor evolutionist). Other expert witnesses are Roman Catholic, Jewish and Agnostic.

33. These creationist scientists include Dr. Duane T. Gish, with a Ph.D. degree in biochemistry from University of California-Berkeley; Dr. Kenneth B. Cumming, with a Ph.D. degree in biology from Harvard; Dr. Henry M. Morris, with a Ph.D. degree in hydrology from University of Minnesota; and Dr. Steven A. Austin, with a Ph.D. degree in geology from Pennsylvania State University.
with doctorate or master’s degrees in diverse fields of science, all of whom support creation-science. There are also many scientists who do not believe that existing evidence supports evolution, although they are not themselves creationists. 34

2. Creation-Science Is at Least as Nonreligious as Evolution-Science

Both creation-science and evolution-science are consistent with some religions, but that does not render either religious in nature, and each may be presented in public schools without involving the many different religious views of creation and evolution. 5 All of the allegedly religious characteristics of creation-science are equally true of evolution-science, and none of these characteristics renders creation-science or evolution-science religious or non-scientific.

The following paragraphs discuss the allegedly religious characteristics of creation-science and their parallel applicability to evolution-science:

(a) Harmony with many religions;
(b) Nonnaturalistic presuppositions;
(c) Reference to a creator;
(d) Incomplete falsifiability;
(e) Circumstantial evidence;
(f) Teleological aspects;
(g) Original articulation in religious bibles;
(h) Original articulation by religious leaders;
(i) Scientific writers with strong religious beliefs; or inspiration; and
(j) Scientific writers with other religious publications or activities.

a. Reference to a Creator. Both explanations of origins refer at times to a creator or an act of creation. For example, one of the four leading textbooks for public school evolutionist biology refers to “the Supreme and Omnipotent Creator’” and to “God,” and another refers to “the flood recorded in Genesis of the Hebrew Bible,” yet that does not render those books inherently religious.

34. E.g., G. Kerkut, supra note 152; see N. Macbeth, supra note 152. “[T]he most distinguished of French zoologists,” Pierre P. Grasse, in L’Evolution du Vivant, launched “a frontal attack on all kinds of ‘Darwinism.’” Dobzhansky, Darwinian or “Oriented” Evolution?, 29 EVOLUTION 376 (1975). A large “silent group of students engaged in biological pursuits” disagrees with much or all of the general theory. Olson, Morphology, Paleontology and Evolution, in 1 EVOLUTION AFTER DARWIN 523 (S. Tax ed.).


36. E.g., THE BIOLOGICAL SCIENCE CURRICULUM STUDY, BIOLOGICAL SCIENCE: Molecules
Darwin's *Origin of Species* ends with a reference to "life, with its several powers, having been originally breathed by the Creator." Yet few evolutionists would argue that this book's frequent references to a creator would render it religious and inappropriate for the public school classroom. Public schools constitutionally may refer to a creator, and courts have consistently sustained this principle over Establishment Clause challenges. The pledge of allegiance refers to our nation "under God," and may be recited daily. The national anthem affirms "in God is our trust" in the final verse, and may be sung freely in public schools. The Declaration of Independence refers several times to "our Creator," and may constitutionally be recited in public schools. Only an extremist interpretation of the Establishment Clause would bar similar reference to a creator in public schools, and that interpretation not only has never been adopted but also has been frequently repudiated by the Supreme Court.

The harmony of public school curricula with various religious beliefs does not violate the Establishment Clause or render the curricula inherently religious. In biology, the Genesis account of creation divides visible organisms into plants and animals, and distinguishes between fish, creeping reptiles, fowls, and land beasts, yet public schools are not precluded from dividing organisms into...
the plant and animal kingdoms and differently classifying fish, reptiles, birds, and mammals. In physics, the Bible says that the earth is round, that it is suspended in space, and that it rotates, yet clearly public schools in physics classes may teach scientific evidence on these points. In astronomy, the creation account mentions the sun, moon, and stars, and the Bible says that stars are so numerous as to be uncountable and that the sun orbits in a circuit through the universe, yet the science classroom obviously may present scientific evidence on these matters. In meteorology, the Bible describes the hydrologic cycle of evaporation and wind currents and precipitation, yet public schools may teach this. On oceanography, the creation account mentions the seas and deep ocean troughs, and the Bible refers to submarine springs, underwater mountains, underwater currents, and sea channels, yet physical science classes may present information on these topics. On health, the Bible discusses disposal of sewage and not eating the meat of animals that died naturally, yet health and hygiene classes are not precluded from teaching this. In geography, the Bible describes in detail Israel, Rome, Greece, Egypt, Arabia, Ethiopia, Persia, Spain, and other countries, the Nile, Jordan, and other rivers, the Mediterranean and Red and other seas, and Mount Ararat and Olivet and the seven hills of Rome, yet public schools may teach about these geographical features. In mathematics, the Bible states that seven times seven is forty-nine, and that \( \pi \) is approximately 3.14, yet classroom instruction may present these facts. In history, the Genesis account of creation places the inception of civilization on the Euphrates River, and the Bible explicitly describes the Pharaohs in Egypt, the theocracy of Israel, Nebuchadnezzar and Darius and Cyrus in Babylon, Caesar Augustus and Tiberius and Nero in Rome, and other events, yet that biblical mention

44. Genesis 1:16; Jeremiah 33:22; Psalms 19:6. The Bible also refers to Pleiades, Orion, Saturn, Venus, and comets, Job 38:31; Amos 5:25-26; Revelations 22:16; Jude 13, but public schools clearly may teach about these celestial bodies.
47. Deuteronomy 23:12-14; 14:21. The Bible also mentions gangrene, boils, anthrax, leprosy, venereal disease, elephantiasis, dysentery, polydactylism, and dwarfism.
does not render them inherently religious. In ethics, the Bible ex- 
tols wisdom and honesty, commands aid to the poor and love, con- 
demns murder and theft, provides for marriage and child-rearing, 
and commands patriotic loyalty and civil obedience, yet public 
schools may teach these ethical and civil principles. It is simply 
absurd to argue that something described in the Bible or the 
Qu’ran is inherently religious, that public schools may not present 
scientific material or historical facts harmonious or consistent with 
the Bible or Qu’ran, and that any evidence is rendered nonscient- 
fic (or nonhistorical etc.) by a consistent reference in the Bible.

b. Harmony with Many Religions. Both explanations of origins 
are doctrinally consistent with many religions, and in fact the reli- 
gious faiths in the United States can be divided almost evenly be- 
tween creation and evolution. This division splits both Protestant, 
Catholic, Jewish, and Non-Judeo-Christian faiths. The left column 
lists religions with which creation-science is consistent, and the 
right column enumerates religions with which evolution-science is 
consistent.51

(i) Fundamentalism & Conservative 
Evangelical; (i) Theological Liberalism 
and NeoOrthodoxy;
(ii) Church of Christ & 
Seventh-day Adventism, 
Mormonism & 
Jehovah’s Witnesses; (ii) Religious Humanism & 
Unitarianism, 
Evolutionary Humanism 
& Secular Humanism;
(iii) Orthodox Roman 
Catholicism; (iii) Liberal Roman 
Catholicism;
(iv) Orthodox Judaism; (iv) Reform Judaism;
(v) Islam (Muslims). (v) Buddhism & Atheism.

Evolution-science is harmonious or consistent with as many reli-
gions as to the same extent that creation-science is.

Such harmony between scientific explanation and religious belief 
does not violate the Establishment Clause. As the Supreme Court 
said in McGowan v. Maryland,52 “the ‘Establishment’ Clause does 
not ban federal or state regulation whose reason or effect merely

3:1; Acts 25:11.
51. Creationist religions are discussed more fully in part II in section B(1). See infra text 
accompanying notes 150-54. Evolutionist religions are discussed more fully in section A(1) 
of Part II. See infra text accompanying notes 112-42.
happens to coincide or harmonize with the tenets of some or all religions." In *McGowan*, the Court sustained a Sunday closing law despite its consistency with many religions, and noted that "murder is illegal" and "the fact that this agrees with the dictates of the Judaean-Christian religions while it may disagree with others does not invalidate the regulation. . . . The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue." In *Harris v. McRae*, the Supreme Court recently upheld a restriction on governmental funding of abortions despite the limit's consistency with Roman Catholicism and much religious belief. The mere harmony or consistency of creation-science and evolution-science with many religions and their doctrines does not render inherently religious scientific explanation of either.

c. Partial Nonnaturalism. Both creation-science and evolution-science include nonnaturalistic presuppositions about a creator, about matter, and about other things. Just as creation-science presupposes that a creator exists, a majority of evolution-science adherents also presuppose that a creator exists while a sizable minority presuppose that there is no creator. Just as creation-science assumes that an act of creation occurred, a majority of evolution-science adherents also assume that the universe including matter and energy was created, while a sizable minority posit that the universe including matter and energy has preexisted. Both of these views are nonnaturalistic. Those evolutionists who characterize themselves as theistic evolutionists share precisely the nonnaturalistic presuppositions of the creationists; thus, the creation-science presupposition of a creator does not render creation-science any less scientific or less nonreligious than evolution-science. Biological evolution includes the nonnaturalistic aspects of natural selection (in that it is nonfalsifiable and tautological) and the concept of irreversibility or undirectionality (which is nonfalsifiable). Biochemical evolution embraces the nonnaturalistic concepts of abiogenesis and the past existence of a reducing

55. 448 U.S. 297 (1980).
56. *Id.* at 319-20.
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atmosphere (both of which are nonfalsifiable). Cosmic evolution includes the nonnaturalistic aspects of the eternal existence or creation of matter and energy and the contraction and explosion required for the big bang (both of which are nonfalsifiable).

Although both creation-science and evolution-science embody nonnaturalistic presuppositions, both also include natural processes operating in both past and present. Examples are mutation, genetic variation, extinction, and other biological processes; the law of thermodynamics and other physics processes, stellar novas, supernovas, and other astronomical processes; and erosion and sedimentation and fossilization, and other geological processes.

d. Partial Falsifiability. Although both creation-science and evolution-science as overall paradigms are nonfalsifiable, specific elements and predictions of both creation-science and evolution-science are falsifiable. Because of their overall nonfalsifiability, both explanations involve an element of presupposition or assumption, as pointed above, which is inherent in circumstantially-supported scientific explanations, as discussed below. In fact, one non-creationist author has concluded that "[b]elief in the theory of evolution is thus parallel to belief in special creation—both are concepts which believers know to be true but neither, up to the present, has been capable of proof."

e. Circumstantial Evidence. Both creation-science and evolution-science are only circumstantially supported by logical inferences from scientific evidence, and are not directly supported by any human observation of the origin of the universe, life, living types, and man. Neither overall explanation is subject to any experimental repetition of the complete process, although specific elements and predictions of both creation-science and evolution-science are subject to experiment; but successful experiments about what can occur are still only circumstantial evidence about what actually did occur. The absence of direct evidence necessitates presuppositions and assumptions on both sides of the origins issue, and leaves room for rational disagreement.


60. E.g., Dobzhansky, On Methods of Evolutionary Biology and Anthropology, 45 Am. Scientist 381, 388 (1957).
f. Teleological Aspects. Both creation-science and evolution-science have teleological (or design) aspects. Just as creation-science points to the complex design in nature as evidence of creation, evolution-science involves teleology in the form of natural selection. In any event, as Dr. Wernher von Braun wrote, "the scientific method does not allow us to exclude data which lead to the conclusion that the universe, life and man are based on design." Public school curricula are not limited to a positivistic concept of that which may be materially verified, and may constitutionally include logical inferences concerning design.

g. Original Articulation in Religious Bibles. Both explanations of origins were first articulated in religious writings. Just as creation was first stated in the Pentateuch and in the Qu'ran, evolution was first outlined in the Babylonian Genesis or Enuma Elish and in other religious writings. The Enuma Elish gives an evolutionary account of the origin of the universe, plants and animals.

h. Original Articulation by Religious Leaders. Both creation and evolution were first set forth by religious leaders. Just as creation was first propounded by Moses and Mohammed and other religious leaders, evolution was first articulated in the religious-philosophical writings of such Greek pagans as Thales, Anaximander, Anaximenes, Xenophanes, Heracleitus, and the Milesian school, as well as in the earlier religious writing of the priestly Babylonian author of the Enuma Elish.

i. Scientific Writers with Strong Religious Beliefs or Inspiration. Both creation-science and evolution-science are advocated by

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62. Dr. von Braun is known as the father of modern rocket technology.


67. E.g., M. Munitz, supra note 66, at 63-64; Empedocles, 8 *Encyclopædia Britannica* 400 (1960); Lucretius, *The Nature of the Universe* 58 (R. Latham trans. 1951).
scientific authors who hold strong religious convictions and sometimes are inspired by those religious beliefs. Charles Darwin himself was professionally trained as a theologian, not as a scientist, and held deep religious beliefs, but that does not render his books inherently religious or exclude his scientific discoveries from the classroom. Herman Melville held and was inspired by firm religious beliefs, which his literary works reflect, but that does not render *Moby Dick* inherently religious or exclude *Billy Budd* from the English classroom. The harmony or consistency of personal religious convictions of either evolutionist or creationist authors with their textbook works does not render the books inherently religious or bar them from the classroom; a religious motive in writing one book does not carry over into every other book or conclusion.

The inspiration or source of a scientific discovery or explanation is irrelevant to the objective merit of that scientific discovery or explanation. A vision of a snake biting its tail was the inspiration for Kekulé’s development of the model for the benzene molecule. A vision while reading a pantheistic poet was the inspiration for Nikola Tesla’s discovery of the alternating current motor. Meditation on ocean waves on Sunday morning was the inspiration for Herbert Spencer’s theory of cosmic evolution. A religious prophetess, the Oracle of Delphi, was the inspiration for Socrates’ philosophy and literature. Three dreams were the inspiration for René Descartes’ philosophy of rationalism. Genesis and other Bible passages are the inspiration and guidebook for many respected archaeologists such as William Allbright. The merit of an idea in any discipline is independent of its source.

The purpose of a scientist is also irrelevant to the objective validity of the scientist’s conclusions. Sir Francis Bacon, the father of the scientific method, had the purpose to “subdue the world” according to the command in Genesis. Louis Pasteur, the discoverer of the law of biogenesis, was a creationist and vigorously opposed evolution.

j. *Scientific Writers with Other Religious Publications or Activities*. Both explanations of origins have scientific authors who have written theological treatises. Sir Julian Huxley and many other...
evolutionists (such as Darwin) have authored religious treatises as well as scientific books, but this does not make their scientific works inherently religious or impermissible for public school use. Isaac Asimov has written both religious and scientific books, but his scientific ones are proper for the classroom. The religious publications of either evolutionist or creationist scientists do not deprive the authors of their status as scientists or of their ability to communicate scientific information.

The question arises whether the addition of creation-science instruction to evolution-science instruction in public schools would require inclusion of the multitude of religious doctrine of creation or evolution. However, only scientific models of origins may be discussed in the science classroom in public schools, so none of these religious doctrines may be presented as science. Creation and evolution are the sole logical and scientific alternatives, as many evolutionist authors have recognized, so only two scientific explanations need or may be presented.

B. No Unneutrality Toward a Particular Religion or Toward Religion Generally by Balanced Presentation of Creation-Science and Evolution-Science

The key to the Establishment Clause is neutrality. The Supreme Court has construed the Establishment Clause to require "neutrality between religion and religion and between religion and nonreligion."

The Supreme Court employs a tripartite test to determine whether a governmental activity violates the Establishment Clause, scrutinizing the primary effect, primary purpose, and entanglement involved in that activity. A governmental activity contravenes the Establishment Clause if it has either

(1) A primary effect of advancing or opposing religion,

(2) A sole nonsecular purpose of aiding or hindering religion, or


(3) An excessive entanglement of the state with religion.  

1. **No Primary Effect of Advancing Religion**

The primary effect of presenting creation-science along with evolution-science in public schools is simply to teach all scientific information regarding origins, and thereby to advance academic freedom. The primary effect is not to advance any religion or religion generally, because only scientific material is presented and greater neutrality results. Creation-science is at least as scientific and as nonreligious as evolution-science. Evolution-science to the same extent as creation-science harmonizes with many religions, includes some nonnaturalistic presuppositions, refers to a creator, is incompletely falsifiable, is circumstantially supported, has teleological aspects, was originally articulated in religious bibles, was originally articulated by religious leaders, is expoused by scientific writers with strong religious beliefs, and is advocated by scientific writers with other religious publications. Although presenting exclusively either evolution-science or creation-science may by these secondary effects advance some religions and oppose others, presenting both explanations does not have a primary effect of advancing or opposing any religion.

In *McLean v. Arkansas Board of Education*, the district court held that an Arkansas law requiring balanced treatment of creation-science and evolution-science violated the Establishment Clause:

If the defendants are correct and the Court is limited to an examination of the language of the Act, the evidence is overwhelming that both the purpose and effect of Act 590 is the advancement of religion in the public schools.

Section 4 of the Act provides:

Definitions. As used in this Act:

(a) "Creation-science" means the scientific evidences for creation and inferences from those scientific evidences. Creation-science includes the scientific evidences and related inferences that indicate: (1) Sudden creation of the universe, energy, and life from nothing; (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes only within fixed limits of originally created kinds of plants and animals; (4) Separate an-

cestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a world-wide flood; and (6) A relatively recent inception of the earth and living kinds.78

The court is incorrect in treating the primary effect of creation-science instruction as the advancement of religion. Creation-science is sharply distinguishable from the Genesis account of creation or other religious doctrine, just as evolution-science is distinguishable from evolutionist religious doctrine.79 Creation-science consists of scientific discussion and evidence, such as systematic gaps between fossil types of plants and animals, rather than biblical discussion of concepts.80 In presupposing a creator, creation-science is no more religious than evolution-science, in either also presupposing a creator (the theistic evolutionist majority) or presupposing no creator (the atheistic evolution minority). In neither case is the emphasis necessarily on the creator.81 Moreover, in referring to a creator, creation-science comes under explicit United States Supreme Court precedents permitting public school mention of a creator or God.82 The first amendment requires neither an absolute wall of total separation between church and state83 nor a religion of secularism and indoctrination in evolution in public schools.84 Regardless of the correctness of the court's opinion, creation-science is not bound to the poor definition in the Arkansas statute. It need not involve "sudden" creation or creation "ex nihilo," or "kinds" of plants and animals, or "a worldwide flood," or a time scale of "6,000-20,000 years" because of Bible genealogies.

2. No Sole Purpose of Aiding Religion

The legislative purpose85 of presenting a creation-science along with evolution-science also is simply to offer all of the scientific evidence regarding origins, and thereby to provide more academic

78. Id. at 1264.
79. See infra notes 109-43 and accompanying text.
80. See supra notes 26-34 and accompanying text.
81. See supra notes 36-41 and accompanying text.
82. See supra notes 38-41 and accompanying text.
83. See supra notes 17-18 and accompanying text.
84. See infra notes 160-65 and accompanying text.
freedom. The sole purpose of nonexclusive instruction is not advancement of any religion or of religion generally. Even Clarence Darrow in the Scopes trial recognized the secular purpose behind presenting alternative theories when he said that it is "bigotry for public schools to teach only one theory of origins." The Supreme Court has found that a public university would have a secular purpose for allowing religious groups as well as other groups to use campus meeting facilities in Widmar v. Vincent, that Congress had a secular purpose in restricting federal funds for abortions in Harris v. McRae, and that a secular purpose exists for direct payments to parochial and private schools for the compliance costs of state-mandated tests, reports, and records in Committee for Public Education v. Regan. The Supreme Court also has found a secular purpose for tax exemption of religiously-used and other charitably-used property in Walz v. Tax Commission, for provision of public school textbooks to religious and private schools in Board of Education v. Allen, for a Sunday closing law in providing a uniform day of rest in McGowan v. Maryland, and for a released-time program for religious instruction during school hours but off school grounds in Zorach v. Clauson. The legislative purpose in teaching creation-science along with evolution-science is equally secular: presentation of all the scientific evidence about origins and consequent expansion of academic freedom.

The purpose aspect of the tripartite test only requires that a law have "a secular purpose" and not a "solely religious purpose." It does not demand that the legislative purpose be exclusively or even primarily secular, if there is "a secular purpose" along with a secondary or even primary religious purpose. The legislative purpose

86. Note 1 supra.
94. See Harris v. McRae, 448 U.S. at 319-20; Committee for Public Education v. Regan, 444 U.S. at 654-55; Wolman v. Walter, 433 U.S. at 235-36; Roemer v. Board of Public...
is the purpose of the legislature as a whole, which can differ from the purpose or motive of any individual legislator. The purposes or motives of one or more individual legislators (even if the sponsors) are neither determinative nor indicative of the purpose of the legislature, and indeed the purposes or motives of individual legislators are both inadmissible and nondiscoverable except as reflected in the statutory wording and the official legislative history (if any).

The Supreme Court in *Epperson v. Arkansas* held that a law forbidding public school instruction in evolution, but not forbidding instruction in creation-science, under penalty of criminal sanctions, as a factual matter had a nonsecular legislative purpose of advancing religion by teaching *Genesis*. The legislative purpose of balanced presentation of creation-science along with evolution-science is secular—in contrast to the purpose as a factual matter in *Epperson* of advancing religious belief. No religious doctrine and solely scientific evidence is advanced by creation-science, in contrast to the inherently religious content of *Genesis* that the legislature intended be taught in *Epperson*. Also, neutrality is the primary effect of balanced presentation of both scientific explanations, in contrast to the unneutrality of the *Epperson* prohibition against only evolution. No criminal penalties are involved in balanced presentation of the two scientific explanations, in contrast to the law involved in *Epperson*. Hence, *Epperson*, with its emphasis on neutrality, actually supports balanced presentation of creation-science and evolution-science and militates against exclusive presentation of evolution-science.

The district court in *McLean v. Arkansas Board of Education* ruled that the Arkansas law had a nonsecular legislative purpose, as quoted above. The court was incorrect in ignoring the plain legislative purpose of presenting all scientific evidence on origins.

Works, 426 U.S. at 744-56; *Epperson v. Arkansas*, 393 U.S. at 107; Board of Education v. Allen, 392 U.S. at 242-44; McGowan v. Maryland, 366 U.S. at 431-44.


98. *Id*.

and in relying on the individual purpose of a sponsoring legislator and of an out-of-state draftsman. Regardless of the correctness of the opinion, elsewhere the legislative purpose of requiring balanced presentation of both creation-science and evolution-science may differ from the alleged Arkansas legislative purpose.

3. No Excessive Entanglement with Religion

No entanglement, much less excessive entanglement, results from balanced presentation of creation-science along with evolution-science in public school classrooms. No financial entanglement in the sense of any financial subsidy of a religious organization or of sectarian school students would result from balanced presentation, because any expenditures would be for public school textbooks with scientific content. No administrative entanglement in the sense of continuing state supervision of religious institutions or of religious content would arise from balanced presentation of creation-science and evolution-science, and any continuing supervision would be small compared to the administrative supervision of the parochial aid and textbook loan programs that have been sustained. No political entanglement in the sense of division along political or religious lines would result from balanced presentation of the two scientific views, beyond the division that already exists, because individuals believing in evolution-science would not lose instruction in their viewpoint, individuals supporting creation-science would have access to supporting scientific evidence and would no longer be indoctrinated in evolution, and the seventy-six percent of the public believing in balanced presentation would be mollified.

In McLean v. Arkansas Board of Education, the district court found that the Arkansas law produced excessive entanglement:

References to the pervasive nature of religious concepts in creation science texts amply demonstrate why State entanglement with religion is inevitable under Act 590. Involvement of the State in screening texts for impermissible religious references will require State officials to make delicate religious judgments. The need to

102. Note 2 supra.
monitor classroom discussion in order to uphold the Act's prohibition against religious instruction will necessarily involve administrators in questions concerning religion. These continuing involvements of State officials in questions and issues of religion create an excessive and prohibited entanglement with religion.\(^{103}\)

The court was incorrect. Religious concepts are not pervasive or inherent in creation-science, and textbooks containing both scientific explanations may be written that present strictly scientific evidence for creation. Textbook committees regularly screen texts and adopt some while rejecting others, and any religious judgments in the sense of screening balanced presentation texts and finding them either scientific or religious are not the sort of ecclesiastical determinations about church property doctrines that produce excessive entanglement.\(^{104}\) Teachers and administrators presumably monitor their classrooms currently to avoid Establishment Clause violations, and any monitoring of balanced presentation of creation-science and evolution-science is no different or more entangling than what already occurs for the curriculum generally. Creation-science does not involve any religion, and its presentation alongside evolution-science does not produce any entanglement with religion, and certainly no excessive entanglement.

4. More Complete Neutrality as the Result

The underlying question in Establishment Clause analysis is neutrality. Balanced presentation of creation-science and evolution-science in the public school classroom is neutral—it is evident that presentation of both scientific explanations is the neutral approach—and, in fact, it is more neutral than exclusive presentation of evolution-science. Neutrality under the Establishment Clause permits governmental programs that are consistent and harmonious with religion but are not themselves religious, as is the case with balanced presentation of creation-science and evolution-science.\(^{105}\) Neutrality allows extension of a general benefit to religious and nonreligious interests alike, such as instruction in all nonreligious explanations of origins, which is the consequence of balanced

\(^{103}\) 529 F. Supp. at 1272.

\(^{104}\) For excessive entanglement in religious doctrinal questions, see Jones v. Wolf, 443 U.S. 595 (1979); Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); see also Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

presentation of both scientific explanations. Neutrality under the Establishment Clause is furthered by governmental restoration of neutrality after a government-imposed burden has caused un-neutral, and balanced presentation of creation-science and evolution-science restores neutrality by ending the existing abridg- ments of freedom of religious exercise, freedom of belief, and the Establishment Clause, which are discussed below. The neutral approach is for public schools to teach both scientific explanations of origins or to teach neither. Public schools constitutionally may present creation-science along with evolution-science, and that does not violate separation of church and state.

II. THE FIRST AMENDMENT REQUIRES NEUTRAL INSTRUCTION IN CREATION-SCIENCE AND EVOLUTION-SCIENCE

The First Amendment provides that government “shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech.” The Supreme Court has ruled that freedom of speech includes freedom of belief, as it logically must, so the Freedom of Speech Clause is referred to as a protection of freedom of belief.

Section A delineates how public school presentation of evolution-science alone abridges the Establishment Clause. Section B discusses how public school instruction only in evolution-science abridges freedom of religious exercise and freedom of belief. Section C mentions the appropriate remedies for those first amend- ment violations.

A. Violation of the First Amendment Prohibition Against Estab- lishment of Religion by Exclusive Presentation of Evolution-Science

This section discusses whether unneutral instruction in public schools solely in evolution-science (or solely in creation-science) abridges the Establishment Clause. Although evolution-science it-

108. U.S. Const. amend. I.
109. For the Establishment Clause violation from exclusive presentation of evolution-sci- ence, see generally Bird, 1979 Harv. J.L. & PUB. POL’y at 198-204.
self is not a religion, evolutionist doctrines are held by many religions. Religions with evolutionist doctrines include some Protestant, Catholic, Jewish, and non-Judeo-Christian faiths, such as Religious Humanism, Theological Liberalism, NeoOrthodoxy, Modernist Catholicism, Reform Judaism, Buddhism, other Humanist faiths, and Atheism. Public schools that exclusively present evolution-science are unneutral in violation of the Establishment Clause, because the effect is to advance these evolutionist religions and to oppose the creationist religions.

1. Evolutionist Religions Under the Establishment Clause

Many religious faiths have evolutionist religious doctrines, and evolutionist religions span the entire religious spectrum to include Protestant, Catholic, Jewish and non-Judeo-Christian faiths. Examples of evolutionist religions are

Protestant: (a) Religious Humanism and Unitarianism, (b) Theological Liberalism, (c) NeoOrthodox;
Catholic: (d) Modernist Roman Catholicism;
Jewish: (e) Reform Judaism;
Non-Judeo-Christian: (f) Buddhism and Hinduism, (g) Secular Humanism and other humanist faiths, (h) Nontheistic religions, (i) Atheism.

The argument is not that evolution-science is religious, but that evolutionist religious doctrines are held by many religions, as the following text describes.

a. Religious Humanism and Unitarianism. Religious Humanism includes doctrinal belief in evolution. Religious Humanism is presented by the first Humanist Manifesto, and its adherents concede their theology to be religious. Four of the fifteen points

110. See infra text accompanying notes 114-42.
111. See infra text accompanying note 143.
of the Humanist Manifesto explicitly affirm evolution. Religious Humanism is currently advocated by the Fellowship of Religious Humanists, and it is conceded religious and explicitly evolutionist; a substantial proportion of Unitarian-Universalist leaders are members. "Evolutionary Humanism as a Developed Religion" is the concluding chapter of a book by Sir Julian Huxley, who conceived that religion which obviously features evolution.

b. Theological Liberalism. Theological Liberalism encompasses doctrinal belief in evolution. Theological Liberalism arose through the primary "formative factor" of evolution. The leading Theo-


114. The first Humanist Manifesto states:

\[\text{First: Religious humanists regard the universe as self-existing and not created.} \]

\[\text{Second: Humanism believes that man is a part of nature and that he has emerged as the result of a continuous process.} \]

\[\text{Fifth: Humanism asserts that the nature of the universe depicted by modern science makes unacceptable any supernatural or cosmic guarantees of human values . . . . Religion must formulate its hopes and plans in the light of the scientific spirit and method.} \]


118. Sir Julian Huxley, a prominent author on the subject of evolution-science, believed in a "religion of evolutionary humanism." Huxley, The Coming New Religion of Humanism, Humanist, Jan.-Feb. 1962, at 3, 5. His religion was "not based on revelation in the supernatural sense, but on the revelations [of science]," id. at 5, that "all reality is in a perfectly valid sense one universal process of evolution." Id. at 4. He regarded the general theory of evolution as the primary element in Humanism. Huxley, Evolutionary Humanism, Humanist, Sept.-Oct. 1962, at 201, 206.

119. The impact of modern science in breaking down the orthodox scheme was decisive . . . . Mechanical causation appeared to be supreme, leaving little or no room for special divine activity. Thus, the gap between general and special revelation . . . . was acutely called into question . . . . Moreover, the doctrine of evolution narrowed the gap between nature and man and, along with the developmental theories regarding the origin of the solar sys-
logical Liberals in the nineteenth century are discussed in *The Post-Darwinian Controversies.*\(^{120}\)

Frederick Temple (Anglican, Archbishop of Canterbury);
Henry Ward Beecher (Congregational minister);
George Henslow (Anglican minister & botanist);
George Douglas Campbell, Duke of Argyll (politician);
St. George Mivart;
John Bascom (Congregational minister & professor);
Henry Drummond (Free Church minister);
Thomas Howard MacQueary (Episcopal priest);
Lyman Abbott (Congregational minister);
Francis Hove Johnson (Congregational minister);
George Matheson (Church of Scotland minister);
Minot Judson Savage (Church of the Unity minister);
John Fiske (Congregational then Unitarian philosopher);
Joseph S. Van Dyke (Presbyterian minister);
James McCosh (Church of Scotland minister).

The theological beliefs and publications of these Theological Liberals all incorporated and featured evolution.\(^{131}\) The foremost Theo-

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K. CAUTHEN, *THE IMPACT OF AMERICAN RELIGIOUS LIBERALISM* 7 (1962). See also id. at 22 ("It would be difficult to overemphasize the influence of the doctrine of evolution in all of its forms on theology. The combination of evolution and immanence goes a long way toward providing the basic context out of which liberalism came and in which it grew."); Meland, *Liberalism, Theological*, in 13 *ENCYCLOPAEDIA BRITANNICA* 1021, 1022 (W. Preece ed. 1965). ("The decisive events" giving rise to religious Liberalism in the late nineteenth and early twentieth centuries were "the publication of Darwin's *Origin of Species*" along with the industrial revolution).


121. On Rev. Frederick Temple, see F. TEMPLE, *RELATIONS BETWEEN RELIGION AND SCIENCE* 113-14, 167 (1885); see generally J. MOORE, *supra* note 120, at 220.


On Rev. George Henslow, see G. HENSLOW, *PRESENT-DAY RATIONALISM CRITICALLY EXAMINED* (1904); G. HENSLOW, *THE ORIGIN OF FLORAL STRUCTURES* vi, xi, 335 (1888); G. HENSLOW, *THE THEORY OF EVOLUTION OF LIVING THINGS* (1873); G. HENSLOW, *GENESIS AND GEOLOGY* (1871); see generally J. MOORE, *supra* note 120, at 221, 232-34.

On George Douglas Campbell, eighth Duke of Argyll, see G. CAMPBELL, *ORGANIC EVOLU-
logical Liberals of later years may readily be identified from a list in the Encyclopaedia Britannica. Edward Scribner Ames; William Newton Clarke; George A. Coe; Harry Emerson Fosdick; Shailer Mathews; Walter Rauschenbusch; and Ernst Troeltsch. Their theological beliefs and writings also all have included and emphasized evolution. For example, Rev. Harry Emerson Fosdick, see S. Mivart, Lessons from Nature 274-77 (1876); S. Mivart, Man and Apes (1873); S. Mivart, On the Genesis of Species 277, 314 (1871); see generally J. Moore, supra note 120, at 222-23.

On Rev. St. George Mivart, see S. Mivart, Lessons from Nature 274-77 (1876); S. Mivart, Mean and Apes (1873); S. Mivart, On the Genesis of Species 277, 314 (1871); see generally J. Moore, supra note 120, at 222-23.

On Rev. John Bascom, see J. Bascom, Evolution and Religion 10-11, 13, 16 (1897); J. Bascom, Natural Theology 13, 14-45 (1880); J. Bascom, Science, Philosophy, and Religion 228-29 (1871); see generally J. Moore, supra note 120, at 223-24.

On Rev. Henry Drummond, see H. Drummond, Ascent of Man 15-16, 44-45, 414, 418, 429, 435 (1894); H. Drummond, Natural Law in the Spiritual World (1883); see generally J. Moore, supra note 120, at 224.

On Rev. Thomas Howard MacQueary, see T. MacQueary, The Evolution of Man and Christianity 16, 229-30 (rev. ed. 1891); T. MacQueary, Topics of the Times (1891); see generally J. Moore, supra note 120, at 225-26.

On Rev. Lyman Abbott, see L. Abbott, The Theology of an Evolutionist 3, 6-10, 19, 20, 176 (1897); L. Abbott, The Evolution of Christianity 1, 3, 8-9, 246-47 (1892); see generally J. Moore, supra note 120, at 26-27.

On Rev. Francis Howe Johnson, see F. Johnson, What is Reality? 260-65, 272, 276, 282-83, 312, 493 (1891); see generally J. Moore, supra note 120, at 227-28.

On George Matheson, see G. Matheson, Can the Old Faith Live with the New? 79-80, 86-87, 91, 157-58 (1885); see generally J. Moore, supra note 120, at 228-29.

On Rev. Minot Judson Savage, see M. Savage, The Evolution of Christianity (1892); M. Savage, The Irrepressible Conflict Between Two World-Theories 11, 26 (1892); M. Savage, Evolution and Religion from the Standpoint of One Who Believes in Both 32-34 (1888); M. Savage, The Morals of Evolution 166 (1880); M. Savage, The Religion of Evolution 47, 59 (1876); see generally J. Moore, supra note 120, at 229-30.

On John Fiske, see J. Fiske, Life Everlasting (1901); J. Fiske, Through Nature to God (1899); J. Fiske, The Idea of God as Affected by Modern Knowledge 129-30, 150-51 (1885); J. Fiske, The Destiny of Man (1884); J. Fiske, Darwinism and Other Essays 2-3 (rev. ed. 1885); J. Fiske, Outlines of Cosmic Philosophy (1874); see generally J. Moore, supra note 120, at 230-31.

On Rev. Joseph S. Van Dyke, see J. Van Dyke, Theism and Evolution xvii-xxi, 24-34, 41-47 (1886); see generally J. Moore, supra note 120, at 241-45.

On Rev. James McCosh, see J. McCosh, The Life of James McCosh 16-18, 82, 233 (1896); J. McCosh, The Religious Aspect of Evolution vii-x, 52-55, 103-04 (1888); J. McCosh, Herbert Spencer’s Philosophy (1885); J. McCosh, Development 12 (1883); J. McCosh, Christianity and Positivism 39-42, 346-50 (1871); J. McCosh & G. Dickie, Typical Forms and Special Ends in Creation 432-36, 464, 474-78 (1856); see generally J. Moore, supra note 120, at 245-50.

122. Meland, supra note 119, at 1021-22. They are the theological fathers of Religious Liberalism in its present stage.

123. Rev. Edward Scribner Ames wrote:

Many of the problems long prominent in religion may find their answers through the
dick wrote that "[w]e hold a worldview whose structural bases were not laid down by Moses in the thirteenth century B.C.," but by "the evolutionary hypothesis." Theological Liberalism is the

discoveries of science. One of these is the problem of creation. By finding out how nature works . . . there may come knowledge of the nature of life itself. Already the astronomers tell of the beginnings . . . of heavenly bodies . . . . The rough outline of man's life on the earth has become clear to anthropologists.

E. Ames, Religion 84 (1929).

Rev. William Newton Clarke stated that, because "theology should remand the investigation of the time and manner of the origin of man to the science of anthropology with its kindred sciences, just as it now remands the time and manner of the earth to astronomy and geology, and should accept and use their discoveries on the subject," theology "will receive from them an evolutionary answer" and "special creation . . . may come to appear improbable." Thus, "Genesis will be regarded . . . as the record of a human tradition or conception of beginnings, and not as a literal narrative of occurrences." W. Clarke, An Outline of Christian Theology 223, 224, 225 (9th ed. 1894).

Rev. George A. Coe believed that the essential truth of "the application of the theory of evolution to the whole of man's nature" and "belief in the immanence of God in nature and in man" "may be said to be already established." G. Coe, The Religion of a Mature Mind 8 (1902).

Rev. Harry Emerson Fosdick is quoted in note 124 infra.

Rev. Shailer Mathews wrote that Modernism "trusts Him—the awful, mysterious God of abysmal space, of galaxies, of stars, of ether, of evolution, of human liberty—as Father." S. Mathews, The Faith of Modernism 118 (1936). He further stated that "Modernists . . . accept the results of scientific research as data with which to think religiously," and so a Modernist "is frankly and hopefully an evolutionist because of facts furnished by experts." Id. at 29-30.

Rev. Walter Rauschenbusch emphasized:

According to orthodox theology, man's nature passed through a fatal debasement at the beginning of history. According to evolutionary science the [physical] impulses . . . run far back in the evolution of the race . . . whereas the . . . spiritual impulses are of recent development and relatively weak. We can take our choice of the explanations, but there are defects in the doctrine of original sin.


Rev. Ernst Troeltsch wrote:

In and of itself this concept ["of evolutionary development"] is one of the most reliable working tools there is, and it is one of the fundamental presuppositions of the scientific study of history. It has proved its worth beyond all shadow of doubt and corresponds to all knowable processes . . . .


124. H. Fosdick, The Modern Use of the Bible 50-51 (1924). Fosdick further stated: the more facts we know the better founded does the hypothesis appear . . . . We have not kept the forms of thought and categories of explanation in astronomy, geology, biology, which the Bible contains. We have definitely and irrevocably gotten new
viewpoint of a large number of churches.125

c. NeoOrthodoxy. NeoOrthodoxy also incorporates evolution, as
is evident in the theological writings of Reinhold Niebuhr and Ru-
dolph Bultmann.126 NeoOrthodoxy is embraced by a large segment
within such mainline Protestant denominations as United Method-
ists, Episcopalians, United Presbyterians, and American Luth-
ers, as well as within Roman Catholicism.127

d. Modernist Roman Catholicism. Modernist Roman Catholic-
ism holds evolution as part of its theology (just as Orthodox Ro-
man Catholicism accepts creation). This is exemplified in the theo-
logical publications of Teilhard de Chardin.128

e. Reform Judaism. Reform Judaism includes doctrinal belief in
evolution (just as Orthodox Judaism embraces belief in creation),
as is evident in the new Reform Jewish commentary on Genesis.129

f. Buddhism and Hinduism. Buddhism holds to an evolutionary
doctrine, viewing the universe as always existing but going through

ones diverse from and irreconcilable with the outlooks . . . the Bible in particular
had.

Id.

125. Theological Liberalism is embraced by a large proportion of ministers, as well as
members of major religious denominations, such as:

- Methodist [now United Methodist] ministers 33.8%
- Episcopalian ministers 25.7%
- American Baptist ministers 17.9%
- Presbyterian Church in the U.S.A. ministers 18.4%
- American Lutheran ministers 12.9%


126. Chadwick, Protestantism—The Twentieth Century—The Rise of NeoOrthodoxy, 15
ENCYCLOPAEDIA BRITANNICA: MACROPAEDIA 119-20 (15th ed. 1975). See generally Jewett,
NeoOrthodoxy, BAKER'S DICTIONARY OF THEOLOGY 375-79 (1960).

127. NeoOrthodoxy is embraced by a large proportion of ministers, as well as members, in
major denominations such as:

- Methodist [now United Methodist] ministers 31.8%
- Episcopalian ministers 30.1%
- American Baptist ministers 15.4%
- Presbyterian Church in the U.S.A. ministers 41.2%
- American Lutheran ministers 23.5%

J. HADDEN, supra note 125, at 39, 75.

128. E.g., P. TEILHARD DE CHARDIN, CHRISTIANITY AND EVOLUTION (trans. R. Hague 1971);
P. TEILHARD DE CHARDIN, SCIENCE AND CHRIST (1968); P. TEILHARD DE CHARDIN, THE AP-
PEARANCE OF MAN (1965).

129. E.g., THE TORAH: A MODERN COMMENTARY (W. Plant ed. 1981); Resolution, 47 CENT-
RAL CONFERENCE OF AMERICAN RABBIS (I. Marcuson ed. 1937); see also L. BARISH & R.
developmental cycles, while denying a divine creator. 130 Hinduism also generally embraces evolution. 131


g. Secular Humanism and other Humanist faiths. Secular Humanism and other Humanist faiths include a doctrine of evolution. These faiths are represented by Humanist Manifesto II, 132 which emphasizes evolution in such passages as that "science affirms that the human species is an emergence from natural evolutionary forces." 133 Secular Humanism and other Humanist views are also represented by A Secular Humanist Declaration, which lists evolution as one of ten points and states that "the evolution of the species is supported so strongly by the weight of evidence that it is difficult to reject it" although it is not an infallible principle of science. 134 Although many Secular Humanists and other Humanists do not regard their faith as religious, their free exercise is protected by the free exercise of religion clause, 135 and therefore 136


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133. Id. at 4, 6. One hundred seventy of its signatories were ministers of the Unitarian-Universalist Church, and many were members of the Fellowship of Religious Humanists. Wilson, supra note 116, at 40.
136. Both the Establishment Clause and the Free Exercise Clause refer to the same word, "religion," in the text of the first amendment, so the first amendment requires an identical and coextensive definition of "religion" for the Establishment Clause and the Free Exercise Clause. E.g., Everson v. Board of Education, 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting with Frankfurter, Jackson, and Burton, JJ.) ("[T]he word ["religion"] 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 exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty . . . ."); Malnak v. Yogi, 592 F.2d 197, 211-13 (3d Cir. 1979) (concurring opinion); Malnak v. Yogi, 440 F. Supp. 1284, 1316 n.20 (D.N.J. 1977), aff'd per curiam, 592 F.2d 197 (3d Cir. 1979); Note, Toward a Uniform Valuation of the Religion Guarantees, 80 YALE L.J. 77, 78 (1970); see Note, Humanistic Values in the Public School Curriculum: Problems in Defining an Appropriate "Wall of Separation," 61 NW. UNIV. L. REV. 758, 811 (1966).
their establishment is prohibited by the establishment of religion clause.\textsuperscript{137}

h. Nontheistic Religions. Other Nontheistic Religions such as Scientology,\textsuperscript{138} Theosophy,\textsuperscript{139} and Anthrosophy\textsuperscript{140} similarly include evolutionist doctrines.

i. Atheism. Atheism generally bows to a doctrinal belief in evolution.\textsuperscript{141} Although many Atheists do not regard their viewpoint as religious, Atheism receives protection under the Free Exercise Clause, and therefore must be regarded as subject to establishment along with any other secularistic philosophy.\textsuperscript{142}

2. Public School Unneutrality Toward Those Religions

Public schools that present only evolution-science and not creation-science advance those religions that include evolutionary doctrines and oppose those religions that include creationist doctrines.

\textsuperscript{137} As the Supreme Court stated in Torcaso v. Watkins: “Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.” 367 U.S. 488, 495 n.11 (1961). \textit{E.g.,} Malnak v. Yogi, 440 F. Supp. 1284, 1326 n.29 (D.N.J. 1977), \textit{aff’d per curiam,} 592 F.2d 197 (3d Cir. 1979); Kauper, supra note 50, at 21 (“According to Torcaso secular or humanistic religions enjoy the same liberty under the first amendment as do theistic religions. It should follow then that naturalistic or secular religions are religions also for the purpose of the Establishment Clause and that it is as inappropriate for government to establish nontheistic ideologies as it is to establish theistic ideologies.”) (footnotes omitted); Toms & Whitehead, \textit{The Religious Student in Public Education: Resolving a Constitutional Dilemma,} 27 Emory L.J. 3, 10 (1978) (“The Supreme Court recognized that the first amendment grants the same protections to and imposes the same limitations on secular or humanistic religions as are applicable to theistic religions. It logically follows then that the government is prohibited from establishing nontheistic or secular ideologies in the public schools, just as it is prohibited from establishing theistic practices.”) (footnotes omitted). \textit{See generally} Whitehead & Conlan, supra note 25.

\textsuperscript{138} L. HUBBARD, \textit{SCIENTOLOGY: A HISTORY OF MAN} 22 (1965) (“the discovery of the GE (genetic entity) makes it possible at last to vindicate the theory of evolution proposed by Darwin . . . .”); L. HUBBARD, \textit{DIANETICS AND SCIENTOLOGY} 50 (2d ed. 1974) (“The proposition on which dianetics was originally entered was evolution.”).

\textsuperscript{139} H. BLAVATSKY, \textit{THE KEY TO THEOSOPHY} 65 (1889) (“No one creates [the universe]). Science would call the process evolution . . . . we, Occultists and Theosophists, see in it the only universal and eternal reality . . . .”).

\textsuperscript{140} Anthrosophy, 8 \textit{ENCYCLOPEDIA OF PHILOSOPHY} 13 (P. Edwards ed. 1967).


This primary effect of aiding some religions and opposing others constitutes unneutrality in violation of the tripartite test applied to the Establishment Clause.

This analysis does not argue that evolution-science itself is a religion, any more than creation-science itself is a religion. In fact, evolution may be presented either in scientific terms as a scientific explanation (evolution-science) or in religious terms as a theological doctrine (evolutionist religions). Similarly, creation may be framed either in scientific terms as a scientific explanation (creation-science) or in religious terms as a theological doctrine (creationist religions). This analysis instead suggests that teaching either scientific explanation in the absence of neutralization by the other explanation advances religions consistent with that explanation and opposes contrary religions. Public schools that teach evolution-science but not also creation-science violate the Establishment Clause of the first amendment. 143

B. Violation of the First Amendment Protections for Freedom of Religious Exercise and Freedom of Belief by Exclusive Presentation of Evolution-Science

This section discusses whether unneutral instruction in public schools exclusively in evolution-science abridges freedom of religious exercise and freedom of speech and belief. 144 Religious or philosophic beliefs in creation clearly are protected exercises of freedom of religion and freedom of belief, and religious or philosophic disagreement with evolution clearly is a protected form of freedom of belief and academic freedom. 145 Public school instruction only in evolution-science significantly burdens those protected convictions and beliefs. 146 Instruction in just evolution-science is not justified by any compelling state interest, and is not served by the least burdensome means because creation-science may be taught along with evolution-science. 147 Public school teaching of evolution-science alone, to the exclusion of creation-science, simply amounts to indoctrination in evolution-science and censorship of creation-science.

143. See generally Bird, 1979 HARV. J.L. & PUB. POL'Y at 198-204; Note, supra note 25.
145. See infra notes 149-54 and accompanying text.
146. See infra notes 155-79 and accompanying text.
147. See infra notes 183-92 and accompanying text.
Courts that confront a first amendment issue generally look at three aspects of first amendment analysis:

1. **Protected Exercise**—A protected exercise of freedom of religion or of belief;
2. **Governmental Burden**—A significant governmental burden on the protected exercise of religion or belief;
3. **No Justification**—A lack of a compelling state interest, or of the least burdensome means, to justify that governmental burden.  

These elements are discussed next in sequence.

1. **Protected Exercise of Freedom of Religious Exercise and of Freedom of Belief**

Many religious faiths have creationist doctrines. Like evolutionist religions, creationist faiths span the entire religious spectrum to include Protestant, Catholic, Jewish, and non-Judeo-Christian faiths. Creationist religions are not by any means limited to Fundamentalism, and the vast majority of creationists are not Fundamentalists. Examples of creationist religions are

- **Protestant:**
  - Conservative Evangelical denominations, such as Missouri Synod and Wisconsin Synod Lutheranism; Presbyterian Church in America and Reformed Presbyterian Church; Free Will Baptist and most Southern Baptist churches; Southern Methodist Church and Free Methodist Church; Brethren, Christian and Missionary Alliance; Christian Reformed Church; Mennonite groups; and Pentecostalism.

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149. For the protected exercise of religious convictions of creation and philosophic beliefs against evolution, see generally Bird, 87 Yale L.J. at 519-22.

150. Many religious faiths hold to a religious belief in evolution: Protestant faiths such as (a) Religious Humanism and Unitarianism, (b) Theological Liberalism, and (c) NeoOrthodoxy; (d) Modernist Roman Catholicism; (e) Reform Judaism; and non-Judeo-Christian faiths such as (f) Buddhism and Hinduism, (g) Secular Humanism and other Humanist faiths, (h) Nontheistic Religions such as Scientology, Theosophy, and Anthroposophy, and (i) Atheism. See text accompanying notes 109-43.

Fundamentalists, such as the Independent Baptists, Independent Methodists, and Independent Presbyterians.

Nonprotestant denominations, such as the Church of Christ, most of Mormonism, and Seventh-day Adventists.

Traditionalist Roman Catholicism.

Orthodox Judaism.

Islam (Muslims).

Jehovah's Witnesses.

As this chart shows, creationist religions span the religious spectrum just as evolutionist religions do, and American religions may be divided almost evenly between creationist doctrines and evolutionist doctrines.

Many other individuals have philosophic beliefs contrary to evolution. They object to exclusive public school instruction in evolution on the basis of freedom of speech and belief rather than on the basis of freedom of religious exercise.

Courts do not inquire into, and simply accept, an individual's contention that a governmental requirement is contrary to his protected religious convictions or philosophic beliefs. The contradiction between evolution-science and these religious convictions in creation or these philosophic beliefs contrary to evolution is obvious.

2. Public School Burdens on Freedom of Religious Exercise and on Freedom of Belief

Public schools burden freedom of religious exercise and freedom of belief in four ways by teaching only evolution-science. These four types of burdens, which the Supreme Court has ruled government may not impose through public schools, are

(a) Undermining religious convictions and philosophic beliefs;
(b) Compelling unconcious statements of religious conviction and of philosophic belief;
(c) Interfering with parental instilling of religious convictions and of


155. For the governmental burden on religious convictions in creation and philosophic beliefs against evolution, see generally id. at 523-36.
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philosophic beliefs;
(d) Imposing an unconstitutional condition on religious convictions and on philosophic beliefs. These burdens are significant because of several types of coercion, which courts have recognized to exist in the public school setting: mandatory instruction in particular courses, a need for important curricular material, the influence of teachers, and pressures from the peer group.

a. Burden by Undermining Religious Convictions and Philosophic Beliefs. In Wisconsin v. Yoder, the Supreme Court ruled that public schools may not undermine religious convictions of students. Amish parents and students argued that public school education beyond the eighth grade was contrary to their religious convictions. The Supreme Court found that the statute “substantially interfer[ed] with the religious development of the Amish child and his integration into the way of life of the Amish faith,” which “contravenes the basic religious tenets and practice of the Amish faith.” Analogously under the Free Speech Clause, public schools may not undermine philosophic beliefs of students. Public school presentation of only evolution-science similarly undermines religious convictions in creation and philosophic disagreements with evolution.

b. Burden by Compelling Unconscionable Statements of Religious Convictions and of Philosophic Beliefs. In West Virginia State Board of Education v. Barnette, the Court held that government may not compel students to make statements of belief contrary to their religious convictions or philosophic beliefs. The students’ religious faith and philosophy forbad them from reciting the pledge of allegiance or saluting the flag, which state law required. The Supreme Court ruled that this statutory requirement “transcends constitutional limitations . . . and invades the sphere of intellect and spirit which it is the purpose of our first amendment to our Constitution to reserve from all official control,” because “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.” In

157. Id. at 234-35.
158. Id. at 218.
160. 319 U.S. 624 (1943).
161. Id. at 642.
162. Id. at 642.
Wooley v. Maynard,163 the Court similarly forbade government from compelling unconscionable statements through requiring license plates to bear an ideological message that was contrary to religious convictions and philosophical beliefs.164 Public schools require students to give evolutionary answers on tests or to give evolutionary responses in class discussion. Just as compulsory creationist responses would abridge the religion or belief of evolutionists, compulsory evolutionist answers burden these freedoms. In this way, public school instruction in only evolution-science compels unconscionable statements of conviction and belief by students who believe in creation or who disbelieve evolution.165

c. Burden by Interfering with Parental Instilling of Religious Convictions and of Philosophic Beliefs. In Pierce v. Society of Sisters,166 the Supreme Court held that government may not unjustifiably interfere with parents' right and responsibility for instilling religious convictions and philosophic beliefs in their children. A statute that required all students to attend public schools prevented parents from selecting religious schools or private nonreligious schools to inculcate particular values. The Court ruled that this law unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control.167 In Wisconsin v. Yoder, the Supreme Court read the Pierce decision "as a charter of the rights of parents to direct the religious upbringing of their children," and ruled that this protection "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."168 Public school presentation of only evolution-science interferes with this parental interest in instilling religious convictions and philosophic beliefs.

d. Burden by Imposing an Unconstitutional Condition on Religious Convictions and on Philosophic Beliefs. In Sherbert v. Ver- ner,169 the Supreme Court ruled that government may not impose an unconstitutional condition on first amendment rights by creating a choice between enjoyment of those rights and receipt of a

164. Id. at 715.
165. See generally Bird, 87 YALE L.J. at 525-26, 537-38).
166. 268 U.S. 510 (1925).
167. Id. at 534-35.
substantial public benefit. A statute that required acceptance of available work (including Saturday work) as a prerequisite to receipt of unemployment compensation benefits rendered a sabbatarian individual ineligible. The Court held that government may not burden first amendment freedoms by forcing an individual "to choose between following the precepts of her religion in order to accept work, on the other hand."\textsuperscript{170} An important public benefit in public school is curricular material in biology,\textsuperscript{171} chemistry, physics, social studies, world history, or other subjects,\textsuperscript{172} but much of that curricular material is pervaded by evolution-science without any other explanation of origins.\textsuperscript{173} Public schools impose an unconstitutional condition on this public benefit when they impose a choice between receiving that benefit or enjoying freedom of religious belief in creation and freedom of belief opposing evolution.\textsuperscript{174}

e. Significant Burden Through Coercion Against Religious Convictions and Against Philosophic Beliefs. The burdens on religious exercise and philosophic beliefs that public schools impose by teaching only evolution-science are made significant through four forms of coercion that exist in public schools. First, mandatory instruction in many particular courses that have an evolutionary bias yields coercion to accept evolution-science. Many public schools require a biology course, which virtually always presents only evolution-science, and nearly all schools require a social studies, world


\textsuperscript{172} E.g., Goss v. Lopez, 419 U.S. 565, 576 (1975) (public education is a public benefit); Spence v. Bailey, 465 F.2d 797, 799-800 (6th Cir. 1972) (public school course is a public benefit); Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 156 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (public college education is a public benefit).

\textsuperscript{173} E.g., E. Klinckmann, Biology Teachers' Handbook 16 (2d ed. 1970) ("Because of its pervasive and comprehensive character, evolution is treated in three different ways in the BSCS materials. . . . [E]volution either as history or as process is interwoven in all other chapters where it has a place . . . ."); Lee, The BSCS Position on the Teaching of Biology, BSCS Newsletter, Nov. 1972, at 5; Bird, 87 Yale L.J. at 521-22 nn.26-30 (pervasive evolution-science in the 4 leading biology texts).

\textsuperscript{174} See generally Bird, 87 Yale L.J. at 528-31.
Students at the secondary and elementary levels are very susceptible to these pressures to accept evolution-science, and are especially susceptible to religious doubt or philosophic confusion, as much psychological research shows. Such students generally do not weigh classroom instruction analytically and do not approach religious issues abstractly, so that "critical powers may be emotionally oriented against religious beliefs, while the assertions of a popular Humanism . . . is uncritically accepted." The two significant court decisions that have denied that public school instruction in only evolution-science abridges freedom of religious exercise or freedom of belief, Willoughby v. Stever and Wright

175. Whether required or effectively compelled by important content, a biology course is taken by 92.8% of public high school students. L. OSTERNDORF & P. HORN, supra note 171, at 15, 54. The trend is toward greater enrollment. Id. at 15; L. OSTERNDORF, SUMMARY OF OFFERINGS AND ENROLLMENTS IN PUBLIC SECONDARY SCHOOLS, 1972-73, at 3, 18 (1975).


178. E.g., R. GOLDMAN, RELIGIOUS THINKING FROM CHILDHOOD TO ADOLESCENCE 239, 242 (1964); A. VERGOTE, THE RELIGIOUS MAN: A PSYCHOLOGICAL STUDY OF RELIGIOUS ATTITUDES 297, 298 (M. Said trans. 1969); E. HURLOCK, supra note 177, at 357, 360.

179. K. HYDE, RELIGIOUS LEARNING IN ADOLESCENCE 92 (1965); id. at 44.

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v. Houston Independent School District, reached their results on the basis of the lack of evidence of coercion. Neither case reached trial so evidence of coercion was not introduced, and Willeloughby did not involve coercion because the person bringing suit was not a public school student or a parent of such a student.


Courts accommodate the individual interest in freedom of religious exercise or freedom of belief with the state interest in the challenged program by means of a compelling interest test. The individual interest should prevail if government lacks a compelling state interest that requires the specific challenged instruction in the public schools, or if government has failed to use the least burdensome means to fulfill its compelling interest.

a. Lack of a Compelling State Interest. In Sherbert v. Verner, the Supreme Court stated that matters in which government has a compelling interest “have invariably posed some substantial threat to public safety, peace or order.” In Wisconsin v. Yoder, the court implicitly found that the state does not have a compelling interest in requiring public school attendance at least beyond the eighth grade. The Supreme Court employs a compelling state interest test in free religious and free speech cases.

Public schools do not have a compelling interest in teaching biology at all, as is evident because the majority do not require stu-
students to study biology before graduation. Schools clearly lack a compelling interest in teaching the evolution-science explanation of origins at all, or in teaching evolution-science as the only explanation of origins.189

b. Nonuse of the Least Burdensome Means. Even if the state has a compelling interest in a challenged program, the program's burden is justified only if no alternative approach would meet that state interest without greatly burdening first amendment rights.190 Regardless of whether public schools have a compelling interest in teaching science, or in teaching biology, or in teaching other curricular subjects, a means of fulfilling that interest that is less burdensome than teaching just evolution-science is to teach creation-science along with evolution-science, which would be constitutional.191 Another means that is less burdensome is to eliminate instruction in evolution-science and teach nothing about origins, which would also be constitutional.192

Public schools that teach only evolution-science and not also creation-science abridge freedom of religious exercise and freedom of philosophic belief, by burdening it in at least four ways without any justification by a compelling state interest with the least burdensome means.

C. Remedies for First Amendment Violations by Unneutrally Presenting Evolution-Science

Three general remedies are available when freedom of religious exercise or freedom of speech and belief are abridged; only the second and third remedies are applicable when the Establishment Clause is violated.

(1) Exemption—Exempting individuals from the challenged program;

189. E.g., Spence v. Bailey, 465 F.2d 797, 799 (6th Cir. 1972); Wooley v. Maynard, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right" and hence cannot be compelling); Hirschoff, Parents and the Public School Curriculum: Is There a Right To Have One's Child Excused from Objectionable Instruction?, 50 S. CAL. L. REV. 871, 957 (1977) (only state interests in teaching basic reading, writing, arithmetic, and constitutional government are sufficiently substantial to overcome parental objections to curricula).


191. See text accompanying notes 1-107 supra.

192. See text accompanying notes 194-97 infra.
(2) Elimination—Eliminating the program; or
(3) Neutralization—Neutralizing the burden imposed by that program, if that can be done with nonreligious material, which amounts to use of a less burdensome means to achieve the state interest.

Only neutralization, by teaching creation-science along with evolution-science in public schools, or elimination of either explanation, will adequately remedy the first amendment abridgments caused by instruction exclusively in public school classrooms in just evolution-science.

1. Exemption from Exclusively Evolutionary Courses or Lectures

Exemption of students who object to a public school course that presents only evolution-science is not an adequate remedy for abridgment of their freedom of religious exercise or of their freedom of belief. The very forms of coercion persist that make the burden on first amendment rights significant, because the unconstitutional condition on other instruction, the influence from teachers, and the pressure from the peer group continue after exemption. Also, the widespread nature of the religious conviction and philosophic beliefs abridged by instruction solely in evolution-science renders exemption infeasible as a remedy. Moreover, exemption is never an adequate remedy for violation of the Establishment Clause such as occurs when only evolution-science is taught.

2. Elimination of Both Evolution-Science and Creation-Science

Public schools may eliminate instruction in evolution-science, and indeed may eliminate instruction entirely in a subject area such as biology. In Epperson v. Arkansas, the Supreme Court overturned a state law that prohibited instruction in evolution but effectively left Genesis as the only viewpoint to be taught on the ground that the statute violated the Establishment Clause through its nonsecular legislative purpose and its unneutral effect. While an unneutral law forbidding evolution-science but not creation-science is unconstitutional, a law that eliminates all explanations of origins would be consistent with the Establishment Clause under Epper-

193. For the constitutional inadequacy of exemption see Bird, 87 Yale L.J. at 545-50.
194. For the constitutionality of eliminating both evolution-science and creation-science, see id. at 565-70.
son. Justice Black, in a concurring opinion in Epperson, recognized this in saying that "[i]t is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theory of a given doctrine." 196

3. Neutralization by Instruction in Both Creation-Science and Evolution-Science 197

Teaching the scientific evidence for creation along with the scientific evidence for evolution would remedy the abridgment of constitutional freedoms that arises from teaching only evolution-science; in other words it would neutralize public school instructions in origins. For an example of neutralization of a public school course, imagine a philosophy course that discusses the existence of God in which only the arguments of Nietzsche and Griffin against the existence of God are taught. The public school may add the arguments of Kierkegaard and Thomas for the existence of God without violating separation of church and state, and indeed must teach both viewpoints or teach neither to avoid violating the Establishment Clause.

The same is true of current instruction in just evolution-science. Public schools may add creation-science without violating the Establishment Clause, and indeed must do so if they continue to teach evolution-science. Instruction in creation-science does not involve religious material, and is not unneutral in violation of the tripartite test under the Establishment Clause as long as evolution-science is also taught. 198

Public schools constitutionally must teach creation-science if they teach evolution-science, in order to remedy the violation of the Establishment Clause and the abridgment of freedom of religious exercise of freedom of belief that result from exclusive presentation of evolution-science.

III. SUMMARY

Public school presentation of creation-science along with evolution-science does not violate separation of church and state (the Establishment Clause), because it is nonreligious instruction in a

196. Id. at 111 (Black, J., concurring).
198. For the constitutionality of neutralizing public school instruction with both creation-science and evolution-science, see Bird, id. at 554-63; Bird, 1979 HARV. J.L. & PUB. POL'y at 165-74.
scientific explanation in a neutral manner. Classroom instruction in only evolution-science to explain the origin of the universe, life, and man violates three first amendment provisions: (A) establishment of religion, (B) freedom of religious exercise, and (C) freedom of belief. Because of these first amendment abridgments, public schools either must teach both scientific explanations of origins—creation-science and evolution-science—or they must eliminate both explanations of origins, because of these three first amendment violations.

Giving students the opportunity to study the scientific evidence for both explanations, rather than indoctrinating students in evolution-science and censoring evidence for creation-science, is precisely what academic freedom demands. The words of Clarence Darrow in a past age of censorship of evolution-science are poignantly applicable in the present age of censorship of creation-science: it is "bigotry for public schools to teach only one theory of origins."199

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199. Note 1 supra.
I. INTRODUCTION

Wendell Bird restates a number of points that he has previously made in connection with the teaching of "creation-science" in the public elementary and secondary schools. Although we disagree with much of what he has said, his article does illustrate some unresolved issues of church-state relations. Moreover, it illustrates the limits of rational discourse in a situation in which principles are dogmatically accepted and language is manipulated so as not to conflict with the dogma.

II. NATURE AND ANALYSIS OF BIRD'S THESIS

A. A Summary of Bird's Views

Bird argues that the teaching in the public elementary and secondary schools of only "evolution-science" and not "creation science" burdens the free exercise of religion on the part of those who accept the biblical account of creation and establishes religions that favor an evolutionary explanation of the origins of the earth and man. One acceptable remedy for such constitutional violations, according to Bird, is the equal treatment of "evolution-science" and "creation-science" in the public schools. Moreover, Bird argues that such equal treatment does not itself violate the Establishment Clause of the first amendment. Bird maintains that "creation-science" is really a science and not a religion; at least, he


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Both authors are members of the American Civil Liberties Union; this article, however, is not written in a representative capacity.

3. Bird, supra note 1, text accompanying notes 143-179.
4. Id., text following note 198.
5. Id.
says, it is no more of a religion and no less of a science than evolution.\textsuperscript{6}

The only other remedy acceptable to Bird is the exclusion of both "creation-science" and "evolution-science" from the curricula of public elementary and secondary schools.\textsuperscript{7}

**B. Extent to Which the United States Constitution Permits or Requires Teaching of "Creation-Science" in Public Elementary and Secondary Schools**

Although Bird claims that equal treatment of "creation-science" and "evolution-science" is constitutionally compelled, one may profitably begin by considering whether such treatment is permissible. If it is not permissible, then, \textit{a fortiori}, it cannot be constitutionally required.

Although no Supreme Court decisions directly deal with Bird's view that the Establishment Clause of the first amendment, as made applicable to the states by the fourteenth amendment, is violated by the failure to give equal treatment to "creation science,"\textsuperscript{8} Balanced Treatment for Creation-Science and Evolution-Science Act, Ch. 590, § 4(a) 1981 Ark. Acts 1231-32 (repealed 1982). The statutory use of the term "kinds" is especially significant insofar as this term has no scientific meaning; it is, however, found in \textit{Genesis}: "And God said, 'Let the earth bring forth living creatures according to their kinds.'" \textit{Genesis} 1:24 (Revised Standard Version).

\textit{No Supreme Court case has explicitly dealt with the question whether "creation-science" must be taught if "evolution-science" is taught. In Epperson v. Arkansas, 393 U.S. 97 (1968), the Supreme Court struck down an Arkansas statute which forbade the teaching of evolution in the schools. In so holding, the Court said, among other things:}

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

\textit{Id. at 103-04. Of course, neutrality would require the teaching of "creation-science" as well as evolution only if it were established that "creation-science" was indeed science. As indi-}
in *McLean v. Arkansas Board of Education,* a United States district court found unconstitutional a state statute that required the equal teaching or treatment of "evolution-science" and "creation-science." The court held that the Arkansas statute failed the three-pronged test of *Lemon v. Kurtzman:*

1. The primary purpose of the drafter of the statute and of the legislator who introduced the bill in the legislature was to advance the religious views of those who believe in the first creation story of Genesis;
2. The primary effect of the statute was to enhance religion, specifically the religious views of those who adhere to a "literal" interpretation of the Bible and specifically the first biblical story of creation in *Genesis;*
3. The effort to prevent religious indoctrination in the teaching of "creation-science" would excessively entangle government with religion.

The court found that "creation-science" is not a science in the commonly accepted meaning of that term; that "cre-
ation-science” violates a general principle of scientific endeavor that the conclusions of science are tentative, that is, are not necessarily the final word and are subject to being refuted by other evidence; and that the principles of “creation-science” are not subject to being refuted by empirical evidence discoverable through normal scientific methods.14

If we assume, for the sake of argument, that the district court in Arkansas correctly applied the pertinent constitutional principles,15 then it is clear that Bird’s assertions are incompatible with controlling constitutional doctrine. If a state statute that requires the teaching of “creation-science” along with “evolution-science” is violative of the first and fourteenth amendments, then certainly there can be no principle under these amendments that, independently of any statute, requires that “creation-science” be taught along with “evolution-science.”

14. The methodology employed by creationists is another factor which is indicative that their work is not science. A scientific theory must be tentative and always subject to revision or abandonment in light of facts that are inconsistent with, or falsify, the theory. A theory that is by its own terms dogmatic, absolutist and never subject to revision is not a scientific theory.

The creationists’ methods do not take data, weigh it against the opposing scientific data, and thereafter reach the conclusion stated in Section 4(a). Instead, they take the literal wording of the Book of Genesis and attempt to find scientific support for it. Id. at 1268-69.

That the district court’s conclusion in McLean is correct is demonstrated, for example, by passage from the Forward to a book prepared by the Institute for Creation Research:

Evolutionist teaching is not only harmful sociologically, but it is false scientifically and historically. Man and his world are not products of an evolutionary process but, rather, are special creations of God. According to the Biblical record, God Himself wrote with His own hand these words: 'For in six days the Lord made heaven and earth, the sea, and all that is in them is ....' (See Exodus 20:11, 31:17-19).

That being true, it follows that real understanding of man and his world can only be acquired in a thoroughgoing creationist frame of reference. True education in every field should be structured around creationism, not evolutionism.

INSTITUTE FOR CREATION RESEARCH, SCIENTIFIC CREATIONISM iii (H. Morris ed. 1974).

15. The approach taken by the district court does seem to be consistent with one of the latest Supreme Court opinions in the area of establishment of religion. See Stone v. Graham, 449 U.S. 39 (1980). In Stone, the Court struck down a statute requiring the display of the Ten Commandments in each public classroom in the state. In so doing, the Court disregarded a statement of secular purpose set forth in the statute and concluded nevertheless that the requirement had no secular legislative purpose. Id. at 41-42.

This is not to say that the issue is free from doubt or that the Supreme Court has been consistent in interpreting the potentially conflicting Establishment and Free Exercise Clauses. See generally Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. PITT. L. REV. 673 (1980); Pepper, Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause, 1981 UTAH L. REV. 309.
C. Exemption As a Possible Constitutional Remedy for Burdens on Free Exercise of Religion

Bird may be correct in asserting that students who have religious objections to evolution are subjected to an unconstitutional interference with the free exercise of their religion by compulsory courses in which evolution is taught. Certainly such cases as Wisconsin v. Yoder, in which the Amish were granted an exemption from part of the compulsory school laws (in regard to students who had finished the eighth grade but had not yet reached the age of sixteen), would tend to support this view. Of course, the remedy in Yoder was merely an exemption of the objectors' children from a few years of compulsory education; it did not take the form of a requirement of equal treatment of views that were consistent with the religious beliefs of the Amish who were claiming an interference with the free exercise of their religion.

The matter is not free from doubt, however, especially in light of United States v. Lee, in which the Supreme Court very recently upheld the Federal Social Security Act's failure to grant an exemption from coverage to "Old Order Amish" employers (as distinguished from those who are self-employed). The Court assumed

17. Aided by a History of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American Society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish Communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one which probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

Id. at 235-36.
18. 102 S.Ct. 1051 (1982).
19. The statute provides in pertinent part:

Any individual may file an application . . . for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenents or teachings of such sect or division by reason of which is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments towards the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Secur-
that the act burdened the free exercise of the Amish religion, but nevertheless upheld it because the government had met the test of constitutionality by showing that the statute "is essential to accomplish an overriding governmental interest."\textsuperscript{20} The Court concluded that compulsory participation by employers "is indispensable to the fiscal vitality of the social security system."\textsuperscript{21} Specifically, the Court alluded to the difficulty in attempting to "accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."\textsuperscript{22}

Although it is possible to view \textit{Lee} as limited to exemptions from taxes,\textsuperscript{23} some of the language quoted above suggests that exemptions from participation in school programs based on religious beliefs might be treated similarly by the Court. Particularly, "myriad exceptions flowing from a wide variety of religious beliefs" would have to be recognized if even one exception were recognized; evolution is not the only principle to which a person might be religiously opposed. For example, a Christian Scientist might object to references to advances in medical science that might be discussed in courses dealing with health.\textsuperscript{24} Moreover, one of the reasons given by Bird in support of his view that mere exemption is not adequate is that it would not "counter the coercive effects of influence from teachers and pressure from peers."\textsuperscript{25} If he is right, then exemption might have to take the form of exemption from public education generally, since such influence and pressure are not

\textsuperscript{20} 102 S.Ct. at 1055.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 1056.
\textsuperscript{23} The Court emphasized the potential interference with the operation of the tax system: "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." Id. at 4204.
\textsuperscript{24} For example, in a course in health, students might learn the basic principles of cardiopulmonary resuscitation. Teaching materials might include \textit{D. Effron, Cardiopulmonary Resuscitation—CPR} (2d ed. 1980). The presuppositions of this material, which is based on modern medical science, are arguably inconsistent with the approach taken by the founder of Christian Science, Mary Baker Eddy: "What is the cardinal point of difference in my metaphysical system? This: that \textit{by knowing the unreality of disease, sin, and death, you demonstrate the allness of God.}" M. Eddy, \textit{Unity and Good} 9-10 (1825) (emphasis is original).
\textsuperscript{25} Note, \textit{supra} note 2, at 547.
likely to be restricted to courses in biology. This possible result might cause the Court to find Lee rather than Yoder dispositive.

D. Ramifications of Bird’s Contention that Equal Treatment must be Afforded to Both “Creation-Science” and “Evolution-Science”

As has been pointed out, Bird has argued that “creation-science” is at least as scientific as evolution and no more religious than evolution. In reaching this conclusion, he argues that a number of “religions” have views that are compatible with evolution. Among those religions, according to Bird, is “atheism.”

It is true that in one context at least—in interpreting the conscientious objector provision of the Selective Service Act—the United States Supreme Court has given the phrase “religious training and belief” a very broad interpretation. In several cases the Court has indicated that any belief that is analogous to a belief in a Supreme Being on the part of one who is unquestionably religious in the traditional sense is a religious belief. For this reason, it is not

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26. It is difficult to imagine how one who believed in a “literal” interpretation of the Bible could function in a modern public school. Compliance with the “Rules Concerning the Clean and Unclean,” found in Leviticus, for example, would appear to be difficult, to say the least. It is not merely the dietary restrictions that would cause a problem—see, for example, Leviticus 11:7 (unclean nature of pig), 11:10 (unclean nature of fish without fins or scales)—but also such restrictions as the prohibition on the touching of a menstruating female. See Leviticus 15:19.

27. See supra note 6 and accompanying text.

28. The following would characterize themselves as religion: Religious Humanism and Unitarianism, Evolutionary Humanism, Theological Liberalism, Neoorthodoxy, Reform Judaism and Nontheistic Religions such as Theosophy and Scientology. Most individuals would also characterize the following as religions: Secular Humanism, Buddhism, and Atheism.

Bird, supra note 1, text accompanying note 114.

It is interesting to note that, when the Supreme Court listed a number of non-theistic “religions” in the context of declaring invalid a provision of the Maryland Constitution that, in effect, permitted individuals to be denied public office because of a refusal to declare a belief in God, the Court did not list “atheism” as a religion: “Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.” Torcaso v. Watkins, 367 U.S. 488, 499 n.11 (1961).

29. For example:

We have concluded that Congress, in using the expression “Supreme Being” rather than the designation “God,” was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief “in relation to a Supreme Being” is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.
totally unreasonable to say that any deeply held belief is or can be regarded as "religious."

The difficulty with this analysis is that Bird uses it to assert that the teaching of only "evolution-science" has the primary effect (second prong of the Lemon test) of advancing certain "religions" in preference to other religions. From this he concludes that "creation-science" must also be taught so that this religious preference will be removed and so that the Establishment Clause will not be violated. But if any sincerely or deeply-held belief is religious, then almost all beliefs are religious; if a particular belief is taught, then under Bird's analysis, all competing beliefs regarding the same subject matter must also be taught.

A moment's reflection will show that such a principle, if enforced, would make teaching in the public schools impossible. All beliefs might be thought to have counter-beliefs which are, in Bird's sense, religious; thus all competing beliefs must be taught, and no beliefs may be left out. As a consequence, all discretion in


What is necessary under Seeger for a registrant's conscientious objection to all war to be "religious" within the meaning of § 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. Id. 339-40 (emphasis added).

Justice Harlan concurred in the result on the ground that this statutory interpretation was not justified, but that the discrimination in favor of religious views was unconstitutional:

The constitutional question that must be faced in this case is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate all exemptions for conscientious objectors. Such a course would be wholly "neutral" and, in my view, would not offend the Free Exercise Clause, for reasons set forth in my dissenting opinion in Sherbert v. Verner. . . . However, having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment. Id. at 356 (Harlan, J., concurring) (emphasis in original).

30. Public schools that present only evolution-science and not creation-science advance these religions that include evolutionary doctrines and oppose those religions that include creationist doctrines. This primary effect of aiding some religions and opposing others constitutes unneutrality in violation of the tripartite test under the Establishment Clause.

Bird, supra note 1, text following note 142. The Supreme Court has recently stated that in instances of denominational preference, such preference is unconstitutional, "unless it is justified by a compelling governmental interest . . . and unless it is closely fitted to further that interest." Larson v. Valente, 102 S.Ct. 1673, 1685 (1982).
regard to matters of curriculum must cease, and all knowledge must be taught.\textsuperscript{31} For example, books used in public schools in history and civics often refer to the free market system. The free market, however, is not the only method by which economic matters may be approached. One of the competing theories—Marxism\textsuperscript{32}—occupies a position in the belief system of some people that is analogous to the belief in a Supreme Being on the part of those who are religious in the traditional sense.\textsuperscript{33} Consequently, principles of Marxism must be given equal treatment with principles of the free market.

Consider another example. Secondary schools often give instruction in hygiene, teaching students basic principles of cleanliness. According to at least one religion, Sikhism, however, hair is not permitted to be removed from the body, and facial hair must be kept in a turban.\textsuperscript{34} Arguably, this is inconsistent with the principles of hygiene taught in public schools. If Bird's thesis is accepted, then the school must give equal time to the cleanliness precepts of the Sikhs. Similarly, although students are often taught to refrain from using dangerous drugs, members of the Native American Church believe that peyote is a deity;\textsuperscript{35} as part of their service they utilize this drug and, in fact, are exempt from

\textsuperscript{31} Cf. Wright v. Houston Indep. School Dist., 366 F. Supp. 1208, 1211 (S.D.Tex. 1972), aff'd per curiam, 486 F.2d 137 (5th Cir. 1973), cert. denied, 417 U.S. 969 (1974) ("To insist upon the presentation of all theories of human origins is . . . to prescribe a remedy that is impractical, unworkable and ineffective.").

\textsuperscript{32} See generally, e.g., L. Marcus, Dialectical Economics—An Introduction to Marxist Political Economy (1975).

\textsuperscript{33} That at least some Marxists accept Marxism as an ultimate truth analogous to the belief in God on the part of those adhering to traditional theistic religions is suggested by the manner in which Marx and Engels are revered in the Soviet Union. That Marxism can be accepted as dogmatically as the Bible sometimes is, is suggested by the works of Milton Rokeach, who found that the English communists were the most dogmatic of any group he studied. M. Rokeach, The Open and Closed Mind 115 (1960). Co-author Davidow's personal experience confirms Rokeach's findings: When he was in law school in 1961, he met two graduate students from the Soviet Union who accepted Marxism dogmatically, that is, in much the same way that some people insist upon the "literal" truth of the seven-day story of creation.

\textsuperscript{34} [A] Sikh will not alter his human form from the way the Creator has created it, thereby not removing or permitting to be removed, any hair from the body, and protecting his human form by wearing the unshorn hair on top of the head in a Rishi knot and covered with a cotton cloth known as a "turban."

Sherwood v. Brown, 619 F.2d 47, 48 (9th Cir. 1980).

\textsuperscript{35} For a discussion of the use of peyote by Indians and a non-Indian group, members of which claim that peyote is a deity, see Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979), aff'd mem., 633 F.2d 205 (2d Cir. 1980).
federal regulations that otherwise prohibit the possession of such a
drug.\textsuperscript{36} Presumably, if Bird’s thesis is accepted, the school authori-
ties must present the views of the Native American Church when
they discuss certain dangerous drugs. The impossibility of imple-
menting Bird’s thesis is an obvious and sufficient reason for its
rejection.

III. UNRESOLVED ISSUES OF CHURCH AND STATE ILLUSTRATED BY
BIRD’S ASSERTIONS

Bird’s arguments do highlight one of the unsettled issues in the
church and state area—when one can or must distinguish between
religion and non-religion. As indicated above, the Supreme Court
has stated, in the context of an interpretation of the Selective Ser-
vice Act, that a very broad interpretation is to be given to “reli-
gious training and belief.”\textsuperscript{37} This definition appears so broad that
almost any deeply held belief might be regarded as religious. It
would seem that in this context the Court, in effect, has said that
one cannot distinguish between what is and what is not religious.

Similarly, the Supreme Court has recently held that, once a state
institution has created a public forum, it may not discriminate
against religious worship as contrasted with mere beliefs or ideas
about religion.\textsuperscript{38} Thus, once the forum becomes open, persons who
wish to discuss religion or other matters and those who wish to
conduct worship services are equally entitled to the use of the fo-
rum.\textsuperscript{39} In still another context the Court has also held that it is not
permissible to determine whether a particular group is religious or
not for the purpose of issuing a license to solicit funds.\textsuperscript{40}

\textsuperscript{36} 21 C.F.R. § 1307.31 (1981).
\textsuperscript{37} See supra note 30 and accompanying text.
\textsuperscript{38} Widmar v. Vincent, 102 S. Ct. 269 (1981).
\textsuperscript{39} In Widmar, the Court treated the issue as one of free speech. Accordingly, it stated
that the regulation could survive constitutional attack only if “necessary to serve a compel-
ling state interest and . . . narrowly drawn to achieve that end.” Id. at 274. In concluding
that the state had not met the test, the Court said, \textit{inter alia}:
The University’s argument misconceives the nature of this case. The question is not
whether the creation of a religious forum would violate the Establishment Clause.
The University has opened its facilities for use by student groups, and the question is
whether it can now exclude groups because of the content of their speech . . . . In
this context we are unpersuaded that the primary effect of the public forum, open to
all forms of discourse, would be to advance religion.
\textit{Id.} at 276.
\textsuperscript{40} It will be noted, however, that the Act requires an application to the secretary of
the public welfare council of the State; that he is empowered to determine whether
the cause is a religious one, and that the issue of a certificate depends upon his af-
The Court has said, however, that one must distinguish between religious worship and mere ideas about religion in the context of prayer or Bible reading in the public schools. Consistently with the Establishment Clause, then, schools cannot require Bible reading or prayers if such are to be regarded as part of a religious service. Nevertheless, the Court has indicated that it would be permissible to discuss, in a secular fashion, the Bible as literature or history.

Conceptual confusion results from a situation in which sometimes one must determine whether something is a mere discussion of religion or a worship service, and at other times one may not firmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

Cantwell v. Conn., 310 U.S. 296, 305 (1940).

Similarly, in United States v. Ballard, 322 U.S. 78 (1944), the Supreme Court held that the trial judge properly withdrew from the jury's consideration in a fraud case the question of the truth or falsity of certain religious beliefs of the defendant; the trial court had submitted to the jury only the question whether the defendant entertained these beliefs in good faith. Id. at 87-88.

43. We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessing as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious, none of the respondents has denied this and the trial court expressly so found.

370 U.S. at 424-25.

Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the prevailing religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for non-religious moral inspiration or as a reference for the teaching of secular subjects.

374 U.S. at 224.

44. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

374 U.S. at 225 (dictum).
distinguish what is religious from what is not religious. In part, this confusion is a reflection of the basic tension between the Establishment and Free Exercise Clauses, a tension that the Supreme Court has yet to resolve. Preference given to religion as such is said to violate the Establishment Clause, but a failure to prefer religion may be seen as a violation of the Free Exercise Clause. For example, although the Court has indicated that a requirement of Bible reading in school prefers religion to non-religion, thereby constituting an establishment of religion, the failure to provide exemption, for a person who had a religious objection to working on Saturday, from a mandate that an unemployed person accept Saturday employment, is a violation of the Free Exercise Clause.

In the latter instance, the failure to prefer a religious objection to work is regarded as a violation of free exercise and not as an establishment, even though one could just as easily argue the converse. It is possible, of course, for the Court to resolve this dilemma by saying that states and the federal government have greater authority either to act more favorably towards religion or more negatively...

45. Among recent discussions of the tension between the Establishment and Free Exercise Clauses in the opinions of the United States Supreme Court, see, e.g., Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. PRRR. Law 673 (1980); Pepper, Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause, 1981 Utah L. Rev. 309.


48. Striking down the practice of Bible reading in Schempp, the Supreme Court quoted with approval from a prior opinion: “Neither [a state nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religious as against non-believers.” 374 U.S. at 220, quoting Torcaso v. Watkins, 367 U.S. 491, 495 (1961). It is fair to say, however, that the evidence in the case also suggested that the practice of Bible reading was also a discrimination in favor of certain religions (certain Christian sects) and against certain other religions (for example, Judaism). Id. at 209-10.


50. The meaning of today's holding, as already noted, is that the State must furnish unemployment benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. The State, in other words, must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated.

It has been suggested that such singling out of religious conduct for special treatment may violate the constitutional limitations on state action. . . . My own view, however, is that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant.

Id. at 422 (Harlan, J. dissenting) (emphasis in the original) [citations omitted].
towards religion; this, indeed, is the position taken by Justice White. In the absence of such an approach, however, the tension is likely to remain, and no consistent resolution of the problem seems at hand. However the conflict is settled, it is unlikely that a solution can be found that will be acceptable to Bird, because his argument is premised on the false assumption that "creation-science" is a "science."

IV. BIRD'S USE OF LANGUAGE: THE "SCIENCE" OF CREATIONISM

Bird asserts that the concept of "science" encompasses the beliefs or doctrines of "creation-science." As already indicated, a federal district court in Arkansas recently rejected the notion that

51. In my view, just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion. In other words, I believe the states to be a good deal freer to formulate policies that affect religion in divergent ways than does the majority.

Widmar v. Vincent, 102 S.Ct. 269, 281 (White, J., dissenting).

52. For a useful discussion of possible ways of resolving conflicts between the Establishment and Free Exercise Clauses, see Pepper, Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause, 1981 Utah L. Rev. 309. Among other things, Professor Pepper deals with the seemingly simple solution of adopting a "neutral" approach:

One appealing and elegant approach removes the conflict by reading the religion clauses as a unitary prohibition. Professor Kurland suggests that the clauses must be read as a limitation "akin to . . . the equal protection clause," prohibiting use of religious classifications "for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations." This understanding is attractive for its simplicity, comprehensibility, and consistency. Its primary weaknesses are an absence of support in the text or history of the clauses and its evisceration of the Free Exercise Clause.

Id. at 346-47 (footnotes omitted).

Another approach to the resolution of the tension between the Establishment and Free Exercise Clauses is to define "religion" differently in the two clauses:

These changed circumstances made it all but inevitable that the Supreme Court would modify the narrow understanding of "religion" that had characterized the early development of this area of the law. Clearly, the notion of religion in the free exercise clause must be expanded beyond the closely bound limits of theism to account for the multiplying forms of recognizably legitimate religious exercise. It is equally clear, however, that in the age of the affirmative and increasingly pervasive state, a less expansive notion of religion was required for establishment clause purposes lest all "humane" programs of government be deemed constitutionally suspect. Such a two-fold definition of religion—expansive for the free exercise clause, less so for the establishment clause—may be necessary to avoid confronting the state with increasingly difficult choices that the theory of permissible accommodation . . . could not indefinitely resolve.

“creation-science” is science in the traditionally accepted meaning of the term.53

As Justice Holmes said, almost anything can be given a logical form, if one properly manipulates the major and minor premises.54 For example, “that which is scientific is true; my views are scientific; therefore, my views are true.” The real question, then, is whether the major and minor premises have been properly defined. In turn, this depends upon language and the definition of terms. Few today would be so naive as to suggest that most words have only one meaning.56 Nevertheless, if communication is to be possible at all, terms must have some reasonably well accepted definition, at least in the particular context in which they are used.56

Suffice it to say that there are many degrees of specificity of definition. Some words have fairly precise meanings; other words are used very differently by different people.57 Bird gives the word

53. See supra note 1 and accompanying text.
54. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You can always imply a condition in the contract. But why do you imply it?
Holmes, The path of the Law, 10 HARV. L. REV. 457, 466 (1897).
56. The problem may be illustrated by the ambiguous meaning of the term “democracy.” Citizens of the United States have a general idea of what is meant by “democracy”; they may differ in some respects, but most assume that a democracy involves free election of representatives or an election, as illustrated by the New England Town Meeting, in which all people vote directly for or against a particular law. The term has also been used, however, by regimes in which there is no such direct popular election of representatives and no direct popular participation in the making of laws. In some of these countries, rule has been by an elite group organized into a particular party. Consider, for example, the People’s Republic of China. The same term may be used; nevertheless, the meaning is quite different. The attribution of different meanings to the same word is one of the difficulties encountered in international negotiations.
57. Even ostensibly “precise” words can sometimes have rather different meanings, depending on the context:
If the rule excluding vehicles from parks seems easy to apply in some cases, I submit this is because we can see clearly enough what the rule “is aiming at in general” so that we know there is no need to worry about the differences between Fords and Cadillacs. If in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it has no purpose. It is rather because, for example, whether the rule be intended to preserve quiet in the park, or to save carefree strollers from injury, we know, “without thinking,” that a noisy automobile must be excluded.
What would Professor Hart say if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the
“science” a meaning that is not readily acceptable to many members of the scientific community. To understand the extent to which Bird’s use of the term “science” departs from the commonly accepted meaning of the term, one must be aware of the different approaches to the receipt of information that are taken by creationists and evolutionists.

Evolutionists and creationists differ from each other in relation to their beliefs in their models and their use of evidence or experimental results. Evolution scientists recognize that their body of theory will change through time as experimental questions are asked and results are obtained. The philosophy of science teaches them that they can be sure only of ideas that are wrong, and, therefore, they conditionally accept their current ideas and expect them to change over time in the general direction of greater fidelity to the real world.

Creationists differ radically in regard to the source of their knowledge and their treatment of evidence. They begin with complete faith in their picture of the world and believe that any evidence that does not support evolution proves their side. They seem to believe that evolutionary theory as it currently stands and their ideas are the only possibilities. No evidence appears to force them ever to question their beliefs.

In using the term “science” as he has, Bird has departed substantially from the commonly accepted meaning of that term. In—

proposed memorial as an eyesore, support their stand by the “no-vehicle” rule? Does this truck, in perfect working order, fall within the core or the penumbra? Fuller, supra note 5, at 663.

58. "Scientific creatism" is a self-contradictory, nonsense phrase precisely because it cannot be falsified. I can envision observations and experiments that would disprove any evolutionary theory I know, but I cannot imagine what potential data could lead creationists to abandon their beliefs. Unbeatable systems are dogma, not science." Gould, Evolution as Fact and Theory, 2 DISCOVER 34, 35 (May 1981). See supra note 14.


61. Creationists thus seem not to be open-minded, in the sense in which Rokeach has used that term, for in his view the essence of the open mind is the capacity to “[r]eceive, evaluate, and act on relevant information received from the outside on its own intrinsic merits, unencumbered by irrelevant factors in the situation arising from within the person or from the outside.” M. Rokeach, supra note 3, at 57.
vidious comparisons come to mind. One may think, for example, of Through the Looking-Glass, in which Humpty Dumpty says, "When I use a word ... it means just what I choose it to mean—neither more nor less." Consider also the concept of "Newspeak" in Orwell's Nineteen Eighty-Four. In a sense, everyone is free to use terms in whatever way he or she chooses; in this sense "science" may mean what Wendell Bird says it means. But, clearly, if the meaning is stretched to the extent that he wishes, communication becomes virtually impossible.

V. IN DEFENSE OF EVOLUTION

One cannot evaluate the claim for equal treatment of "creation-science" and evolution without an exposure to some of the positive aspects of evolution—in particular the quantum of evidence supporting evolution—and a further explanation of some of the processes employed by evolutionists.

A. The Quantum of Evidence Supporting Evolution

People trust scientific evidence, not because any one individual experimental result is perfect and will never be questioned or reinterpreted, but because of the accumulation of vast quantities of evidence. Indeed, scientific evidence can be compared to a huge lawsuit supported by circumstantial evidence, which depends not only on a large number of individual pieces of evidence, but also on (1) the way they interlock, and (2) mutually supporting pieces of evidence from many different, theoretically independent fields of inquiry.

In short, the sheer volume of scientific evidence offers strong support for an evolutionary explanation of phenomena. Scientific inquiry is a world-wide effort. If one were to compare the numbers of pages of scientific results supportive of an evolutionary view of the world published since the Scopes trial, a little over half a century ago, it would dwarf the number of documents filed by both sides in the IBM case.

63. "No word in the B vocabulary was ideologically neutral. A great many were euphemisms. Such words, for instance, as joy-camp (forced-labor camp) or minipax (Ministry of Peace, i.e., Ministry of War) meant almost the exact opposite of what they appeared to mean." G. ORWELL, NINETEEN EIGHTY-FOUR 309 (1949).
65. U.S. v. IBM, No. 69-200 (S.D.N.Y. filed Jan. 17, 1969). One may infer from the photocopying and transcribing cost incurred by Cravath, Swaine & Moore in the recently termi-
B. Successful Use of Evolutionary Theory

Creationists seem to ignore the main reasons most scientists accept evolution: explanations of natural phenomena and prediction of fruitful new work.

1. Evolution by natural selection provides a more understandable and unified explanation of the natural world. Furthermore, one could point to successful demonstrations that cases which appear anomalous and seem initially to contradict evolutionary theory, in fact, may be explained and offer increased richness to the theory. One would dearly love to have a dollar for every "inadaptive" trait of various organisms that later work has shown to be adaptive and that now supports rather than disproves evolution.

2. Since the theory of evolution was initially proposed, an increasingly rich fossil record—new evidence after theory—has found no organisms out of expected order in a phylogenetic change from ancestral to derived forms. Many little surprises and much diversity have been added by new fossil finds, but there have not really been any major discoveries refuting a general evolutionary explanation.

3. Finally, evolution by natural selection explains the mechanisms of, and lends technical help in solving, many biological problems, such as crop and livestock improvement, and pesticide and antibiotic resistance by pests and microorganisms.

C. Polonium Rings—An Illustration of the Treatment of Anomalies

In Mclean, the district court commented on the one piece of scientific evidence which appears at first glance to cast some doubt on evolutionary theory:

Robert Gentry's discovery of radioactive polonium haloes in granite and coalified woods is, perhaps, the most recent scientific work which the creationists use as argument for a "relatively recent inception" of the earth and a "worldwide flood." The existence of polonium haloes in granite and coalified wood is thought to be inconsistent with radiometric dating methods based upon constant

nated IBM case—forty million dollars—the large amount of documentary evidence introduced. With transcripts in the case amounting to 114,493 pages, the exhibits submitted by the plaintiff numbering up 7,484 and the exhibits submitted by the defendant numbering 14,625, it is no wonder that it has been estimated that the total number of pages of material is in the millions. Telephone Interview with Ralph Dionne, Cravath, Swaine & Moore (April 22, 1982).
radioactive decay rates.\textsuperscript{66}  
The relationship of Gentry's work on radioactive polonium haloes to evolutionary theory is instructive of the process of scientific inquiry. At the moment, it is an interesting anomaly, but it has several stages to advance through in order to be completely accepted.

1. The existence of the haloes needs to be verified by other workers in the field.

2. If the existence is verified, this does not necessarily mean that the mechanism proposed by Gentry is the cause of the haloes.

3. If the haloes were produced by polonium, the implications would seem to demand an earth history on the order of 2,000 to 3,000 years, which would be less than recorded human history, even as recorded in the Bible.\textsuperscript{67}

4. Even if the evidence is supported, it is but a single case and one that disagrees both with all other radiometric dates and with all of the mutually supportive evidence from stratigraphy for the ordering of earth history: it is an anomaly.

But proven anomalies do not lead one to cease believing in an entire scientific field. Instead, anomalies suggest that there exists a larger, more inclusive paradigm, capable of explaining not only the anomalies, but also all of the older inclusive data seemingly at odds with the anomalies, within a new, broader theoretical framework. Usually the new paradigm is even more satisfactory at explaining natural phenomena than the old, as well as at explaining more separate observations. Often the previous paradigm is shown to be a special case of the new one, and not universal as once thought.

Apparent contradictions between different fields do not always refute each other; sometimes they lead to a new and far stronger

\textsuperscript{66} 529 F. Supp. at 1270.

body of theory. An excellent example of this exists in the relation of Mendelian genetics and evolutionary theory. When Mendelian genetics was rediscovered in the early twentieth century and the mechanisms of heredity were being worked out, in their investigations the geneticists used large, clearly differentiated mutations, which allowed the mechanism of inheritance to be most easily observed. This led many geneticists to believe that the field of genetics did not support evolution by relatively small quantitative changes. When the mechanisms of Mendelian genetics had been worked out, after more than thirty years of apparent conflict, population geneticists such as Wright, Fisher, Haldane, and Dobzhansky and natural historians and museum scientists such as Simpson, Mays, Rensch, and Stabbins erected present day Neo-Darwinian Synthesis, which showed that the different fields supported and reinforced each other making a stronger, more general theory.

D. Present Contentions Within Evolutionary Theory: Doubts About Mechanisms of Evolution But Not About Evolution Itself

Contentions within the field of evolutionary theory are disagreements as to the details of the mechanism of evolution. None of the disputants questions that evolution occurred and occurs presently, but only how it occurs. Gould points out that the evolution of organisms through time is what most people would call a fact. It is the data that must be explained.

Natural selection is the current, most intellectually respectable mechanism to explain evolution. Theories of natural selection or the mechanism of evolution may change, but the fact or evidence of evolutionary events will not. If the creationists dislike evolution by natural selection, they will probably abhor its successor, which is likely to be even more inclusive in its explanation of natural events and even more mechanistic in operation.

VI. Conclusion

Despite a failure to provide a consistent, coherent theory of the religion clauses; the Supreme Court has indicated that the Bible, and religion in general, can be presented in the public schools, so long as the subject is treated in a context other than worship or proselytization. A course in history would certainly be an appropriate vehicle for the discussion of the importance of traditional

69. 374 U.S. at 225.
religion in the founding and development of the United States. Similarly, a course in comparative religion and philosophy could focus on the present importance of religion, both traditional and non-traditional. It is regrettable that Bird finds this approach unsatisfactory and that he apparently feels compelled to distort the meaning of the term “science” in support of religious dogma.

Why does Bird stretch the meaning of “science” as he does? Perhaps the reason is that today in a largely secular society, “science” has positive connotations. Possibly some individuals whose views are not generally characterized as “scientific” feel at a disadvantage in relation to those whose views are thus characterized; perhaps the former resent the implication that their views are somehow less worthy. The main problem of the advocates of “creation-science” may be that, on the basis of religious conviction, they reject the validity of separation of church and state, which, in our pluralistic society, has led to secularism. What is sad and ironic is the apparent failure of the supporters of “creation-science,” who are a minority insofar as they insist upon a “literal” interpretation of the Bible, to recognize that, today in the United States, the

70. In a pluralistic society such as that existing in the United States today, in which many different forms of religion (in the traditional sense) exist, the approach that seems the least likely to offend the most people is one which does not permit religion in the traditional sense to be discussed officially.

71. Bird states, in effect, that over fourteen million Americans adhere to “religious creationism,” which he defines as the teaching “that God supernaturally created the earth and life, that He directly formed all living kinds including Adam and Eve, and that God sent a worldwide flood destroying all mankind except Noah and his family. This doctrine ordinarily involves a literal reading of Genesis, a relatively recent time for God’s creative acts, and a historical fall of the first human beings into sin.” Note, supra note 2, at 520; see id. at 519-20 n.21, 520 n.22. Obviously, this total number of adherents is a small minority of the total United States population, which was roughly 203 million in 1970 and 226.5 million in 1980. U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION 1-458 (vol. 1, pt. 1, § 2 1973); U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION AND HOUSING ADVANCE REPORTS UNITED STATES SUMMARY 4 (April 1981).

Bird also claims that “many individuals and churches within Mormonism, Roman Catholicism, and the Southern Baptist Religion affirm belief in special creation.” Note, supra note 2, at 520 n.22. He then gives the total number of adherents of each of these religions. Even if all of these persons were added to the previous total, the grand total of adherents would be a little over 78,000,000—still well short of half of the United States population. It seems highly unlikely, however, that all 48,881,872 Roman Catholics (the figure given by Bird for the total American membership of the Roman Catholic Church), for example, adhere to a “literal” reading of Genesis—especially the seven-day creation story and the relatively recent origin of the earth. There is nothing in official Roman Catholic doctrine that requires adherence to these views. The Nicene creed, for example, says nothing about Adam and Eve and nothing about when God acted in creation. Moreover, Catholic teaching about the biblical accounts of creation hardly suggests a “literal” interpretation of Genesis. For
alternative to separation of church and state would very likely be the establishment of some religion other than theirs.

Example:

The Biblical story expresses the truly transcendent, and in this sense might be called antmyth, but the manner of expression proceeds from the same thought patterns that modern authors call mythopoetic. In the creation account, after all the objectionable elements have been excised, very little remains of the Mesopotamian myth except the structure of the universe, which is not strictly a mythological concept but simply the primitive, uncritical cosmography of that day (see COSMOGONY (IN THE BIBLE)). Nevertheless, the myth form and some real elements of the myth do remain. The myth is not replaced by modern techniques of history. The objectionable story is simply replaced by another story of the same mold of literary expression. Although the account deals with a real occurrence that took place at the beginning of time, and in that sense may be called historical, it is not history in the ordinary sense of the term, for it does not intend to describe the event as preserved or recorded in the memory of man. Although dealing with cosmic origins, it is not science, for it is not intended to be a factual description of the material succession of phenomena in the process of creation. And yet, although abounding in vivid imagery, it is not purely and simply poetry or allegorical description. Again, although dealing with the activity of God, it is not even theology, in the accepted sense of the term, because it is not a synthesis of abstract concepts obtained by the analysis of phenomena. But it is teaching—Torah, a teaching about God, who is the only principle by which the origins of the cosmos and its observable order can be truly explained. The basic purpose is to instruct men on the ultimate realities that have an immediate bearing on daily life and on how to engage vitally in these realities in order to live successfully. It contains "truths to live by" rather than "theology to speculate on." A similar intention, in fact, can be said to have been the purpose of the pagan myths, even though they erred.

With the understanding of the literary form of the account, it is clear that the scientific problems of evolution, polygenism, etc., are not really involved at all. A false starting point raises false problems. One can no more accuse the ancient mythopoetic-minded teacher of scientific error than one can a modern metaphysical poet. Neither is concerned with the correspondence of their uncritical observations or concrete impressions to scientific reality, but only with the aptitude of the imagery thus engendered to express invisible reality...

Sabbath. The arrangement, evidently artificial, of the picture of creation as 6 days of work (for eight works) with a 7th-day rest is simply an imaginative way of expressing the fact that the "Sabbath observance also is willed by God. The origin of the Sabbath is not known, but it is vindicated in Genesis as the will of God, who has led his chosen people, through their hereditary customs and reasonable practices, to adopt this method of consecrating their lives to Him by regular worship. This is, in fact, the real climax of the story. All things must return to God, who made them. This is done by the Sabbath observance, which sets man apart for God alone. Sanctified by the will of God, it sanctifies man: and through him, all creation. Eschatological inference is not lacking. Man will enter into the joyous rest of the Lord when his work in this world is done. The author gives no conclusion to the 7th day. Finally, the whole of the account is permeated by the idea of goodness, which is of God. Evil has not yet appeared; but when it does, it will come from man.

In the absence of a survey of Roman Catholics, Bird's statement that "many individuals" within Roman Catholicism adhere to Bird's view of creationism is meaningless.
As a practical matter, the unfortunate aspect of the creationists’ demand that “creation-science” be given equal time is the possibility that school boards will respond to the controversy by ending the teaching of evolution in the public schools under their control. Without evolutionary theory, biology becomes something merely to be memorized. Under such circumstances, students interested in the underlying theory would be discouraged from pursuing the study of biology—surely a result to be deplored by those interested in the advancement of scientific inquiry in the United States.
RELIGION IN THE PUBLIC SCHOOLS

By David M. Treiman*

I. RELIGION IN THE PUBLIC SCHOOLS

A. Nature of the Controversy

Religion in the public schools has been a subject of controversy for many years and is today the focus of much public discussion and judicial and legislative action. There are attempts in Congress effectively to reverse the Supreme Court decision excluding prayer from public schools. Many communities are struggling with the appropriateness of Christmas plays and pageants in the public schools. Much litigation continues concerning Bible reading in public schools, despite the 1963 Supreme Court decision curtailing it. The Supreme Court recently held that the posting of the Ten Commandments in public school classrooms was unconstitutional because it was for the improper purpose of advancing religion, though one year later it decided that a student religious group constitutionally could not be denied the use of state university facilities. Now many courts and state legislatures are turning their attention to the teaching of a Biblical theory of creation in biology.


1. This article does not deal with the related problem of public aid to parochial schools, though cases on this subject are analyzed to the extent they shed light on the application of the Establishment Clause of the first amendment to the topic of religion in the public schools.

Governmental control of the religious content of private education is also beyond the scope of this article. See e.g., State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).


3. Proposals in the 97th Congress, 1st session (1981) to restrict the jurisdiction of the federal courts to prevent prayer in the public schools include, inter alia, S. 481, S. 1742, H. 72 and H. 326.


5. See Annot. 45 A.L.R.2d 742 (1956).


courses in public schools.9

B. Concerns of the Courts

Religion in the public school classroom is an especially controversial issue because it combines two very emotional concerns—religion and the training (or indoctrination) of children.10 Two basic questions are raised by the controversy over prayer, Bible reading, the Ten Commandments, Christmas plays, and creation science in the public schools: (1) which topics are religious and (2) to what extent can topics that are religious be discussed or studied in the public schools? The goal of this article is to identify the problems inherent in the courts' current approach to answering these questions and to suggest an alternative approach.

In the cases—dealing with prayer, the Bible, and the Ten Commandments—the Supreme Court has decided the topics have clearly been religious, and the litigation has focused on the second issue: the extent to which religious subjects may be studied and discussed in the public schools. The Supreme Court has devoted much attention to the question whether a given topic is a religious one.

Lower federal courts, however, have addressed this inquiry, regarding both public schools and other settings. In McLean v. Arkansas Board of Education,11 the district court attempted to resolve whether "creation science" was a religious or a scientific subject, and whether science was in fact a religious subject.12 In another context, a district court inquired whether the nativity scene was secular in nature.13 In these cases, and in others exploring whether certain symbols or subjects are secular or religious,14 the courts relied on the testimony of expert witnesses and treated

12. Id. at 1266-67, 1273-74. The court found the "Section 4(a) [definition of creation science] is unquestionably a statement of religion." Id. at 1265.
the question as one of fact. As will be discussed later,16 courts confront serious constitutional difficulties when they attempt to pronounce what is or is not religious, either as a question of fact or of constitutional law.

Perhaps that partially explains the Supreme Court's desire to bypass the first question, by assuming a subject is religious, in order to get to the second question—concerning the extent its discussion is permitted in the public schools. In Abington School District v. Schempp,16 the Supreme Court recognized that religion is not totally out of place in the public schools. It stated, "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment."17

The Supreme Court provided a test, or more appropriately "guidelines,"18 to be used in answering the second question, when religious subjects may be taught. It said "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."19 In later cases, ones dealing with what aid government may provide to parochial schools, the Court expanded the test to three parts by adding the requirement that the government action "must avoid excessive entanglement with religion."20

Unfortunately, evading the question of what subjects are reli-

15. See infra text accompanying notes 61-80.
17. Id. at 225.
18. These "tests" should not be viewed as precise or absolute, but rather as general guidelines. Tilton v. Richardson, 403 U.S. 672, 677-78 (1971); accord, Committee for Public Education v. Nyquist, 413 U.S. 756, 773 n.31 (1973).
19. 374 U.S. at 222.

In some opinions, the Court appears to convert the three part test into a four part test by adding the requirement that the government involvement not be politically divisive along religious lines. In other opinions, the Court ignores political divisiveness or treats it as one factor in determining the danger of entanglement. Recent decisions make this explicit. E.g., Committee for Public Education v. Regan, 444 U.S. 646, 661 n.8 (1980). Professor Tribe also treats divisiveness as part of the entanglement test, distinguishing between political entanglement which focuses on political division along religious lines and administrative entanglement.

L. Tribe, supra note 10, at 366. See Gaffney, Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy, 24 St. Louis U.L.J. 205 (1980), for a discussion of the origin of divisiveness as a separate test and a criticism of this development.
igious and skipping to the second question has not demonstrably simplified the inquiry. This is because there are innate deficiencies in the Court's three part test.

First, there are problems in determining what the actual purpose of the governmental action is and whether that purpose is secular. Judicial analysis of legislative purpose has received sharp criticism in the context of constitutional provisions such as the commerce clause, freedom of speech, and equal protection, but has received less attention when used as part of Establishment Clause analysis. This may be due to the Court's willingness to unquestioningly confer upon government action a valid secular purpose in the rush to analyze the primary effect.

Skipping to the second part of the test has not simplified the Court's task in many hard cases. The second part of the test, whether the government action has the primary effect of advancing or inhibiting religion, evokes what Justice Powell has characterized as a metaphysical question concerning the meaning of "primary" as opposed to "secondary" effect. He suggested that it would be more appropriate for the Court to examine whether an effect was "direct and immediate" or "indirect and remote." Decades ago, however, the Court found concepts such as direct and indirect effect analytically inadequate, and substituted for them concepts such as substantial versus insubstantial impact.

The second part of the three part test also raises supervision or policing problems when the courts try to determine the primary effect of what is actually being taught in the classroom rather than the primary effect of the lesson plan that appears on paper. The supervision necessary to prevent a religious effect risks excessive judicial entanglement with religion in violation of the third part of the test.

Finally, skipping the question of what is a religious as opposed to a secular purpose by going to the question of primary effect may

23. 413 U.S. at 783-85 n.39.
not even avoid the problem of defining what is religious. In some cases, it may still be necessary to define what is religious in order to decide whether a particular primary effect is religious or secular.

Apart from the mechanical and analytical problems of determining what is religious and to what extent religious topics may be discussed in the public schools, there is an overriding problem with the answer the Court's current approach is likely to yield. The basic flaw in the Court's three part test and the Court's definition of religion or lack thereof, is that, with such a broad definition of religion (or a willingness to assume a given topic is religious), the teaching of almost any subject arguably constitutes establishment of religion. For example, proponents of the teaching of creation science argue that current theories of evolution in fact advance the religion of "Secular Humanism" and to exclude "creation science" advances one religion and is hostile to others.26

A narrow definition of religion—one limited perhaps to established churches or theistic religions—which excludes Secular Humanism or atheism as a religion solves the potential problem of exclusion of all topics, but creates serious problems of a different sort. Such a narrow definition would be inconsistent with a broader view of religion taken by the Court with respect to the Free Exercise Clause, and in the context of establishment could result in a bias against older, in favor of newer, religions.

Some writers favor a dual definition of religion for first amendment purposes, using a broader definition for free exercise purposes and a narrower one for establishment clause purposes.27 Instead of avoiding the problem of defining religion, however, this creates a need for two definitions. For example, courts must still address whether "creation science" is religion or whether teaching of morality is the teaching of religion. The effort to define religion and exclude certain matter from the definition itself raises constitutional problems. On several occasions, the Court has cautioned against government becoming the arbiter of what is religious.28

C. Absolutist Alternatives to Supreme Court Guidelines

Despite the analytical perplexities presented by these two ques-

tions—what is religious and to what extent can religious topics be discussed in the public schools—it appears that the task of answering them cannot be avoided, unless an absolutist position is taken of either no discussion of religion in the public schools or, at the other extreme, open discussion untrammeled by judicial supervision.

At the outset, therefore, it might be useful to consider whether the difficult problems inherent in the application of the Court’s three part test might be avoided by adopting an absolutist position. A total ban on the discussion of anything religious or arguably religious in the public schools would not be effective in avoiding constitutional problems and it would probably not be acceptable.

First, a total ban on the mention of anything religious would distort a person’s education, as Justice Jackson made clear in a concurring opinion in *McCollum v. Board of Education*:

> The fact is that . . . nearly everything in our culture worth transmitting . . . is saturated with religious influences . . . . One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

A similar position was taken by Justice Clark in *School district of Abington v. Schempp*:

> “[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.”

Second, even if intended to avoid establishment clause problems, a total ban on discussion of religious topics in the public schools would hamper academic freedom.

A total ban might also be construed as hostile toward religion, rather than neutral, thereby violating the establishment clause.

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30. *Id.* at 236 (Jackson, J., concurring).


32. *Id.* at 225.

33. In recent years, the Supreme Court has recognized that restrictions on religious liberty may be unconstitutional even though such restrictions are imposed to avoid Establishment Clause violations. *Widmar v. Vincent*, 102 S. Ct. 269, 274-77 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978). As to the objection that a total ban would violate academic freedom, see generally infra authorities cited in note 131.

And, finally, total exclusion of religion from the public schools still would not elude the task of defining religion. For example, a determination would still have to be made whether a total ban on religious topics required the exclusion of creation science, of Darwin's theory of evolution, or of transcendental meditation.

The second absolutist position calls for courts to refrain from any effort at supervision of the religious content of public education, allowing public officials complete discretion with respect to discussion of religious topics. In the extreme case, this would permit public schools to be used by officials to preach, indoctrinate, and expressly seek to convert students to the belief in, and practice of, certain religions. At first glance, this alternative appears wholly unacceptable under the first amendment. It runs contrary not only to the idea that government shall not sponsor or endorse a particular religion, but also to the more general first amendment edict that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

This ideal, expressed by Justice Jackson in West Virginia v. Barnette, is probably unattainable. To a certain extent, some indoctrination, if only indoctrination that one should be rational and open-minded, is ingrained in the educational process. Any sincere attempt by the courts to insure that the schools do not indoctrinate would probably require the elimination of all public education.

A more realistic response to the fear of indoctrination of the child, contrary to his or her own wishes or contrary to the wishes of the parent, would be to excuse the objectors from the class, rather than to prohibit the lesson completely. The Supreme Court long ago recognized that constitutional protection of liberty requires that those who object to instruction in the public schools be given the option to attend private school. For those who cannot afford

Free Exercise Clause prohibits abridging religious liberty, it might appear that the Establishment Clause is redundant in this respect. However, the Establishment Clause is violated by a purpose to inhibit religion alone, whereas Free Exercise violations are established only upon a showing of coercion. Engel v. Vitale, 370 U.S. 421, 430 (1962).
private education or who do not object to public education in its entirety, constitutional protection of free exercise of religion, and of freedom of belief in general, may require the state to excuse individuals from specific courses or from discussion of specific topics.38

Some judges and writers have suggested that excusals are impermissible because they demonstrate the religious nature of the program or activity, thus proving that there is an Establishment Clause violation. In Vaughn v. Reed,40 for example, the district judge specifically ordered that no one be excused from religious education courses in the public school because “permitting nonattendance . . . does indicate that a constitutionally questionable course is being taught in this situation.”41

In other contexts, however, religiously based excusals have been sustained against Establishment Clause challenges.42 It is not necessarily true that a person may only have free exercise objections to religious activity. One might also have religious objections to secular programs. Allowing an excusal based on the Free Exercise Clause merely recognizes the religious nature of the objection to the program, not the religious nature of the program itself. Therefore, a free exercise excusal should not be determinative of the establishment clause issue.

It is also argued that excusals are inadequate because they do not eliminate the psychological coercion to participate or psychological harm to the child if the child does not participate.43 While it is true that excusals do not eradicate the coercion implicit in certain programs, absent a better solution, such a danger does not

41. Id. at 434. Accord 374 U.S. at 224: “[T]he state's recognition of the pervading religious character of the ceremony is evident from . . . the recent amendment permitting nonattendance at the exercises.”
rule out their use. Excusals, while in some situations inadequate, may be the only reasonable solution. Rejection of the use of excusals would leave only three alternatives: 1) leave no remedy for the objector (a partial remedy of excusal is surely preferable to none); 2) ban the program or activity entirely, which in effect gives the objector a veto over what others are taught; or 3) attempt to modify the program to eliminate the free exercise objection.

Modification of the program to eliminate the free exercise objection is the alternative advocated by those who, unable to exclude the Darwinian theory of evolution from the public schools, at least want the presentation balanced by a discussion of "creation science." In many situations, however, this third alternative may prove illusory. To the extent modification requires exclusion of some topic, it is really no different than the second alternative—a veto by the objector over what others are taught. To the extent modification requires adding something to the discussion to achieve balance, it should be considered a valid alternative to excusals as a solution to free exercise objection. Nevertheless, this does not dispose of objections to the very teaching of a subject, rather than to the imbalance or point of view. Also, the addition of a topic to provide balance may create Establishment Clause problems.

Even if excusals were satisfactory to the individual who found a program religiously objectionable on free exercise grounds, there still remains, in the extreme case, the fact that an officially-sanctioned program of religious indoctrination of "willing" participants, amounts to an establishment of religion. Despite the fact that the current three part test for evaluating establishment clause challenges has serious drawbacks, unless the core meaning of the establishment clause is abandoned, there must be some limit on what religious topics are taught in the public schools and the manner in which they are taught. Limiting religious programs in the public schools to willing participants does not avoid government sponsorship or endorsement of a given religion. Besides giving the government a measure of control over the religion it chooses to sponsor, the message is also conveyed to non-believers that they are outsiders, perhaps unwelcome in the community.

46. Cf. Citizens Concerned for Separation of Church and State v. The City and County of
The free exercise clause was designed to prevent coercive interference with the practice of religion.47 If the establishment clause adds anything, it is a demand for government neutrality in religious matters.48 But neutrality does not necessarily mean that there can be no discussion of religion in the public schools. What needs to be considered, then, is the alternative to the absolutists' positions—how to reconcile discussion of religion in the public schools with the ban on government sponsorship of religion, without excessive judicial entanglement.

II. ACCOMMODATION—THE THREE PART TEST

If the Supreme Court continues to avoid defining religion whenever possible, the question of the extent to which religion may be discussed in the public schools of necessity will have to be answered by use of the Court's three part establishment test. The remainder of this article will focus on the usefulness of the three part test in addressing the issue of religion in the public schools, and on an alternative to the three part test. No attempt will be made to consider the suitability of the current three part test in other contexts. Perhaps part of the reason the Establishment Clause analysis has internal contradictions is that the Court has tried to answer too many questions of radically different natures with one test.

At a minimum the present test requires government neutrality with respect to religion, but does not require absolute silence on matters relating to religion, as long as the discussion of religion is "presented objectively as part of a secular program of education."49 It will be demonstrated herein that, in many situations, the three part test is inadequate at best and so intrinsically contradictory it causes unreasonable results at worst.

A. Primary Effect

Again, the three part test requires that the government action "first must reflect a clearly secular . . . purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion."50 Since the most troublesome aspect of the three

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47. 374 U.S. at 223; 370 U.S. at 430-31.
48. Id.
49. 374 U.S. at 225.
part test is the second, assume for the moment, as the Court often does, that the discussion of a particular topic in the public schools serves a clearly secular purpose.\footnote{See supra note 22.}

First, unlike the equal protection clause which prohibits only purposeful or intended results,\footnote{Personnel Admin. of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).} the primary effect test invalidates programs with the effect of advancing or inhibiting religion even if this result was unintended.\footnote{J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 869 (1978); Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 SUP. CT. REV. 95, 110 n.87 (1971).} Literally interpreted, this could mean that identical programs, conducted for identical purposes, could be found constitutionally valid or invalid based exclusively on audience reaction. For example, a discussion of Biblical stories presented in a "neutral" manner, might be perceived as literally true by some audiences, resulting in a primary effect of advancing religion.

This is not to suggest that the unintended effect of a program should be ignored. It is probably desirable to encourage government officials to consider the unintended consequences of their actions. When the audience is not mature enough to understand the lesson and may be indoctrinated, then that lesson, even though intended for secular purposes, is inappropriate for that audience. But such a concern with the primary effect should not be allowed to convert the primary effect test into an audience veto, precluding discussion of a subject because a portion of the audience thinks that the lesson is slanted, and not religiously neutral.

For example, in Calvary Bible Presbyterian Church v. Board of Regents,\footnote{436 P.2d 189 (Wash. 1967).} ministers objected to a Bible literature class at the University of Washington.\footnote{Id. at 190.} Part of the evidence in support of an Establishment Clause challenge to the teaching of such a course in the English Department was that one of the students felt that the course was slanted in favor of a liberal Christian view of the Bible.\footnote{Id. at 196 (Hunter, J., dissenting).} Merely because a majority or some substantial portion of the class agreed the course was slanted does not mean the lesson would have the primary effect of advancing a liberal Christian religious
viewpoint. Religion would not be advanced unless at a minimum the lessons resulted in some additional acceptance of the religious point of view.

Also raised by this illustration is the question of which effects are primary when there is more than one possible effect. This, in turn, presents the problem, first, of defining “primary” effect and “religion,” and, second, of supervising or policing the effect of the discussion once the terms are defined.

The definitional problem is indeed a perplexing one. In Committee for Public Education and Religious Liberty v. Nyquist, Justice Powell noted that determining whether a given effect of a program was “principal or primary” was a “metaphysical judgment” that was neither “possible nor necessary.” He suggested that, even where an effect was not primary, the court should examine whether the program had the direct and immediate effect of advancing religion, or whether the effect was only remote and incidental. Though terms such as direct and immediate and incidental and remote might be more familiar to the tort lawyer than the term “primary,” they are not necessarily any less metaphysical.

Even if a usable definition of primary effect may be arrived at, and even if the primary effect may be identified in a given situation, it may still be necessary to determine whether that particular effect advances or inhibits religion. Assuming, for instance, that participation in a Christmas play has the primary effect of advancing understanding of the story and symbols of Christmas, it is still hard to say whether the effect is a religious or a cultural one. Thus, does study of the “science of evolution” have the primary effect of enhancing understanding science or of advancing the “religion of Secular Humanism?”

These examples demonstrate that, though a valid secular purpose for a given activity may be assumed, it may not be possible to avoid confronting the defining of religion. As noted earlier, how-

57. 413 U.S. 756 (1973).
58. Id. at 783-85 n.39.
59. Id.
60. “Cause had been frequently characterized as direct, proximate . . . . and by many other descriptive terms . . . . The causation doctrinal superstructure for determining liability is extensive, refined, complicated in detail, and metaphysical both in thought and terminology.” Green, Duties, Risks, Causation Doctrines, 41 Tex. L. Rev. 42, 43 (1962) (emphasis in original).
ever, there are constitutional dangers in the government declaring what is and what is not religious, even when assisted by "experts." In a sense, the problem is comparable to that which occurs when the law attempts to determine the sanity of an individual with the help of experts. Not only are there experts ranged on opposite sides of the question, but they define it differently than the law does. The insanity defense has proved so unsatisfactory in delineating criminal responsibility that many have called for its abolition. Others have rejected the dominant role of experts. Others have called for reformulation of the test. Perhaps the definition of religion for purposes of deciding Establishment Clause challenges faces a similar fate.

The dilemma of defining religion has been avoided to some extent with respect to free exercise challenges by the adoption of a very broad, inclusive definition of religion. While it is possible to live with the use of such a definition in free exercise cases, since recognition of the religious nature of the practice is only the first step in the analysis and far from determinative, in testing establishment claims, a broad definition of religion along with the primary effect test could invalidate discussion of nearly any topic in the public schools.

To solve this problem, some writers have suggested that the courts should have a dual definition of religion: a broad one for free exercise claims and a narrower one for Establishment Clause purposes. While this may help to establish relationships on a continuum of religiousness, it does not eliminate the need to define religion.

It is also important to note that a challenge to discussion of a religious subject in the public schools might involve both a free exercise challenge and an establishment challenge. A concession that the practice is religious for purposes of the free exercise challenge may be addressed by excusal of the objector. The challenge to the activity that its primary effect advances or inhibits religion, however, cannot be addressed, under the current test, by excusal or

62. See supra note 28.
64. See id. at 986-86, for a discussion of some of these proposals.
66. See 471 F.2d at 986-89.
68. See supra note 27.
69. See supra discussion of excusals, text accompanying notes 38-45.
balancing of governmental and individual interests. It is significant that, in the free exercise claim, some belief may be labeled as religious by one who seeks protection for the belief, while in the Establishment Clause challenge, some topic of discussion may be labeled as religious by one who seeks to exclude the topic rather than protect it. In such a situation, it is not as dangerous for the courts to inquire whether the challenged topic is religious, because, if the court finds the topic is not religious, no adherent or follower is being denied protection.

This suggests a partial solution to the problem of defining religion for purposes of the Establishment Clause. To the extent no one claims free exercise protection for certain beliefs, opponents of the belief cannot use the Establishment Clause to exclude the belief by labeling it religious. Claiming protection for the belief under the Free Exercise Clause would necessitate considering whether the belief was also religious for purposes of the Establishment Clause, but would not be determinative, since the definition of religion for free exercise purposes is broader, more inclusive.

This partial solution, however, may create problems of its own. What if the overwhelming majority of people in the community view secular humanism, or Santa Claus, or the nativity scene as secular cultural concepts? Does the fact that a few individuals’ religious beliefs include secular humanism, Santa Claus, or the nativity defeat the ability of the courts to presumptively treat these concepts as secular for Establishment Clause purposes? Note that it is now hypothesized that not just opponents but at least some adherents to the concept are labeling it as religious.

In *Citizens Concerned for Separation of Church and State v. City and County of Denver,*70 despite the fact that the majority of the community viewed the erection of a nativity scene on public grounds as secular, it was challenged as a religious activity supported by government. The court heard from experts and eyewitnesses, some who claimed the nativity was part of their religious beliefs and some who found that the nativity was part of a religion they did not follow.71 The court found that such an activity was religious.72 The case was reversed on appeal because of lack of

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71. 481 F. Supp. at 525-27.
72. *Id.* at 528-29.
standing.\textsuperscript{73} When the case was brought again, by those with standing, a second district judge, based largely on the same evidence, gave greater weight to testimony that the nativity scene had become integrated into our culture and heritage, and thus was not an instance of impermissible state involvement with religion.\textsuperscript{74} Two district judges, looking at basically identical evidence, reached opposite conclusions as to whether the nativity scene was religious in nature.

According to expert testimony, certain symbols associated with Christmas have taken on a secular significance in our society.\textsuperscript{75} Nevertheless, to many, such symbols retain religious significance. Public display of these symbols is offensive to their religious beliefs because it debases the meaning of the symbol,\textsuperscript{76} just as some find the wearing of the American flag on the seat of blue jeans debasing.\textsuperscript{77} This illustrates that, as in defining insanity, in many situations, there will be no simple way to resolve whether a given topic is religious, even with the assistance of experts.

Finally, unlike insanity where the person either is or is not insane, in some of these situations it may be that both side's experts are correct—a given topic may be secular and religious at the same time. This differs from the challenge to Sunday closing laws, the motivation and meaning of which the Court found were once religious, but the religious significance of which was now found to be minimal or absent.\textsuperscript{78} Some attacks on public school discussion of religious topics involve matters that the Court concedes still have primarily religious significance, but that it assumes (often unchallenged) are also of at least secondary secular significance. For example, the Bible has great and primarily religious significance. Yet, most would concede that the Bible has at least some historical significance.\textsuperscript{79} In \textit{Schempp}, the Court recognized that it would be permissible to discuss the Bible in the public schools despite the

\textsuperscript{73} 628 F.2d 1289 (10th Cir. 1980).
\textsuperscript{74} 508 F. Supp. 823 (D. Colo. 1981).
\textsuperscript{75} Citizens Concerned for Separation of Church and State v. City and County of Denver, 508 F. Supp. 823, 826, 828 (D. Colo. 1981); Florey v. Sioux Falls School Dist., 619 F.2d 1311, 1316 (8th Cir. 1980).
\textsuperscript{76} 508 F. Supp. at 829. See also Pevar, \textit{Public Schools Must Stop Having Christmas Assemblies}, 24 St. Louis U.L.J. 327, 334 (1980).
\textsuperscript{79} 374 U.S. at 225.
fact that its current significance was still primarily religious. Instead of focusing on the religious nature of the subject, the Court focused on the manner of presentation and on the primary effect of this manner of presentation. 80

This brings us, once problems of deciding what subjects are religious and whether a primary effect is secular or religious are solved or avoided, to a final problem with the primary effect test—that of supervision or policing. To the extent the Schempp approach focuses on the manner of presentation of religious subjects, requiring that they be "objectively presented" as a part of a secular program, the courts must examine whether the presentation is in fact objective. This may require an examination of what actually occurs in the classroom in addition to an examination of the purported nature of the subject of discussion.

The complications inherent in this task are illustrated by a series of decisions by a district judge, attempting to ensure that a program of Bible study in the elementary schools was being presented objectively and did not have an impermissible primary effect.

In Wiley v. Franklin, 81 minor students through their parents challenged a program of Bible study in the elementary schools of Chattanooga and Hamilton County, Tennessee. The trial judge heard sixty-seven witnesses, including experts called by the plaintiffs and defendants, and made a detailed examination of the purpose and nature of the Bible study programs. 82 Subsequent to the filing of the lawsuit, but before trial, a new Bible study curriculum was developed and the judge examined this new curriculum. 83 He found that it was constitutionally possible to teach Bible study courses at all levels of public school, though the methodology would have to vary depending on the level of the students. 84 He noted that the experts had examined the proposed curriculum but none had examined the actual classroom instruction. 85 Applying the Supreme Court's three part test, he found that the nature, intent, and purpose of the courses were religious, 86 that they ad-

80. Id.
82. 468 F. Supp. at 136.
83. Id. at 139.
84. Id. at 149-50.
85. Id. at 142.
86. Id. at 151.
vanced Christian faiths and inhibited other faiths, and that the courses constituted excessive entanglement with religion.\textsuperscript{87}

Rather than enjoining the continuance of the Bible study program, the judge chose to give the defendants an opportunity to bring the courses into compliance with constitutional standards, since all the experts who testified agreed that "a legally permissible secular Bible study course would be academically and educationally desirable."\textsuperscript{88} Therefore, the judge stayed an injunction against the course for forty-five days to allow the board of education to revise the course according to certain guidelines.\textsuperscript{89}

In the next reported opinion in the case, approximately six months later, the same judge examined the revised plan for the Bible study course.\textsuperscript{90} He found that the revised lesson plan was "capable of being taught for its secular, literary or historical worth and without religious emphasis,"\textsuperscript{91} but that the only reasonable message of lesson fifteen, which concerned Jesus' resurrection, was religious.\textsuperscript{92} The Court approved of the other lessons, such as those on John recounting a vision and Saul of Tarsus becoming a follower of Jesus.\textsuperscript{93} The judge concluded that the ultimate test of the constitutionality of any course "founded upon the Bible must depend upon classroom performances."\textsuperscript{94} Therefore, he retained jurisdiction.

A little more than a year later this judge wrote yet another opinion regarding these courses.\textsuperscript{95} The judge heard tape recordings of thirteen classroom sessions and examined affidavits of experts who had examined the tape-recorded sessions.\textsuperscript{96} The judge, after noting that the affidavits of the experts were of assistance to him, stated that they did not relieve him of the obligation to make his own evaluation.\textsuperscript{97} He found the intent and purpose of the lessons in the Chattanooga city schools were secular and the primary effect neither advanced nor inhibited religion. Thus, the lessons were

\textsuperscript{87.  Id.}
\textsuperscript{88.  Id.}
\textsuperscript{89.  Id. at 152.}
\textsuperscript{90.  474 F. Supp. 525 (E.D. Tenn. 1979).}
\textsuperscript{91.  Id. at 531.}
\textsuperscript{92.  Id.}
\textsuperscript{93.  Id.}
\textsuperscript{94.  Id.}
\textsuperscript{95.  497 F. Supp. 390 (E.D. Tenn. 1980).}
\textsuperscript{96.  Id. at 393-96.}
\textsuperscript{97.  Id. at 394.}
constitutional. After a review of the tapes of the Bible study courses, as taught in the Hamilton County schools, however, he concluded that the intent and purpose of those classes were to convey a religious message and that this might also be the primary effect. These lessons were, therefore, found unconstitutional and their continuation enjoined. 98

The lengthy history of just this one case illustrates numerous problems innate in any attempt to judicially supervise discussions in the public schools to ensure that the primary effect remains secular. The judicial resources involved in this task could be enormous. In Wiley, even after the judge invested all this time, presumably it would be open to the Hamilton County schools to hire new teachers and modify the program and attempt to teach a Bible study course comparable to the one held valid in Chattanooga, whereupon the judicial examination would have to begin anew. This approach also utilized the resources of experts, ones the judge found of assistance, though it did not eliminate the judge’s need to make his own evaluation.

Perplexing questions are presented to the school administrator attempting to comply with the Constitution. Why are not accounts of Jesus preaching on the mountain and Saul of Tarsus becoming a follower of Jesus religious? Even when the administrator looks to an expert to help devise constitutionally permissible lesson plans, as was the case in Wiley, there is no guarantee that the lessons as taught in the classroom will remain true to the intent of the plan.

Finally there is the time-consuming and symbolically chilling practice of tape recording the classroom session to ensure that the presentation is doctrinally satisfactory. Should the teacher, even an expert, disagree with the trial judge as to what is an objective presentation, academic freedom to differ will give way to an adjudication of whether the trial judge finds the primary effect secular or religious.

Going to the third part of the three part test, the Wiley case is a clear illustration of the danger that supervision to avoid a primary religious effect will result in excessive entanglement of the courts with religion. In order to avoid the conflict between the second part of the test, primary effect, and the third part of the test, excessive entanglement, the Supreme Court, in dealing with questions of permissible public aid to religious schools, denied certain

98. Id. at 396.
types of aid because it would be impossible to ensure that they were used only for secular purposes without excessive supervision. Such aid as teachers' salaries and field trip transportation was invalidated. In the process of steering clear of entanglement, the prevention of any opportunity for the religious slanting of a subject may result in the exclusion of too much.

B. Secular Purpose

The preceding discussion has attempted to illustrate the many difficulties with the second part of the Supreme Court's three part test, that the primary effect must neither advance nor inhibit religion. Since governmental involvement with religion is unconstitutional if it violates any part of the test, perhaps the first part, that the purpose must be secular, provides a method of analysis which avoids the perplexities of the second part.

For example, in Stone v. Graham and Epperson v. Arkansas, the Supreme Court halted certain practices relating to the public school classroom because the purpose behind them was religious rather than secular. Since the practices failed the first part of the test, there was no need to proceed to an examination of the practices under the other two parts.

Such an analysis averts many of the problems present when focusing on primary effect. It eliminates the need to look at how the policy is being implemented in the classroom, at least when the policy fails the first test. Because religious rather than secular purpose can independently invalidate a practice but not independently validate it, however, where there is a proper purpose, it will still be necessary to look to the other parts of the test.

In McLean v. Arkansas, the district judge looked to evidence of religious purpose behind creation science as a method of invalidating its teaching. It should be noted that this approach deemphasizes the need to define religion in certain cases, since in McLean the actors (legislators, school officials, lobbyists) by their own words labeled the subject religious. As discussed earlier, this is

103. 393 U.S. 97 (1968).
105. Id. at 1264-66.
different than focusing on the label attached to a subject by those seeking to exclude the subject as religious.\textsuperscript{106} 

Despite its usefulness as a tool to invalidate certain practices as violative of the Establishment Clause without getting into questions of primary effect and the definition of what is religious, there is a reluctance to use the purpose part of the three part test to invalidate practices under the Establishment Clause. There are several reasons for this reluctance. First, where it is not apparent on the face of the legislation or there is no statement of legislative policy, the purpose must be determined.\textsuperscript{107} Looking behind a purported purpose and claiming that it is a pretext for some hidden purpose can generate hostility or tensions between the different branches of government.\textsuperscript{108}

Additionally, where a multimember body is involved, whether a school board or a legislature, there is the problem of whose purpose is determinative—that of any member, that of a majority of members, or that of the sponsor?\textsuperscript{109} There is also the question whether, if the improper purpose may be purged, such as through election of new school board members, the same program will be valid once predicated on other reasoning that is secular.\textsuperscript{110} Such a scenario suggests subterfuge. These difficulties seem to encourage courts to assume a proper purpose and tackle the analytically more difficult problems of primary effect, which avoid accusing officialdom of an improper purpose.

Finally, there is the problem that although the motivation or purpose of those enacting the law is secular, there also may have been a secondary religious motivation, perhaps even a subconscious one. The test does not speak in terms of primary versus secondary purpose, but on occasion this may be an issue. Whether a purpose or motive is primary or secondary may be an even more metaphysical inquiry than whether an effect is primary or secondary, since, rather than results, a person’s thoughts must be delved

\textsuperscript{106} See \emph{supra} text following note 69.

\textsuperscript{107} See \emph{infra} discussion of proof of purpose, text accompanying notes 116-24.


\textsuperscript{110} \emph{Brest, supra} note 53 at 125-27; \emph{Ely, Legislative and Administrative Motivation, supra} note 109.
into. In one first amendment case,\textsuperscript{111} to avoid the metaphysical puzzle of primary versus secondary purpose, the Court spoke in terms of but/for causation. Justice Rehnquist examined whether a government official would have taken the same course of conduct even if the improper motivation had not entered into the decision.\textsuperscript{113} This suggests that the spotlight should not be on purpose alone, since effect is one of the best indicators of purpose,\textsuperscript{118} and that, except in cases of clearly improper purpose, it may be necessary to look at the effect to determine purpose.

In conclusion, focusing on purpose may be a simple answer to the issue of religion's place in the public classroom only in a limited number of cases. This does not mean it should not be used where it works, but that relying solely on purpose will be insufficient in most cases to ascertain when religious subjects may be taught in public schools.

C. Excessive Entanglement

The discussion now turns to the last part of the three part test—government must not become excessively entangled with religion. As discussed earlier, the very act of supervision to avoid a primary effect of advancing or inhibiting religion often results in entanglement, but without such supervision there is the danger of improper effect. Additionally, as already suggested, such close supervision raises the spectre of violation of academic freedom. This suggests that the third part of the test is as likely to complicate the analysis as it is to provide a solution.\textsuperscript{114}

III. AN ALTERNATIVE TO THREE PART TEST

The preceding discussion demonstrates that the Court's current three part test analyzing the extent to which religion may be taught in the classroom is unsatisfactory. The consideration of primary effect raises difficult "metaphysical questions" of the meaning of "primary" and does not avert the need to decide what is religious within the meaning of the Establishment Clause, something the Court has fruitlessly tried to dodge. Such a definition is central to the question whether exclusion of certain material from the classroom is really neutral or favors the "religion" of "secular

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\textsuperscript{112} Id. at 287.


humanism.” At the same time, judicial attempts to define religion risk excessive state entanglement in religious matters. Focusing on governmental purpose has occasionally proved to be a successful method of skirting the difficulty, but not when that purpose appears secular.

Prefatory to any search for alternatives, it must be recognized that no solution to a problem reflecting deep divisions based on faith will be acceptable to all. Any proposal threatens being culturally, religiously, or temporally biased. The following analysis seeks to avoid such biases by by-passing questions of faith to as great an extent as possible, though in some respects this may prove as fruitless as it has been for the Court.

Despite its deficiencies, the current approach to determining the degree to which religion may be taught in the public schools, on occasion, has provided a viable framework for analysis. Therefore, rather than totally supplanting the Court’s approach, the following proposal is built upon the portions that have worked.

A. Use of Religious Purpose

As discussed earlier, the first part of the three part Lemon test requires that the challenged governmental activity have a valid secular purpose. The problem with using sectarian or religious purpose to invalidate a particular activity inhered in the need to prove whether an admittedly religious purpose was the primary of several purposes or whether a given purpose was in fact religious. Since the Court has yet to develop a satisfactory means of identifying religious purposes, there is no simple solution to these problems. There are, however, some clear cases in which there is strong proof of concededly religious purpose or where there does not appear to be any sincere secular purpose behind the governmental activity. In these situations proof of religious purpose, the first prong of the current test, offers an adequate, unconfusing basis for adjudication of the dispute. The task is merely to prove intent, an endeavor common to many areas of the law. Methods of proving subjec-


tive intent used in other areas of the law may be utilized. Public statements of the officials involved in the program, the selection of inefficient religious means to achieve a secular purpose when efficient secular means were available, or other circumstantial evidence all may be used to demonstrate that the purpose behind the program was really a religious one.

When examination reveals not only a religious but also, arguably, a secular purpose for the program, the analysis is complicated but still within the competency of the court. The Supreme Court has addressed the problem of multiple purpose in another first amendment context, freedom of speech. In *Mt. Healthy City Sch. Dist. v. Doyle*, Justice Rehnquist suggested that proof that an improper purpose—punishment of free speech—might have played a role in governmental action would shift the burden to the government to come forward with another explanation for the conduct. The government could meet its burden by proving that even if punishment of free speech played a role in its conduct, in *Mt. Healthy* the firing of a teacher, the conduct would have been performed anyway for legitimate reasons. Justice Rehnquist converted the issue from the metaphysical one of multiple subjective intent to the more comprehensible one of but/for causation, a favorite of every first year torts student. Though perhaps no less metaphysical in reality, it is a mode of inquiry with which lawyers and judges may feel more familiar. Without suggesting that this is the appropriate method for settling all first amendment dilemmas, the *Mt. Healthy* test may provide useful means of dealing with multiple purpose in the religion context. That is, if circumstantial evidence suggests that a religious purpose played a significant role in the adoption of a certain program, those proposing or initiating the program must come forward with evidence to demonstrate that there are secular reasons which would justify the program apart

and free speech challenges.


120. 429 U.S. 274 (1977).

121. Id. at 287.

from the religious purposes. Requiring such a justification will also provide a basis for later judging the appropriateness of the religious means used.

B. Defining Religion or Modifying the Primary Effect Test

When proof of religious purpose or motivation is difficult to obtain, or when difficult questions of multiple purpose are involved, however, it might be wise to continue to search for alternative means of analysis, as the Court has discovered in many of its decisions. This search leads to the second prong of the Court's test—the requirement that the primary effect of the program or activity neither advance nor inhibit religion. For the reasons discussed earlier, this portion of the test must be reconsidered. It is virtually unworkable without an adequate definition of religion, it too often requires such excessive judicial supervision that it violates the entanglement portion of the test, and it can exclude too much or too little from the public schools.

A satisfactory definition of religion could eliminate many of the shortcomings of this part of the test, but such a definition has eluded the courts and forced them into disputes better left to theologians. Whether or not it suffices for free exercise claims, a broad definition of religion is unsuitable for use with the primary effect test. This is because, in the adjudication of free exercise claims, defining religion is a prelude to an express balancing process allowing a large degree of flexibility. A definition of religion used to determine whether a primary effect is religious is more mechanical and far less flexible. A broad definition of religion that would include philosophy, history, secular humanism, and science could result in the banning of almost everything from the classroom. Therefore, for Establishment Clause purposes, it is necessary either to take a somewhat narrower approach to religion or to modify the primary effect test.

One place to start would be to exclude from the scope of religion,

123. The burden could be either to demonstrate that it could have been justified on secular grounds or that it in fact was based on secular grounds. The latter test is clearly more demanding, and perhaps preferable if the goal is purging the education system of religious motivation. However, if the program is justifiable on secular grounds, some other official could introduce the program for legitimate secular reasons and the previously invalid program would now be valid, despite the identity of content.


124. See infra discussion following note 125.
for Establishment Clause purposes, any matter that does not constitute religion for free exercise purposes. Given the current broad definition of religion in the free exercise arena, this may not eliminate much, but it may help to solve at least some disputes. For example, when the only group attempting to label a certain activity as religious consists of those who seek to bar the activity from the schools, it would be justifiable to reject the label "religious." 125

In cases in which there is no clear answer to the definitional question, evasion may be the better course. This requires modification of the primary effect test, but would allow the Court to assume, arguendo, that a given subject alleged to be religious was religious for Establishment Clause purposes, without leading to the almost automatic exclusion of the subject from schools or to the need to calculate primary effect. The focus would shift from the label attached to the subject and instead would be directed at the validity of the subject as a means to achieve a secular purpose. For example, while it is debated whether Darwin's theory of evolution is accurate or is anti-Christian, it is not debated that the reason for studying evolution is to gain an allegedly scientific understanding of the origin of the species. The origin of the species could also be the subject of other courses with a different focus, such as a comparative study of religious views of origins, or as part of a study of literary views of the origins of man, or as a part of a history course dealing with migrations of people from different parts of the world. In each course the secular purpose would be different. The specific topic of discussion would be judged in terms of the appropriateness of those means to the secular goal, regardless of whether the means were labeled religious.

This does not mean that the use of religious subjects to achieve secular purposes, when there were equally effective secular means available, is always irrelevant. Such a choice might constitute circumstantial evidence to demonstrate that the secular purpose was in fact a pretext for a religious purpose, 126 shifting to those seeking to use religious materials the burden of demonstrating that these materials would have been chosen for purely secular reasons. But invalidation of the means (the use of religious subjects) would turn on proof of religious purpose alone, not religious effect.

It has been suggested that this is unacceptable because it would

125. See supra discussion following note 69.
126. See supra note 118.
allow use of materials which have the effect of advancing religion.\textsuperscript{127} To avoid this, it is argued, there should be an additional requirement comparable to the "less restrictive means" element used in free speech, equal protection, and due process analysis. This requisite would demand that secular rather than religious means be employed whenever secular means were available.\textsuperscript{128} While such a requirement would sidestep some of the analytical difficulties of examining whether the primary effect of the religious material is to advance religion, it would evidence hostility to the discussion of religious matters and approach the absolutist exclusionary view rejected earlier. Additionally, such a limitation could be evaded by a simple semantic device.

The Court has recognized that even the Bible and religion could be part of an objective program of secular education. If the secular goal is defined as studying the role religion played in sixteenth century Europe, or the impact of the Bible on western philosophy, then there is no alternative secular subject that would serve that purpose. The counter-argument to this is also semantic—that the study of religion can never have a secular purpose. But the study of history, in itself, cannot be considered undertaken for a religious purpose in Establishment Clause terms. As discussed above, no one claims history is a religion entitled to free exercise protection. If it can be shown by neutral principles that religion is a part of the history of the sixteenth century, then its omission merely because it is religious would constitute hostility to religion in violation of the Establishment Clause.

The preceding analysis abandons examination of primary effect. The primary effect test, broadly defining religion, can exclude too much. Moreover, it is probably futile to expect to escape either advancing or inhibiting religion by controlling the content of classroom discussion. For example, in one case a teacher was prohibited from discussing Darwin and was disciplined for violating this restriction.\textsuperscript{129} The Court pointed out that when children asked questions, it was unfair to expect the teacher to evade answering them.\textsuperscript{130} This is probably an unreasonable expectation with respect to religious topics, too. When a student, reading a history or litera-

\textsuperscript{127} 374 U.S. at 281 (Brennan, J., concurring); 619 F.2d at 1324, (McMillian, J., dissenting).
\textsuperscript{128} 374 U.S. at 294 (Brennan, J., concurring).
\textsuperscript{130} Id. at 1043.
ture book, comes across a reference to Moses or Jesus or Mohammed and asks a question about him, is the teacher to refuse to explain who the person was because each is arguably a religious figure? Any attempt to censor the responses to such questions or to require an administrator's or a court's clearance before the teacher may answer raises serious questions about academic freedom. 131

Constitutional protection for freedom of speech dictates that truth be sought not through the exclusion of information but by the provision of more information. 132 The Establishment Clause should not be read to bar from free dispersal information that touches on religious subjects. To the extent that the true concern behind the Establishment Clause is that religion be neither advanced nor inhibited, government neutrality would better be assured by educating students rather than by keeping them in ignorance of religious subjects. Part of the reason for the success of religious cults may be that their members are searching for something of which they feel they have been deprived. Those who join are said to be brainwashed. People who are informed, however, are not likely to fall under the spell of ideas that may intrigue the uninformed. Educating students on religion and religious matters is perhaps a better way of ensuring governmental neutrality than by banishing any mention of religion from the classrooms. This is implicit in the Court's recognition that study of the Bible or comparative religion is acceptable if conducted impartially for secular


Apart from the inquiry into the primary effect of a discussion of a religious subject, the Supreme Court has said that religion may be presented "objectively" as a part of a secular program of education. Thus, the Court shifts the focus to the meaning of "objective." It may be argued that there is no such thing as objectivity or neutrality. Certainly the search for elusive neutral principles in the area of constitutional law has generated much controversy. Since neither courts nor scholars have satisfactorily identified such neutral principles, the courts cannot hope to police the classroom to see that religion is being taught neutrally. For example, in Calvary Bible Presbyterian Church v. Board of Regents, the Washington Supreme Court found the trial court's conclusion that the Bible was being taught in a neutral manner was justified, based on the testimony of expert witnesses. The dissent pointed out, however, that at least one student thought the lesson was slanted toward a liberal Christian point of view. To those on the left or the right of the spectrum, the person in the middle is not neutral; his is merely a third position, and one that some would argue is least tenable because it is the product of compromise and lacking in ideological purity.

Rather than demanding objectivity and neutrality on religious matters of the teacher, the law might demand that the teacher disclose his or her position to the students and conscientiously attempt to avoid coercing the students into accepting his or her beliefs. Teachers would be free to discuss religion for secular purposes and to take a position on religious issues, but would have to acknowledge other, differing views. They could not demand ideological conformity on the part of students. Students might still conform, of course, since students often believe they may earn a better grade by saying what the teacher wants to hear. Superficial conformity to the teacher's views occurs in many secular classes, however, and does not necessarily win converts or disciples to these secular subjects. The true concern of the Establishment Clause
should be with teachers’ engaging in indoctrination, not with students’ protective mimicry.

To avoid constitutional violations the teacher should also be required to present other points of view. Such a requirement is probably the most important safeguard against establishment of religion or improper teacher conduct, and may be more easily policed or supervised than a requirement of objectivity or neutrality. It should not be perceived, however, as demanding equal time for all religions. Giving equal time to discussion of all religions, or presenting all religious doctrines apart from a concern for equal time, would be wholly impractical. There are far too many religions, teachers would have difficulty gathering information and, most importantly, such comprehensive coverage would cause religion to dominate school curricula. Even under the current test of neutrality, the Court has recognized that attempts to balance religious discussion by considering different religions results in advancing those religions.

Under the proposed approach it would neither be necessary nor desirable for the teacher to give equal time to or to examine all religions. It would not even be necessary for the teacher to publicly acknowledge that he or she might be wrong. All that would be required is that the teacher acknowledge what is indisputably true—that others dispute the teacher’s belief and that the teacher will not penalize students for expressing contrary views. For example, in the context of the study of Western Civilization, it is possible some might find a Protestant teacher’s depiction of the role of the Catholic Church in a certain historical event, antithetical to Catholic ideology, or even anti-Catholic. Rather than ordering the teacher to present a neutral version, it would only be necessary that he or she recognize that Catholic and other scholars disagree, and that mention, though not necessarily equal, be made of another point of view. The teacher would not be obliged to identify the views of Moslem or Jewish or atheist scholars on this issue. Students who were concerned that the teacher’s views opposed those they had learned at home or in church would be encouraged to come to their own conclusions.

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139. L. Tribe, supra note 10, at 826, states that there are more than 250 recognized major churches and hundreds of small fringe groups in America.

140. See supra note 45.

Abrogating the demand for objectivity and neutrality in the classroom may result in political divisiveness along religious lines, something the Court's current test seeks to avoid, perhaps futilely. Parents will probably protest teachers being allowed to present "biased" views in the classroom, but the current test's requisite of neutrality has not eliminated parental objections either. As discussed above, those parents who have strong religious objections to such instruction have, at most, a claim for excusal of their child, not exclusion of the subject from the classroom.

It is not meant to be suggested, however, that under the banner of academic freedom, the teacher may take any position on any subject, religious or otherwise, so long as he or she acknowledges and gives examples of other points of view. Academic freedom is not unlimited. But the limitations on the teacher are secular ones, applicable to classroom discussions and generally judged by secular principles unrelated to the teaching of religion.

Judicial resolution of church property disputes provides an illustration by analogy. In several cases, a division, branch or congregation of a church embroiled in a controversy with another part of the church organization has sought civil adjudication of ownership of church property. The Supreme Court has said that courts may not resolve such disputes by determining which division or congregation of the church is the true adherent to the faith because it would result in excessive entanglement in religious matters. Courts encounter comparable difficulty in attempting to decide whether a particular presentation of the Bible is neutral or slanted, based on the testimony of theologians. The solution

142. See supra note 20.
143. Id.; J. Nowak, R. Rotunda, & S. Young, supra note 53, at 867.
144. See supra text accompanying notes 38-45.
145. Allowing a teacher to express a point of view that some persons might regard as anti-religious or contrary to a specific religion does not mean that school officials must also allow the preaching of religious or racial intolerance or bigotry. However, a prohibition on such teaching should not seek to protect only certain "sacred" values or ideas. Rather, school officials should prohibit and punish teaching of intolerance or hatred toward any group, racial, ethnic, or religious. Classroom comments would be inappropriate whether they were anti-Italian-American, Irish-American, Puerto Rican, or Chicano, as well as anti-Catholic. It should not be the religious nature of the comment that makes the subject "sacred" and protected from attack or criticism.
147. 426 U.S. at 709; 443 U.S. at 602.
mandated by the Supreme Court is that courts must search for neutral, that is, non-religious, principles to resolve the property disputes. Use of secular principles may enable the courts to sidestep both the inquiry into primary effect and the excessive entanglement generated by scrutiny to ensure objectivity of classroom discussion of religion.

Several cases illustrate how such secular principles may be used to control the content of classroom discussion. In cases involving the use of offensive words by teachers in the classroom, the courts have used academic standards unrelated to religion, employing expert testimony on the legitimacy of such teaching methods relative to the subject being taught. In a history lesson, it may be appropriate for a teacher to comment upon the involvement of the United States in Vietnam. It would be a violation of academic freedom to punish the teacher, or limit what could be said, based on whether the supervisor or the court agreed with the teacher's view of the war in Vietnam. On the other hand, requiring the teacher to disclose that there are other positions on the war, and to make mention of them, would not infringe academic freedom. Demanding that he or she teach only those other views could violate academic freedom. By contrast, it would not invade academic freedom to prohibit a political or historical discussion of the war in Vietnam in a math class, especially if such talk intruded on the teacher's primary mission of teaching mathematics.

In each situation the suitability of the teacher's observations, including those on religious or arguably religious topics, would be determined by nonreligious criteria. In a biology course, the purpose

149. 443 U.S. at 602-04.
150. Mailloux v. Kiley, 323 F. Supp. 1387, 1389-92 (D. Mass. 1971), aff'd, 448 F.2d 1242 (1st Cir. 1971). Neutral principles (i.e., not involving questions of religion or theology) were used by experts to determine whether the Bible was used in Bible Literature courses according to sound principles of literary criticism. In Calvary Bible Presbyterian Ch. v. Board of Regents, 436 F.2d 189 (Wash. 1967), the conclusion was that its use was appropriate. Id. at 194. Contrast this with the court's conclusion in Hall v. Board of School Comm'rs of Conecuh County, 656 F.2d 999 (5th Cir. 1981), that the Bible was being used for religious reasons rather than for literary study. Id. at 1001-02.
151. Comment, Academic Freedom in the Public Schools: The Right to Teach, 48 N.Y.U. L. Rev. 1176, 1193 (1973). It may be argued, however, that the teacher's right to speak should be greater than the teacher's right to refrain from speaking. S. Goldstein, Law and Public Education 108 (1974).
of which allegedly was the study of scientific evidence explaining the origin of man, it would be appropriate for the teacher to indicate that there is some dispute over the scientific evidence and give examples. Merely because the criticism comes from religious groups, and in discrediting Darwin might be said to support religion, does not make its interjection improper. It would not be proper, however, to discuss whether the scientific view of man's origin is contrary to religious views qua religious views, or whether the religious views were morally preferable. To the extent the goal of the class is the study of science, only the study of other scientific evidence would be suitable and not the study of theological approaches to the origin of man.

By contrast, were it a course in theology, mythology or folklore, it would be appropriate to examine differing concepts of the origins of man, including Biblical theories. There is probably less government entanglement and sponsorship of religion in presenting religious views as religious than there is in attempting to justify their inclusion in the classroom by labeling them as science or literature when they are neither. It would not matter that the teacher were perceived as nonneutral or as an advocate or critic of the Biblical version, as long as the teacher emphasized the existence of conflicting ideas and offered a sample of them. The class would not be constitutionally defective if the account of the origin of man subscribed to by 300 South Pacific islanders were omitted from the course. The class probably would be deficient by neutral academic standards if there were several generally acknowledged conceptions of the origin of man and only the Biblical view were discussed. Such circumstantial evidence would suggest to almost anyone that the purpose behind the course might not be secular. It would not require analysis of the metaphysical question of primary effect.

With respect to a literature class, experts could agree generally on the goals of literary criticism. An experienced and trained teacher might then engage in literary criticism of books including the Bible. It would then be permissible for his or her presentation of the Bible to coincide with a particular religious viewpoint and be viewed by students as "slanted," as long as it were explained

154. See Hall v. Board of School Comm'rs of Conecuh Co., 656 F.2d 999, 1001-02 (5th Cir. 1981); Calvary Bible Presbyterian Ch., 436 P.2d at 194.
that the goal was literary criticism and not religious debate. This does suggest, however, that the purpose of the lesson should be made clear to students, and in all cases it should be stressed that the purpose is not a religious one.

C. The Maturity of the Audience as a Limitation

The analysis thus far has focused on the teacher and his or her ability either to be objective or, if not, to present views other than his or her own. Up to this point the analysis has not considered the other participant in this process, the student. As already suggested, when the student (or parent) finds that the teaching of other points of view, whether religious or not, constitutes an assault on religious freedom, the Free Exercise Clause provides the remedy of excusal. Nevertheless, as pointed out earlier, this does not provide complete resolution of the Establishment Clause claim. Assuming that the teacher attempts to acknowledge viewpoints other than her own, nonetheless, it is possible that the audience will be totally swayed by the authority and respect the teacher commands. Thus, the teacher becomes a surrogate preacher, paid by the state, advocating a particular religious perspective.

This alternative analysis does not imply that such a result is constitutionally permissible. If the teacher sought to accomplish such a result, an unconstitutional religious purpose would underlie his or her behavior. To the extent the teacher, the legislature or the school board sought to serve a valid secular purpose, the focus should shift to the maturity of the students and their ability to think critically. This differs from focusing on primary secular effect in that it is not concerned specifically with how students react to religious topics or with what effect a particular discussion may have on them.

Some parents object to classroom discussion of topics such as sex, politics, or morality directed at children of a certain age. While these parents should not be able to veto such study, their objection does reflect legitimate concern with the question of when children are mature enough to handle controversial subjects. The Supreme Court has explicitly recognized this with respect to religion by stating that a discussion of religion appropriate in college may not be appropriate in elementary school. Furthermore,

155. See supra discussion of excusals, text accompanying notes 38-45.
156. Supra text following note 45.
Thomas Jefferson expressed the fear that young children lacked the intellectual maturity to deal with religion. 158 It is important, however, not to single out religion for hostile treatment. Religion is obviously a topic that generates debate and inspires strong feelings, but so do issues such as obscenity, abortion, politics and racism.

The question of when these topics may be taught should be answered by determining the age at which children are mature enough to comprehend topics requiring skills of critical analysis and independent thought. Such investigation is properly the task of psychologists, experts in child development and educators. 159 Some matter, such as the alphabet and simple arithmetic, may be so clear and noncontroversial that analytical skills are not needed and the child may learn it by rote. Other topics are not susceptible to this method of instruction.

Religion must be treated differently from these subjects in one respect. While it may be left to experts to decide when subjects may be introduced into the school curriculum in an artless, non-analytical manner, the Establishment Clause at least should require that religion be recognized as a controversial topic. Though this would not require total exclusion of religion from the public schools, it would withhold the teaching of religious topics until children are sufficiently mature to deal with a multifaceted presentation. Does this exclude too much from early grades? Is there anything wrong with learning about Biblical figures, without comment, in the first grade? It is easy to underestimate what is controversial. Even the Dick and Jane books which present boys in traditional male and girls in traditional female roles have generated conflict. 160 Controversy is probably unavoidable, and not necessarily undesirable. But if grappling with primary secular effect in using the current test is to be avoided, perhaps it is best to delay introduction of religious subjects until the child is able to evaluate them critically. 161

158. 374 U.S. at 235 n.4 (Brennan, J., concurring).
159. For a discussion of ages at which learning skills develop, see, e.g., J. Piaget, Judgment and Reasoning in the Child (1928); A. Jersild, Child Psychology (4th ed. 1954).
161. According to some psychologists, this ability may develop at a very early age. See,
Conclusion

The Supreme Court's current approach to religion in the public schools demands either an unachievable neutral presentation of religion or its total exclusion. As the Wiley case illustrated,\textsuperscript{162} the "neutral" approach demands overwhelming judicial effort, requiring the court to monitor each class taught. The proposed alternative avoids many of the problems of the current approach by treating discussion of religion in the schools the same as discussion of any other controversial issue. It might result in the teaching of religious topics being excluded in the earliest grades of school, but it would allow much more leeway in the higher grades. School boards would be free to introduce religious discussion for secular purposes at the same time other controversial topics are introduced.

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\textsuperscript{162} See \textit{supra} text accompanying notes 81-98.
I. Introduction

The Constitution protects freedom of religion with language as absolute and complete as that found anywhere in the document. "Congress shall make no law . . . prohibiting the free exercise of [religion]."1 Other provisions of the first amendment are phrased in equally absolute form, but the subject matter of those provisions—speech and press—are inherently limited:2 each concerns communicative acts that cannot do direct physical damage to persons or property.3 The phrase “free exercise” contains no such inherent limitation, the word “exercise” clearly connoting action of all types and kinds.4 And the subject matter of the freedom, “religion,” likewise provides no inherent limitation.5 The clause thus presents a conundrum, on its face providing absolute protection, neither articulating nor implying any clear limitations.6

The Supreme Court in its first interpretations avoided the difficulty by ignoring the connotation of action in the word “exercise;” the clause was interpreted to protect belief only, not conduct.7 This stark dichotomy remained the law from 1878 until 1940, when the Court began to reformulate free exercise doctrine, and to expand protection to communicative acts.8 Since such protection ar...
guably was provided by the speech, press, and assembly provisions of the first amendment, no effective separate role for the free exercise clause had been articulated.9

With the opinion in Sherbert v. Verner10 almost twenty years ago, however, the Court commenced a revolution in the understanding and impact of the freedom of religion clause of the first amendment. For the first time, protection was extended to acts (1) not arguably sheltered by other provisions of the first amendment (2) which were impinged upon by a legal provision that was religiously neutral (non-discriminatory) on its face and in its intent.11 In Sherbert, the Court mandated the extension of unemployment compensation benefits to a woman who was unemployed because of a religiously motivated refusal to work on Saturday, despite the fact that the state denied compensation as a general rule to those who were unemployed for personal reasons.12 Confirming this doctrinal transformation, the Court held in Wisconsin v. Yoder the Court held that the state could not enforce the final two years of its compulsory school attendance law against parents whose religious beliefs precluded compliance.13

In essence, if an otherwise valid legal provision or governmental action has the effect of significantly burdening an individual's exercise of his religion, the government must tailor its requirements

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11. Prior to Sherbert, the argument had been made that neutrality in governmental action was all the Free Exercise Clause required. In this view, the clause prohibited governmental action aimed at burdening religious practice, not governmental action with a non-religious purpose that happened to impose upon an individual's religious practice. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting); Minersville School District v. Gobitis, 310 U.S. 586 (1940). This view is apparently shared by Justices Stevens and Rehnquist, and thus is appearing once again in Court opinions. United States v. Lee, 50 U.S.L.W. 4201, 4204, nn.2 & 3 (1982) (Stevens, J., concurring); Thomas v. Review Bd. of the Ind. Employ. Sec. Div., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting). Modern interpretation of the establishment clause prohibits most governmental conduct whose purpose is to assist or encumber religious conduct, and thus a neutrality approach to the Free Exercise Clause tends to subsume it within the Establishment Clause. See Alternatives, supra note 5, at 328-29, 345-52, 365-67.
12. 374 U.S. at 418-20 (Harlan, J., dissenting).
14. Id. at 234.
to avoid the imposition unless it has an extraordinarily strong reason for not doing so. The most common description of the test is that the state may justify its action only on the basis of a "compelling interest."\textsuperscript{16} This doctrine has been summarized by the Court as follows: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."\textsuperscript{16} "[I]n this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"\textsuperscript{17}

Coexisting with the holdings and this strong rhetoric, however, have been dicta suggesting a much more circumscribed and less powerful role for the clause. In Sherbert, the Court accepted and approved the prior Braunfeld decision, in which a Sunday closing law had been enforced upon an orthodox Jew in such a way as to substantially burden his ability to make a living.\textsuperscript{18} How Braunfeld could pass the test and square with the result in Sherbert was unclear to both members of the Court and scholars, but that was the position of the Court nonetheless.\textsuperscript{19} In Yoder, having accepted expert testimony that the Amish religion as a whole was threatened by the state's action with the ultimate burden, extinction,\textsuperscript{20} and having persuasively demonstrated how slight was the state's interest in enforcing the regulation on the Amish,\textsuperscript{21} the justices nonetheless emphasized that "the question is close"\textsuperscript{22} and that "few other religious groups or sects" could have met the requirements of the Court.\textsuperscript{23}

Thus the lower courts have been put in the difficult position of

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\item 16. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); 450 U.S. at 718.
\item 17. 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). The Court's most recent formulation is that a governmental "limitation on religious liberty" is constitutional only if "it is essential to accomplish an overriding governmental interest." United States v. Lee, 50 U.S.L.W. 4201, 4203 (1982).
\item 19. Alternatives, supra note 5, at 332, n.104.
\item 20. 406 U.S. at 212, 218-19.
\item 21. Id. at 221-34.
\item 22. Id. at 240 (White, J., concurring in an opinion joined by three of the six members of the majority).
\item 23. Id. at 236. For a detailed analysis of the Yoder opinion, see Alternatives, supra note 5, at 333-45.
\end{itemize}
following precedent which presents a curious double aspect: holdings and strong rhetoric protecting religiously motivated conduct, apparently undercut to a significant degree by contrary signals. And the Supreme Court has been sufficiently circumspect in accepting free exercise cases—choosing cases which, in the main, do not force it to clarify which aspect of Sherbert and Yoder is to be followed—that little additional guidance has been given. Either the lower court must attempt to divine what the Court really means from the contradictory signals (an impossible task); or it must choose on some basis (preference, prejudice, accident, factual similarity to the Supreme Court cases, etc.) which aspect to follow.

How fundamental is religious freedom? Is the test as strict as the language would appear to indicate? Must a planned dam be abandoned if it will flood holy places and drown gods, thereby obviously significantly burdening the believer's religion? May a public kindergarten teacher refuse to lead activities related to common holidays because to do so contravenes her religious beliefs? To illustrate the difficulties faced by the lower courts in free exercise adjudication, the discussion below focuses upon three problematic claims recently brought before them, the bases used to decide the cases, and some approaches that might have been used but were not. In exemplifying the problems, these concrete cases both demonstrate some of the important inadequacies of current free exercise doctrine and suggest the need for more coherent criteria. A fourth case, the Supreme Court's most recent free exercise opinion, is also briefly examined to determine if the Court has provided any further guidance.

II. Palmer v. Board of Education of the City of Chicago

During her first and second years as a kindergarten teacher,


In cases in which free exercise claims came to the Court in relation to behavior also covered by other first amendment protections, the Court has based its decisions on free speech and free press grounds. See, e.g., Widmar v. Vincent, 102 S.Ct. 269 (1981); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).
plaintiff Joethelia Palmer refused to (1) lead her class in the pledge of allegiance, (2) lead and teach patriotic songs, and (3) conduct activities celebrating commonly observed holidays. The refusal was based upon her religious beliefs. Defendants moved to terminate plaintiff on the basis of this conduct and she sought relief in federal court. Applying the “compelling interest” test, the district court granted summary judgment for the Board of Education and the circuit court affirmed. The case aptly demonstrates what might be called the “two views from Yoder,” but before these alternative analyses are examined, several complicating factors should be put aside:

1) It is possible that the underlying reason for Joethelia Palmer’s dismissal was incompetence as a teacher. If this were the case, free exercise of religion ought not have arisen as an issue for decision. Such grounds for dismissal were abandoned by the Board of Education on appeal, however, and the sole bases relied upon were the religiously grounded refusals listed above. Aside from these specific refusals, it must be assumed for the purposes of free exercise analysis that plaintiff was an acceptable and competent teacher.

2) Although the mandated conduct Palmer refused to perform consisted to a large extent in speech, her claim did not primarily rest on the Free Speech Clause of the first amendment. Unlike the classic Barnette situation, or its modern counterpart in Wooley v. Maynard, Palmer was not being coerced into expressing opinion or affirmation, but rather into a course of conduct and instruction. There is some indication that she would have been allowed to tell her students that her personal beliefs were different from those she was teaching. But Palmer’s refusal did not involve a desire to

25. Palmer v. Board of Educ. of City of Chicago, 466 F. Supp. 600 (N.D. Ill. 1979), aff’d, 603 F.2d 1271 (7th Cir. 1979).
26. 466 F. Supp. at 601; Brief for Appellees at 5-7, Palmer, 603 F.2d 1271 (7th Cir. 1979) (describing deposition testimony of plaintiff’s principal).
27. See infra text accompanying notes 74-75.
28. 603 F.2d at 1272 n.1.
30. 430 U.S. 705 (1977) (citizen may not be compelled to display motto on automobile license plate).
31. Plaintiff was informed by her principal that she “had the right to express her own views 'in a moderate way within the purview of a given course of study and in keeping with the maturity level of the children being taught.'” 466 F. Supp. at 602.
communicate a message to her students, nor (in its essence) to refrain from communicating a message, but rather to refrain from conduct considered forbidden by her religion: worship of idols.\textsuperscript{32} Certainly free speech issues are implicated, but the core issue from plaintiff’s point of view was conduct prohibited by her religion, not communication.\textsuperscript{33} Palmer had no objection to other persons leading the activities while she was present (in other words, no objection to having the communication occur); it was her own conduct which was central to her concern. And had the conduct, a flag salute for example, been mandated in private—absent any communication—her perception of the unacceptability of the behavior would have been no different.\textsuperscript{34}

3) The fact that Palmer sought protection for conduct within the course of her public employment as a teacher did not dispose of the case. Governmental benefits or privileges—such as teaching positions—may not be conditioned in such a way as to unnecessarily burden the exercise of Constitutional rights.\textsuperscript{35} Thus, the status of plaintiff as a teacher was simply one way of suggesting the factual context for what the state had to prove: that it had a “compelling interest” in preventing Palmer from teaching in a manner consistent with her religious beliefs.\textsuperscript{36}

4) The eccentricity of Palmer’s beliefs, or their foolishness by the standards of the vast majority, in no way subverted her claim. It is axiomatic that the first amendment protects those on the

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32. 603 F.2d at 1274; 466 F. Supp. at 602.
33. This distinction is far from a bright line. The first amendment issues are intertwined because the conduct involved (or subsumed) communication. Compare Palmer with Widmar v. Vincent, 102 S.Ct. 269 (1981) and Heffron v. International Soc’y for Krishna Consciousness, 452 U.S. 640 (1981).
34. The distinction is an important one because, if the essence of plaintiff’s claim was the desire to communicate a message, it is quite possible that there were other, alternative forums available to plaintiff, and therefore a constitutional violation of free speech rights might not be found in the denial of the opportunity to reach a captive audience of kindergarten children. Cf. Pickering v. Board of Educ., 391 U.S. 563 (1968) (first amendment protects teacher’s public criticism of school board which does not impede his performance of classroom duties or the general operation of the school).
36. The use of “compelling interest” here, and throughout the text, is as a shorthand reference to the strict standards enunciated in Sherbert, Yoder and Lee. See supra notes 15-17 and accompanying text.
fringe just as it does those in or close to the mainstream. Particularly in regard to religious matters, an initial perception that claims are spurious or ridiculous should function as a caution signal for those who desire to take the protection of the amendment seriously.

A. The First View from Yoder

The interests of the state at issue in Palmer are important: certain traditional elements of elementary school education. And education is one of the most basic and fundamental services of modern government. Yet this is not enough. Although "public schools rank at the very apex of the function of a State," the Yoder opinion clarified that such a general interest could not, without more, be held compelling.

Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim [that the governmental interest in the system of compulsory education is compelling]; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

The governmental interest is to be weighed and understood not at the general or abstract level, but at the level of the harm done to that interest by the alternatives demanded by the claimant. Sherbert and Yoder legitimated as a potential alternative exemption for the claimant (and those similarly situated) from otherwise valid regulation applicable to all others. The result was a drastic narrowing of what may be placed upon the state interest side of the balance. Further, the burden is on the state to prove the compelling

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37. E.g., Kingsley International Pictures v. Regents, 360 U.S. 684 (1959); Girouard v. United States, 325 U.S. 61, 68 (1946) ("freedom for the thought that we hate"), quoting United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Hughes, C.J., dissenting); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Martin v. Struthers, 319 U.S. 141, 149-50 (1943) (Murphy, J., concurring). In the individual instance, this axiom is easy to forget. Compare, e.g., Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977) (serious consideration of claim; successful objection to issuance of social security numbers as a condition to welfare assistance on basis of belief that numbers were a mark of the beast) with Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977) (cursory approach to claim of private religious discrimination under Title VII; personal religious creed supporting the eating of cat food held not to be "religious" under Supreme Court criteria).

39. Id. at 221.
40. Alternatives, supra note 5, at 341-44. For example, in Yoder the state's interest is not
nature of its interest; assertion, imagination, or anxiety are insufficient.\textsuperscript{41} In summary, the revolution of \textsl{Sherbert} and \textsl{Yoder} inheres in the requirement that a court approach with a searching skepticism alleged compelling governmental interests that burden religious freedom.

Neither the district nor circuit court in \textsl{Palmer} did so. Quoting from a pre-\textsl{Yoder} opinion, the district court found it "self-evident" that the state had "a compelling interest in assuring the fitness and dedication of its teachers," and deduced from this that "regulation of [the] curriculum . . . is likewise compelling."\textsuperscript{42} Little further analysis of the state interest was provided. Even more egregious was the circuit court's inflation of the state interest:

Because of her religious beliefs, plaintiff would deprive her students of an elementary knowledge and appreciation of our national heritage. . . . Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please. Plaintiff's right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy. In this unsettled world, although we hope it will not come to pass, some of the students may be called upon in some way to defend and protect our democratic system and Constitutional rights, including a plaintiff's religious freedom. That will demand a bit of patriotism.\textsuperscript{43}

Thus the \textsl{Palmer} opinions omit the substance of a proper free exercise analysis under \textsl{Sherbert} and \textsl{Yoder}. First, the courts neglect to determine whether or not alternatives existed under which the functions refused by Palmer could be performed in other


\textsuperscript{43} 603 F.2d at 1274.
ways. Second, even assuming that no alternatives were possible, the courts failed to focus on the actual interest of the state. The general "fitness and dedication" of all teachers, or even Joethelia Palmer, was not at issue; nor was the general power of the government to prescribe the curriculum in public schools questioned. More significantly, the state's general interest in conveying "knowledge and appreciation of our national heritage"—"patriotism"—also was not at issue. At issue was the state's interest in conveying this knowledge or attitude to the small number of students in Palmer's class during their first year of public education. The state had nine to eleven additional years to reach these children; thus, at most, one-ninth of that particular curricular subject was at issue for those children. Moreover, the vast bulk of the students, those in all other classes and grades, would not be affected.

Neither court suggests that the state presented persuasive evidence that this one year delay in patriotic education for a tiny minority of students constituted a "grave abuse endangering a paramount interest."44

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44. The district court mentions that various alternatives were tried, and summarily concludes, "For various reasons, all of these methods proved infeasible." 466 F. Supp. at 601. No citation to the record is given, nor is there any clear indication whose standards determined feasibility. The standards may have been those of the principal. 406 F. Supp. at 601 n.1 ("using older students . . . burdensome on them;" broadcast pledge "rejected because . . . children at the kindergarten level need actual guidance"). The appropriate standard of feasibility is clearly a constitutional one to be determined by the court, yet there is no indication that the court on this motion for summary judgment independently evaluated what the principal "felt" to be "burdensome" or "proper." Id. Similarly, the circuit court summarily and without reference to the record asserts that "[e]xtraordinary efforts" to accommodate were made, "but it could not reasonably be accomplished." 603 F.2d at 1272 (footnotes omitted).

45. Mere assertion or speculation that a more significant number of students will be affected if other teachers take advantage of the exemption does not meet the government's burden. See supra note 41.

46. Palmer is not the only case to ignore the Sherbert-Yoder doctrinal revolution by failing to realistically appraise and narrow the state's interest. E.g., Johnson v. Motor Vehicle Div., 593 P.2d 1363 (Colo. 1979), cert. denied, 444 U.S. 885 (1979) where the "exigencies of law enforcement," id., at 1365, and the need for a "recognized statewide means of ready identification," were held sufficiently compelling and without alternative to defeat a sincere claim for exemption from the requirement of a photograph on a driver's license (noted and criticized at 1980 B.Y.U.L. Rev. 471 (1980)). (On similar facts, a decision contrary to Johnson is reached in Bureau of Motor Vehicles v. Pentecostal House of Prayer, 380 N.E.2d 1225 (Ind. 1978)). Another example is State v. Brashear, 593 P.2d 63 (N.M. 1979), a marijuana case in which the Court reached the remarkable conclusion that the legislative enactment classifying conduct as criminal was itself sufficient indication that the governmental interest met the Sherbert-Yoder test. See also Pepper, The Case of the Human Sacrifice, 23 Ariz. L. Rev. 897, 927-28 (1981).
B. The Second View from Yoder

1. Divining a Compelling Governmental Interest

Turning from the broad tests announced and applied in Sherbert and Yoder to the contrary undercurrents in those opinions indicating that the holdings are to be understood in a narrow, limited fashion, the result in Palmer is more justifiable. Focusing solely upon the governmental interest side of the balance, a potentially meaningful distinction may be drawn between Palmer, on the one hand, and Sherbert and Yoder, on the other. The state interests weighing against exemption in Sherbert were extremely weak: "fears" that fraudulent claims to a Saturday Sabbath would result in a significant dilution of the unemployment compensation fund and would disrupt the scheduling of Saturday work by employers.47 The harms were both speculative and relatively intangible. In Yoder, harm to two of the three interests suggested by the state was similarly indirect and speculative.48 The only direct harm was to the students to be exempted: they would lose two years of public education. The significance of this harm, however, was substantially ameliorated by the fact that it only directly affected the interests of the plaintiffs themselves—a "harm" which they sought and to which they consented.49 The state's interest in preventing the harm was indirect—as parens patriae.50

To the contrary, identifiable third parties were directly injured by Palmer's conduct: the school administrator, other teachers, children in Palmer's class, and their parents were all inconvenienced and "substantially upset." The district court placed partial reliance upon this factor in reaching its decision,51 and the circuit court placed substantial emphasis upon the direct "impact" of plaintiff's conduct "on her students who are not members of her faith."52 While upset or inconvenience to government employees ought to be categorized as merely an element of governmental ad-

47. 374 U.S. at 407.
48. 406 U.S. at 221-29.
49. Although plaintiffs were parents, and the harm was to the children, there was no indication that the interests and desires of the children were different from the parents'. Moreover, the fact of minority normally gives the parent the right to determine what the "interest" of the child is. As to the two children who did not testify concerning their desires, Justice Douglas was unwilling to assume that the parents were speaking for the children. 406 U.S. at 241-43 (Douglas, J., dissenting).
50. Id. at 229-34.
51. 466 F. Supp. at 602.
52. 603 F.2d at 1274.
ministrative efficiency or economy, an interest which courts do not
ordinarily find significant when balanced against fundamental
rights, the same is not true of the upset and inconvenience to the
students and their parents. Palmer thus presents non-speculative
direct harm to identifiable third persons, a factual element which
the Supreme Court has not weighed in its post-Sherbert free exer-
cise balancing test. Relying on the narrowing dicta in Sherbert and
Yoder to reach the result in Palmer, would lead to the conclusion
that any non-trivial, non-speculative, direct injury to a third party
constitutes a "compelling" governmental interest. This certainly
strains the announced criteria of the Court, but can be seen to be
compatible with the holdings.

Such a result appears surprising because parental inconvenience
or upset with a teacher who was too harsh, too demanding, too
abrasive, or what have you, would not on its face appear to be the
sort of interest which the school board would find "compelling."
Once aligned with the wishes of the government (school board),
however, this minimal interest suddenly becomes "compelling"
when balanced against the religious interest of the individual
(teacher), or so the logic of Palmer suggests. To justify this curious
position, it may be argued that the rights of one individual are not
superior to those of another. Free exercise of religion is not a gen-
eral license to impose upon other individuals. The fact that my
neighbor sincerely perceives my back yard to be the principal
shrine of his religion should not prevent the government from en-
forcing a trespass action against him. This perception is, of

course, complicated and diluted in the Palmer situation by the fact
that the public school is not my back yard.

Non-trivial, non-speculative, direct injury to third parties result-
ing from religious conduct may be a useful criterion for removing
free exercise clause protection. Palmer may not be an appropriate
application of such a test, however, either because the injury is

53. 374 U.S. at 408-09. (Indicating that to reach the level of a compelling governmental
interest, "an administrative problem" would have to be "of such magnitude, or to afford the
exempted class so great a competitive advantage, that such a requirement would have ren-
dered the entire statutory scheme unworkable."); Stevens v. Berger, 428 F. Supp. 896
(E.D.N.Y. 1977).

54. Such an exception to free exercise clause protection for injuries to identifiable, non-
consenting third parties has been recently suggested. See Note, Religious Exemptions
Under the Free Exercise Clause: A Model of Competing Authorities, 90 YALE L.J. 350, 368,
375-76 (1980); see also Alternatives, supra note 5, at 370-73.

55. Id.
trivial, or because the school context is one in which there is no third party interest genuinely independent of the interests of the state, a third party having no right to control what occurs in a public school.

2. Weighing the Burden on Religious Practice

Free Exercise Clause limitations should apply to governmental action which impinges in some significant or meaningful way upon an individual's exercise of religion. Until Yoder, this threshold issue was treated as such: if governmental action resulted in a significant burden on the practice of an individual's religion, that governmental action had to pass under first amendment scrutiny. Perhaps the most significant undercutting element in the Yoder opinion was the shift to an elaborate examination of the extent of the burden on religious action, as opposed to merely determining whether or not the threshold had been crossed. The Yoder Court found the burden to be ultimate (probable destruction of the "religion"), and then emphasized the closeness of the balance. Thus Palmer—and almost any other case likely to arise—could be distinguished from Yoder on the basis of a significantly smaller burden. Jehovah's Witnesses will not disappear as a religious group if none of their number are public school teachers. Joethelia Palmer loses a job, not her religion and not all alternative sources of livelihood.

Interestingly, on the religious interest side of the balance, there is a "second view" only from Yoder, not from Sherbert. Sherbert

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56. There would seem to be little reason why free exercise of religion should not be limited by the same type of reasonable time, place and manner restrictions that are Constitutional in regard to speech. This would not be true if the time, place, or manner itself had religious significance. For example, the location of a church rarely has religious significance, and therefore zoning regulations ordinarily would not be a sufficient burden to trigger free exercise scrutiny, as long as they did not display discrimination against churches or religion. The Pillar of Fire cases provide an illustration. An urban renewal authority attempted to condemn a church building claimed to have "unique religious significance." In the first opinion, the Colorado Supreme Court took the claim seriously and remanded for a determination under the Sherbert-Yoder balancing test. Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250, 1255 (Colo. 1973). Upon remand, the trial court found the church's claim concerning religious significance to be unsupported, and the supreme court affirmed. Denver Urban Renewal Auth. v. Pillar of Fire, 552 P.2d 23, 25 (Colo. 1976).

57. Alternatives, supra note 5, at 337-38. See infra notes 82-86, 93-97 and accompanying text.

58. See supra note 20.

59. See supra note 23. At least one recent opinion has relied in part on how "close" Yoder was to reach a contrary result on similar facts. West Virginia v. Riddle, 50 U.S.L.W. 2397 (W. Va. 1981).
stood to lose only twenty-six weeks of unemployment compensation, yet the Court had no trouble holding that this was a sufficient burden on religious exercise to merit first amendment protection.60 This contrast is muddled, however, by the other side of the balance. In Sherbert, the governmental interest was very weak: in Yoder it was arguably substantially stronger.61 Thus, minimal scrutiny of the extent of the invasion of Sherbert's belief may be premised on the fact that only a threshold invasion was necessary to overbalance the state's weak interest.

Although neither opinion in Palmer relied upon the "second view" (the narrow or close reading of Yoder and Sherbert), but relied instead on the discredited approach of identifying vague and generalized "compelling" governmental interests,62 such a view—on the two separate grounds outlined above—could be understood to validate the otherwise apparently erroneous conclusion reached.

III. Sequoyah v. Tennessee Valley Authority63

The Tellico Dam on the Little Tennessee River was near completion when plaintiffs sued to prevent its operation on the ground that the waters impounded would flood numerous sites sacred to their religion, thus substantially burdening the exercise of that religion by preventing access to unique areas where worship ought to take place and by physically destroying areas of special religious import.64 The purposes of the Tennessee Valley Authority in creating the challenged lake were: (1) energy generation, (2) creation of

60. 374 U.S. at 403-04. One of the aspects which makes Sherbert's reaffirmance of Braunfeld v. Brown, 366 U.S. 599 (1961), so problematic (see supra text accompanying notes 18-19) is the fact that Braunfeld reached a contrary conclusion in a situation in which the entire livelihood of the plaintiff—not just twenty-six weeks—was at issue. Compare the Braunfeld plurality's characterization of the burden, 366 U.S. at 605-09, with that of Justice Stewart in dissent, id. at 616. Due to the procedural stance of the case, Justice Stewart's understanding is technically more correct.

61. The strength was in the state's generalized interest: education. After being narrowed by the realistic and "searching" scrutiny of the Yoder Court, it would be difficult to say whether anything more was left of the state's interest than in Braunfeld, 406 U.S. at 221-34.

62. Prior to Sherbert, the Court tended to inflate the state's interest to a high level of generality, much as the Palmer courts did, and then to determine the issue on vague standards of how much burden on religious practice was too much. See Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Alternatives, supra note 5, at 329-31, 341-44.


64. 480 F. Supp. at 610; aff'd., 620 F.2d at 1160, 1162.
flatwater recreation, (3) flood control, and (4) enhancement of the local economy.\(^65\) Energy generation from the dam was negligible, and there appears to have been no urgency or necessity in relation to flood control.\(^66\) Nor was there clear economic advantage in creating the lake,\(^67\) and the balance of intangibles was likewise controversial. In this kind of closely balanced political decision, favoring some interests and disfavoring others, the injection of a \textit{bona fide} claim of infringement of religious practice would seem to manifestly tip the balance, at least if the test employed were the articulated \textit{Sherbert-Yoder} doctrine. No "compelling," "overriding" or "paramount" governmental interest, none of the "highest order," nor any "grave abuse," appears to have supported the Tellico Dam project,\(^68\) and thus plaintiffs appeared to have a strong claim.

Two factors point modestly in the other direction. First, $111,000,000 had been spent on the project.\(^69\) Although mere economic advantage does not ordinarily overbalance first amendment rights, perhaps when the amount becomes high enough the interest becomes compelling. Second, one could presume that identifiable third parties had taken economic actions in reliance on the planned reservoir, and would have been economically damaged if the water were not impounded. If, as was hypothesized in considering \textit{Palmer}, non-trivial, non-speculative, direct injury to a non-consenting third party constitutes a "compelling" governmental interest, these third party interests (assuming they could have been proved) might tip the balance against plaintiffs.\(^70\)

The courts in \textit{Sequoyah} eluded these issues, however, by avoiding entirely any determination concerning the governmental interest side of the balance. Three alternative escapes from the weakness of the governmental interests will be discussed below, one not


\(^{66}\) There were no electric generation facilities at Tellico, but a canal connecting it to another hydroelectric plant would augment its capacity to the extent of heating 20,000 homes. \textit{Id.}

\(^{67}\) Two official studies had concluded that non-reservoir project area development might be economically preferable to creating the proposed lake. U.S. COMPTROLLER GENERAL, \textit{TVA's Tellico Dam Project: Costs, Alternatives, and Benefits} (1977); U.S. DEP'T OF INTERIOR, ENDANGERED SPECIES COMMITTEE, \textit{STAFF REPORT ON TELLICO DAM AND RESERVOIR} (Jan. 19, 1979).

\(^{68}\) \textit{See supra} notes 15-17 and accompanying text.

\(^{69}\) 480 F. Supp. at 610. \textit{But see supra} note 67.

\(^{70}\) Injury to parents and children in \textit{Palmer} was not speculative and was direct. These two elements would be less clear in regard to economic injury resulting from reliance on the creation of a lake which did not come into being.
taken by either court, one taken by the district court, and one which supplied the final basis for decision in the circuit court.

A. Laches

Both the factors mentioned above—the expense of construction and the economic reliance of third parties—would have been absent if the first amendment claim had been adjudicated prior to construction. And the plaintiffs were aware of the proposed project and its threat to their religious practice prior to the first appropriation of construction funds, an event which occurred approximately thirteen years before suit was filed. Thus, the plaintiffs could be seen to have prejudiced both the government and interested third parties by their delay, an arguably appropriate situation for the equitable doctrine of laches to bar their action.71

The defense was raised by the defendant and appears to color, and perhaps to underlie, the opinion of the district court.72 Nonetheless, the opinion neither addresses nor rules on the issue. For unarticulated reasons,73 the court chose to rule on an entirely different basis, while leaving the impression that its motivation for the result may have been the equitable factors of laches.

Although the application of laches to a constitutional claim would be problematic,74 facing and attempting to resolve the diffi-

71. The elements of laches are usually stated as (1) delay in asserting a right, (2) for which there is no sufficient excuse, which (3) results in undue prejudice to the defendant. See, e.g., Sierra Club v. Cavanaugh, 447 F. Supp. 427, 429 (D.S.D. 1978).

72. The first paragraph of the segment of the opinion relating the facts emphasizes the $111,000,000 expended for the project and the plaintiffs' delay in bringing their first amendment claims, and concludes: "It is difficult to understand why plaintiffs have waited until now to raise their constitutional arguments in court." 480 F. Supp. at 610.

73. The court apparently wished to dispose of the matter quickly. Suit was filed on October 12, 1979; the motions to dismiss and for preliminary injunction were "exhaustively briefed and argued orally before [the] Court"; 480 F. Supp. at 610; and the opinion is dated November 2, 1979. The court notes in its opening fact section that "the dam has been the subject of at least nine law suits on the district court level alone." Id. At oral argument, the judge opined that determination of the laches claim would require an evidentiary hearing. Transcript at 58, 61, Tennessee Valley Auth. v. Hill, 620 F.2d 1159 (6th Cir. 1980), aff'd, 480 F. Supp. 608 (E.D. Tenn. 1979), cert. denied, 449 U.S. 953 (1980). This would have delayed the decision.

74. When a public rather than a private interest is at stake, there is a substantial policy basis countervailing whatever inexcusable delay may be at issue. Organizations United for Ecology v. Bell, 446 F. Supp. 535, 546 (M.D. Pa. 1978). And it would seem that any constitutional interest is by definition a public interest. An unconstitutional governmental exercise of power ought not gain validity merely by the passage of time and reliance by the government or third parties. Sears v. Treasurer and Receiver Gen., 98 N.E.2d 621, 632 (Mass. 1951) (unconstitutional law cannot be validated by lapse of time or laches). But cf. Reynolds v. Sims, 377 U.S. 533, 585 (1964) (legislative apportionment case: "In awarding or withhold-
culties would have been preferable for two reasons. First, plaintiffs’ delay in fact brought into being the most significant governmental interests to be balanced against their claim. In terms of rough justice, the hard fact that the dam was complete and ready for operation was the core weakness in plaintiffs’ position. Second, freedom of religion in a plural, technologically and socially complex, interrelated society, is an inherently difficult and sensitive issue. If a dispute may be decided upon grounds which avoid adjudicating the limits of religious conduct, the wiser course is to avoid the extremely sensitive and fundamental ground of decision in favor of alternative, more characteristically legal criteria, particularly if a decision framed in the first amendment terms will in fact be perceived as significantly circumscribing the asserted freedom. And a decision against plaintiffs in Sequoyah given the weakness of the governmental interests in the lake, will certainly be seen as a significant circumscription of free exercise rights.

Freedom of religion lies at the core of the fundamental problem of encompassing substantially different cultures within one political entity. It is thus a constitutional problem in the deepest sense, not only a problem of interpreting a particular phrase in a particular document, but a problem of constituting a functional polity

On the other hand, in a free exercise claim under the Sherbert-Yoder doctrine, an otherwise valid, religiously neutral governmental law or action may be unconstitutional as applied to a particular individual because of his or her religious beliefs. The law or regulation itself is not unconstitutional, only the particular nexus between it and the individual. In this situation, ought the constitutional interest of a party who has inexcusably delayed prevail over the public and third parties who have substantially relied upon the general validity of the government’s action? Perhaps this is merely a way of restating the question whether the injuries caused by that delay—whatever they may be—constitute a “compelling” governmental interest. (In this case, the court would merely circle back to making a determination whether the $111,000,000 and the reliance of third parties were sufficiently compelling). But perhaps not.

There appears to be surprisingly little in the way of developed doctrine on the application of laches to constitutional claims, although the doctrine is accepted in the context of public issue litigation. See Save Our Wetlands v. United States Army Corps of Eng’rs, 549 F.2d 1021, 1026 (5th Cir.), cert. denied, 434 U.S. 836 (1977); Ecology Center of Louisiana v. Coleman, 515 F.2d 860, 867 (5th Cir. 1975). In cases factually similar to Sequoyah, but without the constitutional element, where public works projects partially or substantially completed were challenged on public interest or policy grounds under the National Environmental Policy Act, the doctrine of laches has frequently been held applicable. See Sierra Club v. Cavanaugh, 447 F. Supp. 427, 429-30 (D.S.D. 1978) (listing cases holding delay prejudicial where project was substantially complete, at 430 n.1); Organizations United for Ecology v. Bell, 446 F. Supp. 535 (M.D. Pa. 1978) (cases involving projects substantially underway discussed at 552).
from disparate and divergent groups and cultures. Both Sequoyah and Palmer blithely (and without indication of competence) take on and decide this issue when alternative approaches may well have been available.

B. The “Two Views from Yoder” Revisited

1. The District Court Opinion

Eschewing the alternatives of (1) ruling on the basis of laches or (2) assessing the weight of the governmental interests on the merits, the district court took a curious turn, holding against the plaintiffs on the ground that they had no property interest in the area to be flooded. Apparently, the court concluded that the government was transformed into a private party when use of its property was at issue: just as my neighbor has no right to my back yard merely because he believes it to be a religious shrine, plaintiffs had no right of access to federal land. The Bill of Rights would seem to apply to all governmental acts, including the use and management of property, yet the court implicitly denied this.

Under a Sherbert-Yoder doctrinal analysis, one could assert that use of its property without constraint in all circumstances is a compelling governmental interest. Merely to assert such a notion is to demonstrate its absurdity, and the court does not take this tack. Rather, it shifts to the religious interest side of the balance, concluding that the governmental action at issue does not constitute a burden upon religion. In light of the court’s earlier “assumption” that the land is “sacred to the Cherokee religion,” whose “practitioners . . . would want to make pilgrimages to this land as a precept of their religion,” this finding of “no burden” is difficult to understand. The court’s logic is that because the Indians have no property interest, they have no right to access; and without a right to access, there has been no burden imposed by the government in rendering access impossible. The court thus ignores the obvious burden on religious practice entailed in the government’s action by positing the absence of one right (property) as the basis for finding the absence of another right (free exercise), in essence assuming its conclusion.

76. 480 F. Supp. at 611-12.
77. See supra notes 57-61 and accompanying text.
78. 480 F. Supp. at 611.
2. The Circuit Court Opinion—"Cultural Imperialism" and Indian Free Exercise Cases

Not surprisingly, the circuit court summarily dismissed this bit of magic on the part of the lower court. The circuit court might then have remanded for a proper weighing of the respective interests under the compelling interest test, or for an evidentiary determination of the laches issue, or it could have confronted the apparent absence of a strong governmental interest itself. Instead, it chose a fourth alternative.

The author has suggested elsewhere that, within the Yoder opinion, "implications seem to be carefully seeded for future cutting back upon the very principles relied upon." The Sequoyah Court cultivates to full flower two of the seeds dealing with the religious interest side of the balance. First, as mentioned above, the Yoder opinion focused upon the degree of imposition upon the Amish religion, not simply the presence or absence of imposition. In determining that the threat to the Amish way of life was extreme, the opinion lays some emphasis upon the fact that the government regulation in question limited Amish religious practice that was "central to their faith" and "played a vital role" in the "continued survival" of the Amish religious identity. Relying on this element of Yoder, the Sequoyah Court read a requirement into the Free Exercise Clause that the burdened religious practice be central or vital to plaintiff's religion, and found the plaintiffs' affidavits insufficient to establish the "centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances."

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79. Unfortunately, the circuit court did not display the faulty legal analysis of the court below. Rather, it recalled historical events which placed a different light on the government's property interest, and let the issue drop: "While [plaintiffs' lack of a property interest] is a factor to be considered, we feel it should not be conclusive in view of the history of the Cherokee expulsion from Southern Appalachia followed by the 'Trail of Tears' to Oklahoma and the unique nature of the plaintiff's religion." 620 F.2d at 1164.
80. The court explicitly rejects these possibilities. 620 F.2d at 1165.
81. Alternatives, supra note 5, at 333.
82. See supra notes 21-23, 57-59 and accompanying text.
83. 406 U.S. at 210.
84. 406 U.S. at 235.
85. 620 F.2d at 1164. While agreeing with the "centrality standard," one member of the panel opined that the case ought to be remanded so plaintiffs could offer further evidence on this issue. Id. at 1165 (Merritt, J., dissenting). Reading Yoder to apply a test of centrality to religious practice, although common, is in fact a distortion. See infra note 91. A more accurate reading is to see the Yoder criterion as measuring the extent of the burden on religious practice. Centrality of the impinged upon practices then becomes an indirect standard, relevant to a determination of the extent of the total burden on religion.
Second, the Yoder Court implied that religion, to qualify for first amendment protection, must be both organized and based upon external authority. Such limitations were necessary, the Court suggested, to avoid religion being established “subjectively,” as a mere matter of “personal preference.” Relying on this guidance, the Sequoyah Court found in the plaintiffs’ affidavits insufficient evidence of a “conviction ‘shared by an organized group,’” and contrary indication of “personal preference.”

This flowering of the Yoder seed exemplifies one of the important dangers of that opinion. The Judeo-Christian tradition may be seen to involve (1) core practices and beliefs, matters more and less central, (2) external authority (one God, the Bible), and (3) some form of organization (the synagogue and Rabbi; the “congregation” or “church” and its minister(s)—be it the Catholic Church and its ramified hierarchy, or a single Southern Baptist minister and his flock). But is there justification for reading the first amendment to limit its protection to this kind of religion? Was that the intention of the Yoder Court, or is it merely the untoward result of the Court’s strong desire to suggest narrow limits to its holding?

Sequoyah painfully demonstrates the ethnocentrism of such a limitation. The religion of the Cherokee is not protected—no need to even evaluate the government’s interest in this lake—essentially because it is not enough like “our” religion. Particularly in relation to traditional Indian religion, the “centrality” doctrine eviscerates the Free Exercise Clause. “Primitive” religions, includ-

Centrality is a criterion more explicitly employed in People v. Woody, 61 Cal.2d 716, 394 P.2d 813 (1964), one of two lower court cases, in addition to Yoder, relied upon by the Sequoyah Court in this critical portion of the opinion. In Woody the court distinguished in advance other religious use of peyote from that in the case by emphasizing that (1) peyote was itself the object of worship, without which there would be virtually no religious practice, and (2) plaintiffs were members of an identifiable group which shared the beliefs at issue and which had a long and orderly tradition and history dating to 1560. Yoder echoed both of these factors, but neither became an explicit test.

86. 406 U.S. at 215-16; Alternatives, supra note 5, at 335-36. Some lower courts have been willing to use these distinctions as bases for decision. E.g., West Virginia v. Riddle, 50 U.S.L.W. 2397 (W. Va. 1981) (challenge to compulsory schooling on free exercise grounds; Yoder distinguished: no recognized West Virginia community with long history of successful preparation of children for adult life, and child had not completed eight grades).

87. 620 F.2d at 1164.

88. See infra note 91.

89. “In the absence of such an infringement [upon religion], there is no need to balance the opposing interest of the parties or to determine whether the government’s interest in proceeding with its plans for the Tellico Dam is ‘compelling.’” 620 F.2d at 1165.
ing traditional native American Indian religions, do not compartmentalize the world into clearly religious and non-religious domains; rather the world is permeated with sacred emanations. The sacred (or religious) and the profane (or the non-religious) co-exist in the surroundings and practices of life. To apply the "centrality" standard to such religions, which perceive pervasive religious aspects of life, not compartmentalized, is to rule that no practice in such a pervasive religion is central, and hence none merits first amendment protection. Thus, the final conclusion in Sequoyah should come as no surprise: in examining plaintiffs' affidavits, the court found "damage to tribal and family folklore and traditions" and to plaintiffs' "cultural history and tradition," but not to religion or "particular religious observances."

Although the Supreme Court has not explicitly repudiated the narrowing dicta in Yoder and Sherbert, it has indicated a distinct


91. There is substantial irony in this aspect of Yoder subverting Indian religious claims. The Amish religion, akin to primitive religion, perceives all of life in religious terms. The religious belief at issue in Yoder was that "salvation requires life in a church community separate and apart from the world and worldly influence." 406 U.S. at 210. This belief was sufficiently overarching (in the eyes of the Amish) to prohibit adolescents from attending non-Amish schools for a few hours a day for two years. The belief was, in fact, pervasive, affecting every element of Amish life, and thus very troubling to the Yoder court. See Alternatives, supra note 5, at 335. The unlimited nature of the Amish religious claim—reaching all aspects of life—appears to be what motivated the Court to its limiting dicta on the nature of religion and the extent of the burden on religion. Otherwise, under the then recently enunciated broad interpretation of "religion" in the draft cases, United States v. Seeberger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970), how were courts to distinguish the hippies and their ilk from the Amish, a distinction the Yoder Court implies is imperative? See infra note 179 and accompanying text. Thus the tortuous opinion limiting that which is essentially unlimited. "This concept of life aloof from the world and its values is central to their faith," 406 U.S. at 210, under the facts of Yoder translates to: "Everything in the lives of the Amish is central to their faith."

The inseparability of the entire Amish way of life from the Amish religion was the Yoder problem, and the Court "solved" it by twisting the situation to emphasize that everything in Amish life was at the core of religion. The Court could as well have concluded that no Amish practice was central, because all conduct, the most trivial as well as the most vital, was covered by religious mandates. The key passage in Sequoyah is a pastiche of distinctions, one of which highlights the irony. The problematic nature of the Yoder facts (the illimitable which the Court struggled to limit), becomes the basis for distinguishing later cases: plaintiffs "have fallen short of demonstrating that worship at the particular geographic location in question is inseparable from the way of life (Yoder)." 620 F.2d at 1164.

92. 602 F.2d at 1164-65.
shying away from close examination of the religious side of the balance. No subsequent Supreme Court opinion has turned upon a finding that religious practice, although burdened, was not burdened enough, or was not sufficiently central. In the Court’s most recent free exercise case, decided against the Amish on the basis of the weight of the governmental interest, the Court went out of its way to reject the government’s reliance on the fact that payment of social security taxes did not “threaten the integrity of the Amish religious belief or observance”—a clear turning away from the narrowing emanations from Yoder. And the only reason for accepting review in Thomas v. Review Board of the Indiana Employment Security Division, must have been to prevent application of the narrower understanding of Sherbert and Yoder. The facts were extremely similar to Sherbert, but the lower court decided against plaintiff because his religious practice was more idiosyncratic than that in Sherbert or Yoder (not all members of Jehovah’s Witnesses shared plaintiff’s belief), and appeared inconsistent. The Court cautioned against requiring “clarity and precision” in religious beliefs, and held that “the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.” The Court seems to be moving away from its Yoder dicta and toward the conclusion that “once a practice is deemed to be religious, questions regarding what is ‘essential’ as opposed to ‘important,’ what is ‘indispensable’ as opposed to ‘desirable’ in a religion is better left to the theologians” than to courts.


94. United States v. Lee, 50 U.S.L.W. 4201, 4202 (1982). “It is not within ‘the judicial function and judicial competence,’ however, to determine whether appellee or the government has the proper interpretation of the Amish faith; [c]ourts are not arbiters of scriptural interpretation.” Id. (footnotes omitted). A similar dictum was announced by the Court in another recent case. Widmar v. Vincent, 102 S.Ct. 269, 271 n.6 (1981). United States v. Lee is discussed at greater length below in part V of the text.


96. As in Sherbert, plaintiff lost his job as a result of his religious practice, and the state denied unemployment compensation benefits. Sherbert had refused to work Saturdays, her Sabbath (a traditionally accepted and understood religious practice). Thomas refused to work in a department that fabricated turrets for military tanks because his religious beliefs prohibited participation in the production of war materials. Id. at 710-11.

97. Id. at 715.

3. Frank v. State

Frank v. State, another recent Indian free exercise case, provides an instructive contrast with Sequoyah, for it relies upon the first view from Yoder to protect plaintiff’s conduct. Frank was convicted of a criminal violation for hunting, killing and transporting a moose out of season. His motivation for this criminal conduct was the provision of appropriate foods for a funeral ritual. As with Palmer and Sequoyah, the case could be approached from both sides of the balance: (1) was the prohibition on hunting moose a cognizable burden on religious practice under the first amendment, and (2) did the prohibition qualify as a compelling governmental interest? The burden on religion will be examined first.

The funeral ritual feast, the “potlatch,” was undoubtedly a highly significant traditional religious event, but moose meat, albeit preferred, was not essential. On this ground it would have been easy to rule against plaintiff, as in Sequoyah, on the basis of the narrowing dicta in Yoder, and the two lower courts did so. The dissent agreed, citing both Sherbert and Yoder: “Unless the use of fresh moose meat rises to the level of a cardinal religious principle, unless it is central to a religious observance, it cannot qualify as a practice protected by the Free Exercise Clauses of either the state or federal constitutions.” In a sensitive, perhaps model opinion, the Alaska Supreme Court held to the contrary.

Commencing with the observation that “[n]o value has a higher place in our constitutional system of government than that of religious freedom,” the court stated as its standards the articulated tests of Sherbert and Yoder. In a stark contrast to Sequoyah, it then provided an anthropologically sensitive and informed description and assessment of the potlatch and the role of moose meat from the point of view of the defendant’s culture. The Athabascan religion, as with “primitive” religion generally, is more diffuse and contains fewer absolutes than religions more familiar to those of Western European ancestry. “From a complex belief system individual selection is tolerated and is the norm. . . . These beliefs have blended comfortably with Christianity which was introduced

100. Id. at 1069-70.
101. Id. at 1076 (Connor, J., dissenting).
102. Id. at 1070. From Yoder the court quotes the criterion set out in the text accompanying note 16 supra. From Sherbert it quotes a requirement of “some substantial threat to public safety, peace, or order.” Id., quoting 374 U.S. 398 at 403.
in the 19th century."\textsuperscript{103} Defendant was following his religion as he understood it.

But what of the second view from \textit{Yoder}, what of the fact that moose meat, though important, is not essential to the potlatch\textsuperscript{104} or to the survival of the religious culture of defendant? Without citing Supreme Court precedent, the court simply asserts that "absolute necessity is a standard stricter than that which the law imposes."\textsuperscript{105} Given the two contrary currents in \textit{Yoder}, there is no choice but to choose,\textsuperscript{106} and the court—in light of the principles underlying the clause—chose the first view, the articulated criteria, over the second view, the narrow, limiting dicta.

On the other side of the balance, the court admitted the unique and compelling nature of Alaska's general interest in hunting restrictions, but then followed \textit{Sherbert} and \textit{Yoder} in (1) focusing on the damage to that interest which would follow from the claimed religious exemption, and (2) requiring proof of that damage, not speculation or anxiety. Since the state made no effort to prove that a "potlatch exemption" for Athabascans would impinge significantly on the moose population, and since its allegation of "widespread civil disobedience," as the probable reaction from others not favored by such an exemption, was based solely upon fear and speculation unsupported by evidence, the state had not met its burden.\textsuperscript{107} Defendant's conviction was reversed. On this side of the balance, \textit{Frank} provides another instructive contrast: compare the assessment of the state's interest in \textit{Palmer}.\textsuperscript{108}

Before moving on, two factual distinctions between \textit{Frank} and \textit{Sequoyah} will be suggested, one on each side of the balance, which the author believes illustrate significant but rarely articulated factors impinging on free exercise adjudication.

First, in regard to the religious interest, note that in \textit{Frank} the Athabascan Indian village culture still existed. As viable social entities, the villages were relatively autonomous with respect to the dominant Western culture and had an uninterrupted tradition and history of identifiable beliefs and practices, among them the pot-

\textsuperscript{103} 604 P.2d at 1071.
\textsuperscript{104} The court indicated that it was "inclined" to find the district court "clearly erroneous" in this conclusion, but chose not to take such an approach. \textit{Id.} at 1072.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} See supra text following note 24.
\textsuperscript{107} 604 P.2d at 1073-74.
\textsuperscript{108} See supra text accompanying notes 42-43.
latch, which predated the arrival of Western European culture.\textsuperscript{109} Both geographically and psychologically, by contrast, Cherokee culture had been substantially interrupted, in fact devastated and displaced, and did not exist as a viable, easily identifiable entity separate from the dominant culture.\textsuperscript{110}

The \textit{Sequoyah} court perceived the plaintiffs as attempting to recreate an interrupted tradition\textsuperscript{111} and reclaim a lost geography (both literal and figurative). The \textit{Frank} court, to the contrary, comprehended that the defendant's entire present and past existence was bound up with the very culture he had followed in his criminal conduct. Moreover, because of the continued presence of a viable "foreign" culture, Alaskan courts had become somewhat familiar with and sensitized to the difficulties of encompassing plural cultures within a single legal system in a way that courts in the lower forty-eight states have not.\textsuperscript{112} The past significant deracination of the Cherokee, the cutting of the roots, has a substantial

\textsuperscript{109} 604 P.2d at 1071. Certainly Athabascan culture had been significantly affected by Western culture, see, e.g., \textit{supra} text accompanying note 103, but not overwhelmed. The analogy to the Amish is significant: they, too, exist in an autonomous culture, "separate and apart" from the dominant culture, which "has not altered in fundamentals for centuries." 406 U.S. at 210, 217, 235. \textit{Cf.} People v. Woody, 61 Cal. 2d 716, 394 P.2d 813 (1964) (reliance on consistent historical record of American Indian religious use of peyote dating back to 1560). In this regard, an instructive comparison may be made between \textit{Frank}, \textit{Woody} and \textit{Yoder} on one hand, and \textit{Africa} v. \textit{Pennsylvania}, 662 F.2d 1025 (3d Cir. 1981), on the other, in which the court ruled against a free exercise claim on the ground that the relatively inarticulate, amorphous, and all encompassing claims of the new creed in question were not religious.

\textsuperscript{110} See H. MALONE, CHEROKEES OF THE OLD SOUTH: A PEOPLE IN TRANSITION (1956); C. ROYCE, THE CHEROKEE NATION OF INDIANS (1975). The circuit court found significant the following facts:

\begin{quote}
[T]he exact location of Chota and the other village sites was unknown to the Cherokees until TVA undertook archaeological explorations with the assistance of the University of Tennessee. It appears that the plaintiffs are now claiming that the entire Valley is sacred. . . . There is no showing that any Cherokees other than Ammonet Sequoyah and Richard Crowe ever went to the area for religious purposes during that time. At most plaintiffs showed that a few Cherokees had made expeditions to the area, prompted for the most part by an understandable desire to learn more about their cultural heritage.
\end{quote}

620 F.2d at 1163.

\textsuperscript{111} The interruption, for at least some of the plaintiffs, had not been total. Cherokee culture maintained itself in its fundamentals from generation to generation for at least a small group. Thus, in a very narrow stream, the culture may have existed separate and apart from the mainstream. \textit{See} Bridgers, \textit{An Historical Analysis of the Legal Status of the North Carolina Cherokees}, 58 N.C.L. Rsv. 1075 (1980). Nonetheless, the contrast with the Athabascan situation remains clear.

\textsuperscript{112} \textit{See}, e.g., \textit{Carle v. Carle}, 503 P.2d 1060 (Alaska 1972) (cultural conflict in the context of a custody dispute).
effect on their current attempt to reestablish those roots. "The greater the past injury, the weaker the current claim," appears to be one of the lessons of free exercise doctrine operating in Frank and Sequoyah.

Second, and probably more significant in determining the actual outcomes in the two cases, is a distinction on the state interest side of the balance. In Frank, the state stood to lose a few moose, how many or how significant a portion of the population apparently was unknown. In other words, the relatively concrete or tangible loss was negligible (from the most limited view, only one moose had been taken out of season); and the larger effect on the state's interest was undetermined. To state its loss in terms that could arguably be characterized as "compelling," the state had to speculate, generalize and abstract. In Sequoyah, the tangible, concrete, certain loss was an entire dam project and its attendant lake. That loss was large ($111,000,000), if not compelling, and patent: the court knew it was there; it did not have to exercise its imagination.

It is noteworthy that, leaving aside the rhetoric and stated tests of Yoder and Sherbert, the actual harm threatened in those cases was entirely speculative and abstract. There was not even a dead moose to deal with. From this perspective, the effect of the Sherbert-Yoder revolution is solely to require that the state interest be measured in a realistic way, that it not be inflated and measured at some general level not actually threatened by the specific religious conduct in question. If this is the case, talk of "compelling," "paramount," "overriding" or "essential" state interests is misleading. The standard is substantially different: is there a real, tangible (palpable, concrete, measurable), non-speculative, non-trivial injury to a legitimate, substantial state interest? If the legitimate independent interests of third parties are subsumed within the category of state interests, a quite reasonable proposition since one of the primary functions of government is to protect such interests, this criterion, as discussed above, could even be stretched to legitimate the result in Palmer.

113. See supra notes 15-17 and accompanying text.
114. See supra notes 47-50 and accompanying text.
115. For examples of such inflation and lack of realism under the pre-Sherbert approach, see Braunfeld v. Braun, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944).
116. See supra note 113.
117. "Third parties" in this context denotes non-governmental entities separate and distinct from those parties claiming first amendment shelter for religious conduct.
118. See supra notes 51-55 and accompanying text.
Such a test would provide significant protection for free exercise of religion. *Yoder* and *Sherbert* do not deal with insignificant situations. But the protection would be narrow. Of course there are cases which might suggest that even then the confines of free exercise would not be narrow enough: that a concrete imposition on freedom of religion does not always overbalance a diffuse harm to the highest general interests of the state. A provocative testing case for this possibility is the state interest in racial non-discrimination in education (surely of the highest order amongst contemporary governmental interests), as served by denying tax exempt status to institutions which engage in racial discrimination based upon genuine religious belief.\(^{119}\)

IV. *Badoni v. Higginson\(^{120}\)*

Similar to *Sequoyah*, *Badoni* resulted from the coming together of Indian sacred geography and a major federal water project. Glen Canyon Dam on the Colorado River was completed in 1963, at which time Lake Powell began filling. By 1974, when plaintiffs filed suit, the waters of Lake Powell were encroaching upon Rainbow Bridge, a natural sandstone arch 309 feet high and 278 feet across. For generations, Navajo ceremonies had been held near the bridge which was considered an incarnate god, as were a nearby cave, prayer spot and spring, whose waters were also used for ceremonies elsewhere. Plaintiffs, Navajo Indians, brought forward two primary complaints: (1) that the impoundment of water under the bridge drowned their gods and denied them access to their religious sites, and (2) that management of tourist visitation to the bridge area was causing desecration of sacred sites and interference with religious ceremonies.\(^{121}\)

The district court ruled against plaintiffs on three grounds, two of which have been discussed in relation to *Sequoyah*. First, the court found plaintiffs “lack of a property interest” to be “determin-

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119. Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980); Goldsboro Christian Schools v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977). In such cases the sincerity of the claimed religious basis is suspect; religion and the first amendment are a tempting cover for bias rooted elsewhere. See, e.g., Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). It is instructive to assume the genuineness of the religious basis for the belief, however, when using such a fact situation as a testing case for discovering an appropriate free exercise standard or criterion.


121. 638 F.2d at 175-77.
native," a finding tersely dismissed by the circuit court with an observation one would have thought obvious, but for the *Sequoyah* and *Badoni* district court opinions: "The government must manage its property in a manner that does not offend the Constitution." Second, relying on the second view from *Yoder*, the district court found that, since plaintiffs visits to the area were infrequent, and because plaintiff medicine men were "not recognized by the Navajo Nation as such," there was no indication that the sites even "approach [having] deep religious significance to any organized group, or [have] in recent decades been intimately related to the daily living of any group or individual." The dubiousness of such *Yoder*-based distinctions has been suggested above. The circuit court avoided ruling on the basis of such distinctions, however, by relying instead upon the district court's third ground, the weight of the governmental interest in Lake Powell, and upon its own understanding of the Establishment Clause.

A. The Establishment Clause as a Limit Upon Free Exercise Clause Protection

Leaving aside for the moment the more problematic claim regarding lowering the overall level of Lake Powell, plaintiffs in *Badoni* were seeking rather modest relief: some accommodation to allow them to resume religious ceremonies. Closing the bridge area to the public on rare occasions to allow for private religious ceremonies, restricting the use of alcoholic beverages in the vicinity, and moving a floating marina to another canyon are examples of the kind of relief sought. It is difficult to imagine any "compelling" governmental interest, one meeting the *Sherbert-Yoder* doctrine, that supported the government’s unwillingness to take any special action to facilitate Navajo religious use of their traditional holy places. The court avoided facing this weakness of the governmental interest, as the court did in *Sequoyah*, by finding another

122. 455 F. Supp. at 644-45.
123. 638 F.2d at 176, citing only *Sequoyah*, 620 F.2d 1159 at 1164; see supra text accompanying notes 76-79.
125. See supra text accompanying notes 82-97.
126. Referring to "alleged infringements" on free exercise, the court said it need not address the issue because it had found the government's interest "compelling." 638 F.2d at 177 n.4.
127. 638 F.2d at 178.
128. See supra notes 10-13, 38-41 and accompanying text.
ground to rely upon. In *Badoni* that ground was the Establishment Clause. Limiting or conditioning public access to the Rainbow Bridge area in order to accommodate Navajo religious belief would constitute a prohibited governmental preference for religion, according to the court’s reading of the first amendment.

Under current doctrine this holding is almost bizarre: government may favor religion (1) with property tax exemptions; (2) by mandating that children be confined in school, and then, on a solely religious basis, releasing some students for religious study; and (3) allowing some children on a solely religious basis to avoid mandatory schooling to which all others must submit. Certainly these are more substantial accommodations, or “establishments,” than the relief requested by the Navajo in relation to Rainbow Bridge. Funeral processions are usually connected with religious services. Does this mean that the police cannot limit public access to the streets—change the normal rules of the road—to accommodate a cortege? Does the Establishment Clause mean that municipalities may not restrict traffic and access to public areas to accommodate the Pope’s public appearances? Or that, in relation to the Pope’s appearance in a public place, preferred seating could not be reserved for persons chosen by the Catholic Church? Some of the very cases relied upon by the circuit court for the absoluteness of the public’s right of access actually stand for the contrary premise that the ordinarily primary function of the streets as public passageways must be limited by the government to accommodate the occasional exercise of a secondary usage: the expression of opinion and assembly for redress of grievances protected by the first amendment.

One could reason to the contrary that the Establishment Clause in itself constitutes a compelling governmental interest, and thus governmental regulations that serve the Establishment Clause or its underlying values always justify impingement on the free exer-

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129. The clause is set out in note 1 supra.
130. 638 F.2d at 178-80.
134. Cf. Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980) (successful Establishment Clause challenge to expenditures by the city in support of visit by Pope; examples of limitation of public access).
cise of religion. Two recent Supreme Court opinions implicitly but clearly rejected such a position. The first case dealt with a legal provision which prohibited ministers of religion from holding public office. The historical basis of the provision was as a prophylactic measure to (1) prevent religious domination of the state, and (2) ameliorate political divisiveness along religious grounds, both obvious Establishment Clause concerns. Such action would also constitute, however, a burden on the religious practice of ministers. The Court found such a burden to be prohibited by the Free Exercise Clause, apparently concluding that the two Establishment Clause interests mentioned above were not sufficiently "compelling." Similarly, in the second case, a public university prohibited usage of its facilities for religious services, a prophylactic regulation designed to prevent any state subsidy or promotion of religion, and thus supported by the Establishment Clause. The Court held that, if the facilities in question are otherwise open to student groups for functions protected by the first amendment (public fora), the state may not limit usage to non-religious functions. Again, the Establishment Clause interests were apparently considered not sufficiently compelling to support limitation of first and fourteenth amendment protections of speech, assembly and equal protection.

The position taken by the circuit court is not quite "bizarre" because the issue is somewhat more difficult than the last two paragraphs and the Supreme Court's recent opinions would suggest. The Free Exercise Clause, on its face, prefers religion, favoring it as no other activity is favored. There is no parallel constitutional protection for free exercise of tourism, boating, hiking, beer drinking, or environmentalism. To the extent the Establishment Clause is read as a blanket prohibition upon governmental preference for religion, the Free Exercise Clause is therefore itself a violation. Approached from the opposite perspective, the Establishment Clause may be seen as a discrimination against religion and a burden upon religion, and therefore, arguably, a Free Exercise Clause violation. There are no parallel clauses preventing the

138. For example, Zorach v. Clauson, 343 U.S. 306 (1952), cited supra note 132, is obviously wrong for the reasons articulated in the dissents of Justices Black and Jackson, id. at 315, 323.
establishment of science, philosophy or speech. Thus, the clauses thrust in conflicting directions.

Without some resolution of the conflict, adjudication of religion clause disputes can be perceived as a mere matter of arbitrary "labelling." If the matter is approached as an "establishment" case, governmental accommodation or aid to religiously motivated conduct is prohibited; if the matter is approached as a "free exercise" case, the same special accommodation may well be mandated. Badoni may be read as an example of this phenomenon. A rational interpretation of the clauses, however, obviously must avoid such arbitrariness and chart a middle ground giving some meaningful content to both clauses, a task the Badoni opinion utterly fails even to attempt.

The two religion clauses may be interpreted to require no preference whatsoever for religion—to require a strict "equal protection"-like neutrality in relation to religion, and such a view could rationalize the Badoni opinion. This approach has some strong academic backing, and possibly some adherents on the Court, but it renders the Free Exercise Clause functionally meaningless. Much modern commentary, and the most recent Supreme Court decisions, conclude to the contrary that "free exercise" principles are the more fundamental of those underlying the two clauses.

140. The Free Speech and Press Clauses of the first amendment limit governmental interference with private speech; they do not prevent the government from espousing or "establishing" an opinion. The Free Exercise Clause has an analogue in the Speech and Press Clauses; there is no such analogue for the Establishment Clause.
141. Alternatives, supra note 5, at 345-52 (discussion of the conflict and alternative paths to its resolution).
144. E.g., P. KURLAND, RELIGION AND THE LAW (1962).
145. See supra note 11.
147. Widmar v. Vincent, 102 S. Ct. 269 (1981); McDaniel v. Paty, 435 U.S. 618 (1978); supra text accompanying notes 136-7. These cases are not determinitive, for they are subject to an alternative reading which supports the neutrality (equal protection) understanding of the clauses. The facts in each case can be seen to involve state action that discriminates against conduct that would be acceptable (running for office; student group use of university facilities) absent the religious motivation. Thus, the state's action is contrary to the neutrality toward religion arguably mandated by the religion clauses. In regard to schol-
And if Sherbert and Yoder have any irreducible core, it is that the Free Exercise Clause has significant potency.\(^{148}\) This is not the place to attempt a coherent interpretation of the religion clauses that grants a genuine significance to each.\(^{149}\) Nonetheless, it can be fairly asserted that first amendment doctrine has evolved well past the point where there is any legitimacy in simply citing the Establishment Clause for the proposition that the Free Exercise Clause has no effect. Yet, in essence, that is the substance of the Badoni opinion: not the slightest preferential treatment or accommodation could be given the Navajo in access to or management of the bridge.\(^{150}\)

B. A Compelling Interest at Last

Over ten years elapsed between completion of the dam (1963) and the commencement of plaintiffs' action (1974). The dam was in place and the lake was forming at the time of the complaint. Preventing inundation of plaintiffs' religious sites would have meant operating the dam at one-half capacity.\(^{151}\) Thus, the factors of laches discussed in relation to Sequoyah\(^{152}\) would weigh against plaintiffs here as well, although the Badoni opinions do not indicate whether the plaintiffs knew of the dam and its consequences prior to construction. One lesson of these cases is that those whose religious practices might be affected by governmental action should be identified and consulted at the planning stage to attempt to avoid or minimize free exercise clashes. In regard to Indian religious interests, this is not only wise policy, and perhaps constitutionally mandated once the government has notice of the likelihood of religious interests being affected, but it also effectuates recently expressed congressional intent.\(^{153}\)
The Glen Canyon Dam, however, had been constructed and was in operation at the time of plaintiffs' complaint. And unlike the Tellico Dam in Sequoyah, it is a genuinely important edifice, an essential element in the management of the Colorado River, and hence a key to water access in a vast area composed of Colorado, New Mexico, Utah and Wyoming. In this arid region water is the essential, the one necessity upon which all else depends. Badoni therefore presented one of the few cases in which the strict requirements of the Sherbert-Yoder doctrine were probably met: a government interest which was indeed “compelling” was balanced against the Navajo religious interest. Moreover, distinctly contrary to the “management” arm of the case, that governmental interest cannot be significantly narrowed. Lake Powell cannot be kept at capacity to fulfill the general government interests and also kept at half capacity for the Navajo. Both the concrete importance of the interest, and the impossibility of providing exception for those affected in their religious practice, provide an instructive contrast with cases such as Palmer and Frank.

Notions of “compelling,” “overriding” or “essential” governmental interests are inherently linked to questions of societal priorities. Can the courts mean—can the first amendment mean—what this strong language suggests: that only an interest approaching the

1981), expresses a general public policy against impeding or burdening Indian religious activity through federal actions, including land management. The circuit court’s interpretation of the Establishment Clause is so extreme as to imply that even this Congressional action may be unconstitutional. 638 F.2d at 180.

154. 638 F.2d at 177; Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973). It is of course possible that the courts are exaggerating the importance of the Glen Canyon project, inflating the governmental interest side of the balance. See generally, Mann, Conflict and Coalition: Political Variables Underlying Water Development in the Upper Colorado River Basin, 15 NAT. RESOURCES J. 141 (1975). This is not the place to attempt to resolve the merits of damming the Colorado River. For our purposes, accepting the validity of the court’s conclusions provides a valuable example of an at least arguably “compelling” governmental interest.

155. See supra notes 10-17, 38-41 and accompanying text.

156. It should be noted that this interest is not merely general and abstract. In terms of the “real injury to third party” test articulated above in the text accompanying notes 47-54 and 70, it would probably not be difficult to identify numerous private third parties (in addition to governmental entities) who would be relatively directly injured in economic terms if Lake Powell does not fulfill its intended function. It should also be noted that plaintiffs, recognizing a “compelling” interest when they saw one, all but abandoned that aspect of their claim challenging the level of Lake Powell. Brief of Appellants at 24-25, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).

157. See supra text accompanying notes 25-46.

158. See supra text accompanying notes 99-107.
strength of that justifying Lake Powell (water development in a huge, arid geographic area) outweighs idiosyncratic religious practice?

If the religion clauses are seen as giving to the minority the same status as that enjoyed by the majority in regard to religious practice, the answer may be "yes." Aside from affirmative legislated preferences in religious matters that were probably a primary target of, and are prohibited by, the Establishment Clause, the majority simply will not enact provisions that intrude upon its religious practice. For example, those who refused to work on Sunday did not face the same disqualification from unemployment benefits as did plaintiff in *Sherbert* for refusing to work on Saturday. Thus, in giving content to the "compelling interest" test, it may be helpful to ask whether the provision in question would be imposed were the burdened religious beliefs those of the majority.

The query must be answered, however, in the context of society as it is, not some hypothetical society that would exist if the minority in question were the majority. In other words, could the

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159. See generally, J. ELY, DEMOCRACY AND DISTRUST (1980). The most common understanding of the purposes of the religion clauses is separation of church and state; neither institution can use the other for its purposes. The clauses may therefore be seen as an effort to disable the majority from using government to further its religious ends or to impede the religious efforts of minorities. See infra note 160. Since a minority ordinarily does not have the power to use the government for such purposes, if the clauses function as designed they will put majority and minority in the same position in regard to use of the government for religious purposes. In putting the minority and majority in the same position, inadvertent governmental imposition on minority religious conduct is as significant as purposeful imposition. The majority will not purposefully impose on its own religious practices, but it is also highly unlikely to do so by inadvertence.

The smaller the minority, the more likely the majority will inadvertently impose on its religious practice, and therefore the greater the need for protection under the Free Exercise Clause. The larger the minority, the more likely it will be able to use the political process affirmatively for its religious purposes, and therefore the more likely it becomes that the limits of the Establishment Clause on governmental assistance will be appropriate rather than the protections of the Free Exercise Clause. The distinctions resulting from this approach may well be justifiable, even though the lines are very hard to draw and the result subject to ridicule. E.g., Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. Rev. 213, 243 (1973) ("Professor John Roche long ago suggested that the smaller the clerical establishment the greater the exemption from the establishment clause.").

160. Alternatives, supra note 5, at 311-22.

161. 374 U.S. at 406. This suggests the possibility of basing the *Sherbert* result on a neutrality approach to the clauses rather than a free exercise balancing approach. See supra note 147 and text accompanying notes 144-46.

162. This caveat is necessary to give some meaning to the test, for without it the question could only have one answer. A tribe of Cherokee untouched by science and technology will
majority have a different rule without transforming itself into a fundamentally different kind of society or culture? An example may be helpful. Photographs on drivers licenses are religiously offensive to some. Could our society remain substantially in its present form without photographs on drivers licenses? Of course, and it would if the dominant religious view disapproved of such photos. The question is closer, but the same is true for social security numbers. And, although more difficult to imagine, the same is also probably true for Palmer: our society would not be fundamentally different if public schools did not (1) conduct flag salutes, (2) teach patriotic songs, and (3) celebrate common holidays. Such questions need not be asked under the Sherbert-Yoder doctrine, because the great advantage of that approach is to focus upon the effect of exception for the minority only, turning attention away from society's generalized interest in the questioned provision. The question may nonetheless be useful in putting a free exercise question in perspective, particularly if a court tends, as in Palmer, toward inflating the governmental interest.

And what of Badoni under such an analysis? Had Bethlehem or the Wailing Wall been located where the Rainbow Bridge is, would the dam have been built where it was? And what would have been the cost of alternative plans? Had the Navajo filed suit or been consulted at the planning stage, such questions should have been asked. If the answers had been that, because of the diffuse nature of Indian religion and its emphasis on reverence for the land, any feasible location for a major lake on the Colorado River would impose upon the religious practice of some Indians, then perhaps someone's religion must be imposed upon under even this relatively extreme understanding of the Free Exercise Clause. Without the development of water resources in the western states, society in those states could not exist in its present form. No one suggests that the Free Exercise Clause be read as a mandate that the major-

give quite different answers than a society based upon science and technology and the attendant manipulative stance toward nature.

163. This suggests that the decision in Johnson v. Motor Vehicle Division, 593 P.2d 1363 (Colo. 1979), cert. denied, 444 U.S. 885 (1979), described briefly, supra note 46, was wrong.

164. See Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977). The question is closer because it might be persuasively argued that, without the social security system, society might well be fundamentally different. But the system could continue without the numbers. Names combined with birth date and address, or some other alternative identifiers, would be much less efficient (more expensive) but the functions of the system could still be fulfilled.
ity fundamentally transform its culture to conform to the religious demands of the minority.

V. A Final Confusion: United States v. Lee

The Supreme Court recently adjudicated another aspect of the Amish mandate to live “separate and apart from the world,” the belief that participation in the social security system, both payment of taxes and receipt of benefits, is forbidden. Statutory exemption is provided for self-employed Amish on the basis of (1) this belief, (2) waiver of social security benefits, and (3) the fact that the Amish provide for their own dependents. No similar relief is provided for employers and employees. Plaintiff, a member of the Old Order Amish who employed other Amish on his farm and in his carpentry shop, failed to comply with various employer obligations under the Social Security Act, paid a minor amount of assessed unpaid taxes, and sued for a refund. The district court held the requirements unconstitutional as applied to Lee, and the Supreme Court reversed.168

There is no reason to think that payment of social security taxes might subvert the existence of the Amish as a distinct cultural group. Given the emphasis in Yoder upon the unrefuted expert testimony that sending children to public schools for two years after eighth grade would have this fatal effect,167 an obvious distinction was available for the Court to rest upon in ruling against Lee.168 As noted above, however, the Court emphatically rejected this ground for decision. It chose not to cultivate the seeds sown in Yoder; and the “second view” from Yoder, while not explicitly disapproved, currently appears disfavored by the Court as a means for deciding free exercise claims.169

With the narrowing dicta of Yoder laid aside, it would seem Lee had a strong claim. It was religiously offensive to him to be involved with the social security system, and compliance with the law thus would have manifestly burdened his religious practice and conscience in a significant way.170 The social security system as a

167. Alternatives, supra note 5, at 337-38.
168. See supra text accompanying notes 56-59.
169. See supra notes 93-98 and accompanying text.
170. There would seem to be no problem meeting the pre-Yoder threshold test on the religious interest side of the balance. See supra notes 56-60 and accompanying text. The claimant's sincerity might be questionable in a tax case, a factor discussed in the text below,
whole might qualify as a compelling state interest, but the "first view" from Yoder mandates narrowing that general interest to a realistic scope. The pre-existing statutory exception for the self-employed suggests that exemption for some is not crippling to the entire system. And nothing in the opinion indicated that exemption for employers who employ only Amish would be so different from exempting the self-employed as to significantly harm the system as a whole. Moreover, the opinion recited no evidence provided by the government concerning the effects exemption of plaintiff and those similarly situated would cause. Under the Court's restatement of the Sherbert-Yoder test, Lee ought to have won.

But the Court turned away from the "first view" from Yoder; it inflated the governmental interest instead of narrowing it. The Court saw no division between those employing only persons who share the conscientious desire not to participate in the system and those employing others. And it saw no distinction between social security tax and income taxes. Absent supporting evidence, and apparently based upon speculation and imagination, the Court reached its key conclusion: "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."

The approach seems to be that of the pre-Sherbert cases. And indeed, in transiting from its reiteration of the Sherbert-Yoder strict test to its conclusion, the Court cites Braunfeld, from

but the government did not challenge Lee's sincerity. 50 U.S.L.W. at 4203.
171. See supra note 164.
172. "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." 50 U.S.L.W. 4203.
173. "Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." Id. at 4204.
174. Id. at 4203. The Court sees a slippery slope where at least one line is clear. Revenue is "essential" to accomplishing most "overriding governmental interest[s]," and the income tax is the primary source of federal revenue. And "[t]here are few, if any, governmental activities to which some person or group might not object on religious grounds." Autenrieth v. Cullen, 418 F.2d 586, 589 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970), cited in Lee, 50 U.S.L.W. at 4204. Therefore, validation of free exercise protection in relation to income taxes might (1) cause sufficient chaos in administration and (2) decrease revenue sufficiently to meet the Yoder-Sherbert test. Nothing remotely similar can be asserted in regard to the social security tax.
175. 50 U.S.L.W. at 4204.
176. See supra note 62.
177. See supra notes 18-19 and accompanying text.
questions of "essentiality" to "overriding" interests, it moves to questions of "undue interference" with "governmental interest," a distinct change of emphasis.

In Yoder, the court appeared very concerned that free exercise protection for the Amish not be extended to the then proliferating counter-cultural groups, and thus laid the seeds for distinction, the narrowing dicta, the "second view" from Yoder. Having retreated from that view, and being now unwilling to repeat the precarious "two ways at once" performance of Yoder, the Court seems to have brought its anxiety about conferring free exercise protection upon the eccentric fringe to the fore so that it dominates the Lee decision. Thus, Lee may be read as the end of the Sherbert-Yoder revolution; a return to no effective independent role for the Free Exercise Clause.

But this is reading between the lines, for the Court took no such explicit position. The opinion may as easily be read to apply only to a special factual situation: taxation. A government cannot function without collecting taxes, and every citizen has a strong motivation to avoid paying them. Unlike Prince, Sherbert, Yoder, and Thomas, where the religious conduct in question involved sacrifice on the part of the claimant, and where the exemption at issue did not on its face provide a benefit greater than the sacrifice, a legally effective religious scruple against taxation has an obvious attraction and no apparent offsetting cost. In Sherbert, for example, plaintiff lost her job by refusing to work on the Sabbath, a significant sacrifice; and exemption under the Free Exercise Clause gave her only twenty-six weeks of unemployment compensation benefits. Her religious scruple did not appear to have resulted in an economic gain. The calculation is not quite as clear in Prince

178. 50 U.S.L.W. at 4203.
180. "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax." 40 U.S.L.W. at 2403-04. The Court appears to be unaware that a close examination of the burden on religion or no examination at all are not the only alternatives.
181. Justice Stevens supports a view of the cases in which there is no revolution; Yoder is seen as an anomaly from which Lee cannot be validly distinguished, and Sherbert and Thomas as examples of an arguably special category deserving stricter protection. 50 U.S.L.W. at 4204 n.3 (Stevens, J., concurring).
183. The Court explicitly noted that if the contrary were true, the result might be different. Supra note 53. This may be argued as a basis for distinguishing Braunfeld from Sher-
and *Yoder*, but at the least no economic gain is evident.

Determinations of sincerity are inherently uncertain, and an erroneous governmental judgment that a religious claim is insincere is the kind of imposition the religion clauses would seem to be aimed at preventing. Courts, therefore, have strong reasons for structuring free exercise criteria that do not provide incentives for false claims of religious belief. Taxation may simply be an area where the Free Exercise Clause, for practical reasons which include at least some of the policy objectives underlying the religion clauses, must be circumscribed to a far greater extent than in other governmental activities such as education, unemployment or workers' compensation insurance, and welfare.

There is another less obvious basis for reading *Lee* in a circumscribed fashion. If the Free Exercise Clause is not a license to impose on non-governmental third parties, and if Lee's conduct as an employer is likely to put pressure on his Amish employees to comply with his beliefs in a way which subverts the important public policies the social security system embodies, Lee's conduct as it affects his employees may be seen to merit distinctly less free exercise protection than conduct which does not similarly impose upon identifiable non-governmental third parties.184

In any view, however, *Lee* injects more confusion into an already confused doctrinal situation. *Yoder* left free exercise doctrine with two major contrary currents; *Lee* floats with neither, and may in fact return to a formerly discredited mode of free exercise analysis. Or it may commence a charting of a more detailed, categorical free exercise doctrine, related to but more ramified than the *Yoder-Sherbert* doctrine. Or it may simply be an anomaly, a throwback signifying no doctrinal direction. The infrequency with which the Supreme Court accepts free exercise cases, combined with the failure of the opinions from *Yoder* to *Lee* to articulate coherent free exercise criteria, suggest that this confusion is not likely to be dispelled in the near future. As a result, cases such as *Palmer, Sequoyah* and *Badoni* are not likely to be anomalies: confused constitutional doctrine invites wrongly conceived decisions in the lower courts.

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184. Compare *Lee* with *Palmer* under this criterion. See supra text accompanying notes 47-51, 113-19.
VI. Conclusion

This article has not attempted to construct any single coherent theory or interpretation of the Free Exercise Clause. Thus, it offers no firm basis for concluding that Palmer, Sequoyah, and Badoni are wrongly decided. If, however, the "first view" from Yoder and Sherbert—the "compelling interest" balancing test—constitutes an authoritative Free Exercise Clause interpretation, then it can be firmly asserted that these opinions are simply wrong. In each, genuinely religious conduct has been significantly impinged upon. In each, the government fails to demonstrate that accommodating the religious beliefs of the plaintiff(s) will sufficiently frustrate a sufficiently important governmental interest. 185

Error in application of first amendment protections is significant, and pointing out such errors would have been justification enough for discussing these cases. 186 But because of the "second view" from Yoder and Sherbert, confidence in the conclusion that these recent decisions are wrong is severely undermined. It can be argued with some validity that the narrowing dicta of Sherbert and Yoder support the decisions in Palmer, Sequoyah, and Badoni. The lesson here is that the Supreme Court has failed to provide coherent guidance for the lower courts, leaving them to pick and choose, or to stumble, in the application of the Free Exercise Clause. And the failure continues with Lee, the Court's most recent effort, in which it manages to retreat from both the best and worst of the Yoder opinion simultaneously. Cases such as Lee, Palmer, Badoni, and Sequoyah stand for the simple, unfortunate proposition that first amendment doctrine protecting freedom of religious conduct is in significant disarray.

185. Badoni is incorrect in this regard only as to plaintiffs' claims regarding management of visitation to the Bridge area, not those relating to lowering the water level of Lake Powell.

186. Unfortunately, the incorrectness of these decisions is not patent. The worst elements of the Sequoyah and Badoni circuit court opinions have already been relied upon to rule against Indian free exercise claims in another suit dealing with the management of federal land. Hopi Indian Tribe v. Block, No. 81-0493 (D.D.C. June 15, 1981) (appeal docketed, no. 81-1912, D.C. Cir., June 23, 1981).
COMMENTS

SERVICE ARRANGEMENTS PURSUANT TO THE REGULATIONS UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975 AND THE ESTABLISHMENT CLAUSE

INTRODUCTION

The physically and mentally handicapped child has been neglected throughout the history of the public school system in the United States, and has traditionally been denied an education which is "available to all on equal terms." Prior to November 19, 1975, when Congress enacted into law the Education for All Handicapped Children Act of 1975 (hereinafter Handicapped Children Act), a significant number of handicapped school age children had never even had the chance to go to public school, and an even greater number had received only minimal educational services. Thus, along with the passage of section 504 of the Rehabilitation Act of 1973, which was designed to ban discrimination on the basis of handicap, the passage of the Handicapped Children Act was a major effort by the Congress to confer on handicapped persons federal civil rights.

1. The term "handicapped children" includes "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities who by reason thereof require special education and related services." 20 U.S.C. § 1401(1) (1976). The categories of handicapped enumerated in the statutory definition are defined in 34 C.F.R. § 300.5 (1981).


4. S. REP. No. 168, 94th Cong., 1st Sess. 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1432. There were more than eight million children between birth and twenty-one years of age with handicapping conditions requiring special education and related services in 1974-1975 with only 3.9 million such children receiving an appropriate education, 1.75 million handicapped children receiving no educational services at all, and 2.5 million handicapped children receiving an inappropriate education.

5. 29 U.S.C. § 794 (1979). Section 504 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." The regulations found in 45 C.F.R. §§ 84.1-84.61 (1981) define and forbid discrimination against qualified handicapped persons in employment in programs receiving funds from the Department of Health, Education and Welfare.

6. Montgomery, The Education for All Handicapped Children Act of 1975 and the Es-
Since the passage of the Handicapped Children Act, all the states are required to provide to all handicapped children residing within them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. The inclusion of handicapped children enrolled in private schools within the coverage of the Act creates a problem, since the Act neither distinguishes private schools which are religiously oriented from those that are not, nor contains a severability clause for private elementary and secondary schools which are religiously oriented. Thus, the Act, along with the regulations promulgated to implement the Act's mandates, raise the controversial issue of government aid to religion. They are vulnerable to attack as violative of the Establishment Clause of the first amendment to the Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

This comment will present the history of governmental involvement in the education of handicapped children, discuss the three-pronged test applied to determine whether a statute violates the proscriptions of the Establishment Clause, and analyze the constitutionality of the regulations implementing the Act's mandates authorizing services on the premises of private schools. The issues to be discussed arise when parents, and not an educational agency, choose to send their handicapped children to a private school when an adequate public school special education program is available.

BACKGROUND

Education in the United States has traditionally been the responsibility of the states. Historically, public school administrators and boards of education have been given broad discretion in the regulation and management of education programs. Their authority has extended to almost all areas of scholastic and school-related matters, including the exclusion of certain students if they

7. Special education is defined in 20 U.S.C. § 1401 (16) (1976) as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." In addition, "related services (including transportation and supportive services) are defined in 20 U.S.C. § 1401 (17).
8. Montgomery, supra note 6, at 458 n.5.
10. U.S. Const. amend. I.
deemed it appropriate. In addition, this authority went virtually unexamined by the legal system. Courts pleading lack of expert knowledge were wary of interfering in the discretion of administrators to educate their students, handicapped or otherwise:

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.12

The principle of education for all is based on the philosophical premise underlying the concept of democracy: that every person is valuable in his or her own right and should be offered equal opportunities to develop his or her full potential. In 1954, the Supreme Court established that all children be guaranteed equal educational opportunity: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms."13 In Brown v. Board of Education, the Court considered public education in light of its full development and its place in American life throughout the country and concluded that the doctrine of equal educational opportunity encompasses the Equal Protection Clause in its application to public school education and becomes a component of due process through the fifth and fourteenth amendments.

This landmark decision was aimed at raising to a level of equality educational opportunities for minority children and bringing to an end the "separate but equal" era of public school education by mandating desegregation of all public school systems in the United States. In desegregating the schools, all children would be afforded an equal opportunity to be educated. Yet, mentally and physically handicapped individuals remained one of the last minority groups recognized as subject to discrimination and denied equal protection and equal opportunity to public school education.

The enactment, in 1966, of Title VI, amending the Elementary and Secondary Education Act of 1965 (hereinafter E.S.E.A.),15

13. 347 U.S. at 493.
marked the beginning of federal government involvement in the education of handicapped children. Title VI established a grant program "for the purpose of assisting the states in the initiation, expansion, and improvement of programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) for the education of handicapped children." The development of educational resources and the training of personnel, however, and not the rights of handicapped children to an appropriate education, is the main thrust of Title VI.

Prior to the enactment of the Handicapped Children Act in 1975, "more than thirty-six court cases in the states have recognized the rights of handicapped children to an appropriate education. States had made an effort to comply; however, lack of financial resources have prevented the implementation of the various decisions which have been rendered." Mandatory special education for all handicapped children did not gain momentum until the early 1970's when two federal courts held that excluding handicapped children from public education was a denial of their constitutional right to equal protection and due process. Congress drew heavily on the findings in Pennsylvania Association for Retarded Children v. Pennsylvania (hereinafter P.A.R.C.) and Mills v. Board of Education of District of Columbia when it began drafting the legislation ultimately leading to the enactment of the Education for All Handicapped Children Act of 1975.

In P.A.R.C., a class action was brought on behalf of mentally retarded children who had been excluded from the public schools as uneducable or untrainable. This civil rights suit challenged a statute relieving the state board of education from the responsibility of educating handicapped children. Recognizing that judges are loath to impose requirements or set standards in areas that they perceive as being outside their official competence, the principal

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27 (1965).
22. 343 F. Supp. at 282.
issue put to the court dealt with equality of access to education for the retarded, rather than the quality of education. The plaintiffs questioned whether the state, having undertaken to provide educational opportunities, could deny it to the plaintiffs entirely. The three-judge federal court not only held that mentally retarded children have the right to an education, but also outlined the state's responsibilities to fulfill its obligation of identifying, classifying and placing handicapped children in appropriate educational settings while preserving these children's procedural due process safeguards. The ruling in P.A.R.C. was an historic step in an area of public education that had suffered from public and professional neglect.

The principles in the P.A.R.C. decision were extended to all handicapped children in Mills v. Board of Education, when parents of handicapped children who had been excluded from the public schools sued the District of Columbia Board of Education, demanding that their children be given a free and adequate public education. The Mills court relied on the District of Columbia's compulsory school attendance statute requiring parents to send their children to school. Like the P.A.R.C. court, the Mills court assessed the duties and obligations of the District of Columbia Board of Education to educate handicapped children. A constitutional basis for this obligation was found in the principle stated in Brown v. Board of Education that, "where the state has undertaken to provide [an educational opportunity, that opportunity] is a right which must be made available to all on equal terms." 24

The court reasoned in Mills that to deny handicapped children access to publicly supported schools violated the Due Process Clause. 26 The school board's defense of lack of sufficient funds was rejected. The court reasoned that lack of funds did not excuse the board of education from its duty to provide educational opportunities for all children and stated that "the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources." 28 In cutting its "financial pie," the school district would have to arrange its finances in such a way as to include all previously excluded children. Thus,

25. 348 F. Supp. at 875.
26. Id. at 876.
the decisions in P.A.R.C. and Mills, and the equal opportunity principle enunciated in Brown v. Board of Education, became the underpinnings of the asserted right to education embodied in the Education for All Handicapped Children Act of 1975.27

This landmark congressional legislation, and the regulations promulgated pursuant to it, provide for a detailed plan for identifying and placing handicapped children,28 planning individual educational goals for each handicapped child,29 and setting guidelines for training educational personnel.30 Provisions for funding31 and due process safeguards32 are also included in the Act. But the heart which beats life into the statute lies in the section entitled "Assistance for Education of All Handicapped Children."33 It is this section that authorizes the federal government to make funds available to the states to use in accordance with the provisions describing entitlements, eligibility, and elements of both state and local and intermediate agency applications for benefits.34

The Act further provides that, where adequate programs are not available in the public schools, handicapped children may be placed in or referred to private schools by the state or by local educational agencies at no cost to the parents.35 This provision is designed to ensure that students served by private facilities are treated equally with those in public schools. The reasoning seems to be that, when the state or educational agency chooses a private institution as its instrumentality, it does not spoil the public nature of the appropriations, because the vital point is whether the purpose is public. If it is, it does not matter whether the agency through which it is dispensed is public or not.

Even if a free, appropriate public special educational program is available, however, parents may reject the public program and instead choose to send their handicapped children to a private school. In that case, the Act does not require the state or local educational agency to bear the cost of the private school. But the Act

27. Klein, supra note 18, at 113.
29. Id. at § 1412(2)(A).
30. Id. at §§ 1431-1435.
31. Id. at § 1411.
32. Id. at § 1415.
33. Id. at subch. II, §§ 1411-1420 (1976).
still requires the state and its local educational agencies to design a program so that those handicapped children who are enrolled in private schools may participate in special education and related services offered by the local educational agencies if the parents of those children so desire. 36

Although the Act simply mandates that handicapped children enrolled in private schools be allowed to participate in special education programs funded under the Act, the regulations suggest the following service arrangements to private school handicapped children: the use of public school personnel on the premises of private schools, 37 the payment of salaries of private school personnel for services rendered outside regular hours of duty, 38 and the loaning of equipment to the private schools. 39 It is these suggested services which are constitutionally vulnerable as violative of the Establishment Clause of the first amendment.

Three-Pronged Test

The constitutional standard of the Establishment Clause is separation of church and state. This general principle stands for the proposition that neither governmentally established religion nor governmental interference with religion will be tolerated. Thus, establishment of religion connotes "sponsorship, financial support, and active involvement of the sovereign in religious activity." 40 Whether government aid to education passes the proscription of the first amendment's Establishment Clause has been addressed by the Supreme Court in several cases out of which a three-pronged test has emerged. In order to pass constitutional muster, first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, it must not foster "an excessive government entanglement with religion." 41

The express purpose of the Handicapped Children Act is "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special educa-

tion and related services designed to meet their unique needs.\textsuperscript{42} The statute clearly states the legislative intent and there is no reason to believe Congress meant anything else. The Education for All Handicapped Children Act of 1975 clearly demonstrates a legitimate secular objective appropriate for governmental action—to enhance the availability and quality of public education to handicapped children. Thus, the Act passes the first prong of the test.\textsuperscript{43}

The second prong of the test requires the primary effect of legislation must neither advance nor inhibit religion. In \textit{Meek v. Pittenger},\textsuperscript{44} the Court upheld state textbook loan programs, because they were merely a component of a general program which provided secular textbooks to both public and private school children. The Court reasoned that the benefit accrued to the children and not to the private school. However, in the same decision, the Court in \textit{Meek} invalidated a state program which authorized the loaning to private parochial schools neutral and secular educational instructional materials and equipment, such as periodicals, photographs, maps, charts, sound recordings and films. The Court held the loan program had the impermissible effect of advancing religion, reasoning that the nature of such materials could be diverted to religious purposes:

The church-related elementary and secondary schools that are the primary beneficiaries of Act 195’s instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; devoted to the inculcation of religious values and belief. . . . Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools’ existence. Within the institution, the two are inextricably intertwined."\textsuperscript{45}

Thus, \textit{Meek} stands for the principle that public funds should be withheld from those schools which are so pervasively sectarian that secular activities cannot be separated from the sectarian ones, because they are “inextricably intertwined.” To permit public funds


\textsuperscript{43} The constitutionality of the Act in terms of the other prongs of the test will be discussed in the remainder of the comment.

\textsuperscript{44} 421 U.S. 349 (1975).

to flow to such sectarian institutions would have the primary effect of advancing religion and would constitute an impermissible establishment of religion.

Conversely, the Court has held that if secular activities can be separated out, they alone may receive public funds. In *Tilton v. Richardson*, the Supreme Court upheld the Higher Education Facilities Act of 1963, which provides to colleges and universities construction grants to be used exclusively for secular educational purposes. It denied the injunctive relief sought by citizens and taxpayers of the United States and Connecticut. The taxpayers were trying to stop the flow of funds to four church-related Connecticut colleges and universities, which had received federal construction grants to build libraries and other academic buildings. The Court reasoned that since religious indoctrination was not a substantial purpose or activity of these church-related colleges and universities, construction grants under the Act did not have the primary effect of government aid to religion. Whether the Handicapped Children Act meets the requirements of the primary effect subtest will be discussed below.

The third prong of the test requires a statute not entangle the government excessively in church affairs. Analysis of the entanglement test requires looking at four considerations or subtests. The first consideration requires examining the character and purpose of the benefitted institution. In *Roemer v. Board of Public Works of Maryland*, the Court upheld a state statute which provided funds to four colleges and universities affiliated with the Roman Catholic Church, because the colleges performed "essentially secular educational functions . . . that are distinct and separable from religious activity." The character and purposes subtest of the entanglement test is also a prerequisite of the pervasive sectarian subtest of the primary effect test of the second prong. In *Lemon v. Kurtzman*, the Court held that, although the statute passed the secular legislative purpose test, it failed the entanglement test, because of the pervasive religious character of the benefitted school.

The second consideration of the entanglement test requires ex-

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46. 403 U.S. 672 (1971).
48. *Id.* at 762.
51. *Id.*
The nature or form of aid. Although the Court has held that aid to church-related schools in the form of “bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students” did not offend the Establishment Clause, in *Lemon v. Kurtzman*, the Court held that a statute which allowed supplementing salaries of non-public teachers of secular subjects in parochial schools failed the entanglement test, because there is “a danger that a teacher under religious control and discipline” would be unable to separate his religious beliefs from his secular educational duties.

The third consideration of the entanglement test requires examining the resulting relationship between the state and religious authority. In *Lemon*, the Court also found the statute failed the entanglement test, because

[a] comprehensive discriminating and continuing state surveillance will inevitably be required to ensure these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.

The Court thought this would result in “excessive and enduring entanglement between state and church.”

The fourth consideration requires examining the potential for political divisiveness. Again, in *Lemon v. Kurtzman*, the Court reasoned that, although political debate and decision are normal and healthy manifestations of a democratic system of government, “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”

Thus, the three-pronged test provides safeguards to assure statutes do not sponsor, financially support, or actively involve the government in religious activity. To summarize, the first step of the test to determine whether a statute authorizing government aid to education passes the proscription of the Establishment Clause requires that the statute have a secular legislative purpose;

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52. *Id.* at 616-17.
53. *Id.* at 617.
54. *Id.* at 619.
55. *Id.*
second, the primary effect of the statute must neither advance nor inhibit religion. This part of the test requires that no aid whatsoever flow to schools which are so pervasively sectarian that secular activities cannot be segregated out, but it does allow aid to flow to those parochial schools if secular activities can be segregated, and they alone will be funded. The third prong requires that the statute not encourage an excessive government entanglement with religion. The entanglement test demands consideration of the character and purposes of the receiving school, the nature and form of the aid, the resulting relationship between the state and religious entity, and the potential for political divisiveness. Thus, the common ingredient of the three prongs of the test asks the question whether the statute involves government in the essentially religious activities of religious institutions.

LEGAL BASIS FOR INCLUDING HANDICAPPED CHILDREN IN PRIVATE SCHOOLS AND THE CHILD-BENEFIT THEORY AND PUBLIC WELFARE THEORY

Because of the concern about lack of adequate services in the public schools, the drafters of the Handicapped Children Act wanted to ensure that handicapped children in private schools would be provided with special education and related services. The legal basis for including handicapped children enrolled in private elementary and secondary schools in section 1413(a)(4)(A) of the Handicapped Children Act was modeled after a similar provision in Title I of the Elementary and Secondary Education Act of 1965.

The Supreme Court had addressed the issue of government aid to parochial schools only twice when the Elementary and Secondary Education Act was enacted in 1965. In *Cochran v. Louisiana State Board of Education*, the Court held that, based upon the Due Process Clause, a Louisiana statute which provided free textbooks to public and private school children was constitutional. The Court found that the appropriations benefited the children, not the school. Seventeen years later, in *Everson v. Board of Ed-

57. Montgomery, *supra* note 6, at 460-61.
60. The first amendment was not made applicable to the states at the time of the *Cochran* decision. The first amendment was made applicable to the states through the fourteenth amendment in *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).
61. In addition, in *Cochran*, the Court foreshadowed the general welfare theory at p. 375.
taxpayers challenged a state statute which authorized reimbursing the parents of parochial school children for bus transportation expenses paid for transporting their children to nonpublic schools. The Court upheld the statute, applying the child-benefit theory and determining that the law did "no more than provide a general program to help parents get their children, regardless of their religion, safely, and expeditiously to and from accredited schools."

Thus, the child-benefit theory in *Everson* permits aid to flow to children or their parents, but does not allow aid to flow directly to the private schools. In addition, *Everson* stands for the proposition that children in public and private schools may be included in government programs which provide public welfare services to all children. This general welfare theory was articulated in *Wolman v. Walter.*

Our decisions from *Everson [v. Board of Education, 330 U.S. 1 (1947),]* to *Allen* have permitted the State to provide church-related schools with secular, neutral, or nonideological services, facilities or materials. Bus transportation, school lunches, public health facilities, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.

The Supreme Court considers three factors when applying the general welfare theory. First, the Court will consider whether or not the service is in fact a public welfare service. In *Everson*, the Court addressed the issue of safety concerned in providing free public bus transportation to public and private school children. It compared this service with other public services which are extended to both private and public schools, such as police and fire protection, sewer connections, and public streets and sidewalks. The Court held that bus transportation was a public welfare service. In other decisions, the Court has focused on whether the service was secular or neutral and, thus, unable to be diverted to reli-

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63. *Id. at 18.*
65. *Id. at 242, quoting, Lemon v. Kurtzman, 403 U.S. 602, 616-17 (1971) (emphasis deleted).*
igious use by the schools. Secular textbooks, 66 publicly prepared
tests and scoring services, diagnostic services, 67 and health ser-
VICES 68 have been held to be public welfare services.
Second, in applying the general welfare theory, the Court will
consider whether the service includes all children regardless of
whether the children are enrolled in public or private schools, or
whether the service favors only private school children. Third, the
Court will consider the location at which the service is provided.
The Court has drawn a constitutionally significant line around the
physical premises of private parochial schools. 69 In Wolman v.
Walter, mobile units off the private school grounds used to provide
therapeutic, guidance and remedial services were approved. 70 Con-
versely, in Meek v. Pittenger, similar services provided on the
school premises were not approved because of the danger that the
pervasively religious character of the parochial school environment
might cause religious beliefs to be transmitted by the teacher or
service provider. 71
It appears, then, that whether the service provided qualifies as a
public welfare service and is provided to both public and private
school children are dispositive facts in determining a program's
constitutionality. In Committee for Public Education and Reli-
gious Liberty v. Nyquist, the Court intimated the fact that the
class of beneficiaries [in Allen and Everson] included all school
children, those in public as well as in private schools, may be dis-
positive of a program's constitutionality. 72 In Wolman, the Court
distinguished diagnostic and other ancillary services on the ground
that such services "have little or no educational content . . . the
diagnostician has only limited contact with the child." 73 Conclud-
ing its reasoning, the Court explained that "[t]he nature of the re-
lationship between the diagnostician and the pupil does not pro-
vide the same opportunity for the transmission of sectarian views
as . . . between teacher and student or . . . counselor and

68. 433 U.S. at 242.
69. Montgomery, supra note 6, at 464 n.41.
70. 433 U.S. at 245.
71. 421 U.S. at 371.
(1973).
73. 433 U.S. at 244.
student." 74

If a specific service rendered to children on the school premises does not qualify as a public welfare service, the Court then must determine the constitutionality of providing that service to private school students. 75 Applying the second factor (whether all children are served) and third factor (location where services provided) of the general welfare theory, four combinations of pupil/services arrangements are possible: (1) private school children/off the school premises; (2) private school children/on the school premises; (3) public and private school children/off the premises; (4) public and private school children/on the premises. 76 Although in Wolman v. Walters 77 and Meek v. Pittenger, 78 the Court held that secular textbooks and diagnostic services provided on the private school grounds were permissible because of their public welfare character, the therapeutic, guidance and remedial services were not public welfare services and must be provided off the school premises. This would appear to mean that nonpublic welfare services provided only to private school children may be rendered off the premises of the private school, but not on the premises.

In addition, the Court has held that nonpublic welfare services are constitutional "in public schools, public centers, or mobile units . . . if both public and nonpublic school students are served simultaneously." 79 The question of the last possible combination regarding nonpublic welfare services provided to both public and private school children on the private school grounds was explicitly left open in Wheeler v. Barrera 80 and Meek v. Pittenger. In Wheeler, the Court found the issue whether the Establishment Clause forbids public school teachers paid the Title I E.S.E.A. funds to teach remedial courses in parochial schools not ripe enough for decision, since no order requiring on-the-premises parochial school instruction had been entered. 81 In Meek, neither the appellant nor the Court questioned the authority of the state of Pennsylvania to make free ancillary services available to all chil-

74. Id.
75. Montgomery, supra note 6, at 465.
76. Id. at 465 n.45.
77. 433 U.S. at 248.
78. 421 U.S. at 371 n.21 (The provision of such diagnostic services was invalidated only because it was not severable from the unconstitutional portion of the statute).
79. 433 U.S. at 246.
81. Id., accord, Montgomery, supra note 6, at 466 n.48.
The Education for All Handicapped Children Act of 1975 mandates special education and related services be provided to those children who are placed in private schools by their parents, and not by an educational agency, even though a public special educational program is available. It must be remembered that only lunches, bus transportation, secular books, publicly prepared tests and scoring services, diagnostic services, and health services have qualified as public welfare services. Thus, related services as defined in the Act, including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, counseling services, social work in schools, and parent counseling and training, are considered nonpublic welfare services.

Thus, although section 1413(a)(4)(A) of the Handicapped Children Act requires participation of handicapped children placed in private schools by their parents, it does not require on-the-premises rendering of such related services, but instead defers to the regulations to determine the manner in which the services are provided. Therefore, the Act falls into the category of nonpublic welfare services to both public and private school children off the private school premises and probably passes constitutional muster under the Establishment Clause.

CONSTITUTIONALITY OF SERVICE ARRANGEMENTS

In Wolman v. Walter, the Court upheld the constitutionality of providing ancillary services to private school children off the premises of the private school whether or not public school children received the same services. The question now is whether ancillary services provided to both public and private school children on the grounds of the private school is violative of the Establishment Clause. The regulations implementing services to private school handicapped children under section 1413(a)(4)(A) of the Handicapped Children Act suggest three on-the-private-school-premises service arrangements: the payment of salaries of private school personnel for services rendered outside regular working hours, the use of public school personnel in the private schools, and the

82. 421 U.S. at 368 n.17.
84. Montgomery, supra note 6, at 466.
85. 433 U.S. at 246-47.
86. 34 C.F.R. § 76.650 (1981).
loan of equipment to private schools.88

Use of Private School Personnel

The regulation89 authorizing the payment of private school teachers’ salaries for services rendered outside their regular working hours ostensibly draws a constitutional line separating services rendered by teachers during regular teaching hours from those services performed outside the private school employees’ regular hours of teaching. It should be noted, however, that the regulation does not draw the line at the regular hours of operation of the private school.90 It may be argued, then, that it is quite possible for private school teachers to receive salaries from funds authorized under the Act’s regulation for services performed outside the employees’ regular teaching hours, but performed during the private school’s regular hours of operation. Thus, the issue is raised whether such an arrangement is constitutional under the Establishment Clause.

The issue of private school salary reimbursement was addressed by the Supreme Court in the companion cases of Earley v. DiCenso91 and Lemon v. Kurtzman.92 The Rhode Island statute in Earley authorized a fifteen percent salary supplement be paid to nonpublic school teachers, who taught only courses offered in the public schools, using only materials used in the public schools, and who agreed in writing not to teach courses in religion. The Supreme Court agreed with the district court’s holding that the parochial school system was “an integral part of the religious mission of the Catholic Church”93 and held that the statute fostered “excessive entanglement” between government and religion, and thus violated the Establishment Clause.

The Pennsylvania statute in Lemon v. Kurtzman had some, but not all the features of the Rhode Island statute in Earley. The statute authorized the state to “purchase” specified “secular educational services” from nonpublic schools and directly reimburse nonpublic schools for their actual expenditures for teachers’ salaries.94 The Supreme Court held that the Pennsylvania statute, like

89. 34 C.F.R. § 76.660 (1981).
90. Montgomery, supra note 6, at 476.
93. Id. at 609.
94. Id.
the Rhode Island statute, violated the first amendment Establishment Clause, because it too fostered excessive government entanglement.

Even though both statutes contained restrictions on services similar to those articulated in the regulations implementing the Handicapped Children Act forbidding diversion of funds to religious use, the Court found both statutes failed the entanglement test on three grounds. First, the Court found the substantial religious character of the church-related recipient schools was illustrated by religious symbols, paintings, and statues found throughout the school buildings, the religiously oriented extracurricular activities, the fact that two-thirds of the teachers were nuns, and that religious authority operated as administrators of the schools.

Second, the statutes failed the entanglement test, because "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that those restrictions are obeyed and the First Amendment otherwise respected," and to ensure that the teachers remain religiously neutral. Third, both statutes failed because of their potential for promoting political divisiveness. The need for successive annual appropriations that would benefit relatively few religious groups would inspire repeated confrontations between proponents and opponents of the program, and the Court warned that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Further, the Pennsylvania statute in Lemon had the additional defect of providing continuing financial aid directly to the church-related schools.

The issue of private school teachers receiving salaries from funds authorized under the Handicapped Children Act for services performed outside their regular teaching hours raises concerns similar to those found in Earley and Lemon. The dangers perceived by the Court in those two cases do not melt and disappear when services are performed outside a teacher's regular hours of duty, because the substantial religious character of the recipient schools and the

95. 34 C.F.R. § 76.660 (1981) states "[a] subgrantee may use program funds to pay for the services of an employee of a private school if [t]he employee performs the services under public supervision and control."


97. 403 U.S. at 619.

98. Id. at 622.

99. Id. at 620-22.
potential for political divisiveness remains the same.όό
It must be remembered, also, that, in Meek, the Court held that public school personnel providing ancillary services in the private schools were equally susceptible to the dangers of “intertwining” religious doctrine with secular educational services.όό Therefore, the regulations under the Act cannot be distinguished from the legislation in Lemon and Earley on grounds that providing auxiliary services enables the service provider to remain religiously neutral.

The only obvious feature distinguishing the Handicapped Children Act’s regulations from the unconstitutional statutes in Lemon and Earley is that the latter statutes authorized services only to private school childrenόό whereas the regulations under the Act are a part of a broader program of services to all children.όό Whether this distinction relieves the programs authorized under the Act’s regulations from the dangers perceived by the Court in Lemon and Earley is the significant question in terms of satisfying the Establishment Clause. If the distinction is material, then salary reimbursements of private school teachers providing services outside their normal hours of duty can be considered constitutionally sound under the Establishment Clause. But if the distinction is not materially sufficient to relieve the dangers perceived by the Court, then salary reimbursement of private school teachers providing services outside their regular teaching hours, but during the normal operating hours of the nonpublic school, would be, according to Lemon and Earley, equally unconstitutional.

Use of Public Personnel

The regulations promulgated under the Handicapped Children Act authorize using funds “to make public personnel available in other than public facilities.”όό The regulations do not explicitly authorize public school employees to provide services on the private school premises, but the broad phrase “in other than public facilities” implies authorization of use of public school employees in private school facilities both off the private school premises and on the private school premises. The decision in Wolman v. Walter

100. Montgomery, supra note 6, at 477.
101. 421 U.S. at 370.
102. 403 U.S. 602 (1971).
103. Montgomery, supra note 6, at 478.
104. 34 C.F.R. § 76.659 (1981); Montgomery, Id.
held that the Establishment Clause permitted public school employees to provide auxiliary services, which are similar to those outlined in the Handicapped Children Act, in public centers or mobile units located off the private school premises. The issue, then, is whether the Establishment Clause will allow public school personnel to provide services on the school grounds as impliedly authorized under the regulations implementing the Act.

The Supreme Court has scrutinized several state programs which have authorized public school employees to provide ancillary services only to private school children on the private school grounds. In Public Funds for Public Schools v. Marburger, a New Jersey statute authorized public school teachers under the supervision of the local board of education to render auxiliary services in remedial reading and mathematics, speech, physical education, guidance counseling and testing services, school nursing and health services to private school children on the premises of the nonpublic school. The district court invalidated the statute on the ground that it lead to excessive government involvement with religion. The court stated that it would be "necessary to continually review the content of the teacher's instruction" to ensure compliance with the restrictions imposed by the statute and to make sure that it remained secular and nonideological in content subject matter. Further, although the teachers of auxiliary services were not employed by a religious organization and not directly subject to the direction and discipline of a religious authority, they would, nonetheless, be working in a religious atmosphere dedicated to inculcating a particular religious doctrine into children. The court held that this atmosphere would require a "constant review of the instruction in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers." In addition, the court held that the statute had the potential for political divisiveness, because of "the inevitable and successive funding" necessary to maintain such programs.

In Meek v. Pittenger, a Pennsylvania statute authorized using

105. 433 U.S. at 248.
107. Id. at 40.
108. Id.
109. Id. at 41.
public school teachers to provide auxilliary services in remedial and accelerated instruction, guidance counseling and testing, speech and hearing services directly to nonpublic school children only on the nonpublic school premises, and only when "requested by nonpublic school representatives." The statute gave rise to a constitutionally intolerable degree of entanglement between church and state that would require constant state surveillance to guarantee that the public school employees did not advance the religious mission of the church-related schools in which they serve.

The Court further reasoned in *Meek* that, although teachers providing auxilliary services in remedial mathematics would be less likely to intertwine religious doctrine with secular instruction, "a diminished probability of impermissible conduct is not sufficient": the state must be "certain" that subsidized teachers do not inculcate religion. The *Meek* Court, like the *Marburger* court, held that the statute created a serious potential for divisive conflict over the issue of aid to religion, because the annual appropriation process would provide "successive opportunities for political fragmentation and division along religious lines."

The Court relying on its affirmance of the *Marburger* decision explained that "the result in *Marburger* was a decision on the merits, entitled to precedential weight." Thus, the Court failed to distinguish *Marburger* and *Meek* from *Lemon* and *Earley* on the grounds that the services were auxilliary and provided by public school employees under the direct supervision of the local boards of education.

In *Wolman v. Walter*, taxpayers of Ohio challenged the constitutionality of a statute authorizing speech and hearing diagnostic services and diagnostic psychological service to nonpublic school children on the premises of private schools using local board of education employees. Relying on its distinction between diagnostic services and teaching and counseling services, the Court upheld the statute. It noted that the nature of the relationship be-

110. 421 U.S. at 367.
111. *Id.* at 370.
112. *Id.* at 371.
113. *Id.* at 372.
114. *Id.* at 366-67 n.16.
116. *Id.* at 244.
between pupil and diagnostician does not give rise to the same opportunities to transmit sectarian views as the relationship between counselor and student. The Court also noted that the decision in Meek relating to similar provisions concerning speech and hearing were invalidated only because they were not severable from the unconstitutional portions of the Pennsylvania statute: "diagnostic speech and hearing services . . . seemed to fall within the class of general welfare services for children that they may be provided by the State regardless of the incidental benefit that accrues to church-related schools."\textsuperscript{117}

It is difficult to distinguish the unconstitutional programs in Marburger and Meek from those authorized by the Handicapped Children Act regulations, which impliedly authorize special education and related services to handicapped children provided by public school personnel "in other than public facilities." Once again, the only obvious distinction is that the regulations are part of a broader program of services provided to all handicapped children in both public and private schools, whereas the programs in Marburger and Meek applied only to children in private schools.

Unless this distinction is materially sufficient to remove the dangers of excessive governmental entanglement in religious matters and the potential for political divisiveness found to exist in Marburger and Meek, public school personnel will only be permitted to provide the following special education and related services on the private school premises: early identification and assessment of disabilities in children, medical services for diagnostic or evaluation purposes, and school health services.\textsuperscript{118} Consequently, in accordance with the Supreme Court's decisions in Marburger, Meek, and Wolman, related services mandated by the Act, such as counseling services, social work services in schools and parent counseling and training, would be unconstitutional if provided on the school grounds using public school personnel.

To summarize, the Court's decisions concerning whether the Establishment Clause allows public school personnel to provide services on the private school premises seem to depend on what type of service is provided. The statutes in Marburger and Meek authorizing a full range of auxiliary services be provided to private school children on the premises of the private school by public

\textsuperscript{117} Id. at 243, quoting, Meek v. Pittenger, 421 U.S. 371 n.21.

\textsuperscript{118} Montgomery, supra note 6, at 481.
school personnel were invalidated even though the personnel were to be under the direct supervision of the public schools. In *Meek*, the Court did state that, had the provision for diagnostic speech and hearing service been severable from the unconstitutional portions of the statute, these services would have been constitutional. In contrast, the statute in *Wolman* authorizing only diagnostic and health services on the premises of the private school by public school employees was sanctioned by the Court.

**Equipment and Supplies**

The Handicapped Children Act defines equipment as including machinery, utilities, and built-in equipment, instructional equipment and necessary furniture, printed, published and audio-visual instructional materials, telecommunications, sensory and other technological aids and devices, and books, periodicals, documents, and other related materials. The regulations authorize placing “equipment and supplies in a private school for the period of time needed for the project.” Thus, the equipment must be mobile to be loaned. Built-in equipment and other non-mobile items cannot be loaned or used by private schools. In addition, there are restrictions similar to other sections of the regulations authorizing services on the premises of private schools which restrict their use to secular activities and requires continuing public administrative control over the use of such equipment.

The Supreme Court has addressed the issue of state instructional materials and loan programs on several occasions. In *Public Funds for Public Schools v. Marburger*, the Court affirmed the district court’s decision invalidating a New Jersey statute which authorized the state to supply directly to nonpublic schools “secular, nonideological textbooks, instructional materials and supplies,” and “equipment.” The statute further authorized the loaning of such textbooks, instructional materials and supplies and equipment to supplement the auxiliary services provided in private schools. The Court agreed with the district court’s decision that the statute offended the Establishment Clause on three

120. 34 C.F.R. § 76.661 (1981).
121. Id.
123. Id. at 34.
124. Id. at 38.
125. Id. at 39.
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grounds: (1) The statute failed the primary effect test because it authorized state aid to flow directly to nonpublic religiously-oriented schools which had the primary effect of advancing religion; (2) the statute failed the excessive entanglement test because continued state surveillance would be necessary to assure that the loaned equipment would not be diverted to religious purposes; and (3) the statute failed the excessive entanglement test because of the potential for political divisiveness resulting from the annual appropriation process. Additionally, the textbook loan program was invalidated because the statute authorized monetary reimbursement to parents of private school children for textbooks, while public school children merely borrowed the textbooks from the state.

In Meek v. Pittenger, the Court upheld the constitutionality of the textbook loan program authorized by the Pennsylvania statute. Relying on its reasoning in Board of Education v. Allen, the Court held that secular textbooks "merely make available to all children the benefits of a general program to lend school books free of charge . . . and the financial benefit [accrues] to parents and children, not to schools." Conversely, in Meek, relying on its affirmation in the Marburger decision, the Court found the direct loan of instructional materials and equipment to nonpublic schools had the unconstitutional primary effect of advancing religion. Even though the materials and equipment were earmarked for secular purposes, when used in a school in which religion was pervasive, the very nature of such equipment could be subsumed in the religious mission of the sectarian school so as to constitute an impermissible establishment of religion. Because the Court concluded that the direct loan of instructional material and equipment to church-related schools had the constitutionally impermissible primary effect of advancing religion, it found no need to consider whether such aid would result in excessive entanglement between the state and church.

Two years after its decision in Meek, the Supreme Court once

126. Id. at 36.
127. Id. at 37-38.
128. Id. at 41.
129. Id. at 37.
132. 421 U.S. at 360, quoting, 392 U.S. at 243-44.
133. 421 U.S. at 363 n.13.
again examined the issue of the loan of equipment and supplies to private parochial schools in *Wolman v. Walter.*\(^{134}\) The Ohio statute authorized the purchase and loan to pupils or their parents of instructional materials and instructional equipment which was "incapable of diversion to religious use," and which "may be stored on the premises of the nonpublic school."\(^{135}\) The Court held that the statute was unconstitutional even though the legal bailee of the equipment would be the pupil or parent, and not the school. The Court held that the equipment was substantially the same, would be used by the students in the private parochial schools and would be stored and distributed on nonpublic school premises. Concluding that it would be impossible to separate "the secular educational function from the sectarian, [the Court held] the state aid inevitably flows in part in support of the religious role of the schools."\(^{136}\)

The regulation implementing the Handicapped Children Act which authorizes the loan of instructional material and equipment to private schools is merely a component of a broad program of services to handicapped children enrolled in both public and private schools. The statutes which were invalidated in *Marburger, Meek,* and *Wolman* authorized loaning of instructional materials and equipment only to private schools or private school children. Unless this distinction is sufficient to overcome the dangers perceived by the Court in *Marburger, Meek,* and *Wolman,* under the regulations, only secular textbooks could constitutionally be loaned to private schools. It may be argued, however, that, consistent with the Court's distinction between diagnostic and health services in *Meek* and *Wolman,* it would not offend the Establishment Clause to loan to nonpublic schools equipment used in providing those diagnostic and health services on the premises of the private school.\(^{137}\)

**CONCLUSION**

The three on-the-premises service arrangements suggested by the regulations to implement section 1413(a)(4)(A) of the Education for All Handicapped Children Act of 1975 must square with the dictates of the first amendment Establishment Clause's pro-

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135. *Id.* at 248.
136. *Id.* at 250.
scription against the advancement or inhibition of religion by the
government. The Constitution mandates that religion must be a
private matter for the individual, the family, and the institutions
of private choice. The state always has a legitimate interest in
maintaining minimum standards in all schools it authorizes to op-
erate, and while some involvement and entanglement are inevi-
table in regard to nonpublic schools, the Establishment Clause man-
dates lines be drawn in light of the decisions invalidating the
programs provided to private school children on the private school
grounds in *Earley v. DiCenso*, *Lemon v. Kurtzman*, *Public Funds
for Public Schools v. Marburger*, *Meek v. Pittenger*; and *Wolman
v. Walter*.

The child-school benefit distinction does not provide sufficient
grounds for distinguishing the service arrangements on the prem-
ises of the private school suggested by the regulations from those
invalidated by the Supreme Court in the just-named cases. The
general welfare theory does distinguish on-the-premises service ar-
rangements under the regulations from similar state programs in-
validated by the Supreme Court, however, because the regulations
apply to both public and private schools and private school
children.

The salary reimbursement of private school personnel in *Earley
v. DiCenso* and *Lemon v. Kurtzman*, the auxiliary services ren-
dered by public personnel in *Public Funds for Public Schools v.
Marburger*, and *Meek v. Pittenger*, and the equipment loan pro-
grams in *Marburger*, *Meek*, and *Wolman v. Walter* all provided
services only to nonpublic schools or private school children. The
distinguishing feature of the service arrangements authorized
by the regulations is that services are provided to both public and
private school handicapped children. Therefore, the majority of
the recipient schools are not primarily pervasively sectarian.
Whether this distinction is materially sufficient to remove the dan-
gers of advancing religion, producing excessive governmental en-
tanglement between church and state, and creating the serious po-
tential for political divisiveness along religious lines while
implementing the service arrangements is an issue that will con-
tinue to be addressed by the Court in case by case analyses.

**MERLE STOLAR POLLINS**

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138. *Id.* at 486-87.
RELIGIOUS ACCOMMODATION VERSUS UNION SECURITY: A TALE OF TWO STATUTES

I. Introduction

The problem of individual religious freedom in employment is a delicate and difficult one. Since the industrialization of America, the challenge to maintain a peaceful, productive workplace has absorbed the energy and attention of legislators, judges and labor relations practitioners. The law governing labor relations has taken many years to develop and the course has been fraught with emotion and strife. The recognition of organized labor and its right to union security is one ramification of the gradual maturing of labor law, over the years. To the union, the right to union security is vital and indispensable. Today, the union security clause, together with the binding arbitration clause, constitute crucial components of, and may be found in most, collective bargaining agreements executed between union and management. Section 8(a)(3) of the Taft-Hartley Act allows union security clauses, other than the closed shop.

1. A court of appeals has stated that it "as well as other courts . . . recognized that there is both tension and conflict between the legitimate interests of the union in preserving the benefits of the union security agreements, which are valid under the National Labor Relations Act, (29 U.S.C. § 158 (1976)) and the accommodation requirements of the Title VII." Anderson v. General Dynamics Convair, 589 F.2d 397, 400 (9th Cir. 1978).

2. The Supreme Court years ago recognized the significance of peaceful labor relations through organized collective bargaining.


5. [N]othing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the latter.

[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or maintaining membership.


6. Under the closed shop agreement, only members of the union may be hired. See generally, Haggard, A Classification of the Types of Union Security Agreements Affirmatively Remitted by Federal Statutes, 5 Rutgers Camden L. Rev. 418 (1974).
The already complex day-to-day administration of labor relations under existing law was further complicated by Congress' enactment of the Civil Rights Act of 1964. Title VII of the Act, as amended, prohibits discrimination in employment on the basis of religion. The statute has been interpreted to impose a duty upon the employer and the union to accommodate the sincerely held religious beliefs of individual employees. Hence, Title VII runs headlong into the union security protection afforded by the Taft-Hartley Act, when an employee is discharged by his or her employer pursuant to the union security clause for failing to pay union initiation fees or periodic dues for reasons of religious belief.

Difficult as it is, this problem must, nevertheless, be satisfacto-

8. It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge 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 . . . religion . . . ; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion.

Id. § 2000e-2(a) (1976).
10. Of course conflicts between the federal labor laws and Title VII are not restricted to the problem of religious accommodation and union security. Other contradictions, on even a more massive scale, have surfaced, for example, in the area of racial discrimination in employment, and in union seniority systems governing transfer and promotion. See, e.g., Local 188, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) (seniority system negotiated between employer and union which insisted upon carrying forward exclusion of a racially determined class, without business necessity, must yield to Title VII); Robinson v. Lorillard Corp., 444 F.2d 791 (1970), cert. denied, 404 U.S. 1006 (1971) (union seniority system that gives blacks a lower expectation than their co-workers in preferred departments was an unfair employment practice); International Brotherhood of Teamsters v. United States, 431 U.S. 324, (1977) (under section 703(h), a bona fide department seniority system is lawful even when the employer engages in pre-Act discrimination in hiring and promotion and even though the seniority system perpetuated into the present the effects of pre-Act discrimination); United Air Lines v. Evans, 431 U.S. 553 (1977) (a seniority system does not independently violate Title VII simply because it perpetuates the effects of prior discrimination). Extensive litigation also arose in the area of union seniority, hiring and layoff. See e.g., Watkins v. United Steelworkers of America, Local 2369, 516 F.2d 41 (5th Cir. 1975) (use of employment seniority to determine layoff and recall of employees does not violate Title VII when the plaintiffs are not identifiable victims of discrimination); Acha v. Beame, 438 F. Supp. 70 (S.D.N.Y. 1977) (constructive seniority may be granted to individuals who were refused employment prior to the 1965 effective date of Title VII); Franks v. Bowman Transportation Co., 495 F.2d 398, rev'd on other grounds, 424 U.S. 747 (1976) (class-based constructive seniority relief ordered for identifiable victims of illegal hiring and layoff).
rily resolved, in order that the needs of pluralistic society be ade-
quately met. The fundamental freedom possessed by the individ-
ual religious believer must be balanced with the more pragmatic
need for a workable national industrial policy. For a decade, the
burden of reconciliaiton of the two statutes has fallen, in large
measure on the federal judiciary. It was not until December of
1980 that Congress acted to assist in resolving the conflict. This
comment will analyze the efforts of the judiciary in interpreting
the law in this area, first defining the terminology, then briefly out-
lining the development of federal legislation affecting union secur-
ity and the history of Title VII and, finally, reviewing the case law.
Examination of the cases is divided into four parts: (1) the case law
before Trans World Airlines v. Hardison,11 (2) Trans World Air-
lines v. Hardison, (3) the case law after Hardison but before the
Act of December 24, 1980,12 and (4) the case law after the Act of
December 24, 1980.

II. SOME BACKGROUND ON UNION SECURITY CLAUSES

A. Definitions

A union security clause provides, in one form or another, that
membership in the union be a condition for continued employment
in a place of work in which a union has been recognized or certified
as the exclusive bargaining representative.13 The union security
clause is negotiated between the employer and the union for all the
employees in the bargaining unit.14 Since the union security clause
in a collective bargaining agreement may take a number of forms,

13. The right of representation is the authority to bargain on behalf of a group of employ-
ees in an appropriate bargaining unit. A union may obtain the right of representation by (1)
being voluntarily recognized by the employer, (2) through a National Labor Relations Board
(hereinafter N.L.R.B.) order requiring the employer to bargain as a remedy for an unfair
labor practice, or (3) in an N.L.R.B. conducted election. The union will be certified if it wins
a majority of the votes cast. The National Labor Relations Act, as amended, sought to pre-
solve industrial peace, and therefore national industrial strength, by defining the role of
organized labor in the national economy. The labor laws are primarily based on the concept
of majority rule. The union is certified as the exclusive bargaining representative by major-
ity vote. As the bargaining representative, the union has the right to collect fees and dues
from the employees who enjoy the fruits of the collective bargaining process. In return, the
union owes the employees in the bargaining unit the duty of fair representation and the
union selected by the majority must represent all employees fairly and without discrimina-
14. See AFL-CIO, Union Security: The Case Against The Right-To-Work Laws
the following definitions of various clauses that may be used are provided to ensure clarity in subsequent discussion.

(i) Closed Shop- This clause contains the employer's promise to hire only union members and to demand that employees maintain membership during the period of employment. The closed shop is proscribed by the Taft-Hartley Act.

(ii) Union Shop- This clause allows the employer to hire non-union members, but these employees must join the union within a specific period of time, usually thirty days after being employed, and must maintain their membership during the period of employment.

(iii) Union Shop with Preferential Hiring- This clause mandates that the employer hire union workers first. Non-union workers may be hired only if union workers are not available. Once employed, non-union workers must join the union within a specified time period and must maintain union membership. Like the closed shop, this form of union security is proscribed under the Taft-Hartley Act.

(iv) Modified Union Shop- This clause permits employees, who are not union members at the time of the signing of the collective bargaining agreement, to remain non-members. All workers hired thereafter must join the union.

(v) Maintenance of Membership- This clause requires all employees who are members of the union at the beginning of or during the life of the collective bargaining agreement to remain members of the union for the duration of the collective bargaining agreement.

(vi) Agency Shop- This clause allows the employer to hire non-union workers and employees are not required to join the union. However, they must pay the initiation fee and periodic dues that are required of union members.

(vii) Service Fee Agreement- This clause permits the employer to hire non-union members and employees are not required to join the union. But they must tender the union the pro rata share of costs incurred by the union during the performance of its statutory duties as the exclusive bargaining representative.

In addition to the foregoing forms of union security, the dues check-off is another commonly encountered clause in a collective
bargaining agreement. While not a strict union security device—it does not require membership in a union—it is a convenient administrative tool used to facilitate the collection of union dues. Under the clause, the employer agrees to automatically deduct periodic union dues from employees' earnings. This provision saves the union shop steward the time and effort that dues collection normally entails.

B. Early Common Law Doctrines Affecting Union Security

In the early nineteenth century, the English common law courts responded to efforts by labor to achieve union security by employing criminal and civil conspiracy doctrines, with varying degrees of success. The influence of the conspiracy doctrine began to wane after Commonwealth v. Hunt. This historic decision held that a concerted refusal to work for an employer who hired non-union employees did not constitute an illegal conspiracy, unless (a) the workers intended to use the closed shop for "oppressive" or prejudicial purposes; (b) the refusal to work itself was a breach of contract; (c) the employer was thereby induced to break contracts of employment with non-union employees; or (d) force or fraud was used in conjunction with the refusal to work.

In the wake of Hunt, however, another device against the attainment of union security, the contractual interference doctrine, continued to be used in the twentieth century. In addition, the federal labor injunction and the Sherman Antitrust Act were in-

23. See King v. Journeymen-Tailors of Cambridge, 8 Mod. 10, 88 Eng. Rep. 9 (1721) (conviction of defendant tailors allowed to stand because a labor combination was a criminal conspiracy at common law, and is punishable independent of whether the procedural requirements of the Criminal Conspiracy Statute of 1720 (7 Geo. 1 C.13) were met).


27. See Vegelahn v. Gunther, 167 Mass. 92, 44 N.E. 1077 (1896) (union picketing enjoined because it was an unlawful interference with the contractual rights of employer and employee); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) (union strike enjoined as an unlawful interference with rights of employer and employees).


29. Interestingly, the Sherman Act, 15 U.S.C. §§ 1-7 (1976) has been applied against union organizing. In the famous Danbury Hatters Case, Loewe v. Lawlor, 208 U.S. 274 (1908), the Court held that the Act banned the secondary boycott. Id. at 283-309. In response to this decision, in 1914, Congress passed the Clayton Act. 15 U.S.C. §§ 12-27, 29
voked in lieu of the conspiracy doctrine. Besides injunctive actions by the government, damage suits for private monetary remedies by non-union workers, who are discharged because of union pressure or a closed shop agreement, also began to be used.50

C. Federal Legislation

In 1898, Congress passed the ill-fated Erdman Act,31 which concerned the arbitration and resolution of labor disputes of common carriers involved in interstate commerce. Section 10 prohibited carriers from requiring their employees to agree to refrain from joining a labor union as a condition of employment.32 The Supreme Court, in Adair v. United States,33 declared the statute violative of the Fifth Amendment guarantee of liberty to contract.

It was not until almost forty years later,34 in response to the use of antitrust laws, and the widespread but ineffective use of injunctions with the corresponding increase in labor strife, that Congress


30. The Massachusetts approach favored the discharged plaintiff. See Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900) (strike by one union in a dispute between two rival unions enjoined because of motive of strike was to force employer to hire only members of one union and was not related sufficiently to the legitimate self-interest of the striking union); Berry v. Donovan, 188 Mass. 353, 70 N.E. 605 (1905) (judgment in tort for plaintiff, who had been discharged pursuant to a closed shop agreement, due to unjustifiable interference with plaintiff's employment relationship). For additional cases, see T. HAGGARD, COMPELLSORY UNIONISM, THE NLRB AND THE COURTS 23 n.43 (1977). Other states, like New York, were more tolerant of union organizing. For cases, see id. at 18-21.


32. This type of agreement is commonly known prejoratively as the yellow dog contract.

33. 208 U.S. 161 (1908).

34. The Railway Labor Act of 1926, 45 U.S.C. §§ 151-88 (1976), preceded the Norris-LaGuardia Act, but only provided for procedures for resolution of disputes in the railway industry and did not cover union security agreements. In 1934, Congress amended the Railway Labor Act, prohibiting both the yellow dog contracts and the union shop. Act of June 21, 1934, Pub. L. No. 442, 48 Stat. 1187. In 1851, however, Congress shifted its views and amended the Act to allow union shop agreements in the railway industry. Act of Jan. 1, 1951, Pub. L. No. 914, 64 Stat. 1238. The constitutionality of this section, which permitted the union shop, was upheld against first amendment attack in Railway Employees Department, AFL v. Hanson, 351 U.S. 225 (1956). In Hanson, the Court ruled that the Act, by reason of the Supremacy Clause of Article VII of the United States Constitution, expressly permits a union shop, any state law not withstanding. Congress had the power to preempt the field in the railway industry because of the Commerce Clause and the Act did not violate either the first or fifth amendments as long as the dues collected were to cover the expense of collective bargaining. 351 U.S. at 238. See also, International Association of Machinists v. Street, 367 U.S. 740 (1961) (constitutionality of compulsory union dues upheld but expenditure by union for political causes was limited). For an application of the Hanson doctrine, see Railway & Steamship Clerks v. Allen, 373 U.S. 113 (1963).
enacted the Federal Anti-Injunction Act or the Norris-LaGuardia Act of 1932. Section 3 of this Act disallowed the use of the yellow dog contract as a basis for legal or equitable relief in the federal courts. After the enactment of the Norris-LaGuardia Act, in United States v. Hutcheson, the Supreme Court effectively overruled its prior decisions on federal labor legislation and gave judicial legitimacy to peaceful collective action by workers. The Norris-LaGuardia Act remains in effect to this day and is an important component of federal labor legislation.

In 1933, Congress passed the short-lived National Industrial Recovery Act with the aim of stimulating a depressed national economy. With respect to union security, the Act attempted to proscribe the company controlled union, and once again, the yellow dog contract. On the other hand, it appeared that the closed shop was permitted under the Act. Of course, upon judicial review, the National Industrial Recovery Act was held an unconstitutional delegation of legislative power by Congress to the president.

The National Labor Relations Act or Wagner Act of 1935 was the next product of congressional activity. The Wagner Act is a comprehensive piece of labor legislation with application to industries in interstate commerce. It became the backbone of modern labor law. The question of union security was addressed in section 8(3), which made it an unfair labor practice for any employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” This section outlawed any use of the yellow dog contract in employment. Additionally, a proviso of the section legalized the closed shop and other forms of union security for purpose of federal law. The Wagner Act permitted

37. 312 U.S. 219 (1941).
39. Id. § 7(a).
40. Id.
44. It shall be an unlawful labor practice for an employer...
(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organi-
unions to increase greatly their ranks and power. As union influence grew, however, so did disruptive activities and the arbitrary use of the closed shop, by which union leadership deprived dissenters of their jobs simply by terminating union membership.

In 1947, Congress amended the National Labor Relations Act by passing the Labor Management Relations Act or Taft-Hartley Act. A new section, 8(a)(3), effectively restricted union security by (1) allowing the employer to hire non-union workers, although these workers could be required to join the union within thirty days, and (2) allowing the employees to refrain from actively participating in union activities so long as they "tender[ed] the periodic dues and the initiation fees uniformly required" of union members. The section also prohibited the employer from being required to discharge an employee for non-participation in a union other than for failure to tender fees or dues. Thus, Congress precluded the closed shop in favor of the union shop. The Congressional intent in permitting the union shop was to eliminate the problem of "free rider."

The practical meaning of the union shop under the Taft-Hartley Act was further refined by court decisions. In *NLRB v. General Motors Corp.*, the Supreme Court whittled the membership con-
dition to its “financial core.” The court held it “permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights may in turn be conditioned only upon payment of fees and dues.” The decision limited union membership for retention of employment to the payment of fees and dues that are required of all other union members. In the accompanying case, Retail Clerks Local 1625 v. Schemerhorn, the Court further construed its General Motors decision to hold that the agency shop is the “practical equivalent” of the union security agreement permitted by the proviso in section 8(a)(3). In Retail Clerks, the Court found that a union could not deny employment to a prospective employee by refusing him union membership. Augmenting that decision, in NLRB v. Hershey Food Corp., the Court ruled that an employee who tendered the amount equivalent to fees or dues could not be denied employment because he refused to comply with any other obligations of union memberships.

In 1974, Congress amended the Taft-Hartley Act to bring employees of private non-profit health care institutions within its coverage. The amendment specifically excused employees of private non-profit health care institutions who objected because of religious convictions, from having to join or financially support a union, and instead let them pay an amount equal to union fees and dues to a non-religious, tax-exempt charity. The Act’s exclusion of certain religious groups from the necessity of joining and paying dues to unions was the precursor of the Act of December 24, 1980, which expanded the exemption to all industries governed by the Taft-Harley Act.

III. THE RELIGIOUS DISCRIMINATION CLAUSE OF TITLE VII

In 1964, Congress passed the Civil Rights Act, Title VII of which was intended to eliminate discrimination in employment on
the basis of religion. Though a large part of the legislative history of the Act focused on the pernicious effect of racial discrimination in the workplace, other types of discrimination were recognized and proscribed in Title VII. The Equal Employment Opportunity Commission (hereinafter EEOC) was delegated the authority to issue guidelines to clarify and administer the statute. Since the statute neither defined the term "religious discrimination," nor indicated the boundaries of the protected "beliefs," the task fell to the EEOC. The first set of guidelines were issued by the EEOC in 1966. This early version emphasized that employers not only must refrain from using religion as a decision-making factor, but also must observe the affirmative duty "to accommodate the religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." The guidelines were revised in 1967 to stipulate that employers must "make reasonable accommodations to the religious needs of employees or prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business." Thus, the 1967 guidelines reaffirmed those of 1966 and, in addition, equated religious discrimination under Title VII with failure to make "reasonable accommodations" that did not present an "undue hardship" to the employer. The burden of proof was placed on the employer. While introducing the concepts of "reasonable accommodation" and "undue hardship," the 1967 guidelines did not define "religion," but instead spoke of "religious needs," "religious beliefs," and "religious practices." Interestingly, the employer was the party designated to make the accommodations and the union was not mentioned.

The EEOC's attempt to establish guidelines was not well ac-

59. The statute is reproduced in note 5 supra.
63. 29 C.F.R. § 1605 (1966).
64. Id. § 1605.1(a)(2).
65. Id. at 1605 (1967); see also, id. § 1605.1(b) (1979).
66. "Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to religious needs of the employee unreasonable." Id. § 1605.1(c).
67. Id. § 1605.1.
68. The omission of unions imposed some statutory interpretation difficulties on the courts. See Cooper v. General Dynamics Convair Division, 533 F.2d 163 (5th Cir. 1977).
cepted by the judiciary. The 1967 guidelines were challenged in *Dewey v. Reynolds Metals Co.*, which involved an employee who refused to work on Sunday. At trial, the district court had held for the employee, reasoning that the employer had not proven that accommodation would give rise to "undue hardship." The Sixth Circuit Court of Appeals reversed, finding that the employer had attempted to make an accommodation that satisfied the statutory requirement of Title VII. Further, the court scrutinized EEOC's statutory authority to promulgate guidelines which sought to impose an affirmative duty on the employer to accommodate the employee's religious beliefs. The court stated that even if the EEOC had the statutory authority, its expansive guideline on reasonable accommodation "would raise grave constitutional questions of violations of the Establishment Clause of the First Amendment." The constitutionality of the guidelines was left in doubt when the court of appeals decision was affirmed by an equally divided Supreme Court.

In 1972, seeking to clarify the law, Congress incorporated the EEOC guidelines in Title VII by adding section 701(j). The section defined "religion" broadly as "all aspects of religious observance and practice, as well as belief." Congress thus declared its intention to protect religious beliefs and practices and to place the affirmative duty to accommodate, absent undue hardship, on the employer. Once again unions were not mentioned. The new enactment was reviewed by the Sixth Circuit Court of Appeals in

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70. 300 F. Supp. at 709.
71. 429 F.2d at 324, 331. The employer had attempted to accommodate the employee by permitting him to find someone to replace him on the days on which he did not report to work. The employee refused.
72. Id. at 331 n.1.
73. Id. at 334.
76. "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless the employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance without undue hardship on the conduct of the employer's business." Id.
77. For the legislative history of this amendment, see 118 CONG. REC. 705 (1972); H.R. Rep. No. 899, 92d Cong., 2d Sess. (1972).
Cummins v. Parker Seal Co., a case involving the discharge of a Sabbatarian. This time, the court upheld the constitutionality of the religious accommodation provisions. Again, the Sixth Circuit was affirmed by an equally divided Supreme Court.

A review of the guidelines and EEOC annual reports show that the EEOC initially did not take the position that Title VII protected the employee who refused due to sincere religious convictions to pay union fees and dues required under a union shop agreement.

The commission was also required to determine whether an employee in a union shop may refuse to pay union dues on the grounds that such payments are prohibited by his religious beliefs. The commission has held that "a union shop is not unlawful" and that charging party's refusal on religious grounds is protected neither by Title VII nor the First Amendment.

Nevertheless, the commission apparently reversed its position and by the time of Yott v. North American Rockwell Corp. had decided to submit amicus curiae brief on behalf of the religious em-

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78. 516 F.2d 544 (6th Cir. 1975), aff'd by equally divided court per curiam, 429 U.S. 65 (1976), vacated per curiam, 433 U.S. 903 (1976), aff'd per curiam, 561 F.2d 668 (6th Cir. 1977).

79. The plaintiff belonged to the Worldwide Church of God which forbade work on Saturdays. His employers accommodated by substituting other employees for the plaintiff, but these other employees complained. Subsequently, plaintiff was discharged. The trial court found that the employer had attempted "reasonable accommodation" and that further accommodation amounted to "undue hardship." Id. The court of appeals reversed the finding of the district court, reasoning, that it was the other employees' complaints which caused plaintiff's discharge and that inconvenience to such employees and the effect on employee morale did not constitute an "undue hardship" on the employer. 516 F.2d at 550. For a discussion of Sabbatarian cases, see generally Kushner, Toward the Central Meaning of Religious Liberty: Non-Sunday Sabbatarians and the Sunday Closing Cases Revisited, 35 Sw. L.J. 557 (1981).


83. 6 EEOC ANN. REP. 12 (1972).

84. 501 F.2d 398 (9th Cir. 1974).
ployee. Ever since, the EEOC has supported the employee’s right to religious accommodation in preference to union security.

IV. THE CASE LAW

A. Free Exercise Clause Challenges to Union Security

A number of cases have attacked union security on first amendment grounds. Section 8(a)(3) of the Taft-Hartley Act, which permits the inclusion of union shop and other union security clauses in collective bargain agreements, was challenged by members of the Seventh Day Adventist Church in *Cap Santa Vue, Inc. v. NLRB.*

*Cap* involved a National Labor Relations Board (hereinafter N.L.R.B.) decision making union security a mandatory subject for collective bargaining. The union was certified by the N.L.R.B. as the bargaining representative after an election at the workplace. The employers refused to meet with the union when requested to do so. The union filed unfair labor charges against the employers with the N.L.R.B.

At the Board level, the employers set up the defense that their religious convictions prevented them from dealing with the union and that mandatory bargaining with the union would violate the Free Exercise Clause of the first amendment. The N.L.R.B., nevertheless, found the employers in violation of sections 8(a)(5) and (1) of the National Labor Relations Act and ordered collective bargaining with the union to begin. The employers appealed the Board decision to the court of appeals, arguing that the “good faith” bargaining provision of section 8(a)(5) required more than mere external compliance with an objective law, and that “good faith” compliance by one who does not believe in the Act is prohibited by the Constitution.

Distinguishing “the absolute freedom to hold religious beliefs and the freedom of conduct based on religious beliefs,” the court opined that the freedom of religious conduct “may be curtailed in some circumstances for the protection of society.”

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86. Employer unfair labor practice is proscribed by § 8(a) of the National Labor Relations Act. 29 U.S.C. § 158(a) (1976).
87. Id. at 887.
88. 424 F.2d at 883.
89. Id. For its authority, the court relied on *Cantwell v. Connecticut,* 310 U.S. 296 (1940): The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to
agreed that the employers could not be forced to believe in the National Labor Relations Act or "anything else for that matter," but, it held that the National Labor Relations Act did not concern itself with employers' beliefs. Rather, it was enacted to regulate conduct, especially in the field of labor relations. The court recognized the national importance of collective bargaining: "There is a compelling public interest in applying the good faith collective bargaining requirement uniformly to all employers and labor unions." It explained that the legislative history and wording of the Act indicated that the requirement of "good faith" bargaining with the union was not intended to be and did not compel the employer to believe the Act. Therefore, the employer need not abandon his or her religious beliefs while conducting good faith bargaining with the union. Consequently, the court enforced the N.L.R.B. collective bargaining order.

The fact pattern of another first amendment attack on union security, Gray v. Gulf, Mobile & Ohio Railroad Co., is characteristic of religious accommodation litigation brought under Title VII. The case involved "a clash between enforced union adherence and an individual conscience which forswears union allegiance." The defendant railroad and union had entered into a union shop agreement pursuant to the Railway Labor Act. The union shop clause required all employees to become union members within sixty days of employment. Gray, a Seventh Day Adventist, refused to join be-

adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

310 U.S. at 303-04.
90. 424 F.2d at 886.
91. Id. at 890.
92. The court accepted the pragmatic view on good faith bargaining as interpreted by many other Board and judicial decisions: "good faith" contemplates a willingness to enter the discussions "with an open mind and purpose to reach an agreement consistent with the respective rights of the parties." Id. at 888. For a discussion of the meaning of good faith in labor relations, see Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958).
94. 429 F.2d at 1065.
cause of his religious convictions. The union then gave him the option of tendering the required initiation fees and periodic dues without actually accepting union membership, but Gray rejected this alternative. The railroad was compelled to discharge Gray in accordance with the collective bargaining agreement.

Gray brought suit in federal district court, alleging violations of his rights guaranteed by the first, fifth, ninth, tenth and fourteenth amendments to the United States Constitution. He sought reinstatement, an injunction against future discharge and damages for lost wages. When the trial court held against him, Gray appealed. The scope of the appeal was narrowed to a claim that the Railway Labor Act should not be interpreted to require the payment of union fees and dues by persons who were prevented from doing so by their religious beliefs. The appellant further contended that, if the Act were interpreted to give union security precedence over religious objections, then it was violative of the Free Exercise Clause of the first amendment. Nevertheless, the court relied on its analysis of the congressional intent embodied in the Act and on the cases of Railway Employees' Department, AFL v. Hanson and International Association of Machinists v. Street, to hold against Gray.

Linscott v. Millers Falls Co., is a similar exertion of free exercise objections to union security. Linscott was a Seventh Day Adventist, who had been employed by the Millers Falls Company since 1950. Her troubles began in 1968 when the company and the newly certified union entered into a collective bargaining agreement which included a union shop provision. Linscott refused, on the basis of her religious convictions, either to join the union or to pay initiation fees and dues. Instead, she offered to pay an equivalent amount to a non-religious charity; the union refused to accept. After discharge, Linscott filed suit in federal district court, alleging a violation of her first amendment rights to free exercise of

96. 302 F. Supp. at 293.
97. Id.
102. Linscott's troubles could have been avoided if, for example, the employer and union had agreed to a modified union shop.
The trial court dismissed the action and Linscott appealed to the First Circuit Court of Appeals. The three judge panel affirmed the decision of the lower court. The defendant had argued that plaintiff's discharge was the result of a private arrangement and that there had been insufficient government activity for the plaintiff to invoke the first amendment. Chief Judge Adrich and Judge McEntee disagreed, preferring to address the first amendment issue. The majority relied on the Hanson doctrine to decide against Linscott. To the court, the "free exercise of religions is not absolute." It insisted on balancing Linscott's religious conduct and the governmental interest in peaceful labor relations, and curtly concluded that "in weighing the burden which falls upon the plaintiff if she . . . avoid[ed] offending her religious convictions, as against the affront which sustaining her position would offer to the congressionally supported principle of the union shop, it is plaintiff who must suffer."

B. Title VII Challenges to Union Security Before Trans World Airlines v. Hardison

Although first amendment challenges to union security have not been successful, the 1972 amendments to Title VII of the Civil Rights Act have generated another series of challenges to union security on the basis of religious discrimination in employment. The cases discussed below involve Title VII challenges to the union or agency shop wherein all employees of the bargaining unit had been required to tender initiation fees and periodic dues to the union. These cases are to be distinguished from the "refusal to

104. Id. at 1373.
105. 440 F.2d 14 (1st. Cir. 1971).
106. Id. at 18.
107. Judge Coffin, while concurring in the result, did not reach the constitutional issue. He would have distinguished Hanson, which interpreted the Railroad Labor Act, from the case at bar, which involved the National Labor Relations Act. He held the view that, although a federal agency (the N.L.R.B.) was charged with administering labor law, there had been insufficient government involvement to precipitate a first amendment violation, especially when the parties had not sought N.L.R.B. enforcement. Instead, the judge suggested that the employee avail herself of the protection of the N.L.R.B. by charging the violation by the union of its duty of fair representation, or interestingly, that she seek relief under Title VII of the Civil Rights Act of 1964. Id. at 20.
108. Id. at 17.
109. Id. at 18. The court was reassured that "[h]er alternative is not absolute destitution" because "[t]he cost to her is being forced to take employment in a nonunion shop - here, less remunerative employment." Id.
work” or Sabbatarian religious discrimination cases, which commonly arise under Title VII.

The first Title VII religious discrimination case, *Yott v. North American Rockwell Corp.*,110 arose from the following oft-repeated facts. Yott, a Seventh Day Adventist, had been a “faithful and satisfactory employee”111 at Rockwell for almost twenty-two years. In 1968, the company entered into a collective bargaining agreement with the United Automobile, Aerospace and Agricultural Transport Workers of America Union. The collective bargaining agreement contained a union security clause which required all employees to pay union dues. Yott objected to joining the union and to paying dues, asserting that his religion prohibited him from joining or paying dues to a union. The union refused to except Yott from the union security clause and he was subsequently discharged by the employer under the terms of the collective bargaining agreement. At the time of discharge, Yott had not offered to contribute an amount equal to the union fees and dues to a non-union charity.

Yott complained to the EEOC and eventually filed a suit in federal district court which was dismissed. Upon appeal, the Ninth Circuit Court of Appeals held that, while Yott’s rights to free exercise of religion as guaranteed by the first amendment were not violated by the union security clause, the employer and the union had a duty to make “reasonable accommodation” of Yott’s religious beliefs, as long as such accommodations did not cause “undue hardship” to the employer and to the union.112 The court distinguished the case from the “refusal to work” cases113 but accepted the language of the 1972 amendments to Title VII as extending beyond the observance of holy days and non-Sunday sabbaths to include issues of union membership and the non-payment of union dues. While the court expressed doubts over the availability of a reasonable accommodation, it set the following standard for use by the trial court: “If appellees are able to demonstrate that any suggested accommodation would impose *undue hardship on the union or on the employer’s business*, then Yott’s discrimination claim

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110. 501 F.2d 398 (9th Cir. 1974), on remand, 428 F. Supp. 763 (C.D. Calif. 1977), aff’d, 602 F.2d 904 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980).
111. *Id.* at 399.
112. *Id.* at 404-05.
113. *Id.* at 403.
should fail." Thus, the court recognized the "free-rider problem" and the nexus between hardship to the union and hardship to the employer, and allowed both the benefit of "undue hardship." The case was remanded to the district court for a determination of the exact extent of "reasonable accommodation" and "undue hardship."

Upon trial on remand, the defendants claimed that the accommodations sought by Yott were not reasonable because (1) they were illegal, (2) even if legal, the transfer to a non-unit job would be only temporary because of the organizational efforts of the union, and (3) section 701(j) violated the first amendment. Yott, on the other hand, urged the court to apply the law of Cummins v. Parker Seal Co., which involved a religious discrimination claim by a Sabbatarian over workshifts. The trial court disagreed and found a violation of the Establishment Clause:

Government simply cannot make the choice—termed reasonable or otherwise—that conduct which lacks either discriminatory intent or discriminatory application can be circumscribed because religious beliefs may oppose its implementation. Faced with such a decision, government must declare its neutrality. The neutrality may result in a sacrifice for the individual who adheres sincerely to his religious beliefs. . . . However well-intentioned governmental action may be in an attempt to alleviate this sacrifice it cannot survive the clear command of the First Amendment.

The court also expressed dissatisfaction with the accommodation

114. Id. at 403 (emphasis added).
115. The Court was:
   . . . certain that the [district court, upon remand] will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share. "Free riders" are discouraged. In effect, stability is promoted by reducing potential labor strife, thus increasing the efficient operation of the business.
   Id. at 402 n.6.
116. Id. at 405.
118. Yott sought three alternatives: (1) that he be given a job outside the bargaining unit or (2) that he be exempted from the union security clause, or (3) that he be reinstated at a low rate of pay permitting Rockwell to dispose of the difference as it saw fit. Id. at 765.
119. Id.
120. 516 F.2d 544 (6th Cir. 1975), aff'd mem. by an equally divided court, 429 U.S. 65 (1976). The Sixth Circuit applied the secular purpose, secular effect and excessive entanglement analysis and upheld section 701(j) as constitutional.
121. 428 F. Supp. at 767.
alternatives proposed by Yott. Yott appealed the court's constitutional interpretation and findings on reasonable accommodation to the Ninth Circuit Court of Appeals. Since the decision of the appellate court on these questions was rendered after Hardison, discussion of the decision is postponed until after a review of Hardison.

The facts of Cooper v. General Dynamics Convair Aerospace Div. are similar to those of Yott. Plaintiffs were Seventh Day Adventists who worked for General Dynamics on a federal enclave in the Fort Worth area. They had once belonged to the union but had withdrawn from union membership in the 1960's. In 1972, for the first time, the employer and the union, executed an agency shop agreement. After an unsuccessful protest to the employer and the union, plaintiffs commenced to pay in trust the amount equal to the required dues for the benefit of an acceptable non-religious charity and commenced an action pursuant to Title VII. The trial court denied relief, holding that plaintiffs' beliefs, while both religious and sincere, were "specious," and, hence, no accommodation was necessary. On appeal to the Court of Appeals for the Fifth Circuit, the court reversed the district court. As a preliminary matter, the appellate court chided the trial court for looking into the logic of plaintiffs' religious beliefs, insisting that "the district court should not have analyzed the logic of the assumptions underlying these beliefs." The court noted that "[t]hese telling arguments [of the trial court] address an issue that is not for federal courts, powerless as we are to evaluate the logic or validity of beliefs found religious and sincerely held."

The Fifth Circuit ruled that the plaintiffs' religious beliefs were entitled to reasonable accommodations by both the employer and by the union. The three judge court was divided, however, over the question of whether the accommodation should extend to

122. Id. at 769-70.
124. 533 F.2d at 165.
125. 378 F. Supp. at 1262.
126. 533 F.2d 163 (5th Cir. 1976).
127. Id. at 173.
129. 533 F.2d at 171.
union security and whether the union was to be afforded the "undue hardship" escape hatch enjoyed by the employer. Judge Gee and Chief Judge Brown formed the majority, which decided that Title VII covered not only holy day or non-Sunday sabbath cases, but extended to disputes over union security; and that the payment of an amount equal to union dues to a non-religious charity constituted a possible accommodation of plaintiffs' religious beliefs. According to Judge Gee, the majority was "unable to reconcile with section 701(j)'s sweeping terms . . . the Union's suggestion that Congress intended by it to protect Sabbath observance only . . . All forms and aspects of religion, however eccentric, are protected except those that cannot be, in practice and with honest effort, reconciled with a businesslike operation. The Civil Rights Act extends to the religious doctrine implicated here." Judge Rives disagreed, arguing that at no time should the union be compelled to accommodate the plaintiff's religious beliefs.

On the second issue, Judge Rives and the Chief Judge formed the majority, holding that the union was entitled to a trial to determine whether it had been subjected to "undue hardship." Judge Gee dissented, preferring a strict reading of section 703(j). Thus the court, while divided, mustered a majority rule that,

130. See text accompanying notes 110-13 supra.
131. 533 F.2d at 168-69 (emphasis in original).
132. To my way of thinking, the "undue hardship" analysis has no application at all to the union security agreement . . . I would remand to the district court for the limited purpose of determining whether accommodations such as a transfer can be made without undue hardship; and would direct that in no event should the district court extend the scope of accommodation to provide an exemption from the payment of dues under an agency shop agreement.
**Id.** at 177 (Rines, J., dissenting in part).
133. Like the Yott court, Chief Judge Brown recognized the importance of treating the union and employer equally with respect to "undue hardship":

[T]he Union's legitimate self-interest is an inevitable part of the inquiry into hardship to the employer. We must remember that the aim of all federal employment relationship legislation is the idyllic goal of industrial peace. The quest, of course, is not for some unrealistic hope for tranquility . . . What is sought is a means by which these natural irrepressible contentious contentions can find resolution through civilized means not [through] the brute strength of an employer's goon squad or violence on the picket line . . . The Union should therefore have the right—equally with the employer—to demonstrate if it can [] that the practice condemned cannot be avoided without undue hardship to its legislatively ordained role.

**Id.** at 172.
134. The section provided only for "undue hardship on the conduct of the employer's business," and Judge Gee preferred not to read anything more into the statute. **Id.** at 170-71 (Gee, J., dissenting).
under Title VII, both the employer and the union owe a duty to make "reasonable accommodations" to the religious employee's objection to union security and that both the employer and union are entitled to use of the "undue hardship" test.

Yet another case came to trial half a year before Hardison. In Anderson v. General Dynamics Convair, the plaintiff had been employed by General Dynamics since 1956. In 1959, Anderson became a member of the Seventh Day Adventist Church. The employer and union maintained an open shop until 1972 when a union shop was negotiated into the collective bargaining agreement. Anderson refused for religious reasons, to comply with this union security clause and also refused to pay an equal amount to a charity of the union's choice. Instead, he complained to the EEOC and in due course obtained a "right to sue" letter. At trial, the court essentially relied on Yott's holding by the Sixth Circuit Court of Appeals that reasonable accommodation without undue hardship to employer and union is required in such cases. The court found, however, that "plaintiff's refusal to give the equivalent of dues to the Union to be earmarked for a recognized charity of his own selection was based on his general distrust of unions, rather than on religious beliefs," and that "the overriding interest of the Union in carrying out its bargaining function with sufficient funds makes an accommodation impossible, given plaintiff's unyielding position." The court did not reach the constitutional challenge to Title VII, since it found that accommodation had not been possible. The appeal by the plaintiff was decided by the Ninth Circuit in the wake of Hardison.

C. Trans World Airlines v. Hardison

The difficulty encountered by the Ninth and Fifth Circuits over the balancing of the interests of religious plaintiffs whose beliefs prevented them from joining unions and paying union dues and

136. Article 9, paragraph B of the collective bargaining agreement provided:
Any employee on the company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in paragraph A above.

Id. at 419.
137. Id. at 420.
138. Id. at 422.
that of the union has been repeated in all the Sabbatarian cases. In an effort to bring some order to the confusion in the lower courts, the Supreme Court finally rendered a substantive opinion in *Trans World Airlines v. Hardison*, a Sabbatarian case. While *Hardison* is not on all fours with the union security cases, it represents, at a minimum, an authoritative voice on the scope of the duty of "reasonable accommodation" and the judicial yardstick for "undue hardship" in Title VII religion cases. *Hardison* is also important because lower courts have referred to its teaching in deciding subsequent religious accommodation versus union security cases.

The facts in *Hardison* are straightforward. Hardison was an employee in a Trans World Airlines warehouse and he was also a member of the Worldwide Church of God, which observed the Sabbath by not working from sunset Friday until sunset Saturday. Trans World Airlines had a collective bargaining agreement with the International Association of Machine and Aerospace Workers (hereinafter IAM). The collective bargaining agreement contained a seniority provision with respect to shift assignments. For a while, Hardison was able to avoid any conflicts with Saturday work because he had sufficient seniority and when necessary would work night shifts. When he transferred to another building, however, he was put second from last on the seniority list. Asked to work on Saturdays when a fellow employee went on vacation, Hardison objected and Trans World Airlines agreed to allow the union to change work assignments for him. A number of alternatives were explored but none worked out. The union refused to make exceptions in the seniority list on behalf of Hardison and he did not have sufficient seniority to bid out of the Saturday shift. Hardison then refused to report to work on Saturdays and was discharged after a hearing for insubordination. Hardison filed an action in federal district court against both the employer and union under Title VII. The trial court ruled for both defendants, but the Eighth Circuit Court of Appeals reversed as to Trans World Airlines, finding that it had engaged in an unlawful employment practice under section 703(a)(1), and affirmed as to the union.

Upon petition by both employer and union, the Supreme Court

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140. 432 U.S. at 69.
142. 527 F.2d 33 (8th Cir. 1975).
found that Trans World Airlines' actions did not violate Title VII. Rather surprisingly, the question on the lawfulness of the union action was not reached. The Court held that "absent a discriminatory purpose, the operation of the seniority system cannot be an unlawful practice even if the system has some discriminatory consequences." Apparently the Court took account of the special treatment accorded seniority systems under Title VII, and relied on the provisions of the statute to uphold the union action regarding seniority. For the bulk of the opinion, the Court focused on the efforts made by Trans World Airlines (hereinafter TWA) to accommodate Hardison's religious belief. On the status of the collective bargaining agreement, the court agreed that neither a collective-bargaining contract nor a security system may be employed to violate the statute," but it did "not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement: Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts." The Court felt that any requirement for "TWA to bear more than a de minimus cost in order to give Hardison Saturdays off is an undue hardship." The Court was also concerned about the adverse effects of religious accommodation on the other employees:

By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs . . . . In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

In summary, the Court decided that under section 703(a)(1),

143. 432 U.S. at 70.
144. Section 703(h) provides in pertinent part:
   Notwithstanding any Ohio provision of Rees subchapter, it shall not be an unlawful employment practice for our employer to apply different standards of compensation, on different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . . provided that such differences are not the result of an intention to discriminate, because of race, color, religion, sex or national origin . . . .
145. 432 U.S. at 79.
146. Id. at 84.
147. Id.
neither employer nor union is required to encroach upon the seniority system negotiated under collective bargaining, in preference to the religious needs of the Sabbatarian. It follows that the employer has no obligation to subject other employees to undesirable shifts in favor of religious employees, and that an employer need not incur additional expense to find substitute workers in order to accommodate the religious worker, if such an accommodation would impose anything more than a de minimus cost on the employer. As noted previously, unlike the Yott court, and especially the Cooper court, the Hardison Court did not analyze in depth the union's duty of "reasonable accommodation" with respect to the seniority system. The Court simply and narrowly upheld the legitimacy of union seniority systems. By confining its opinion to only union security the Court's silence on the general duty of the union to accommodate religious employees spawned another round of litigation in the lower courts, especially concerning the legitimacy of union security. More important, by deciding against Hardison, the Court avoided the necessity to rule upon the constitutionality of section 701(j).

D. Challenges After Hardison

On the second time around, in Yott v. North American Rockwell Corp., the Ninth Circuit Court of Appeals affirmed, as not being clearly erroneous, the finding of the trial court on the issue of reasonable accommodation. The Yott court construed Hardison to hold that "Title VII did not require an employer to deny the shift and job preference of some employees in order to accommodate or prefer the religious needs of others and presumably contrary to the seniority provisions of the 1968 collective bargaining agreement." With respect to the plaintiff, the court found that Yott had not shown that the legal standard used by the district court differed from that employed by the Supreme Court, and that "a standard less difficult to satisfy than the 'de minimus' standard for demonstrating undue hardship expressed in Hardison is difficult to imagine." The court was satisfied that both the employer and the union had made a good faith effort to accommodate the reli-

148. Id. at 81-85.
151. 602 F.2d at 908.
152. Id. at 909.
Religious convictions of the employee and that further accommodation would impose undue hardship upon both. Thus, by simply agreeing with the factual finding of the trial court, the court decided against the plaintiff and avoided commenting on the correctness of the district court's constitutional pronouncements.

In *McDaniel v. Essex International, Inc.*, the first full-fledged challenge after *Hardison*, the plaintiff employee was a Seventh Day Adventist. She was hired by Essex, a company which had a collective bargaining agreement with IAM Local 982. A union security clause required all employees to join the union within forty-five days from the date of hire. Because of her religious beliefs, McDaniel refused to join or to pay union fees and dues, but did offer to contribute an equal amount to a non-sectarian non-union national charity. The union rejected this alternative and asked that she be discharged. Essex pleaded for more time on behalf of the employee and McDaniel made another offer to pay the union the fraction of the dues which represented the cost of peaceful collective bargaining and to pay the balance to a mutually agreeable non-religious charity. This was unsatisfactory to the union and McDaniel was discharged for failing to join the union and tender fees and dues, although negotiations continued for a while between the Seventh Day Adventist Church and the union.

McDaniel filed a Title VII section, but the trial court dismissed on the grounds that she had failed to state a claim "as a matter of law," and that the failure to pay dues imposed an undue hardship on the union. The Sixth Circuit reversed, interpreting *Hardison* to require "an effort at accommodations and if unsuccessful, to demonstrate that they are unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship." The court also upheld the constitutionality of section 701. The case was remanded to the district court "to receive evidence to determine therefrom whether any reasonable accommodation to the religious needs of the plaintiff may be made by Essex and IAM without undue hardship." Upon remand, the district court ruled that the

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153. *Id.*
156. 571 F.2d at 343.
157. *Id.* at 344.
158. *Id.*
defendants had to prove that an effort was made to accommodate before they could invoke the defense of undue hardship. For this reason, the union was adjudged to have violated Title VII for its failure to attempt accommodation of plaintiff's prima facie claim of religious discrimination. On the status of the union security clause, the court stated that, "[t]hough a union security clause is recognized as a valid provision in a collective bargaining agreement, the IAM's blatant refusal to make any kind of accommodation with plaintiff" and the lack "of any substantial hardship, since substituting charitable contributions for plaintiff's union dues certainly was not an undue hardship, put the IAM's actions clearly in the realm of a Title VII violation."

Having disposed of the union's case, the court then addressed the undue hardship defense of the employer. Essex had argued that retaining McDaniel would have caused it to violate the collective bargaining agreement, thus exposing it to potential liability from the union and its members, and that this constituted undue hardship. For authority, Essex cited Hardison. The court responded by distinguishing Essex's situation from that of the employer in Hardison. The court pointed out that, in Hardison, the Supreme Court was concerned with the adverse impact on the other employees that would result from Trans World Airlines' accommodation of Hardison. But "in the present case, there is not a comparable substantial burden to be borne by the other employees or a substantial cost to be imposed on the employer." The weak link was the legality of the union's unyielding demand for discharge, and the fact that the employer had unwisely relied on the union's position as the basis of its own defense. Since, as a preliminary matter, the court had imposed liability on the union for its unwillingness to accommodate, the outcome for the employer was not surprising. Since the union had unequivocally demanded enforcement of the collective bargaining agreement and McDaniel's discharge, the employer was confronted with two options: (1) comply and risk violation of Title VII, or (2) refuse to comply and risk breaching the collective bargaining agreement. The court assisted the employer in its dilemma by instructing it to set aside the collective bargaining agreement in favor of accommodating McDan-

160. Id. at 1058.
161. Id. at 1061.
162. Id.
iel's religious beliefs. Thus, the employer's coalescence with the union's efforts to enforce the union security clause caused it to incur liability under Title VII. In so distributing liability, the court underplayed the "free rider" problem that had worried the Yott and Cooper courts. The approach of the McDaniel court may be incomplete, however, since it failed to appreciate an important purpose of union security: the keeping of industrial peace and productivity, and the maintenance of the balance in bargaining power between employer and organized labor.

Upon appeal of Anderson v. General Dynamics Convair, decided at the district court level before Hardison, the Ninth Circuit reversed. It recognized the "tension and conflict" present in the case and noted that a balancing of the interests had been struck in Hardison "in favor of the elimination of discrimination in employment practices and the requiring of accommodation of religious practices absent proof by the union, the employer or both, that reasonable accommodation cannot be made without undue hardship to the Union or to the employer." The court ruled that the employer and the union had the burden to make good faith efforts to accommodate an employee's religious convictions in spite of the employee's recalcitrance. With respect to the employee, the court held that he or she had only to show that "(1) he had a bona fide belief that union membership and the payment of union dues are contrary to his religious faith; (2) he informed his employer and the Union about his religious views that were in conflict with the Union security agreement; and (3) he was discharged for his refusal to join the Union and to pay union dues." Upon this prima facie showing, "the burden was upon the appellees, not Anderson, to undertake initial steps toward accommodation." The appellees could not "excuse their failure to accommodate by pointing to deficiencies" in the employees proposed accommodations. The court

163. Note the court's analysis of the actual numerical impact on union finances and its conclusion that "the situation presented the present case, with only the remote possibility of a significant number of individuals seeking accommodations to the obligation of paying union dues, clearly falls on the 'hypothetical' side of the line." Id. at 1060.
165. 589 F.2d 397 (9th Cir. 1978).
166. Id. at 400-01.
167. Id. at 401.
169. 589 F.2d at 401.
followed *McDaniel v. Essex International, Inc.*, in requiring the employer and union to attempt accommodation. The case was thus remanded for trial to determine what the "reasonable accommodation without undue hardship" would be. 170

Upon retrial, the district court declared section 701(j) to be violative of the Establishment Clause, and therefore unconstitutional. 171 The court observed that "[n]o Ninth Circuit or United States Supreme Court decision directly addresses this [constitutional] issue," and that the decisions by other circuit courts of appeals "reveal a tortuous and inconclusive path toward the resolution of this difficult issue." 172 The court reviewed the legislative history of Title VII and the case law illuminating the constitutional standard for the application of the Establishment Clause. Applying the three-pronged test of *Nyquist* to section 701(j), the court found that the section failed all three prongs. With respect to secular purpose, the court found that "the accommodation provision mandates religious discrimination," and that "[i]t requires an overt preference for the religious beliefs of certain employees and dictates that an employer must go out of his way to accommodate minority beliefs, even if such accommodation is detrimental to other employees." 173 Thus, "[N]o clearly secular legislative purpose is manifested." 174 Consequently it must also fail the primary effect test. With respect to the excessive entanglement test, the court opined that "[b]ecause of the potential for recurring litigation before courts and government agencies concerning difficult questions of the exercise of religious beliefs, the reasonable accommodation of Title VII [insofar as religion was concerned] cause excessive government entanglement with religion." 175 This decision was apparently not appealed.

Nevertheless, the Ninth Circuit Court of Appeals obtained another chance, on the same day as *Anderson*, to balance the interests of the religious employee and those of the union in *Burns v. Southern Pacific Transportation Co.* 176 Burns, a Seventh Day Adventist, had worked as a brakeman and conductor since 1955. In

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170. *Id.* at 402-03.
172. *Id.* at 783.
173. *Id.* at 790.
174. *Id.*
175. *Id.* at 791.
1974, he withdrew from the union upon learning that union membership conflicted with the teachings of his Church. He did offer to pay the equivalent of his union dues to a designated charity. The employer and union both agreed to waive membership requirements for Burns, but refused to relieve him of his obligation to pay dues. Thereupon Burns complained to the EEOC, obtained a right-to-sue letter, and sued in federal district court. Labor relations in the railway industry are governed by the Railway Labor Act, which permits union security clauses. The trial court ruled that the union and employer had fulfilled their statutory duties of accommodation. 177 The court of appeals held that the loss of Burns' dues, amounting to nineteen dollars per month, was *de minimus.* If so necessary to its fiscal well-being, the union could collect its equivalent amount from the local's 300 members at a rate of two cents each per month. 178

The Seventh Circuit had an opportunity to decide a similar controversy in *Nottelson v. A. O. Smith Corp.* 179 Again, the facts were representative of such cases. After becoming a Seventh Day Adventist, plaintiff refused to tender dues to the union, but instead, paid an equal amount to the American Cancer Society. The union objected to this division of funds and, subsequently, plaintiff was discharged pursuant to an existing union security clause. The trial court found plaintiff's alternative contribution to be a reasonable accommodation which did not cause an undue hardship to the union. 180 Thus, the alternative satisfied the *de minimus* requirement of *Hardison.* The three judge panel of the court of appeals upheld the lower court's decision and sustained section 701(j) in the face of a constitutional challenge. 181

*Lutcher v. Musicians Union Local 47* 182 is an interesting Ninth Circuit case in which the religious plaintiff was partially denied Title VII protection from mandatory union security. Lutcher was a professional musician who at one time belonged to the union. After he became a Seventh Day Adventist in 1953, he refused to pay union dues. In 1974, he entered into an agreement as an indepen-

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177. Unpublished opinion, summarized 589 F.2d at 404.
178. 589 F.2d at 407.
179. 481 F. Supp. 756 (E.D. Wis. 1979), *reh'g & reh'g en banc denied*, 643 F.2d 445 (7th Cir. 1981).
180. 481 F. Supp. at 759.
181. Judge Pell, however, dissented. 643 F.2d at 456 (Pell, J., dissenting).
182. 633 F.2d 880 (9th cir. 1980).
dent contractor with the Los Angeles Unified School District to perform a number of concerts. The contract was not renewed the following year and Lutcher had to seek new work as a musician. He contacted his old union and offered to pay the delinquent dues and to pay to charity an amount equal to current dues. This offer was not accepted by the union. As a result, Lutcher was unable to secure further contracts with the school district. In addition, Lutcher was denied employment as a musician with the Watts Community Symphony Orchestra because some of its musicians were union members. 183

Lutcher sued the school district and union in federal district court, alleging among other things, a violation of Title VII. 184 The district court granted summary judgment for all defendants on all claims. 185 Upon appeal, the Ninth Circuit affirmed the trial court's holding with respect to the school district, reasoning that the uncontested facts show that Lutcher was an independent contractor and that Title VII protected only employees and not independent contractors. 186

As to the claims against the union, the court separated its analysis into two parts: (1) the union's effect on plaintiff's affiliation with the school district, and (2) the union's effect on plaintiff's relation with the symphony. To the first part, the court answered that Title VII did not protect Lutcher because "[a]t most, the Union interfered with an independent contractor relationship between Lutcher and the school district." 187 The relationship with the symphony, however, was different. Lutcher was attempting to secure employment with the symphony as a musician and was unable to do so because of the position taken by the union. Therefore, the court reversed the district court and held that the union had violated Title VII by refusing to accommodate plaintiff's religious needs. The court recognized that Lutcher was able to work for the symphony as its business and personnel manager, but found that the denial of a position as a musician offended Title VII because the "statute makes illegal discriminatory deprivations of promotion or transfer opportunities, as well as discharges." 188

183. Id. at 882.
184. Id. at 883.
185. Unpublished opinion, summarized 633 F.2d at 882.
186. 633 F.2d at 886.
187. Id. at 880.
188. Id. at 884-85.
RELIGIOUS ACCOMMODATION

Tooley v. Martin Marietta Corp. is another Ninth Circuit case, originating in a district court in Oregon. Three plaintiffs refused to join the union as required by the union security agreement, but instead, offered to pay an amount equal to the union dues to a mutually acceptable charity. The union rejected this accommodation offer. After exhaustion of EEOC administrative remedies, the employees filed suit in district court. The trial court rejected the union's argument that the religious accommodation provision of Title VII was unconstitutional: "The NLRA authorizes unions to negotiate and enforce closed shop provisions. 29 U.S.C. section 18(a)(3), (b)(2).\(^{190}\) I believe the religious accommodation provision of Title VII is an appropriate exception to the NLRA. It accommodates the free exercise of religion without violating the Establishment Clause."\(^{191}\) The court, however, recognized the availability of the undue hardship defense to both employer and union. The court then engaged in numerical analysis of the cost burden on the union, noting that the losses due from the three plaintiffs added up to $600 each year and that, in 1978, the union had $46,000 in income. The income was $4,500 above its expenditure.\(^{192}\) Thus, to the court, a 1.3 percent loss made the union argument on undue hardship frivolous.\(^{193}\) The appellate decision in this case was rendered after the Act of December 24, 1980, and for this reason will be discussed after a review of the Act itself.

E. Act of December 24, 1980

To reconcile the inconsistency between section 701(j) of the Civil Rights Act of 1964 and section 8(a)(3) of the National Labor Relations Act, Congress approved a long overdue amendment to section 19 of the latter on December 24, 1980.\(^{194}\) The legislative history of

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190. This is clearly an erroneous statement of law on the part of the court. As discussed earlier, the Taft-Hartley Act specifically proscribed the closed shop in favor of the union shop. The meaning of the union shop has further been restricted to its "financial core" by judicial opinion. Of course, the court here may have merely made a mistake in semantics.
191. 476 F. Supp. at 1029.
192. The loss of dues from the plaintiffs as a percentage of total income is $600/$46,000 = 1.3%. One wonders whether 1.3 percent is de minimus in light of Trans World Airlines v. Hardison.

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be
the Act showed that the amendment enjoyed immense support in the House of Representatives, and that it passed with 349 yea votes, 15 nays and 69 abstentions. Congressman Thompson noted that "H.R. 4774 as previously stated enjoyed widespread support with virtually no opposition. The labor movement has recognized that this bill represents fair and just accommodation, and those who represent the potentially affected religious groups are strongly supportive."

Organized labor's support of this amendment is confirmed by Congressman Buchanan's remarks: "This bill is supported by the American Federation of Labor and Congress of Industrial Organizations. The charity substitution arrangement for accommodation has been the subject of numerous accommodation agreements entered into between labor organizations and religious objectors." This fact is echoed in the Senate by Senator Melcher: "Certainly, H.R. 4774 which will allow religious dissenters who work under collective bargaining agreements that contain union-security clauses to pay a dues equivalent to a neutral charity, rests on a solid American concept, the fundamental right to free exercise of religion. It is a concept endorsed strongly by the AFL-CIO executive council and by the legislatures of several States." It appears that the AFL-CIO had considered supporting the accommodation principle since the eighty-ninth Congress sixteen years ago when the late AFL-CIO President, George Meany, wrote a letter to

required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employee's employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

Id.

197. Id. at 760.
198. Id. at 763.
199. Id. at 766.
Congress:

In any event, I believe that unions and employers, too should accommodate themselves to genuine individual religious scruples, and I am sure that all of our unions will take that view, too. I intend, accordingly, to propose to the AFL-CIO Executive Council that it adopt a strong policy statement to that effect; and that the international unions affiliated with the AFL-CIO undertake to insure that their local unions scrupulously respect individual religious reservations in the administration of union security arrangements.200

Senator Melcher also noted that “[s]ome large labor organizations, such as the Communications Workers of America, have followed the AFL-CIO executive council policy with outstanding results,”201 but that “[c]ertain others, unfortunately, have not made accommodations and religious dissenters have used the religious accommodation requirement of the Civil Rights Act of 1964 [citation omitted] to seek accommodations.”202

The bill was signed into law by President Jimmy Carter on January 2, 1981. In approving the bill, the President remarked that “the language in this bill defining conscientious objection is not to be construed in such a way as to discriminate among religions or to favor religious views over other views that are constitutionally entitled to the same status. To put any other construction on this definition would, in my view, create serious constitutional difficulties.”203

F. The Case Law After the Act of December 24, 1980

Upon review of Tooley v. Martin Marietta Corp.,204 the Ninth Circuit upheld the finding of the trial court and affirmed the constitutionality of section 701(j) of the Civil Rights Act of 1964. On the question of undue hardship, the court “recognized that the Hardison standard applies to religious accommodations of the kind requested here.”205 The court held that the union’s burden of proof went beyond showing “merely conceivable or hypothetical hardships,” but “instead it must be supported by proof of ‘actual impo-

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200. Id.
201. Id.
202. Id.
205. 648 F.2d at 1243.
sition on co-workers or disruption of the work routine." The court believed the union had "not established that the substituted charity accommodation, as applied here, will deprive the union of monies necessary for its maintenance or operation." The court upheld the findings of the trial court as being not clearly erroneous. With respect to the constitutional challenge, the court applied to section 701(j) of the Civil Rights Act of 1964 the three-pronged test of Nyquist and Lemon v. Kurtzman. The court noted that the Act of December 24, 1980, amended section 19 of the National Labor Relations Act, but did not review this amendment according to the Nyquist or Lemon tests. The court found that section 701(j) manifested a "legitimate secular purpose," did not have "a primary effect which either advances or inhibits the plaintiffs' religion," and required an accommodation which did not cause "the government [to] become impermissibly entangled with the accommodation's administration."

IV. DISCUSSION

All the courts of appeals that have ruled on the religious accommodation-union security issue have found section 701(j) to be constitutional with respect to the reasonable accommodation of religious objectors. Only two district courts have declared the section unconstitutional. These decisions have been effectively overruled by Tooley. Nevertheless, even though the Ninth Circuit decided an appeal after the enactment of the Act of December 24, 1980, no court has had the opportunity to review the constitutionality of the Act of December 24, 1980. The legislative purpose of the Act of December 24, 1980, is so closely linked to that of Title VII of the Civil Rights Act that it is safe to predicate the constitutionality of the former on the latter. The House Report on the law

206. Id. (citing Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397, 406-07 (9th Cir. 1979)).
207. 868 F.2d 1244.
209. Id. at 1245.
210. Id. at 1246.
211. Id.
prior to enactment declared that “[b]y recognizing that this bill accommodates the religious beliefs of certain small religions and sects, and thereby reconciles the National Labor Relations Act with the Equal Employment Opportunity Act, we feel that the first amendment constitutional rights are fully protected, for that is what the Equal Employment Opportunity Act sought to accomplish.” Nevertheless, the judiciary remains the final arbiter of the constitutionality of congressional legislation. Since the federal judiciary has not ruled on the constitutionality of the Act of December 24, 1980, an analysis of Act is appropriate here.

The Act was passed for the benefit of “any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations.” This is a lengthy but carefully worded definition of the religious objector. The obvious emphasis on “established,” “traditional,” “bona fide,” and “historical” appears deliberately to limit the groups which are eligible for protection under the Act. The house report noted that “to our knowledge, several religious groups in America prohibit joining or financially supporting labor organizations. The largest group is the Seventh Day Adventists, representing about 500,000 members. There may be others whose numbers are small, but the protections offered to them by this bill are large.” It is clear that the law is designed to protect a religious minority from a labor law which would force them to “choose between their job and their religion.” Therefore, aside from the Seventh Day Adventists and “others whose number are small,” other established religious groups who historically, or traditionally have not adhered to a bona fide belief against joining or financially supporting unions would fall outside the ambit of the Act. Otherwise, if large groups

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214. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (the Supreme Court has the power to review the constitutionality of federal statutes and to declare them void if it finds them repugnant to the Constitution); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (the power of judicial review extends to the constitutionality of state statutes).


216. House Report at 4. 500,000, when compared to a total population of 226.5 million, reduces to 0.22 percent of the whole.


of persons succeeded in claiming protection under the Act, stable labor relations and the intent of federal labor legislation would be undermined. Given sufficient exemptions under the Act, it is conceivable that the resulting “free-rider” problem would affect the financial well-being of unions.219

The law poses knotty problems concerning new religions and beliefs. Will future religious groups who are not presently in existence be covered by the Act? How is the law to be interpreted with respect to the claims by existing religions which have just adopted a belief of not joining or supporting unions? It is possible that the courts may be asked to decide these questions. Under the doctrines set forth in United States v. Seeger,220 and Welsh v. United States,221 the courts may encounter difficulties in trying to decide who is and who is not entitled to claim protection under the law. If sufficient groups of persons succeed in claiming protection, the efficacy of federal labor legislation will be affected. In order to decide who can pass through the pearly gates erected by the Act of December 24, 1980, courts will have to determine, among other issues, which religions are established, traditional, bona fide, and historical. It is hoped that the future administration of the Act will not give rise to insurmountable constitutional difficulties.222 Of course, it is possible that the number of religious groups with beliefs that prevent them from joining or financially supporting unions will remain a small minority, as Congress envisioned.

So far, excessive religious accommodation claims against union security have not been presented. Therefore, the tale can come to a close with a happy ending: two conflicting laws have been successfully reconciled, and all parties satisfied.

VI. Conclusion

The Act of December 24, 1980, manifests a Congressional attempt at reconciliation of basic rights arising under the National Labor Relations Act and Title VII of the Civil Rights Act. These federal laws were created by Congress at different times and, as written, presented some delicate conflicts which were very difficult

222. The excessive entanglement standard is particularly sensitive to perturbations in the degree of government involvement.
to reconcile. Federal labor laws were passed to define the role of organized labor in national labor relations and to ensure industrial peace, and therefore, industrial strength. Title VII, as amended, sought to give all Americans the right to equal opportunity in employment and to a fair standard of living. While on the whole, these laws were directed toward the betterment of society, a clash between labor law and equal employment law was inevitable. Initially, the courts have thrust on them the burden of reconciling the laws. This resulted in considerable confusion and disagreement within the federal judiciary. Perhaps the controversy required answers that turned too much on subjective value or political judgment, matters that traditionally have given the judiciary the most challenge and difficulty. It is hoped that the Act of December 24, 1980, may provide much-needed clarification and dissipate the need for litigation in this sensitive area. Constitutional problems in the area of religious accommodation and union security may probably be avoided as long as the protected class of religious objectors remains a minority who is seeking tolerance or acceptance from an organized majority.

Charleston C. K. Wang
NOTES


The Old Order Amish are unique in many ways. They have successfully segregated the Amish community from the rest of society and have rejected modern conveniences and contemporary social standards. The community is a closely-knit unit, which emphasized its responsibility for each individual. The Amish live a simple life, working the land and caring for their neighbors. In the words of the district court in United States v. Lee,1 “[d]espite continuing encroachment of the contemporary, worldly society, they have remained independent of society, yet interdependent among themselves. In a society witnessing the gradual erosion of such values, their efforts are worthy of preservation.”2 The Amish believe it is a sin to fail to provide for their people. The basis of this belief is I Timothy 5:8, which states, “But if any provide not . . . for those of his own house, he hath denied the faith and is worse than an infidel.” Relying on this principle, the Amish have established their own system for the welfare of their aged, sick and unemployed members. They have rejected any benefits from the government and are opposed to any public insurance for these purposes.3 The payment of such taxes, even though the Amish do not collect the benefits, is considered a sin; it is said to be an admission that the government is responsible for aged, disabled or unemployed Amish, and to be a denial of what they consider their responsibility.4

The method of payment of social security taxes depends upon whether the taxpayer is a self-employed individual or an employee. A self-employed taxpayer does not have an employer, so there is no means available by which the government can require persons paying social security taxes to withhold them. Therefore, self-employed taxpayers are assessed a “self-employment tax” when they

2. 497 F. Supp. at 181.
4. Id.
file their individual income tax returns. When an individual earns wages as an employee, his or her employer is required to withhold a statutory percentage of social security taxes from his wages. Employers are liable for payment of that tax, regardless of whether they withheld it from their employees. In addition, the employer must pay an amount matching the social security taxes withheld from employees, such amount being an excise tax "with respect to having individuals in his employ." These taxes were imposed under the Federal Insurance Contributions Act (hereinafter F.I.C.A.). There is also a second excise tax on the employer "with respect to having individuals in his employ," which is for the federal government employment fund. This tax was levied under the Federal Unemployment Tax Act (hereinafter F.U.T.A.).

The social security system was established in 1935. Benefits dispensed under it were originally supported by social security employee withholdings and the two excise taxes imposed upon employers. In 1950, the social security system was extended to cover self-employed persons, and the tax on self-employment income was enacted. In 1965, an exemption from the self-employment tax, currently codified as section 1402(g) of the Internal Revenue Code, was granted to any individual if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

In order to be exempted, the self-employed individual must file an

6. Id. §§ 3101, 3102.
7. Id. § 3102(b).
8. Id. § 3111.
application, waiving all benefits under Titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income.\textsuperscript{18} In addition, before an exemption will be granted, the Secretary of Health, Education and Welfare must find that the religious sect has "established tenets or teachings;"\textsuperscript{16} the sect has established the practice, for a substantial period of time, of making reasonable provisions for its dependent members;\textsuperscript{17} and the sect "has been in existence at all times since December 31, 1950."\textsuperscript{18} In United States v. Lee,\textsuperscript{19} the government acknowledged,\textsuperscript{20} that this exemption was enacted specifically for the Old Order Amish because of the Amish belief "that payment of social security taxes is irreconcilable with their [sic] religious convictions."\textsuperscript{21}

**HISTORY OF THE CASE**

In United States v. Lee, Edwin D. Lee, a self-employed farmer and carpenter, and member of the Old Order Amish, had hired several employees who were also members of the Old Order Amish sect, to help him in his farming and carpentry business. Lee’s income from self-employment was exempt from the self-employment tax, due to the exemption provided for in section 1402(g) for those religiously opposed to public insurance. The exemption in section 1402(g), however, does not relieve an employer from liability for failing to withhold F.I.C.A. from employees’ wages, or for failing to pay the excise taxes imposed on employers under the social security system (the matching F.I.C.A. and the F.U.T.A.). From 1970 through 1977, Mr. Lee paid wages to employees but failed to file the required quarterly and annual employment and unemployment tax returns, failed to withhold F.I.C.A. from his employees’ wages and failed to pay the employer’s share of F.I.C.A. and F.U.T.A. taxes. In 1978, the Internal Revenue Service assessed Lee for the amount of F.I.C.A. and F.U.T.A. taxes that should have been paid on the wages over $27,000.00. Lee paid ninety-one dollars of the assessment, which represented the amount of employment taxes

\textsuperscript{15} Id. § 1402(g)(1)(B).
\textsuperscript{16} Id. § 1402(g)(1)(C).
\textsuperscript{17} Id. § 1402(g)(1)(D).
\textsuperscript{18} Id. § 1402(g)(1)(E).
\textsuperscript{19} 50 U.S.L.W. 4201 (1982).
\textsuperscript{20} Brief for Appellant, United States v. Lee, 50 U.S.L.W. 4201 (1982) [hereinafter cited as Brief for Appellant].
due on the first quarter of 1977. Lee then filed a claim for refund of the ninety-one dollars, which was disallowed. This led Lee to sue for a refund of the ninety-one dollars and for injunctive relief against the government to prevent if from attempting to collect the remainder of the unpaid assessment. The basis for Lee’s claim was that the social security taxes were an unconstitutional restraint on the free exercise of religion when applied to persons who object, on religious grounds, both to the payment of such taxes and to the receipt of benefits.

The district court held that Lee, and “employers who fall within the carefully circumscribed definition provided in 1402(g), are relieved from paying the employer’s share of F.I.C.A. and F.U.T.A. as it is an unconstitutional infringement upon the free exercise of their religion.” The district court reasoned that the government had burdened Lee in the free exercise of his religion because the payment of the taxes required him to deny his faith, and that “only a ‘compelling’ state interest [could] justify the state’s constitutional power to [so] regulate.” Since the Amish is a small religious sect, and the requirements for an exemption under section 1402(g) are very stringent, the loss of revenue would be negligible. Also, since section 1402(g) requires that the religious group must make reasonable provisions for its members, the governmental interest had been protected: “[t]he combination of the burden on the free exercise of one’s religion and the alternative method of achieving the same end will override the state’s interest in regulating.”

The government appealed directly to the Supreme Court, under 28 U.S.C. § 1252, which allows any party to appeal to the Supreme Court from a final judgment of any court of the United States when that court has held an act of Congress unconstitutional. The statute applies even though the social security provisions were not held unconstitutional as a whole, but rather as applied to the

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22. This payment was obviously intended to allow Mr. Lee to sue for refund in federal district court. If a taxpayer wishes to contest a tax assessment in federal district court, he must first pay the tax, then file a claim for refund, which, when disallowed, gives him this right. If the taxpayer does not wish to pay the tax, he can ask for a redetermination of the deficiency in Tax Court. Plaintiff’s attorney obviously believed that federal district court would provide a favorable forum for the litigation. This observation proved to be accurate, but the victory was short-lived.
23. 50 U.S.L.W. at 4202.
25. Id. at 183.
26. Id.
UNITED STATES v. LEE

particular circumstances in the case; that is, imposing the statute upon members of the Amish religion was held to be an unconstitutional restraint on their free exercise of religion, but the statute itself, as a whole, was not held unconstitutional.28

UNITED STATES V. LEE

In reversing the district court and ruling for the government, the Supreme Court first noted that Lee and his employees did not come within the express provisions of section 1402(g), so any exemption from the taxes had to be constitutionally required.29 To determine whether an exemption was constitutionally required, the Court conducted a three-step inquiry.

The Court's question was first whether the payment of social security taxes interfered with Lee's free exercise of his religion. The government did not contest the fact that the Amish are religiously obligated to provide for members of their faith, but did contend that the payment of social security taxes did not threaten the integrity of their religious belief. Citing Thomas v. Review Board of Indiana Employment Security,30 the Court held that it was not a judicial function to interpret the scriptures or the Amish faith. Therefore, the Court accepted Lee's contention that payment of social security taxes or receipt of benefits was forbidden by the Amish faith, and therefore interfered with his free exercise rights. This did not end the inquiry, however, since "[n]ot all burdens on religion are unconstitutional."31 The government may limit religious liberty "by showing that it is essential to accomplish an overriding government interest."32

The Court then analyzed the government interest at stake, that "mandatory participation is indispensable to the fiscal vitality of the social security system,"33 which is easily the largest domestic program in our government today. Concerning the passage of the bill granting the exemption from self-employment tax,34 the Senate Report stated that "widespread individual voluntary coverage . . .

29. 50 U.S.L.W. at 4203.
31. 50 U.S.L.W. at 4203.
32. Id.
33. Id.
would undermine the soundness of the social security program.” Since a comprehensive national social security program calling for voluntary participation would be contradictory and difficult or impossible to administer, the Court considered the government's interest very high.

Given that there had been an interference with Lee's free exercise of his religion and that the government interest was high, the third question to be resolved was "Whether accommodating the Amish belief [would ] unduly interfere with fulfillment of the government interest." The Court acknowledged that this was a delicate balancing, but asserted that, in order for American society to maintain a wide variety of religions, it is necessary "that some religious practices yield to the common good." Some religious beliefs may be accommodated, but they must not radically restrict the legislature. The Court held that, due to the government's high interest in maintaining a sound tax system, religious beliefs did not afford a basis for resisting the tax, especially in view of the wide variety of national religious beliefs. In the Court's view, the obligation to pay the social security tax was no different in principle from the obligation to pay income taxes, there being no valid claim for exemption from payment of income taxes on the basis of religious objections to the manner in which those taxes are spent.

Finally, the Court noted that the section 1402(g) exemption provided by Congress accommodated the religious beliefs of the Amish, to the extent compatible with a comprehensive national social security program. When a member of society with particular religious beliefs chooses to enter into a commercial activity, the limits they accept as a matter of religion cannot "be superimposed on the statutory schemes which are binding on others in that activity." Granting an exemption to an employer would impose the employer's religious beliefs upon the employees. The Court also sug-

36. 50 U.S.L.W. at 4203.
37. Id.
41. 50 U.S.L.W. at 4204.
gested that perhaps the Amish could establish a general fund into which members' social security benefits could pass, in order to "ease or mitigate the perceived sin of participation."\footnote{42}

In his well-reasoned concurring opinion, Justice Stevens argued that the constitutional standard as formulated by the majority "suggests that the Government always bears a heavy burden of justifying the application of neutral general laws to individual conscientious objectors."\footnote{43} He believed that the objector should have the burden of showing a unique reason for a valid law of general applicability not applying to him or her.\footnote{44}

Justice Steven's rendition of the immediate effect of an exemption directly contradicted that of the majority. He stated that it would be relatively simple, administratively, to extend the exemption to this case and that the enlarged exemption would benefit the social security system, since relinquishment by the Amish of the right to collect benefits would more than offset the failure to pay the taxes.\footnote{45} The social cost would be minimal because "the Amish have demonstrated their capacity to care for their own."\footnote{46} Based upon this perception, Justice Stevens contended that the constitutional standard for interfering with the free exercise of religion, as formulated by the majority, had not been met.\footnote{47}

The rationale behind the Court's rejection of Lee's claim, according to Stevens, was the risk of encouraging a myriad of other claims, which would be difficult to process. Again, Stevens claimed that the Court overstated the magnitude of the potential risk involved, since the Amish comprise a small religious group, with its own welfare system.\footnote{48} He did agree "that the difficulties associated with processing other claims to tax exemption on religious ground" justified a rejection of this claim, but not under the constitutional standard purportedly applied by the majority.\footnote{49} Because the majority's analysis supported the holding that "there is virtually no room for a 'constitutionally-required exemption' on religious grounds from a valid tax law that is entirely neutral in its general application," and Justice Stevens agreed with that holding, he con-

\footnotesize{\footnote{42.} Id. at 4204 n.12. 
\footnote{43.} Id. at 4204 (Stevens, J., concurring). 
\footnote{44.} Id. 
\footnote{45.} Id. 
\footnote{46.} Id. 
\footnote{47.} Id. 
\footnote{48.} Id. 
\footnote{49.} Id.}
curred in the judgment.50

ANALYSIS

The district court improperly extended the coverage of section 1402(g) to the payment of F.I.C.A. and F.U.T.A. taxes based upon its provisions and the Free Exercise Clause.51 There is nothing in section 1402(g) that authorizes the use of its provisions to exempt employers from the payment of these taxes; its provisions only apply to the self-employment tax. In fact, the legislative history indicates that Congress intended that the exemption apply only to the self-employment tax "since those persons for whom the payment of social security taxes appears to be irreconcilable with their religious convictions also, by reason of their religious beliefs, limit their work almost entirely to farming and to certain other self-employment."52 The first step in the Supreme Court's analysis in Lee was to indicate that section 1402(g) did not apply to Lee, and therefore, any exemption from social security taxes had to be constitutionally required under the Free Exercise Clause. The Court then made a three-step inquiry into whether the exemption was constitutionally required.53

First, the Court inquired whether the payment of social security taxes violated Amish religious beliefs, interfering with Lee's Free Exercise rights.54 The government had not argued that the payment of social security taxes was not a sin under the Amish faith, but it had argued that payment of such taxes did not threaten the integrity of the Amish religion.55 The Court insisted that interpreting religious beliefs was not its proper function, and so it accepted Lee's contention that payment of social security taxes was "forbidden by the Amish faith."56

Lee's argument appears, at first, to be self-serving: he contended it was against his religion to pay taxes. There is no question, though, about the sincerity of the Amish objection to social security taxes on a religious basis. The exemption in section 1402(g) was passed because of the Amish belief.57 The Court did not discuss

50. Id.
52. SENATE REPORT, supra note 35.
53. 50 U.S.L.W. at 4203.
54. Id.
55. Id.
56. Id.
57. SENATE REPORT, supra note 35.
whether the interference of the taxes with Amish beliefs was serious or minor, but there is an indication that, even though the Court claimed to have accepted Lee's contention concerning his religious beliefs, it did not consider the payment of social security taxes a sin. After suggesting to Lee that the Amish could establish a general fund to accept social security benefits of individual members, the Court declared, "It is not for us to speculate whether this would ease or mitigate the perceived sin of participation." This statement implies that the Court, in fact, did interpret Amish religious beliefs, concluding that participation in the program was not an actual, but only a "perceived," sin.

After finding that the tax did interfere with Lee's Free Exercise rights, the Court looked to the government's interest. It determined that the government's interest was very high, based upon the necessity of mandatory coverage to the social security system's fiscal vitality: widespread voluntary coverage would undermine the program's soundness and voluntary participation would be contradictory to a comprehensive program and difficult or impossible to administer. It was with the language in this part of the opinion that Justice Stevens' concurrence disagreed. He pointed out that there is already an exemption for the Amish from the self-employment tax and that it would be relatively simple to extend the exemption to this use. Justice Stevens posited that the fiscal vitality of the system would not suffer, since the tax the Amish would pay would be more than offset by their failure to collect benefits. Further, because the Amish have established a system of providing for their own, the social cost of extending the exemption would be minimal.

Justice Stevens' perception of the facts before the Court seems much more realistic than the majority's. The majority pointed out the enormous size of the social security system, which "distribut[es] approximately eleven billion dollars monthly to thirty-six million Americans." It then inconsistently claimed that this very narrow, limited exemption, which would be minute in terms of dollars, would threaten the fiscal vitality and undermine the

58. 50 U.S.L.W. at 4204 n.12 (emphasis added).
59. Id. at 4203.
60. Id. at 4204.
61. Id.
62. Id.
63. Id. at 4203.
soundness of the system. Though it may be true that widespread voluntary coverage would threaten the system, there do not appear to be widespread religious objections to social security taxes. The Court did not offer any other examples of religious sects that both consider it a sin to pay social security taxes and have a system that provides for the sect's members. The Amish are unique in that respect. The Court could have prevented other religions from adopting the Amish stance in the future, in order to obtain the benefits of the exemption, by holding that only religions in existence at the time of the enactment of the Social Security Act would be exempted, it being the enactment of the law and its enforcement against pre-existing religions that interferes with Free Exercise rights.

The majority's argument that the exemption would be contradictory to a comprehensive national social security system is irrelevant, since exemptions from, and exceptions to, general laws are almost always, by their very nature, contradictory to the general rule. It would be very difficult, if not impossible, to draft a statute or construct a rule of law if no exemption were allowed to be inconsistent with the general rule. Carrying this reasoning to its logical conclusion would invalidate section 1402(g), since it is inconsistent with the general rule.

The Court also claimed that an extended exemption would create administrative difficulties, but there is no evidence that the exemption under section 1402(g) has created any administrative problems. In order to help avoid this problem and assure that the exemption would be utilized as intended, the exemption could have been limited to cases in which both the employer and employee qualify as adherents to a religion with the requisite teachings, and could have required both to waive any rights to benefits under the program.

The final step in the Court's analysis was deciding "whether accommodating the Amish belief [would] unduly interfere with fulfillment of the governmental interest." The Court noted that, given the numerous, discrete religious sects in the nation some religious practices must yield to the common good. In the Court's view, there was no principled distinction between income taxes and so-
cial security taxes.\textsuperscript{68} It compared \textit{Lee} with cases in which taxpayers unsuccessfully claimed to be exempt from part of their income tax liability due to religious objections to military expenditures by the government\textsuperscript{69} and payments for the Vietnam war effort,\textsuperscript{70} insisting that, "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."\textsuperscript{71} Justice Stevens, on the other hand, argued that there was a distinction between the \textit{Lee} and other cases: in \textit{Lee}, the taxpayer had provided "the government with an equivalent substitute for the objectionable use of his money."\textsuperscript{72}

In addition to perceiving the fact situation differently, Justice Stevens also disagreed with the majority’s formulation of the constitutional standard. He asserted that the Court’s formulation suggested "that the Government always bears a heavy burden of justifying the application of neutral general laws to individual conscientious objections."\textsuperscript{73} Justice Stevens suggested that the objector should have the burden of showing a unique reason for a "special exemption from a valid law of general applicability."\textsuperscript{74} He thought the government had not met the standard formulated by the Court because the magnitude of the risk of granting an exemption to the Amish had been overstated. Rather than simply stating that there was no basis for religious objection to a valid tax law of general applicability, the Court went through an elaborate rationale explaining why the government’s interest was overriding, and the interference with the free exercise of \textit{Lee}’s religion did not give him a basis for relief.\textsuperscript{75}

\textbf{CONCLUSION}

The \textit{Lee} Court failed to formulate a proper standard for determining when a taxpayer may object, on religious grounds, to the payment of a neutral tax. The opinion suggested that the government bears a heavy burden of showing an overriding interest. As a

\begin{itemize}
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} Lull \textit{v.} Commissioner, 602 F.2d 1166 (4th Cir. 1979), \textit{cert. denied}, 444 U.S. 1014 (1980).
  \item \textsuperscript{70} Autenrieth \textit{v.} Cullen, 418 F.2d 586 (9th Cir. 1969), \textit{cert. denied}, 397 U.S. 1036 (1970).
  \item \textsuperscript{71} 50 U.S.L.W. at 4204.
  \item \textsuperscript{72} \textit{Id.} a 4204 n.1.
  \item \textsuperscript{73} \textit{Id.} at 4204.
  \item \textsuperscript{74} \textit{Id.}
  \item \textsuperscript{75} 50 U.S.L.W. 4201.
\end{itemize}
result, the Court was forced to grossly exaggerate the facts in favor of the government, in order to establish a predominant governmental interest. In contrast, Justice Stevens' concurring opinion took an honest look at the fact situation and formulated a standard by which the government logically could prevail.

Michael J. Doppes
The United States Constitution expressly guarantees freedom of religion through the first amendment as well as equal protection through the fourteenth amendment. In recent years, however, a constitutional storm has been brewing, and has caused the Supreme Court to hear a case which focuses on the conflict between these constitutional amendments. The case deals with religious schools which practice racially discriminatory admission policies. The case arose when the Internal Revenue Service revoked a school's tax-exempt status on the grounds that its discriminatory policies violated federal public policy. This policy was enunciated and, indeed, mandated by the federal district court for the District of Columbia in Green v. Connally, in which governmental support of racial discrimination was the primary issue. In Green, the court sustained the revocation of the schools' tax-exempt status, holding that the Internal Revenue Code must be construed and applied to support the federal public policy against racial segregation in schools, public or private.

In a recent surprising announcement, however, the Reagan Administration suddenly abandoned legal efforts to deny tax-exempt status to private schools with discriminatory admission policies. Deputy Treasury Secretary R. T. McNamara announced that the Justice Department had decided to discontinue prosecution in a case wherein the government had previously supported the denial of tax-exempt status for two private religious schools with a stated policy of racial discrimination. Accordingly, the tax-exempt status of the schools was continued without challenge by the government. Officials of the Justice and Treasury Departments stated that the reason for the policy change lay in their belief that policies against racial discrimination should be enforced by Congress, and not by the tax authorities. The Internal Revenue Service, which, as re-

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1. U.S. Const. amend. I, XIV.
4. Id. at 1163.
cently as the fall of 1981, had asked the Supreme Court to uphold its denials of tax-exempt status to such institutions, now attempted to defend its shift in policy by saying that, while the Reagan Administration deplored racial discrimination, it did not believe the tax laws gave the IRS the authority to deny tax-exempt status.7

The purpose of this note is to analyze the legal ramifications of the practices of a private sectarian school that discriminates on the basis of a claimed religious belief. The note will discuss the distinction between a sincere religious belief and one which is racially motivated, the nature of the first amendment guarantees of freedom of religion, and racial discrimination and the governmental interest in squashing such discrimination. This discussion will be presented in light of federal policies, such as tax-exempt status, which are used to promote a certain social policy over another, and the recent shift in policy by the Reagan Administration.

Background

Bob Jones University is incorporated as an eleemosynary corporation under South Carolina laws.8 The school accepts students from kindergarten through college and offers approximately fifty educational degrees. It enrolls nearly 6,300 students, half of which are studying for the ministry. The University claims that every subject is taught according to the Bible’s literal language. Every class, cultural event, and athletic contest is opened with a prayer. Every teacher is required to be a “born again” Christian. Every student must abide by the disciplinary rules which are ancillary to the school’s religious beliefs. The rules control almost every facet of a student’s life and, if the rules are not obeyed, the student is

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7. CHRON. HIGHER EDUC., Jan. 20, 1982, § 1, at 1, col. 1.
8. The purposes of the University, as stated in its Preamble and contained in its Certificate of Incorporation:

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures, combating all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel, unqualifiedly affirming and teaching the inspiration of the Bible (both Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; His identification as the Son of God; his vicarious atonement for the sins of mankind by the shedding of His blood on the Cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.
expelled. The University claims to adhere to fundamentalist convictions and biblical mandates by forbidding interracial dating and marriage. In line with this belief, the school only accepts married blacks. The University reasons that by barring unmarried blacks, it can safely, easily and reliably promote its religious doctrine which forbids interracial dating and marriage.

The District Courts of the District of South Carolina found Bob Jones University to have a valid religious belief, and refused to allow the IRS to revoke the tax-exempt status. The Court of Appeals for the Fourth Circuit reversed, and found the University's racial policies to be violative of the clearly defined public policy against racial discrimination rooted in our Constitution. The Supreme Court's ruling in this case will be closely viewed by a great many organizations, especially those which have a vested interest in the outcome.

What is an Acceptable Belief

Before a court can decide the question whether a denial of tax-exempt status involves a violation against the first amendment free exercise of religion, a threshold determination must be made whether there is a sincere belief and whether this belief is a religious belief. In making these determinations, the Supreme Court,

9. A sample of the Rules provides:
The institution does not permit dancing, card playing, the use of tobacco, movie going, and other such form of indulgences in which worldly young people often engage; no student will release information of any kind to any local newspaper, radio station, or television station without first checking with the University Public Relations Director; students are expected to refrain from singing, playing, and as far as possible, from "tuning-in" on the radio or playing on the record player, jazz, rock and roll, folk rock or any other types of questionable music; and no young man may walk a girl on campus unless both of them have a legitimate reason for going in the same direction.

Id. at 894.


11. 639 F.2d 147 (4th Cir. 1980).

12. On the basis of the Supreme Court's treatment of freedom of religion cases, it appears that the determination of whether the beliefs underlying a private sectarian school's admission policy's are religious is best viewed as "a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976) (referring to the determination of whether a fact is "material" with respect to proxy solicitations). Courts are responsible for establishing, as a matter of law, standards for distinguishing religious and nonreligious beliefs, but these standards must be applied to the facts involved in particular cases in order to decide whether the claimed belief of a private school is entitled to first amendment protection. Comment, Section 1981 After Runyan v. McCrary: The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race, 1977 Duke L.J. 1219, 1223 n.21.
in United States v. Ballard\textsuperscript{18} and subsequent cases, has made clear that courts must be careful not to examine the reasonableness, believability, or truth of the allegedly religious belief: judicial inquiry into such matters is forbidden by the Free Exercise Clause. In United States v. Seeger,\textsuperscript{14} however, the Supreme Court stated that, while the “truth” of a belief is not open to question, the Court may make inquiries to determine whether the belief is “truly held.”\textsuperscript{10}

When cases involving religious beliefs have arisen, the courts have tackled the situations in many ways. Some courts have attempted to define the term “religion,”\textsuperscript{16} while most courts have avoided the impossible task of trying to formulate a functional definition.\textsuperscript{17} Nevertheless, the Supreme Court has left little doubt

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\textsuperscript{13} 322 U.S. 78 (1944), rev’d on other grounds, 329 U.S. 187 (1946). In a frequently quoted passage, Justice Douglas wrote:

> The religious views expoused by [the defendants] might seem incredible, if not preposterous to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

322 U.S. at 87-88. Accord United States v. Seeger, 380 U.S. 163, 184-85 (1965) (courts may not reject beliefs as not being religious because they consider them “incomprehensible”).

\textsuperscript{14} 380 U.S. 163 (1965).

\textsuperscript{15} Id. at 185.

\textsuperscript{16} Davis v. Beason, 133 U.S. 333, 342 (1890) (“The term ‘religion’ has reference to one’s views 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”); Welsh v. United States, 398 U.S. 333, 339 (1970) (plurality opinion) (individual who “deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon them a duty of conscience to refrain from participating in any war at any time... is... entitled to a ‘religion’ conscientious objector exemption under the Universal Military Training and Service Act.”) See generally Comment, supra note 12, at 1224 n.22.

\textsuperscript{17} “It is unnecessary to attempt a definition of religion: the content of the term is found in the history of the human race and is incapable of compression into a few words.” United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943) quoted in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 658 (1943) (Frankfurter, J., dissenting). (But see attempted definition of religion by Kauten court, 133 F.2d at 708). See also Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir.), cert. denied, 419 U.S. 1003 (1974) (“it is difficult for the courts to establish precise standards by which the bona fides of a religion may be judged” (footnote omitted); L. PFEFFER, CHURCH, STATE AND FREEDOM 609 (1967) (“The term religion may not be subject to precise definition”).

Some courts and commentators have taken the inability of courts to formulate a workable definition of religion one step further, arguing that to even attempt to define religion would in itself violate the first amendment. Kolbeck v. Kramer, 84 N.J. Super. 569, 202 A.2d 889 (1964), modified on other grounds per curiam, 46 N.J. 46, 214 A.2d 408 (1965); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 658 (1943) (Frankfurter, J., dissenting) (Supreme Court cannot constitutionally determine what claims of conscience should be recognized as constituting “religion” entitled to first amendment protection). See also Catholic
that religion under the first amendment is to be interpreted as having a broad and comprehensive meaning. The Constitution was designed to secure religious autonomy for all, not merely for those belonging to traditional religious organizations. Keeping this broad scope in mind, how should the Court treat the racial beliefs promoted and practiced at Bob Jones University? It is true that most people would consider such beliefs unreasonable and illogical, and conclude that the belief is not religious, but merely racist in nature, and thus deny it first amendment protection. As previously discussed, however, in order to adequately protect even the most unorthodox religious beliefs, courts cannot base a determination of the sincerity of religious beliefs upon the credibility of the belief. Hence, the issues of reasonableness and logic are completely irrelevant to this determination.

A major consideration in determining whether one's beliefs are religious is whether these beliefs play the role of a religion and function as religion in a person's life. In Seeger, the Supreme Court stated, "[T]he task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." The question of "practicing what one preaches" has not been a source of inquiry in the past, but may become a determinative factor when there are inconsistencies between a claimant's statements and his conduct. These are not
the sole consideration, for it would be too easy for an institution to then deny all types of constitutional guarantees under the guise of religious practice. For example, Bob Jones University could claim that a segregated school best supports the everyday religious practice of its students by keeping blacks and whites separated, thus, preventing interracial marriage, which is consistent with the claimed belief.

Another major factor in determining whether a belief is truly religious is the source of the claimant's belief. It has been the practice of the courts to accept the beliefs of persons who are members of established religions, or who claim individualized beliefs derived from widely accepted religious authorities, such as the Bible. Two cases in which the Supreme Court determined whether the source of a belief was religious were Seeger and Walsh v. United States. In these cases, the Court determined whether persons claiming exception from combat training and military service were conscientiously opposed to participation in war in any form "by reason of religious training and belief," as required by section 6(j) of the Universal Military Training and Service Act. In Welsh, the Court held that a person's conscientious objection to all war is "religious" within the meaning of section 6(j) if it stems from the person's deeply and sincerely held "moral, ethical or reli-

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between the defendant's statements to his draft board and his conduct was one of several factors casting doubt upon the sincerity of his claim. See also, Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. 1963) (claimants' free exercise rights not violated by trial on his Sabbath where evidence showed that he regularly worked on that day).


religious beliefs about what is right and wrong and (if) these beliefs (are) held with the strength of traditional religious convictions. Through these cases, the Court has defined "religious belief" so broadly as to encompass almost all conceivable religious principles and expressions.

Looking to the beliefs allegedly held and practiced in the present case, it could be strongly argued that the beliefs are based upon a literal interpretation of the Bible, a widely recognized religious sourcebook, and thus should be treated as valid religious belief. In its deference to religious autonomy, the Court's historically preferred position has been to find that a given belief is religious in nature, even when the evidence supporting such a finding is ambiguous. The Court has opined that it is constitutionally preferable to mistakenly treat a secularly based belief as a religious one than to risk the denial of first amendment protection to a truly religious belief.

**ESTABLISHMENT CLAUSE**

The religion clauses of the first amendment present a kind of double-edged sword: the Establishment Clause, to a limited extent, seeks to prevent religious involvement in and control of the government while the Free Exercise Clause seeks to protect religious groups from government interference. More specifically, the Establishment Clause infers that government must maintain an attitude of neutrality towards all religions, and has been interpreted as embodying the Jeffersonian concept of separation of church and state, which takes on precise meaning only in light of prevailing assumptions as to the appropriate sphere of action for each institution. The courts have created a well-settled three-pronged test for applying the Establishment Clause: secular purpose, primary secular effect, and excessive governmental entanglement. Specifically, there will be no violation of the Establishment Clause if the law in question, reflects a clearly secular legislative purpose, has a

27. 398 U.S. at 339-40.
28. See note 8, supra.
30. See note 1, supra.
31. For a general discussion, see Kauper, Religion and the Constitution (1964).
33. 393 U.S. at 103-04.
primary effect that neither advances nor inhibits religion, 34 and avoids excessive government entanglement with religion. 35 In order to understand the ramifications of the tests it is necessary to briefly analyze each prong.

Secular Purpose

The underlying purpose of the religious clauses is to secure church autonomy from government interference. Thus, governmental action must at least be justified in secular terms. If the government wishes to control the actions of some people who claim religious affiliations, the government must point to a secular purpose. This standard must not be strictly applied, however, since "if a purpose were to be classified as non-secular simply because it coincided with the beliefs of one religion or took its origin from another, virtually nothing that government does would be acceptable." 36

Clearly, there is an unambiguously secular federal policy in seeking to ban racial discrimination in the schools and to provide every child with an adequate secular education. 37 Any attempt by Bob Jones University to argue that no secular purpose would be served by governmental prohibition or discouragement of the University's unequal treatment of blacks (through the government's revocation of the University's tax-exempt status) would be highly questionable.

Primary Secular Effect

The secular effect test requires that "if the essential effect of the government's action is to influence—either positively or negatively—the pursuit of a religious tradition or the expression of a religious belief, it should be struck down as violative . . . of the Establishment Clause." 38 The requirement of secular effect has caused the government to develop a policy of neutrality, implying that, while a law may not be struck down simply because the secular effects government seeks to produce are realized in a religious context, no law may be passed which has as its primary effect the

aid of a particular religion.\textsuperscript{39} The Court stated in \textit{Everson v. Board of Education}\textsuperscript{40} that the "First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."\textsuperscript{41}

The \textit{Bob Jones} case dealt with the revocation of the University's tax-exempt status. When the tax-exempt status of a religious organization is revoked, the religious organization suffers financially, and inhibits the efforts of that organization. In essence, tax-exempt status promotes religions which adhere to federal policy and places a burden of taxation on religion organizations whose policies conflict with federal public policy. The Supreme Court stated, "aid normally may be thought to have a primary effect of advancing religion."\textsuperscript{42} When the primary effect inhibits religious practices, the government's neutrality has been compromised and the result may be excessive government entanglement.

\textit{Excessive Government Entanglement}

Excessive government entanglement is an independent doctrine for the most part, but parallels both the secular purpose and secular effect test. The doctrine prohibiting excessive entanglement deals with minimizing government intrusion into religious affairs. Government may not take sides on religious matters because of the mandate "requiring on the part of all organs of government a strict neutrality towards theological questions."\textsuperscript{43}

The existence of excessive government entanglement is determined on a case by case basis. In \textit{Lemon v. Kurtzman},\textsuperscript{44} the Supreme Court held unconstitutional a state reimbursement program involving parochial school teachers because it fostered an "excessive entanglement" between the state and religion. The factors used by the Court to determine that there was an excessive entanglement were (1) the character and purpose of the institution benefited (a church sponsored school);\textsuperscript{45} (2) the nature of the aid (economic support to teachers under supervision of religious

\footnotesize{39. \textit{Id.}
41. \textit{Id.} at 18.
44. 403 U.S. 602 (1971).
45. \textit{Id.} at 615.}
and (3) the resulting relationship between government and religious authorities (continuing state surveillance to insure that teachers "segregate their religious belief from their secular educational responsibilities").

The Supreme Court described the first amendment as resting "upon the premise that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere." The first amendment was intended to prevent "a union of government and religion that tends to destroy government and degrade religion." The separation of church and state, however, has not been viewed as requiring religion to be totally oblivious to government and politics. Many churches and religious groups in the United States have long exerted powerful political pressures on state and national legislatures in areas as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education. The Supreme Court has stated, "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."

The Supreme Court has also found that, "[a]s a general matter . . . the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." Nevertheless, it has noted that "the more discriminating and complicated the basis of classification—even a neutral one—the greater the potential for state involvement" in determining the character of a person's beliefs and affiliations, thus "entangling government in difficult classifications of what is or is not religious," or what is or is not conscientious. But the Court has designated certain governmental interests as so compelling that conflicting religious practices must yield in their

46. Id. at 616-17.
47. Id. at 619-20.
51. 397 U.S. at 670.
52. 401 U.S. at 450; See also note 49, supra, at 430-31; Torcaso v. Watkins, 367 U.S. 488, 495 (1961).
53. 401 U.S. at 457; See also 397 U.S. 664, 698-99 (1970).
favor. When an important societal objective is advanced and when public good and morality is intended, then added security should be given to the purpose involved and special attention should be paid to the precise effects of such action.

In Bob Jones, Court of Appeals for the Fourth Circuit determined that the principle of neutrality embodied in the Establishment Clause does not prevent the government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied. The majority, in ruling to revoke tax-exempt status, decided that the only appropriate inquiry was whether the school had maintained racially neutral policies and thus had avoided the question whether a racially restrictive practice is the result of a sincere religious belief. Judge Widener, in his dissent, stated that, since the majority had found a primary religious purpose and that the University exists as a religious organization, the University's tax-exempt status should not have been revoked.

The Supreme Court has noted that by forcing a religious organization to pay taxes, the government will ultimately become excessively entangled with that religion. In Walz v. Tax Commission, the Supreme Court emphasized that tax exemptions result in less entanglement with religion than would the taxing of the church property: the elimination of the exemption would give "rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." Members of the Court were particularly concerned with avoiding (1) substantive "governmental evaluation" of religious practices, (2) "extensive state investigation into church operations and finances," and (3) the entanglement of "government in difficult classifications of what is or is not religious."

54. The Supreme Court has upheld statutes against religious claims in Braunfeld v. Brown, 366 U.S. 599 (1961) (the Court upheld Sunday closing laws, thus forcing Orthodox Jews to close shop on a day when their Sabbath is not celebrated); Prince v. Massachusetts, 321 U.S. 158 (1944) (prohibiting sale of religious materials by minors); Reynolds v. United States, 98 U.S. 145 (1878) (prohibiting polygamy).
55. 639 F.2d at 154.
56. Id. at 155.
57. Id. at 156 (Widener, J., dissenting).
59. Id. at 674.
60. Id.
61. Id. at 691 (Brennan, J., concurring).
62. Id. at 698 (Harlan, J., concurring).
FREE EXERCISE CLAUSE

The Free Exercise Clause guarantees a citizen's right to exercise his or her religion. The Free Exercise Clause bars "governmental regulation of religious beliefs" and the "interference with the dissemination of religious ideas." Religious liberty was one of the most fundamental and important values of colonial American life.

The law is well settled that the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs. Government may neither compel affirmation of a repugnant belief, penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views. The Supreme Court has shown that only those interests of the highest order may overcome legitimate claims to the free exercise of religion.

It is firmly established that religious beliefs are absolutely free from the state's control, while religiously grounded "action" or "conduct" may be outside the protection of the Free Exercise Clause. There are times when the activities of individuals, even

65. Thomas Jefferson wrote:
Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.
70. The Supreme Court stated:
[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. . . . But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under
though religiously based, are subject to regulation, either by the states in the exercise of their undoubted power to promote the health, safety, and general welfare, or by the federal government in the exercise of its delegated powers.\textsuperscript{71} In \textit{Braunfeld v. Brown},\textsuperscript{73} The Supreme Court held that “if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.”\textsuperscript{78} The Supreme Court set forth an even more stringent test in \textit{Sherbert v. Verner}:\textsuperscript{74} “It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.’”\textsuperscript{75}

Ten years later, the Court made slight changes in its test in \textit{Wisconsin v. Yoder}.\textsuperscript{76} The \textit{Yoder} case dealt with a state statute which required children to attend school until age sixteen. The Amish refused to send their children to school past the eighth grade, because it was contrary to their religious beliefs and way of life. In \textit{Yoder}, the Court recognized that the state has a substantial interest in providing some degree of education to prepare citizens to participate in society. The compulsory attendance statute as applied to the Amish, however, was struck down because the Court could not find any particular state interest “of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”\textsuperscript{77}

Initially, the Court had created a strict test to determine

\textsuperscript{71} See, e.g., \textit{Gillette v. United States}, 401 U.S. 437 (1971) (held that the religious training and belief exemption applies to those who oppose participating in all war and not to those who object to participation in a particular war only); \textit{Braunfeld v. Brown}, 366 U.S. 599 (1961) (held the first amendment does not exempt an Orthodox Jewish merchant from Sunday closing laws because he observes Saturday as the Sabbath and thereby suffers a loss of business); \textit{Prince v. Massachusetts}, 321 U.S. 158 (1944) (upheld a statutory ban prohibiting children of Jehovah Witnesses from distributing religious pamphlets on the public streets); \textit{Jacobson v. Massachusetts}, 197 U.S. 11 (1905) (upheld a state compulsory vaccination requirement); \textit{Reynolds v. United States}, 98 U.S. 145 (1879) (prohibiting bigamy).

\textsuperscript{72} 366 U.S. 599 (1961).

\textsuperscript{73} \textit{Id.} at 607.

\textsuperscript{74} 374 U.S. 398 (1963).

\textsuperscript{75} \textit{Id.} at 406, quoting \textit{Thomas v. Collins}, 323 U.S. 516, 530 (1945).

\textsuperscript{76} 406 U.S. 205 (1972).

\textsuperscript{77} \textit{Id.} at 214.
whether a state’s violation of the Free Exercise Clause was justified. The Sherbert Court decreed that the state would not only have to demonstrate that there was no alternative ways of accomplishing its purpose, but it would also have to show that its purpose was so compelling as to justify interference with the individual’s religious rights. The Court performed an “ad hoc balancing” of interests by looking to the particular facts involved in each case and weighing the interest of the state therein against the interests of the individual. A major problem with the “ad hoc balancing” approach, however, is that there is no rule of law to be applied, but only interests to be weighed, and thus a citizen has no standard by which he can determine whether his interest will be given greater or lesser weight than the competing state interest.

In Yoder, the Supreme Court formulated a different approach which slightly varied the test in Sherbert: “[I]f the individual demonstrates that his actions are sincerely religious and have been interfered with as a result of a state regulation, the state must demonstrate that it has a compelling interest in the regulation, an interest which could not be promoted by any less restrictive means.” This test also required “ad hoc balancing” because in each particular case a court must determine if a given state interest is substantial, if a person’s rights are indeed religious, and if religious, whether they have been interfered with.” Thus, the Supreme Court’s balancing process in Bob Jones ought to focus on three elements: the religious belief, the importance of the government’s interest, and the degree of interference with the claimant’s practice of religion caused by the regulation.

The University seems to have shown a religious belief which has been deeply inbedded in the everyday practice of Bob Jones University for over forty years. The government has not questioned Bob Jones’ religious beliefs, but claims it has a compelling interest in revoking the school’s tax-exempt status. The question at issue is whether the government has an interest in eliminating racial discrimination in private sectarian schools great enough to justify infringement of the school’s free exercise rights. The government has made plain that it has a compelling interest in eliminating all

78. 374 U.S. at 406.
81. Id.
forms of racial discrimination, and that it must "steer clear" of any expression of support for racial discrimination in education. The policy of eliminating racial discrimination should be compelling enough to prevail.

The University claims that revocation of its tax-exemption status will infringe its right to freely practice its religion. Bob Jones is clearly not being prevented from practicing its religion, however. Its religious practice would be more expensive, since the government will not be providing financial support, but there is no preclusion of exercise of its beliefs.

Discrimination

Section 1981 of 42 U.S.C. provides that all persons shall have the same rights. The courts have upheld the strict federal policy Congress intended by prohibiting numerous forms of racial discrimination. An analysis of prior cases is presented below to shed light on the application of section 1981 to Bob Jones.

The public policy prohibiting racial segregation received its real beginning with the case of Brown v. Board of Education, wherein the Court held that racial segregation in public schools was prohibited. Brown initiated a long series of judicial decisions prohibiting racial discrimination within public school systems. The courts then extended enforcement of the federal policy opposing racial discrimination into many areas through use of federal statutes. In Jones v. Alfred H. Mayer Co. the Court looked at the legislative intent behind both 42 U.S.C. § 1981 and §1982 and decided that section 1981, like section 1982, reaches not only official acts, but purely private acts of racial discrimination as well. The Court held

84. Title 42 U.S.C. § 1981 (1978) provides:
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
88. Title 42 U.S.C. § 1982 (1978) prohibits private racial discrimination in the sale or rental of real or personal property.
that Congress intended to prohibit "all racial discrimination, private and public, in the sale . . . of property." 89 That the holding in Jones was applicable to section 1981 was confirmed by the Supreme Court in Tillman v. Wheaton-Haven Recreation Association 90 and Johnson v. Railway Express Agency, Inc. 91 The federal policy against racial discrimination then spread to the private schools receiving direct or indirect state aid. 92 The Supreme Court decided, in Runyon v. McCrory, 93 that 42 U.S.C. § 1981 applied to the admission of students to private schools and that the racial exclusion practiced by the schools in Runyon "amounts to a classic violation of § 1981." 94

The Court has stated that in order to justify classifications by race, the state must show that the classification is substantially related to a compelling state interest, independent of the racial discrimination. 95 Justice Stewart took a stronger position against racially discriminatory statutes in McLaughlin v. Florida, 96 where he stated he could not "conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." 97 In Loving v. Virginia, 98 a law

89. 392 U.S. at 437.
90. 410 U.S. 431 (1973) (private swim club's guest policy which discriminated against negroes was held invalid).
91. 421 U.S. 454 (1975) (held unequivocally "that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." Id. at 459-60).
92. Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (city enjoined from permitting exclusive access to its recreational facilities by segregated private schools); Norwood v. Harrison, 413 U.S. 455 (1973) (state prohibited from lending textbooks to students in private schools which had racially discriminatory policies); Griffin v. County School Bd., 377 U.S. 218 (1964) (School board enjoined from using public funds to help support segregated private schools); United States v. Mississippi, 499 F.2d 425 (5th Cir. 1974) (state enjoined from subleasing public school facility to private segregated school even if private school promises not to discriminate in its admission policies); Wright v. City of Brighton, 441 F.2d 447 (5th Cir. 1971), cert. denied, 404 U.S. 195 (1971) (city enjoined from selling abandoned public school building to segregated private school).

94. Id. at 172.
97. Id. at 198 (Stewart, J., concurring).
98. 388 U.S. 1 (1967).
prohibiting interracial marriage was held unconstitutional. The Court held that there can be no doubt that restricting the freedom to marry solely because of race violated the central meaning of the Equal Protection Clause.99 Marriage is one of the "basic civil rights of man" fundamental to our very existence and survival.100 Any statutes which deny or seriously infringe the freedom to marry also violate the Due Process Clause of the fourteenth amendment.101

The courts have clearly shown that the federal policy against racial discrimination will be enforced, and have applied section 1981 to almost all forms of racial discrimination, and though Supreme Court has ruled that racial discrimination is prohibited in public and private schools, some schools have attempted to create justifications for segregationist policies. The Supreme Court seems to have addressed all questions prohibiting racial discrimination within schools except the question at issue in Bob Jones. The controversial issue is whether section 1981 overrides a conflict with an organization's first amendment free exercise rights. The Court has recognized that the issue of the first amendment rights of church schools would ultimately have to be decided, unless, of course, Congress passed a law resolving the constitutional dilemma.

**Tax Exempt Policy**

While the Constitution, through the first amendment, protects the freedoms of religion and association, there is no constitutional right to governmental support for policies and practices contrary to federal public policy. Congress chose not to tax religious and educational organizations based upon the presumptions that they benefit society, and that taxation would involve impermissible governmental entanglement. Organizations that may be exempt from taxes are set out in 26 U.S.C. § 501(c)(3).102

Prior to 1970, section 501(c)(3) extended tax exempt status to all private schools without considering racial policies. In 1970, however, a class action suit was brought by black parents of children attending public schools to enjoin the government from extending tax-exempt status to private schools which discriminate against

99. *Id.* at 12.
100. *Id.*
101. *Id.*
102. An organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively for one or more of the follow purposes: (a) Religious; (b) Charitable; (c) Scientific; (d) Testing for public safety; (e) Literary; (f) Educational; (g) Prevention of cruelty to children or animals. 26 U.S.C. § 501(c)(3) (1974).
black students. In *Green v. Connally*, the court held that racially discriminatory private schools are not entitled to the federal tax exemption provided for charitable, educational institutions, and that persons making gifts to such schools are not entitled to the deductions provided in case of gifts to charitable, educational institutions.

Following the *Green* decision, the IRS announced nationally that it would no longer allow charitable contributions and deductions under 26 U.S.C. § 170(c)(2), and tax-exempt status under § 501(c)(3), to racially discriminatory schools, including church-related schools. The IRS formalized the nondiscrimination policy in several rulings, including Rev. Rul. 71-447, and Rev. Proc. 72-54. The 1972 procedures were superseded in 1975 by Rev. Proc. 75-50, and Rev. Rul. 75-231, which concerns the nondiscrimination requirement for church-operated schools. The IRS recognized that if tax-exempt status were granted to private schools which discriminated, then the federal government would be in a position of encouraging and supporting racial discrimination. The result was the IRS refusal to allow federal tax exemptions and deductions to activities contrary to the declared federal public policy against racial discrimination. There have been several cases upholding established public policy as a limitation on tax benefits, but no cases have produced a constitutional confrontation. In *Green*, the court stated:

> There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. *That government interest is dominant over other constitutional interests to the extent that there is complete and unavoidable*

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104. *Id.* at 1156.
105. Section 170(c) allows a deduction to any person, corporation, or organization which makes a charitable contribution to a qualifying organization under § 501(c). 26 U.S.C. 170(c) (1974).
This "nondiscrimination policy assures that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race."

By encouraging religious groups to conform to public policy, the government takes a dangerous step toward the preference of one religion over another. Once one concedes that religious organizations must conform to public policy to receive tax-exempt status, those religious organizations whose policies are not coordinated with public policy are inhibited, while those in tune with public policy are advanced. Public policy will not always adequately safeguard the religious guarantees of the first amendment. Public policy is constantly changing with the times. For example, the public policy concerning racial discrimination has shifted dramatically in one generation, while public policy against sex discrimination has only recently began to take shape. But no matter how valid the public policy, the courts have not always followed it. In National Labor Relations Board v. Catholic Bishop of Chicago, the Supreme Court declared that "[g]ood intentions by government—or third parties" do not override the constitutional prohibition against excessive government entanglement in church-related schools.

The controversy has been brewing for several years and has finally boiled over in Bob Jones. Here, there is clearly a conflict between the governmental interests in prohibiting racial discrimination and insuring equality of contractual opportunity, as reflected in section 1981, and a private sectarian school's interest in the free exercise and establishment of its religion. In upholding the section 1981 attack on racial discrimination in nonreligious private schools, the Court has recognized the constitutional conflict with

111. 330 F. Supp. at 1167 (emphasis added) (footnotes omitted).
112. 639 F.2d at 152.
Changes in the courts conceptions of what is charitable are wrought by changes in moral and ethical precepts generally held, or by changes in relative values assigned to different and sometimes competing and even conflicting interests of society.
Scholarly authorities agree that the standards may change over time so that enumerated categories may not be immutably charitable. (Footnotes omitted).
Id. at 1159.
115. Id. at 507.
religious schools but has reserved the question. The Court has recognized the potential for IRS abuse in its regulation of tax-exempt organizations, yet considers Congress "the appropriate body to weigh the relevant, policy-laden considerations" involved in determining how tax-exempt organizations should be treated.

**Rationale**

The importance of the government's interest in eliminating racial discrimination when compared with Bob Jones University's free exercise claim must be determined with careful scrutiny. Whatever the decision of the Supreme Court, the impact upon religion and society will be great.

The principal governmental interest served by the application of section 1981 to private sectarian schools would be the elimination of racial discrimination in the private sectors of society. In *Norwood v. Harrison*, the Court rejected the argument that the school's practice of racial discrimination could be protected by the first amendment guarantee of freedom of association:

> The Constitution . . . places no value on discrimination . . . . Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts.

While *Norwood* and *Runyon* made clear that freedom of association was not a sufficient defense against valid civil rights actions, neither case involved sectarian schools or freedom of religion. The government's support of public policy over religious belief, how-

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117. IRS Commissioner Kurtz has expressed doubts about the IRS's abilities in this area:
> Of all the interpretative judgments the Internal Revenue Service must make in administering the tax laws, probably none is more difficult and none demands more sensitivity than those concerning tax consequences affected by questions of religion and civil rights. These questions are far afield from the more typical tasks of tax administrators—determining taxable income.
120. *Id.* at 469-70; quoted in Runyon v. McCrory, 427 U.S. 160, 176 (1976).
ever, was recognized in *McGowan v. Maryland*,121 in which Justice Frankfurter remarked:

If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained.122

The government has recognized the fact that Bob Jones University is free to exercise its religious beliefs. But should the American taxpayer help to pay for those beliefs? A tax exemption is an indirect use of public funds, being a taking of funds that would otherwise be paid to the IRS for use elsewhere by the school.

As many congressmen and civil rights leaders argue, the IRS must deny tax-exempt status to such organizations in order to properly enforce the Civil Rights Act of 1964.123 The Act requires all federal agencies to deny financial assistance in any form to institutions that engage in racial discrimination. Tax-exempt status is certainly a substantial form of financial assistance. Thus, Congress has given the Supreme Court law upon which to base a decision upholding the revocation of tax-exempt status.

The Court must still consider the University's claim of freedom of religion. Freedom of religion is an important right while the upholding of first amendment rights is a preferred course, not an absolute position.124 Whether freedom of religion is preferred over other constitutionally guaranteed rights is still unanswered. Freedom to engage in associations for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause of the fourteenth amendment,125 and any action which curtails the freedom prescribed by the first amendment is

122. *Id.* at 462 (Frankfurter, J., separate opinion).
123. 42 U.S.C. §§ 2000c to 2000d-4 (1964), Section 601 of the Act, 42 U.S.C. § 2000d provides that: "No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
subject to close scrutiny.

The deciding factor should be that the government has neither questioned the religious beliefs nor attempted to prohibit the religious practices of Bob Jones University. The government seems to have accepted the fact that Bob Jones University is clearly established religious organization which advocates racial segregation as an important religious principle. The government is not trying to ban the religious practices of Bob Jones University, but is merely refusing to support practices which are contrary to established public policy.

The University contends that the IRS is violating its right to freely exercise its religion. But without tax-exempt status, Bob Jones University loses only a valuable financial benefit, and is not prohibited from exercising its religious beliefs. On the other hand, if the University is granted tax-exempt status, the government is really advancing the religious (and racist) practices of Bob Jones University. It surely appears that the denial of tax-exempt status would be the better decision, if only because it would involve less of an infringement of the rights of those involved: the University, although not as well off financially, could still practice its beliefs, and the public policy against racial discrimination would be best served.

Conclusion

The Supreme Court is faced with a major policy decision which may affect all of society. There is law to support either side in Bob Jones: The Court could view the denial of tax-exempt status as an excessive government entanglement prohibiting the free practice of religion, or a proper federal policy supported by a compelling governmental interest.

Whenever financial support of any kind is provided, there is clearly government entanglement. The government is supposed to be neutral, but providing tax-exempt status means government is really contributing to the religion. When government uses tax-exempt status to dictate policy to a religious organization, there is "excessive government entanglement." The government may revoke this status, however, when it possesses a compelling interest that outweighs free exercise. Eliminating racial discrimination is a well-established compelling interest of government.

The Reagan Administration is not to be criticized for what it felt was the proper legal approach. In a case like Bob Jones, it would be expedient if Congress expressly passed a law addressing the
controversy. Passage of such a law would not be easy, however, because of the strong feelings on both sides of the controversy and the existence of the very well-organized conservative coalition within Congress today. It is noted here in passing that one member of Bob Jones University's board of trustees is Senator Strom Thurmond, who is chairman of the Senate Judiciary Committee and supports Bob Jones first amendment claims.

Perhaps the Supreme Court will not be persuaded by political power and will rule in favor of revocation of the University's tax-exempt status. While there are important issues at stake on both sides, the fight for racial equality has come too far to risk derogation at the hands of those who would discriminate under the guise of the free exercise of religion. No matter how sincere its religious beliefs may be, Bob Jones' University should not expect the United States government to aid it in closing the educational door to black students.

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