A. THE RIGHTS OF CONSCIENCE

Earlier volumes have considered (1) the autonomy of religious bodies with respect to their internal affairs, (2) the outreach activities of religious bodies, and (3) inculcation of the faith by religious bodies. This volume will address the legal problems that arise when the faithful seek to practice their faith in the environing society, and efforts are made to protect that practice from regulation or prohibition by the government. Thus will follow exercises of conscience at variance with customary or legal norms: objection to military service, to saluting the flag, to jury duty, to Social Security, to union membership, to vaccination or blood transfusions; also legal restrictions on practices deemed essential to the faith, such as polygamy, sabbath observance, snake-handling, faith-healing, the use of "controlled substances" and the sheltering of persons deemed to be violators of law such as runaway slaves or "illegal" aliens.

It will not be possible to understand the meaning of this volume without some grasp of the religious life as it is viewed by most religious bodies. Virtually none of them see the religious life as being confined within the walls of the church or synagogue. (Though some cloistered and contemplative religious orders exist, whose members by design and commitment spend their lives shut away from the rest of the world, they are in large part products of particularly chaotic periods of history, they are a very tiny part of the total of religious behavior and they too have serious intentionalities toward the world expressed in incessant intercessory prayer for it.)

1. The Believer at Work in the World

Most "Western" religions are vigorously "worldly" in the sense of living actively in the "world." Protestants have laid great emphasis on "the priesthood of all believers" and the acceptability in God's sight of lay vocations. These are related but distinguishable teachings, and both are important for an understanding of the needs and interests of religious bodies with respect to the laws that affect their (lay) members seeking to practice their religion in the world. The former refers to Martin Luther's teaching that Christians can mediate the offices of God to one another, whether ordained or not.

The latter (and most distinctive element of Martin Luther's teaching), however, is the idea that one need not be a priest or other full-time ecclesiastical functionary (monk or nun) to be acceptable to God, but that laypersons can serve God acceptably in their "secular" occupations. It was from Luther that the term "calling" (*Beruf*)—in the sense of a divine summons to religious service—came to apply to lay, as well as ecclesiastical, *vocations*, a view evoked by the famous passage in I Corinthians 7:

> Only, let everyone lead the life which the Lord has assigned him, and in which God has called him.... Every one should remain in the state in which he was called. Were you a slave when called? Never mind. But if you can gain your freedom, avail yourself of the opportunity. For he who was called in the Lord as a slave is a freedman of the Lord. Likewise he who was free when called is a slave of Christ. You were bought with a price; do not become slaves of men. So, brethren, in whatever state each was called, there let him remain with God (I Cor. 7:17, 20-24, emphasis added).

This theme, *Bleib' in deinem Stand*—"remain in your (present) station"—at first meant that one did not need to abandon one's existing responsibilities entirely—to family, class or occupation—in order to follow the divine summons (though, of course, contrary to the injunction, one *could* do so, and many did). It was essentially a *corrective*, both in New Testament times and in sixteenth-century Europe, to the prevailing notion that one had to (or could) abandon home, family and job to become a "holy" person (priest, mendicant friar, hermit, cloistered recluse etc.). It had a somewhat passive implication: If God called you while you were working as a farmer or *hausfrau*, you did not need to become something else; you could serve God while you remained a farmer or *hausfrau*: there were as many opportunities and occasions for service in those stations as in holy orders. This was a quite radical teaching at the time, and elevated lay roles from their fate as "second-class" Christians.

But this teaching has come to have a much more active implication: that God *calls* various people to serve *as* farmers, housewives, chemists, plumbers, physicians, teachers, architects, truck drivers as well as clergy; that God calls them *into* those *vocations* (from Latin, *voco*, "to call") precisely because of their individual aptitudes that enable them to serve God and their fellow human beings in a particular niche where they are needed. So entrenched has this idea become that the very word "vocation"—which once referred only to holy orders—now refers to *all* occupations in the sense of matching individual aptitudes to particular work roles or careers and training individuals to occupy the ones for which they seem to be peculiarly fitted (as in "vocational counseling," "vocational education," etc.).

There is now an effort being made to recover the religious significance of the idea of "vocation," to infuse it with the sense of a divinely invited responsibility, a "call" to serve God to the best of one's ability on the sacred altar of the world, using the special gifts that God has given one to benefit one's fellows. This has sometimes been expressed as "the ministry of the laity," and it refers to the ways in which laypersons can see their occupations in the world as occasions for devout ministry. This can sometimes mean the responsibility to share with one's fellow workers one's religious beliefs, but that is not the main thrust of the concept. It is aimed not at being "churchy" on the job, but at rendering the best service one can in the (secular) office or workplace to which one has been (divinely) called. The "best" service means best in terms of the secular canons of the chosen occupation. A person who neglected his or her assigned tasks to pass out pious tracts would not be doing that.

The essence of this idea of the ministry of the laity for present purposes is as follows:

1. The religious person can and should embody and manifest a ministry of service wherever he or she may be, especially where she or he spends most time and energy, which is in the secular workplace.

2. This is done best in harmony with the canons, needs and expectations of the workplace and the people in it, though not necessarily in slavish conformity thereto, for persons with a religious perspective are to some degree freed from the bonds of mere convention.

3. There will be times, then, when a religious person must act *un*conventionally in the workplace in faithfulness to the dictates of conscience, even if it causes friction, tension, ostracism, penalties or dismissal. (This may be, in a sense, a failure to work out one's vocation in the chosen setting without violating the canons of the workplace, but sometimes it may be a necessary "failure" when those canons come into clear and unavoidable conflict with one's duty to God. "We must obey God rather than man," the Christian scripture adjures—Acts 5:29.)

4. The workplace is a unique and meaningful arena of religious service for the lay devotee. But one's religious duty there is not the *same* as it would be in church or synagogue or temple; one's religious duty there—as elsewhere—is fitted to the nature and need of the particular place and the people in it.

5. The church cannot be a substitute for the workplace. Sometimes the question is asked, "Why should people feel a need for religion-based relationships on the job? Don't they have churches where they can get all that?" But the people, the setting and the needs addressed are not the same. When one spends most of one's waking hours at the workplace, it is a place of importance. One should not be expected to exclude one's religious interests and convictions from that place (or any other) because they can be exercised in church. The people with whom one works may not be, and usually are not, the ones with whom one goes to church. Therefore, one should not relate to them as though they were fellow church members, but neither should one treat them a though they were of no religious significance. One has a deep and vital duty toward them, and with them toward the workplace and toward the public(s) it serves, and to leach from that duty all religious significance or expression is to do a serious disservice to God and to them. That duty is not primarily to *evangelize* them, though there may come a time and occasion when that is appropriate, just as any other form of interpersonal sharing might be, but it is a duty to be a helpful and understanding companion along the earthly pilgrimage being made together.

The point of this exposition is that for most adherents of Western religions, the locus of religious behavior is ideally *not just inside the church* but *out in the world*. (Not everyone lives up to this ideal, and for some their religious activity may be largely located inside the church building, but that is because of inertia on their part, not because of the content of the faith, which may teach otherwise.) Therefore, no religious body in the United States can accept a legal definition of religion that would confine it to the church house or to the full-time or ordained practitioners. Any law or practice that purported to do so would be *ipso facto* an impairment of the free exercise of religion, yet there are many legal decisions or administrative rulings that seem to proceed from the perhaps unrecognized assumption that religion is only

what happens in church on Sunday morning, and anything beyond that is a bit intrusive, if not incongruous, and has exceeded the bounds of First Amendment protection.

2. Plural Marriage or Polygamy

One of the areas in which religious groups seek to guide their followers into a way of life deemed virtuous or in accord with the divine will is with respect to family life and sexual relations. If the teaching of the religious group in these matters is sharply at variance with the norms prevailing in the environing society, trouble can ensue. As it happens, some of the earliest decisions of the Supreme Court of the United States dealing with the law of church and state were precipitated by the teaching and practice of "plural marriage" or polygamy by the Mormon movement in the mid-nineteenth century. The Church of Jesus Christ of Latter-day Saints came into being as the result of the leadership of Joseph Smith, who published *The Book of Mormon* in upstate New York in 1830. Three years later he had gathered some 1,200 followers in a colony in Missouri. Forced to move several times because of the hostility of the "gentile" (non-Mormon) residents, they eventually settled in what was almost an independent kingdom at Nauvoo on the western edge of Illinois overlooking the Mississippi.

Here Joseph Smith, the president, "prophet, seer, and revelator" of the church, had a revelation that he communicated only to some of the inner circle of leaders in the church—the doctrine of plural marriage—which they began to practice in secret while strenuously denying the rumors that began to circulate about it. This innovation led to the defection of two Mormon leaders, who began to criticize Smith as a false prophet. Smith had the Nauvoo Legion, of which he was commander-in-chief, destroy the dissidents' printing press, whereupon they filed suit against him. Smith and his brother Hyrum acceded peaceably to arrest and were imprisoned in Carthage, Illinois, awaiting trial on this count when a mob broke in and lynched them. Shortly thereafter, under the leadership of Smith's successor, Brigham Young, the Mormons migrated to what is now Utah, where they set up a new settlement to which thousands of Mormons gathered, including converts from Europe. In 1852 Brigham Young announced the doctrine of plural marriage to the general membership, and eventually it became a central teaching of the church, practiced by many leading Mormons.

This teaching and practice scandalized the rest of the nation, and in 1862 Congress passed a law against it, which was of little force in Utah because no grand jury there would indict. When a conviction was at last obtained in 1875, the territorial court voided it, and when it was appealed to the U.S. Supreme Court, the result was the famous decision of 1878 entitled *Reynolds v. U.S.*

a. *Reynolds v. U.S.* (1878). The pertinent part of that decision dealt with Reynolds' claim that in marrying more than one wife he was following the teaching of his church, and that if he failed to fulfill that religious duty he risked "damnation in the life to come." The court reasoned as follows:

> [T]he question is raised, whether religious belief can be accepted as a justification for an overt act made criminal by the law of the land....
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> Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as Congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.[1]

Looking to the period when the First Amendment was written, Chief Justice Morrison Waite, writing for an apparently unanimous court, examined the views of James Madison expressed in the famed "Memorial and Remonstrance" of 1785 and found there what he viewed as the solution to the problem before the court:

> "That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,"... [but]... "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the Church and what to the State.

Chief Justice Waite turned to Thomas Jefferson's letter to the Danbury Baptists, with its reference to a "wall of separation between Church and State," for additional authority to undergird his thesis: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

He entered upon an assessment of polygamy as a violation of social duties and subversive of good order.

> Polygamy has always been odious among the Northern and Western Nations of Europe and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people.... [F]rom the earliest history of England polygamy has been treated as an offense against society.... By the Statute of 1 James I, ch. 11, the offense, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death....
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> In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the Act establishing religious freedom,...the legislature of [Virginia] substantially enacted the Statute of James I, death penalty included, because as recited in the preamble, "It hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth." From that day to this we think it may safely be said that there never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity.

1. *Reynolds v. United States*, 98 U.S. 145 (1878).

> In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life....
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> [T]he only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?...
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> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Though one of the earliest essays in First Amendment jurisprudence, this opinion has certain "modern" qualities about it: the references to Madison and Jefferson,[2] the citation of contemporaneous actions of the legislature to show that such actions were not inconsistent with exalted ideals of religious liberty enacted at about the same time,[3] and the equation of exemption for nondisruptive religious practice with the *reductio ad absurdam* of "each man a law unto himself."[4] *Reynolds v. U.S.* stands for the now-classic dichotomy between "belief" and "action," with the former being beyond the reach of the state, but the latter properly subject to government regulation. As a first "cut" in the undifferentiated confusion of human affairs, it was a crude beginning, but it left most of the hard distinctions untouched and—despite its noble tributes to religious liberty—offered a rationale to the state to regulate anything and everything that had a visible "action" component. Little indeed would be left of the "free exercise of religion" if confined to the realm of "mere opinion." "Free *exercise*" must include some aspects of *action* as well as belief. "Exercise" is itself an action word. To say that *belief* is free of government control is to say very little, since there is not much that government can do to control pure belief—though an effort to do so will be seen in the next case. Of course, what governments may try to control is the *expression* of belief in speech and symbol, lest it serve as an incitement to act and a justification of action.

The belief/action dichotomy of *Reynolds* represented a rather primitive stage of First Amendment analysis, yet it is still trotted out by prosecutors seeking to punish

2. See *Everson v. Board of Education*, 330 U.S. 1 (1947), discussed at IIID2.
3. See *Marsh v. Chambers*, 463 U.S. 783 (1983), discussed at VD3a.
4. See *Oregon v. Smith*, 494 U.S. 872 (1990), discussed at § D2e below.

actions grounded in religious conviction. They often quote *Reynolds* followed by *Cantwell v. Connecticut* ("[T]he First 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"[5]) as a prologue to prosecution of a defendant claiming "free exercise of religion."

The belief/action dichotomy, of course, served a much different purpose in *Cantwell*, where it harked back to *Reynolds* but came to an *opposite* conclusion: that the state had overreached in seeking to regulate conduct. *Cantwell* moved the next step beyond *Reynolds* to consider Free Exercise concerns that *Reynolds* never reached:

> In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.... [A] state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.... [I]n the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, [Cantwell's] communication, considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction....[6]

But the *Reynolds* court was not in a position to look at the problem as the *Cantwell* court did with the benefit of sixty more years of experience, including wrestling with the concept of "clear and present danger" in the free-speech context.[7] The *Reynolds* court was confronted with *actions*, not just words or opinions, and actions on a broad scale, involving thousands of people throughout a huge territory, actions that seemed to many contemporaries to threaten the very foundations of civilization. Looking back from the perspective of a century's hindsight, the fairly stable minisociety of Utah with its structured system of plural marriage might seem a welcome improvement over our contemporary marital chaos, but to the society of the 1870s it was the most libertine excess of a despised, perverse and lawless "cult" of vast proportions, that the governor of Missouri said in 1838 "must be exterminated" and a Presbyterian minister called "the common enemies of mankind [who] ought to be destroyed."[8] By 1887 this nationwide hysteria had reached such a pitch that Congress passed the Edmunds-Tucker Act, which disenfranchised Mormon voters, disincorporated the Mormon Church and confiscated its property. Perhaps it is expecting too much that a court could completely surmount such pervasive prejudice coupled with uncritical acceptance of conventional social norms. But *Reynolds* ought not be accorded the authority of a solid pillar of American

5. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), discussed at IIA2c.

6. Ibid.

7. In a line of cases running from *Schenck v. U.S.*, 249 U.S. 47 (1919) to *Whitney v. California*, 274 U.S. 357 (1927).

8. Quotations from Tribe, L., *American Constitutional Law, 2d. ed.* (Mineola, N.Y.: Fndn. Press, 1988), § 14-13, p. 1271.

church-state jurisprudence. It is dated, not only by its unformed analysis, but by its disregard of the dynamics underlying the prosecution. Professor Laurence Tribe has commented on this case:

> The *Reynolds* court perceived a sufficient secular purpose in preserving monogamous marriage and preventing exploitation of women. Few decisions better illustrate how amorphous goals may serve to mask religious persecution. The early history of the Mormons in this country is in large part a chronicle of such persecution.... The anti-polygamy statutes are best understood as parts of the same stained fabric. Born in the same era and of the same fears, they should have been strictly scrutinized. Little is demonstrated by the fact that the law's defenders could invoke a goal as attenuated as the "preservation of monogamous marriage"; that might also be said of a law compelling priests and nuns to marry….[T]he question... must be whether the monogamy-promotion goal is sufficiently compelling, and the refusal to exempt Mormons sufficiently crucial to the goal's attainment, to warrant the resulting burden on religious conscience.[9]

There may also be an unexamined presupposition in the court's mind that polygamy was contagious and, once permitted in Utah, would spread to the rest of the nation. What could have been its supposed attractiveness is difficult to discern at this distance, but it seems to have been feared like the plague. Ostensibly one of the advantages of a nation composed of several semisovereign states is that some legal, social, economic and cultural experimentation may be possible, with varying degrees of diversity from one state to another. It does not seem inconceivable that Utah could undertake a religiously inspired and self-regulated experiment in plural marriage without contaminating the rest of the nation. One of the great services that religious movements perform is to envision and embody new and possibly better arrangements of human community under the beneficial influences of idealistic vision combined with religious discipline. It would seem a felicitous combination of circumstances that such a movement might undertake such an experiment in relative isolation on the cohesive base of a single legal jurisdiction for a long enough period to discern whether it really was an improved arrangement that might commend itself to others.

Suffice it to say, however, that sexual experimentation is a highly sensitive issue in any society—even one as apparently permissive as present-day America—and when combined with unconventional or unpopular religion lends itself very readily to sensationalized rumors, atrocity anecdotes and prurient surmises that help to fuel religious persecutions, and courts should be doubly on their guard when sex and religion come before the bar together.

b. *Davis v. Beason* (1890). But worse was yet to come! In the Territory of Idaho, Samuel D. Davis, a Mormon but not a polygamist, was convicted of falsely taking an oath required as a condition of voting in territorial elections that included the following abjuration:

9. Ibid., pp. 1271-1272.

> ...and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal right of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise....[10]

Davis challenged the Idaho law requiring the oath as a "law respecting an establishment of religion" forbidden by the First Amendment.

Justice Stephen J. Field, writing for an again unanimous Supreme Court, was not indulgent of Davis's First Amendment claims:

> On this hearing we can only consider whether, these allegations being taken as true, an offense was committed of which the territorial court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of the civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases.
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> It was never intended or supposed that the [First] Amendment could be invoked as protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relation to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.... Probably never before in the history of this country has it been seriously contended that the whole unitive power

10. *Davis v. Beason*, 133 U.S. 333 (1890).

> of the government, for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

Justice Field added that it was perfectly reasonable for the Idaho Territory to erect a standard for voters that would prevent persons of such pernicious tendencies "from being enabled by their votes to defeat the criminal laws of the country."

Mr. Davis was not himself accused—let alone convicted—of practicing polygamy, or of teaching, advising, counselling or encouraging others to do so, and in fact he had taken the oath abjuring any intention of doing so. He was punished for implied complicity in such teaching, advising, and such, *because of his membership in the Mormon Church*. And he was not just stricken from the voter's rolls (lest he be enabled by his vote to defeat the criminal laws against bigamy), but he was convicted of a *crime* and sentenced to pay a fine of $500 or to spend 250 days in jail! Thus he was punished, not for action or conduct but for *belief*, and not for avowed, but explicitly *dis*avowed, yet imputed, belief at that. It was not the first time in history that expurgatory oaths were used as a weapon against dissidents, who could be punished for contumacy if they refused to take the oath and for perjury if they did.[11] Such oaths were also used as a means of punishing those suspected of disloyalty in the McCarthyite era of the 1950s until they fell into disfavor because of their excesses.[12]

c. *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. U.S.* (1890). The rigors of righteous strictures against polygamy reached even further when Congress in 1887 enacted legislation revoking the incorporation of the Mormon Church. Later in the same year action was begun in the Supreme Court of the Territory of Utah by direction of the attorney general of the United States for the appointment of a receiver to take possession of the property of the "late corporation known and claiming to exist as the Church of Jesus Christ of Latter-Day Saints." A receiver was duly appointed, whereupon three Mormons acting as trustees for the church contested the action on the ground that it was unconstitutional and void as an impairment of the contract (consisting of the corporate charter) between the government of the territory and the persons constituting the corporation created by the charter. A second petition was filed by a group of Mormons on behalf of the membership of the church, led by George Romney—a name that became better known nearly a century later when one of his descendants, also a leading Mormon, served in the cabinet of a president of the United States and was himself a candidate for president!—and this action bearing the style *Romney v. U.S.* was joined with the first.

The property at issue included realty and personalty valued at approximately $750,000 (excluding Temple Block, which was left by the Utah court in the possession of the then-disincorporated voluntary association of Mormons, to be held

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11. See *Cummings v. Missouri*, 4 Wall. 277 (1866), discussed at ID1b.

12. See *Speiser v. Randall*, 357 U.S. 515 (1958), and *First Unitarian Church v. Los Angeles*, 357 U.S. 545 (1958), esp. Justice Hugo Black's concurrence, discussed at VC6b(2).

by court-appointed trustees for purposes of religious worship only, the trustees appointed by the court to hold the Temple Block being the three Mormon trustees who had entered the first petition).

The Supreme Court of the Territory of Utah upheld the appointment of the receiver and the escheatment of all of the real and personal property of the former corporation to the United States, except for the Temple Block, and the holding of that property by the receiver until such time as a final disposition should be made of it by order of the same court. That decision was appealed to the U.S. Supreme Court by the three Mormon trustees and by the Romney group of "rank-and-file" members of the Mormon Church.

Justice Joseph Bradley delivered the opinion of the court, observing that Congress had supreme power over the territories and their inhabitants.

> [I]t is too plain for argument that this charter, or enactment, was subject to revocation and repeal by Congress whenever it should see fit to exercise its power for that purpose. Like any other act of the territorial legislature, it was subject to this condition.... Congress, for good and sufficient reasons of its own..., had a full and perfect right to repeal its character and abrogate its corporate existence, which of course depended upon its charter.

The court considered whether Congress had power to confiscate all or part of the church's property, noting that "when a [public or charitable] corporation is dissolved, its... real estate reverts or escheats to the grantor or donor," which—in this instance, the court held—was the United States, because it had permitted individuals and corporations to take up property in the territory under the town site act of 1867, "[t]here can be no doubt, therefore, that the real estate of the corporation in question could not, on its dissolution, revert or pass to any other person or persons than the United States."

But another principle also was applicable in this instance, the principle of the law of charities, which reached the same conclusion.

> The principles of the law of charities are not confined to a particular people or nation, but prevail in all civilized countries pervaded by the spirit of Christianity. They are found imbedded in the civil law of Rome, in the laws of European nations, and especially in the laws of that nation from which our institutions are derived. A leading and prominent principle prevailing in them all is, that property devoted to a charitable and worthy object, promotive of the public good, shall be applied to the purposes of its dedication, and protected from spoliation and from diversion to other objects. Though devoted to a particular use, it is considered as given to the public, and is, therefore, taken under the guardianship of the laws. If it cannot be applied to the particular use for which it was intended, either because the objects to be subserved have failed, or because they have become unlawful and repugnant to the public policy of the state, it will be applied to some object of kindred character so as to fulfill in substance, if not in manner and form, the purpose of its consecration....

* * *

> [T]he property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purposes to which it was devoted, but within those limits consecrated to the public use, and become part of the public resources for promoting the happiness and well-being of the people of the state. Hence, when such property ceases to have any other owner, by the failure of the trustees, by forfeiture for illegal application, or for any other cause, the ownership naturally and necessarily falls upon the sovereign power of the state; and thereupon the court of chancery, in the exercise of its ordinary jurisdiction, will appoint a new trustee to take the place of the trustees that have failed or that have been set aside, and will give directions for the further management and administration of the property; or if the case is beyond the ordinary jurisdiction of the court, the legislature may interpose and make such disposition of the matter as will accord with the purposes of justice and right. The funds are not lost to the public as charity funds; they are not lost to the general objects or class of objects which they were intended to subserve or effect. The State, by its legislature or its judiciary, interposes to preserve them from dissipation and destruction, and to set them up on a new basis of usefulness, directed to lawful ends, coincident, as far as may be, with the objects originally proposed.

This rationale is quoted at some length (though omitting many pages of examples and precedents) because of its marked resemblance to the argument underlying the seizure and placing in receivership of the Worldwide Church of God by the State of California in 1979.[13] Although the state's solicitude for the public's interest in the charitable use of the property and assets seems commendable in both instances, its remedy was draconian, since it involved the government's seizure of the material fabric of a church.

What evil seemed to the court sufficient to justify such a sweeping and punitive measure? Here it could also rely on extensive precedents, which have already been reviewed in the cases dealt with immediately above.[14]

> It is distinctly stated in the pleadings and findings of fact, that the property of the said corporation was held for the purpose of religious and charitable uses. But it is also stated in the findings of fact, and is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of the Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress—notwithstanding all the efforts made to suppress this barbarous practice—the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching,

13. Discussed at IE1.

14. *Reynolds v. U.S., Davis v. Beason, supra.*

upholding, promoting and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure[,] a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of civilization, is to be allowed to continue by the sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society.

It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to their attempt to establish an independent community, to their efforts to drive from the territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons. Whatever persecutions they may have suffered in the early part of their history, in Missouri and Illinois, they have no excuse for their persistent defiance of law under the government of the United States.

One preference for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and, therefore, under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical idea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief, but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

The State has a perfect right to prohibit polygamy, and all other open offenses against the enlighted sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced.[15] And since polygamy has been forbidden by the laws of the United States under severe penalties, and since the Church of Jesus Christ of Latter-Day saints has persistently used and claimed the right to use, and the unincorporated community still claims the right to use, the funds with which the late corporation was endowed for the purpose of promoting and propagating the unlawful practice as an integral part of their religious usages, the question arises, whether the government, finding these funds without legal ownership, has or has not, the right, through its courts, and in due course of administration, to cause them to be seized and devoted to

15. Citing *Davis v. Beason*, 133 U.S. 333, *supra*.

> objects of undoubted charity and usefulness—such for example as the maintenance of schools— for the benefit of the community whose leaders are now misusing them in the unlawful manner above described; setting apart, however, for the exclusive possession and use of the church, sufficient and suitable portions of the property for the purposes of public worship, parsonage buildings and burying grounds, as provided in the law.
>
> * * *
>
> Then looking at the case as the finding of facts presents it, we have before us—Congress had before it—a contumacious organization, wielding by its resources an immense power in the Territory of Utah, and employing those resources and that power in constantly attempting to oppose, thwart and subvert the legislation of Congress and the will of the government of the United States. Under these circumstances we have no doubt of the power of Congress to do as it did.[16]

The majority of the court, speaking through Mr. Justice Bradley, characterized the offensive beliefs and practices of Mormons, as of Thugs, Hindus and primitive Britons as *not really religious* ("their thinking so did not make it so") because in conflict with the "sentiments and feelings of the civilized world," and "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." This was an error of definition not uncommon in the nineteenth century, as yet innocent of cultural relativism and prone to see all questions in the light of its own Western "enlightenment." The source of the "obstinacy" and "contumacy" of the Mormons in their persistence in the practice of polygamy (as of the Hindus in their practice of suttee, etc.) was precisely that it *was* a religious practice, and saying otherwise "did not make it so." Denying the religious nature of the practice was not only patronizing and gratuitous, but shifted attention away from the real root of the problem. It would have been more straightforward and respectful to have said, "We recognize the belief in plural marriage to be a religious doctrine and belief, but it is one that has been defined as illegal and will be punished accordingly, whether religious or not." That is in essence what *Reynolds* had said, and the case against the Mormons was not advanced by telling them they were deluded in their view that the practice was religious.

It is interesting that the church does not seem to have offered a defense based upon the government's interference with the free exercise of religion, perhaps feeling that that had been foreclosed by *Reynolds*, not to mention *Davis v. Beason*, and so it relied upon the somewhat strained contention of the sanctity of contract. Since it lost on that basis also, one might wish that it had gone down bravely proclaiming its right to preach and practice its religion without government interference rather than clinging solely to the sanctity of contract. The church could have insisted, "You can punish anyone you catch for the supposed crime of bigamy, but you have no right to punish the church for preaching what it believes to be a divinely inspired mode of family life. It is cruel and vindictive to try to dismember the church and strip it of its

16. *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States,* 136 U.S. 1, *passim* (1890).

possessions because you disagree with its teaching or the practices of its members."

The reason the government resorted to legal warfare against the church was that it had been unsuccessful in trying to enforce the criminal law against bigamy in Utah: grand juries (composed mainly of Mormons, who made up the majority of the population) would not indict, and petit juries would not convict. So Congress, goaded by outraged Presbyterians, Methodists, Baptists and others, resorted to ever severer measures until it eventually attempted to destroy the economic power of the church itself.

A decade or two earlier, even this might not have worked, since the Mormon movement, in Brigham Young's heyday, was a more dynamic and cohesive community that had survived proportionately far worse harms in Missouri and Illinois. But by the latter 1880s it had grown more respectable and relaxed and was unable to exercise the discipline over its members that it once had, so it was more vulnerable to the kind of attack mounted by Congress. And in 1890, shortly after the court's decision, Mormon Church President Wilford Woodruff "threw in the sponge" and announced that he had had a "revelation" ending the practice of polygamy.[17]

In this, the third notable Mormon case, there was a dissent. It was filed by Chief Justice Melville Fuller, joined by Justices Stephen Field and Lucius Lamar. Did they champion the religious liberty of the Mormons? Not quite. The chief justice wrote on that score, "I agree that the power to make needful rules and regulations for the Territories necessarily comprehends the power to suppress crime; and it is immaterial even though that crime assumes the form of a religious belief or creed." Their objection was to the form of the remedy.

> Congress has the power to extirpate polygamy in any of the Territories, by the enactment of a criminal code directed to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals, or corporations, without office found, because they have been guilty of criminal practices.

The whole case, of course, turned on whether "office" had been "found" in the congressional acts of 1862 and 1887; the minority insisted that "no such power as that involved in the act of Congress under consideration is conferred by the Constitution, nor is any clause pointed out as its legitimate source." It is a relief to find that at least three justices believed that there still is *something* sacred: even if not religious liberty or contract, but *property*.

d. *Cleveland v. U.S.* (1946). Although it might have been supposed that the outlawing of polygamy in the preceding cases and the timely revelation by President Wilford Woodruff in 1890 disowning the practice in the Church of Jesus Christ of Latter-day Saints had settled the matter, for some it had not. These were (and are?) adherents of various schismatic or recusant Mormon groups in remote areas of the West. Several such persons were convicted of violating the Mann Act, which prohibited the transportation across state lines of "any woman or girl for the purpose

17. See Kelley, D.M., *Why Conservative Churches Are Growing* (New York: Harper & Row, 1972, 1977), pp. 65-72, esp. p. 71, derived in part from O'Dea, Thomas F., *The Mormons* (Chicago: Univ. of Chicago Press, 1957).

of prostitution or debauchery, or for any other immoral purpose."[18] The conviction was affirmed on appeal, and the U.S. Supreme Court granted *certiorari*. The opinion of the court was delivered by Justice William Douglas.

> Petitioners are members of a Mormon sect, known as Fundamentalists. They not only believe in polygamy; unlike other Mormons, they practice it. Each of petitioners... has, in addition to his lawful wife, one or more plural wives. Each transported at least one plural wife across state lines [footnote: petitioners' activities extended into Arizona, California, Colorado, Idaho, Utah and Wyoming], either for the purpose of cohabiting with her, or for the purpose of aiding another member of the cult in such a project.
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> * * *
>
> It is argued... that the Act was designed to cover only the white slave business and other vices; that it was not designed to cover voluntary actions bereft of sex commercialism; and that in any event it should not be construed to embrace polygamy which is a form of marriage and, unlike prostitution or debauchery or... concubinage..., has as its object parenthood and the creation and maintenance of family life....
>
> [W]e find no indication that a profit motive is a *sine qua non* of [the Act's] application. Prostitution, to be sure, normally suggests sexual relations for hire. But debauchery has no such implied limitation. In common understanding the indulgence which that term suggests may be motivated solely by lust. So we start with words which by their natural import embrace more than commercialized sex. What follows is "any other immoral purpose." Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it. But we could not give the words a faithful interpretation if we confined them more narrowly than the class of which they are a part.
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> * * *
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> We conclude, moreover, that polygamous practices are not excluded from the Act. They have long been outlawed in our society.... Polygamy is a practice with far more pervasive influences in society than the casual, isolated transgressions involved in [a recent individual concubinage] case. The establishment or maintenance of polygamous households is a notorious example of promiscuity. The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community. We could conclude that Congress excluded these practices from the Act only if it were clear that the Act is confined to commercialized sexual vice. Since we cannot say it is, we see no way by which the present transgressions can be excluded. These polygamous practices have long been branded as immoral in the law. Though they have different ramifications, they are in the same genus as the other immoral practices covered by the Act....
>
> * * *

18. 18 U.S.C. § 398.

> Petitioners' second line of defense is that the requisite purpose was lacking. It is said that those petitioners who already had plural wives did not transport them in interstate commerce for an immoral purpose.... There was evidence that this group of petitioners in order to cohabit with their plural wives found it necessary or convenient to transport them in interstate commerce and that the unlawful purpose was the dominant motive. In one case the woman was transported for the purpose of entering into a plural marriage. After a night with this petitioner she refused to continue the plural marriage relationship. But guilt under the Mann Act turns on the purpose which motivates the transportation, not on its accomplishment....
>
> It is also urged that the requisite criminal intent was lacking since petitioners were motivated by a religious belief. That defense claims too much. If upheld, it would place beyond the law any act done under claim of religious sanction. But it has long been held that the fact that polygamy is supported by a religious creed affords no protection in a prosecution for bigamy.... Whether an act is immoral within the meaning of the statute is not to be determined by the accused's concept of morality. Congress has provided the standard. The offense is complete if the accused intended to perform, and did in fact perform, the act which the statute condemns, viz. the transportation of a woman for the purpose of making her his plural wife or cohabiting with her as such.[19]

Justices Hugo Black and Robert Jackson dissented without written opinion. Justice Wiley Rutledge concurred in the judgment. Justice Frank Murphy wrote a significant dissenting opinion disagreeing with the basic thrust of the court's conclusions.

> Today another unfortunate chapter is added to the troubled history of the White Slave Traffic Act. It is a chapter written in terms that misapply the statutory language and that disregard the intention of the legislative framers. It results in the imprisonment of individuals whose actions have none of the earmarks of white slavery, whatever else may be said of their conduct....
>
> * * *
>
> I disagree with the conclusion that polygamy is "in the same genus" as prostitution and debauchery and hence within the phrase "any other immoral purpose" simply because it has sexual connotations and has "long been branded as immoral in the law" of this nation....
>
> It is not my purpose to defend the practice of polygamy or to claim that it is morally the equivalent of monogamy. But it is essential to understand what it is, as well as what it is not. Only in that way can we intelligently decide whether it falls within the same genus as prostitution or debauchery.
>
> There are four fundamental forms of marriage: (1) monogamy; (2) polygyny, or one man with several wives; (3) polyandry, or one woman with several husbands; and (4) group marriage. The term "polygamy"

19. *Cleveland v. U.S.*, 329 U.S. 14 (1946).

> covers both polygyny and polyandry. Thus we are dealing here with polygyny, one of the basic forms of marriage. Historically, its use has far exceeded that of any other form. It was quite common among ancient civilizations and was referred to many times by writers of the Old Testament; even today it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place. To those beliefs and mores I subscribe, but that does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.
>
> The Court states that polygamy is "a notorious example of promiscuity." The important fact, however, is that, despite the differences that may exist between polygamy and monogamy, such differences do not place polygamy in the same category as prostitution and debauchery. When we use those terms we are speaking of acts of an entirely different nature, having no relation whatever to the various forms of marriage. It takes no elaboration here to point out that marriage, even when it occurs in a form of which we disapprove, is not to be compared with prostitution or debauchery or other immoralities of that character.
>
> * * *
>
> Hence I would reverse the judgments of conviction in these cases.[20]

Justice Murphy's awareness of anthropological commonplaces made the court's opinion seem crude and vindictive. He did not mean that polygyny should be tolerated, even in Utah, but that the remedy should be under bigamy statutes, as in *U.S. v. Reynolds*.[21] (Those were *state* statutes, however, and prosecution for bigamy had not been very successful in Mormon country, so perhaps that was why this case was brought under federal law.[22])

Viewed from a perspective of the 1990s, following the much-touted "sexual revolution," with "swingers'" directories widely available listing names and addresses for all kinds of kinky sexual conjunctions in all fifty states, the activities of recusant Mormons in setting up clandestine (but stable) plural households seems comparatively sedate, if not pedestrian. But *Reynolds* and *Cleveland* are still the law, and people seeking for religious reasons—however misguided—to pursue a polygynous form of marriage—as stable and responsible as monogamy used to be—

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20. Ibid., Murphy dissent.

21. 98 U.S. 145 (1878), *supra.*

22. For another case brought under the federal antikidnapping statute and argued the same day as *Cleveland*, see *Chatwin v. U.S.*, 326 U.S. 455 (1946), exonerating a recusant Mormon for marrying a retarded girl young enough to be his granddaughter on the ground that she had freely entered into the marriage relationship (which was not polygamous) and was thus not a victim of kidnapping. See discussion of this case at IIB6l.

are eligible for prosecution today as the most flagrant of "swingers" seem not to be (so long as they confine their activity within state lines).

3. The Rights of Conscience

James Madison, in drafting proposals for a Bill of Rights to be added to the federal Constitution in 1789, submitted these words:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.
>
> No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.[23]

This embryonic form of the First Amendment went through several revisions in the House and in the Senate. Efforts to regulate the states in these matters were eliminated early by states-righters in the Senate, and the references to "rights of conscience," though surfacing repeatedly, were eventually dropped, perhaps because thought to be covered by the "free exercise" of religion.

Madison seems to have thought the rights of conscience to be something distinct from, and in addition to, the other guarantees of what was to become the First Amendment, though he did not explain how or why. Writing in 1792 on "Property," he gave some inkling of his concern for the rights of conscience:

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which impartially secures to every man, whatever is his own.
>
> According to this standard of merit, the praise of affording a just security to property, should be sparingly bestowed on a government which, however, scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property.
>
> More sparingly should this praise be allowed to a government, where a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy. Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right.[24]

Calling conscience "the most sacred of all property" may be a useful corrective for materialistic overemphasis on tangibles at the expense of intangibles, but it does not greatly advance an understanding of what the rights of conscience are. At times

23. Stokes, A. P. , *Church and State in the United States* (New York: Harper & Bros., 1950), vol. I, p. 541.

24. Ibid., p. 551.

Madison seemed to use the term as synonymous with religious rights, at other times as supplementary to them. In his time it was not as clearly recognized that, while conscience in religious persons may be formed and expressed in religious terms, it can be nonreligious in its formation and expression in others. That is, religious persons do not have a monopoly on conscience. It is found also in persons who do not think along religious lines but may have a highly developed sense of moral and ethical insights and obligations.

Conscience is defined by the dictionary as "the internal recognition of the moral quality of one's motives and actions; the faculty or principle which pronounces upon the moral quality of one's actions or motives, approving the right and condemning the wrong."[25] As such, it is a property of individuals rather than of groups. Yet religious groups have a strong interest in the formation, protection, reinforcement and tutelage of conscience, since it represents the internalization by the individual of norms of right and wrong. Until they are thus internalized, they do not play a strong role in motivation, and the teachings of the religious group have not fully engaged the essential character of the individual.

Conscience is not simply or solely intellectual conclusions about right and wrong; it has an insistent, demanding, visceral quality about it that can drive a person to act against seeming self-interest, as when Martin Luther confronted the Diet of Worms in 1521 and announced to the Holy Roman Emperor and the assembled dignitaries of the empire who demanded recantation of his "heretical" views: "I cannot trust the decisions of church councils or of popes, for it is plain that they have not only erred but have contradicted each other. My conscience is thralled to the Word of God, and *it is neither safe nor honest to act against one's conscience*. God help me. Amen."[26]

The pangs of conscience have been known to drive remorseful persons to confess crimes of which they were not humanly suspected, while the conviction of a clear conscience may sustain one through undeserved condemnation, punishment and obloquy. A force so powerful can be of great value to society, for it can render its possessor to a large extent "self-policing," that is, a person who does not need to be watched constantly as a potential malefactor. In fact, society relies, and must rely, very heavily upon the self-policing quality of conscience to keep most of the populace honest and peaceable most of the time. This is a quality beyond the merely prudential—typified by the facetious question to an apprehended shoplifter: "Didn't your conscience tell you someone was watching?" It refers to the "still, small voice" that watches whether anyone else is watching or not. Therefore, society has a substantial interest in honoring the dictates of conscience rather than overriding them, since conscience often represents the best aspirations of the human race and should not needlessly be violated or disowned. In addition, a person compelled to act against conscience is at best a weak, refractory and unreliable instrument.

Conscience has been recognized by religious groups as having independent validity and worth. It is mentioned once in the Old Testament (I Sam. 25:31) and twenty-

25. *Oxford Universal English Dictionary* (Oxford: Oxford Univ. Press, 1955), p. 373.

26. Garrett, Mitchell B., *European History 1500-1815* (New York: American Book Co., 1940), p. 123, emphasis added.

seven times in the New (though not at all in the Gospels). It is the word regularly used to translate *syneidesis*, from *syn-eido*, to see together, to see plainly, equivalent to the Latin root of "conscience," *con-scire*, to know together.

It is used in the New Testament to refer to a taken-for-granted faculty like "mind" or "heart." Its testimony is appealed to as a guarantor of truth, innocence, good will or virtue;[27] it is a faculty enabling even Gentiles to discern the right from the wrong although they do not have the "law" given to the Jews;[28] all must be subordinated to governing authority "not only to avoid God's wrath, but also for the sake of conscience";[29] the person with a "strong" conscience must not lead astray one with a "weak" conscience by eating food offered to idols; he should abstain "for conscience sake—I mean *his* conscience, not yours";[30] "by rejecting conscience, certain persons have made shipwreck of their faith";[31] faith and sacrament can cleanse the conscience;[32] though conscience can be "seared"[33] or "corrupted."[34]

Vatican Council II recognized the important role of conscience in its "Declaration on Religious Freedom," 1965:

> [T]he right to religious freedom has its foundation in the very dignity of the human person.... This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed. Thus it is to become a civil right.
>
> * * *
>
> [M]an perceives and acknowledges the imperative of the divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience faithfully, in order that he may come to God, for whom he was created. It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious.[35]

There are several defects or limitations of conscience that complicate the issue: (1) the erring or corrupted conscience; (2) the *malafide*, insincere or dissembling conscience; and (3) the conscience, which though not erring or insincere, is so at variance with law or generally perceived social good that it must be restrained.

In the eyes of Charles V, the Holy Roman Emperor, Martin Luther must have seemed to fall into the first category, for the emperor announced:

> What my forefathers established at the Council of Constance and other councils, it is my privilege to uphold. A single monk, *led astray by private*

27. Acts 23:1, 24:16; Rom. 9:1; II Cor. 1:12, 4:2, 5:11; I Tim. 1:5; II Tim. 1:3; Heb. 13:18.
28. Rom. 2:15.
29. Rom. 13:5, RSV.
30. I Cor. 8:7, 8:10, 8:12, 10:25, 10:27, 10:29, RSV.
31. I Tim. 1:19, RSV.
32. Heb. 9:9, 10:22; I Pet. 3:16, 3:21.
33. I Tim. 4:2.
34. Titus 1:15.
35. Abbott, Walter S., S.J., ed., *The Documents of Vatican II* (New York: Herder & Herder, 1966), pp. 679, 681.

> *judgment*, has set himself against the faith held by all Christians for a thousand years or more, and impudently concludes that all Christians up to now have erred. I have therefore resolved to stake upon this cause all my dominions, my friends, my body and my blood, my life and soul.[36]

This assertion—one of the more forthright confrontations in the history of the relations between church and state—accused Martin Luther of being mistaken—"led astray"—but not of being insincere.

Throughout much of Christian history, the "erring" conscience was held to have *no* rights, and error, of course, was defined and identified by the church, which possessed the "truth" and could thus "objectively" distinguish it from error. Only recently has the "erring" conscience been held to have some rights (see reference to Vatican II, above). And civil society is not in a position even to pretend to be able to distinguish the erring conscience from the nonerring one, since the ultimate recourse for truth or error in the canons of conscience is ethical, theological or metaphysical: it is a matter of "opinion" on which government, at least in the United States, cannot enforce orthodoxy.[37]

Only slightly better is civil society able to discern the insincere conscience on the basis of past words or deeds inconsistent with it. And even this "internal" evidence of inconsistency turns on the question of time, since conscience may have "crystallized" into firm conviction since the earlier words or deeds that seem inconsistent with it. So civil society is usually not well equipped to discern the validity or invalidity of conscience, but should make the rebuttable presumption that all claims of conscience are valid and should be respected except where they come into irreconcilable conflict with urgent necessities of public health or safety that can be served in no other way.

4. How Should Conscience Be Accommodated?

Once the claims of conscience are recognized as being entitled to some recognition in law, how are they to be treated? One of the most searching and edifying treatments of this subject is to be found in the work of Professor Michael W. McConnell of the University of Chicago School of Law, particularly his impressive research on the understanding of that subject by the Founders who wrote the fundamental law on the subject—the Constitution and its First Amendment. His magisterial article, "The Origins and Historical Understanding of Free Exercise of Religion," appeared in print in the *Harvard Law Review* just after the Supreme Court of the United States had made a historic reversal in the "settled" law of the Free Exercise Clause. By a vote of 5-4, in 1990 it reconstrued its own precedents to vitiate the then-prevailing understanding of that clause since the Warren Court in 1963 announced that governmental burdens on the practice of religion must be justified by government's showing a "compelling state interest" that could be served in no less intrusive way.[38]

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36. Mitchell, *supra, loc. cit.*

37. See *West Virginia v. Barnette*, 319 U.S. 624 (1943), the second "flag salute" case, discussed at § A6b below.

38. *Sherbert v. Verner*, 374 U.S. 398 (1963).

In the Oregon peyote case, *Employment Division of Oregon v. Smith*, Justice Antonin Scalia announced that claims of free exercise of religion did not justify disobedience of neutral laws of general application unless those claims were combined with other claims protected by the Bill of Rights, such as freedom of speech.[39] An impressive roster of constitutional experts and advocates of religious freedom immediately petitioned the Supreme Court to reconsider this fateful decision, attaching to their petition pageproofs of McConnell's article, which had not yet appeared in the *Harvard Law Review*, as providing evidence of the accommodation of Free Exercise claims envisioned by the Founders. The court did not choose to reconsider its holding in *Smith*, but Congress, in the Religious Freedom Restoration Act of 1993, statutorily restored the compelling state interest test.

In this see-saw struggle over the force and scope of the Free Exercise Clause was played out a tension between two understandings of how the claims of conscience should be accommodated. One was the view expressed by John Locke, the English political theorist, as explained by McConnell.

> [T]he government's perception of public need defines the boundaries of freedom of conscience.... When individual conscience conflicts with the governmental policy, the government will always prevail and the individual will always be forced to submit or suffer the punishment.
>
> This understanding of religious toleration expressly precludes free exercise exemptions. The rights of religious exercise, according to Locke, are simply rights of nondiscrimination. "Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses."... They are not entitled, however, to dispensations or exceptions.[40]

Locke was followed in this respect by Thomas Jefferson, who advocated religious freedom as a means of easing religious enthusiasm and advancing the day when everyone would embrace a rational and restrained form of religion such as Unitarianism.[41] The government would then be relieved of the problems of sectarian strife and religious pressures.

> Jefferson's understanding of the scope and rationale of free exercise rights, however, was more limited even than Locke's. Like Locke, he based his advocacy of freedom of religion on the judgment that religion, properly confined, can do no harm.... On this rationale, Jefferson espoused a strict distinction between belief, which should be protected from governmental control, and conduct, which should not.... It was in reliance

39. 494 U.S. 872 (1990).

40. McConnell, M., "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harv. L. Rev.*, 1410, 1434-1435 (May 1990), quoting Locke, J., *A Letter Concerning Toleration*, 6 *The Works of John Locke* (London, 1823), 34.

41. See quotation from Jefferson by McConnell to this effect, ibid., p. 1450, from Letter from Thos. Jefferson to Benj. Waterhouse (1822).

> on Jefferson that the Supreme Court later held that there can be no free exercise right to exemption from a generally applicable law when such laws are directed at actions and not opinions.[42]
>
> Jefferson's advocacy of a belief-action distinction placed him at least a century behind the argument for full freedom of religious exercise in America. William Penn wrote in 1670 that "by Liberty of Conscience, we understand not only a meer (sic) Liberty of the Mind, in believing or disbelieving... but the exercise of ourselves in a visible way of worship."[43] Historian Thomas Curry recounts the 1651 flogging of Obediah Holmes, a Baptist, for holding a religious meeting in Lynn, Massachusetts: "To the familiar argument that he was sentenced not for conscience but for practice, [his colleague, Dr. John] Clark replied that there could be no such thing as freedom of conscience without freedom to act."[44] It is unlikely that many Americans would have disputed that position by 1789.... Thus, while Jefferson was one of the most advanced advocates of disestablishment, his position on free exercise was extraordinarily restrictive for his day.[45]

In contrast to the Locke-Jefferson view that religious liberty did not entail exemption from laws that bound everyone else, the Penn-Clark view found expression in another of the Founders, James Madison.

> Although often linked with Jefferson's "Enlightenment-deist-rationality" stance toward religious freedom, Madison's views on the religion-state question should be distinguished from those of his fellow Virginian, and hence from Locke. To begin with, Madison possessed a far more sympathetic attitude toward religion than did Jefferson.... None of Madison's writings displayed the disdain Jefferson expressed for the more intense manifestations of religious spirit. Indeed, the sight of "5 or 6 well meaning men"—Baptist preachers imprisoned in Culpepper, [*sic*] Virginia "for publishing their religious Sentiments which in the main are very orthodox"—sparked his concern for religious freedom.... This formative experience exemplifies the marked difference between Madison and Jefferson in their attitudes towards religious liberty. In all Jefferson's writings about liberty of conscience, he never once showed concern for those who wish to practice an active faith; to Jefferson, unlike Madison, liberty of conscience meant largely freedom from sectarian religion, rather than freedom to practice religion in whatever form one chooses.
>
> Consistent with this more affirmative stance toward religion, Madison advocated a jurisdictional division between religion and government based on the demands of religion rather than solely on the interests of

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42. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878), cited in *Oregon v. Smith, supra.*

43. Quoting Penn, W., *The Great Case of Liberty of Conscience*, in 1 *A Collection of the Works of William Penn* (London, 1726, photo-reprint 1974), p. 443.

44. Quoting Curry, Thos., *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford Univ. Press, 1986), p. 15.

45. McConnell, *supra,* pp. 1450-1452.

society. In his "Memorial and Remonstrance," he wrote (cited by McConnell, *supra*):

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.... It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.

Moreover, Madison claimed that this duty to the Creator is "precedent both in order of time and degree of obligation, to the claims of Civil Society," and "therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society."[46]

As McConnell commented further:

> This striking passage illuminates the radical foundation of Madison's writings on religious liberty. While it does not prove that Madison supported free exercise exemptions, it suggests an approach toward religious liberty consonant with them. If the scope of religious liberty is defined by religious duty..., and if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable. This is the central point on which Madison differs from Locke, Jefferson, and other Enlightenment advocates of religious freedom.[47]

That is the precise point on which the Supreme Court split in 1990, when the slim majority of five abandoned the *Sherbert* "compelling state interest" test for the *Smith* formula: claims of religious exercise do not exempt from neutral laws of general application that do not target religion or religious practice. It is also the difference between "formal neutrality" of government toward religion and "substantive neutrality," as characterized by Professor Douglas Laycock. The former consists of recognition of an *equality* interest—treating religion like everything else, no better, no worse (as espoused by Locke and Jefferson)—while the latter recognizes a *liberty* interest (espoused by Penn and Madison) in certain special qualities of religion that are uniquely singled out by name for protection in the First Amendment. Such protection may sometimes seem to advantage religious claims (as in exceptions or exemptions) and sometimes to disadvantage them (as in being disqualified for government financial support).[48]

The Supreme Court has swung back and forth between these poles, following Jefferson in *Reynolds* (1879) and subsequent decisions until adopting a Madisonian stance in *Sherbert* (1963) and *Wisconsin v. Yoder* (1972),[49] which in turn gave way to

46. Ibid.

47. McConnell, *supra*, pp. 1452-1454.

48. See Laycock, D., "Formal, Substantive, and Disaggregated Neutrality Toward Religion," 39 *DePaul L. Rev.* 993 (1990).

49. 406 U.S. 205 (1972) (state may not compel Amish to send their children to public high school beyond eighth grade over religious objections).

the Jeffersonian view again in *Smith* (1990), followed by a reassertion of the Madisonian position by Congress in the Religious Freedom Restoration Act of 1993. That statutory position, in turn, is being challenged as unconstitutionally beyond the powers of Congress to enact, and the Supreme Court will eventually have an opportunity to determine that claim.

McConnell, however, has gone far to demonstrate that in and before the time of the Founders it was increasingly common for claims of religious objection to be resolved by simply exempting the objectors from laws that applied to others. That occurred with respect to the objection by Quakers and others to swearing oaths in legal proceedings; they were permitted instead merely to *affirm*. Likewise, Quakers, Mennonites and Moravians were exempted from the requirement of serving in the militia, though that meant someone else might have to serve in their stead. Baptists as well as Quakers and others were regularly exempted from the legal assessments for support of ministers of established churches in those colonies that had them. Special exemptions were also available to Quakers and Jews with respect to marriage ceremonies, since they did not have ordained clergy licensed to solemnize matrimony. Quakers were excused as well from the prohibition on wearing hats in court.

> The history of oath requirements, military conscription, religious assessments, and other sources of conflict between religious convictions and general legislation demonstrates that religion-specific exemptions were familiar and accepted means of accommodating these conflicts. Rather than make oaths, military service, and tithes voluntary for everyone, which would undercut important public programs and objectives, and rather than coerce the consciences of otherwise loyal and law-abiding citizens who were bound by religious duty not to comply, the colonies and [original] states wrote special exemptions into their laws. Lest the exemptions be extended too broadly, they confined the exemptions to denominations or categories known or proven to be "conscientiously" opposed. This aspect of the historical practice parallels in its purposes the requirement of "sincerity" under current law....[50]

One important question about religion-based exemptions is whether they should be extended to nonreligious claimants to the rights of "conscience," as the Supreme Court extended the statutory provision for exemption of conscientious objectors to military service to those whose objections did not arise from "religious training or belief," as will be seen in the next section. That question is connected with the inquiry whether "rights of conscience" are the same as "free exercise of religion." Both terms were used in the process of drafting what is now the First Amendment, and in Madison's usage then they sometimes seemed interchangeable. In the end, the protection for "rights of conscience" was dropped, while that for "free exercise of religion" remained.

> The reference to conscience could have been dropped because it was redundant, or it could have been dropped because the framers chose to

50. McConnell, *supra*, p. 1472.

confine the protections of the free exercise clause to religion.

The "redundancy" explanation can be supported by the absence of any recorded speech or discussion [in the First Congress] of differences between the terms. The drafters alternated between the two formulations without apparent pattern, and participants in the debate later referred to the free exercise clause as a "liberty of conscience" provision without apparent awareness of the difference in denotation.

Still, the theory that the phrase "free exercise of religion" was deliberately used in order to exclude nonreligious conscience seems more likely, since the different drafts called attention to the question. If no distinction was intended, it would have been more natural to stick with a single formulation and to concentrate on the wording of the contested establishment clause. This theory also derives support from Samuel Huntington's comment that he hoped "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[51]

* * *

In any event, it does not matter which explanation—redundancy or intentionality—is correct, for under either explanation, nonreligious "conscience" is not included within the free exercise clause. If "the rights of conscience" were dropped because they were redundant, "conscience" must have been used in its narrow, religious, sense. If the omission was a substantive change, then the framers deliberately confined the clause to religious claims. Neither explanation supports the view that free exercise exemptions must be extended to secular moral conflicts.

McConnell went on to describe the critical changes in how Americans of different historical periods understood conflicts between the claims of religion and the government:

The textual insistence on the special status of "religion" is, moreover, rooted in the prevailing understandings, both religious and philosophical, of the difference between religious faith and other forms of human judgment. Not until the second third of the nineteenth century did the notion that the opinions of individuals have precedence over the decisions of civil society gain currency in American thought. In 1789, most would have agreed with Locke that "the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation."[52]

Religious convictions were of a different order. Conflicts arising from religious convictions were conceived not as a clash between the judgment of the individual and the state, but as a conflict between earthly and spiritual sovereigns. The believer was not seen as the instigator of the conflict; the believer was simply caught between the inconsistent

51. Ibid., p. 1495, quoting 1 *Annals of Congress* 758 (Aug. 15, 1789).
52. Ibid., quoting Locke, *A Letter Concerning Toleration*, *supra*, p. 43.

> demands of two rightful authorities, through no fault of his own....
> Not only were the spiritual and earthly authorities envisioned as independent, but in the nature of things the spiritual authorities had a superior claim. "[O]bedience is due in the first place to God, and afterwards to the laws," according to Locke.[53] The American conception of religious liberty was accordingly defended in those terms. The key passage in Madison's "Memorial and Remonstrance" reads as follows:
>
> > Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

McConnell continued his analysis of these important historical differences as follows:

> Far from being based on the "respect for the person as an independent source of value," the free exercise of religion is set apart from mere exercise of human judgment by the fact that the "source of value" is prior and superior to both the individual and the civil society. The freedom of religion is unalienable because it is a duty to God and not a privilege of the individual. The free exercise clause accords a special, protected status to religious conscience, not because religious judgments are better, truer, or more likely to be moral than nonreligious judgments, but because the obligations entailed by religion transcend the individual and are outside the individual's control.
>
> It is important to remember that the framers and ratifiers of the first amendment found it conceivable that a God—that is, a universal and transcendent authority beyond human judgment—might exist. If God might exist, then it is not arbitrary to hold that His will is superior to the judgments of individuals or of civil society. Much of the criticism of a special deference to sincere religious convictions arises from the assumption that such convictions are *necessarily* mere subcategories of personal moral judgments. This amounts to a denial of the possibility of a God (or at least of a God whose will is made manifest to humans). But while this skeptical position is tenable as a theoretical or philosophical proposition, it is a peculiar belief to project upon the framers and ratifiers of the first amendment, for whom belief in the existence of God was natural and nearly universal. It is an anachronism, therefore, to view the free exercise clause as a product of modern secular individualism. From the perspective of the advocates of religious freedom in 1789, the protection of private judgment (secular "conscience") fundamentally

53. Ibid.

differs from the protection of free exercise of religion.[54]

That is a useful framework for understanding the religious, legal and constitutional assumptions with which the conundrums of conscience are approached in the next sections of this volume.

5. Conscientious Objection to Military Service

When the Bill of Rights was being drafted, James Madison proposed as part of what became the Second Amendment that "No person religiously scrupulous shall be compelled to bear arms," but that idea was not accepted by the majority, or at least it did not appear in the final text, though there is some indication that this omission may have been inadvertent.[55] This was a question familiar to the generation of the Founders, since Quakers, Mennonites, Dunkards and Schwenkfelders of Pennsylvania were averse for reasons of conscience to bearing arms, and Parliament had excused the Germans of Pennsylvania in 1749 from the obligation to bear arms in the Indian wars. The Constitution of New York, adopted in 1821, provided with respect to service in the militia: "But all such inhabitants of this State, of any religious denomination whatever, as from scruples of conscience may be averse to bearing arms, shall be excused therefrom by paying to the State an equivalent in money."[56] A similar device was used during the Civil War by both sides. The Confederacy (October 11, 1862) exempted Friends, Nazarenes, Dunkards and Mennonites on condition that they pay $500, provide a substitute or serve in hospitals. Quakers were exempted by the first conscription act in the North (March 3, 1863), and the principle was expanded to others when that act was extended (February 24, 1864):

> Members of religious organizations who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered non-combatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of $300 to such person as the Secretary of War shall designate...to be applied to the benefit of sick and wounded soldiers: Provided that no person shall be entitled to the benefit of... this section unless his deportment has been uniformly consistent with such declaration.[57]

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54. McConnell, *supra*, pp. 1497-1498.

55. Tribe noted in *American Constitutional Law*, 2d ed. (1988), § 14-13, p. 1266:

> Affirming a constitutional right of conscientious objection [to military service] would be especially appropriate since such a right was only *mysteriously* left out of the Bill of Rights. The Committee of the Whole defeated an attempt to strike from the Bill of Rights a clause exempting religious conscientious objectors from [military] service. Inexplicably, the clause was not included in the Bill of Rights finally approved. 1 Annals of Cong. 749-751 (1789) (emphasis added).

56. Stokes, A.P., *Church and State in the United States*, *supra*, vol. III, p. 265.

57. Ibid., p. 266. Note the appeal to consistency in the final proviso.

During World War I, members of recognized pacifist religious denominations were drafted but were permitted to choose noncombatant service; some were furloughed for alternate service outside the armed forces. Only 1,300 chose the first option, about the same number (1,299), the latter. About 450 were court-martialed and imprisoned (mostly of German birth or descent), and 940 were still in (boot) camp at the time of the armistice, for a total of 3,989.[58]

During the war years there were several challenges to the constitutionality of the Draft Act, and one ground for such challenge was the exemption of conscientious objectors and of ministers of religion and theological students, which was alleged to be an establishment of religion. This contention was rejected by the U.S. Supreme Court in 1918 in a unanimous opinion written by Chief Justice Edward White, which dismissed the First Amendment challenge with one of the more casual *ipse dixit*s of American law:

> We pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the Act...because we think its unsoundness is too apparent to require us to do more.[59]

This decision, *Arver v. U.S.*, upholding the Selective Draft Act and rejecting the establishment challenge, remains the position of the law, but it may be questioned whether *Arver* is consistent with more recent decisions such as *Texas Monthly v. Bullock*[60] (state may not exempt religious publications only from taxation) or *Thornton v. Caldor*[61] (state may not provide automatic accommodation for religious sabbatarians at expense of other employees). It seems unlikely, however, that that the court would upset a long-standing statutory provision of this kind, especially after it was broadened by *Seeger* and *Welsh*[62] (exemption from military service must include nontheistic objectors). Litigation has focused instead on whether persons conscientiously refusing to bear arms in defense of the United States could become citizens, and on who could be exempted from the draft for reasons of conscience and on what basis.

a. *U.S. v. Schwimmer* (1929). The Naturalization Act of 1906 required anyone applying for citizenship to take an oath to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."[63] Soon after World War I the head of the Naturalization Service, without specific congressional authorization, added to the questions asked of

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58. *Encyclopedia Americana*, Vol. VII, p. 538. When the manuscript was reviewed posthumously for publication, reviewers were unable to determine the year for this citation.

59. *Arver v. U.S.* [Selective Draft Law Cases], 245 U.S. 366, 389 (1918).

60. 489 U.S. 1 (1989), discussed at VC6b(4).

61. 472 U.S. 703 (1985), discussed at § 7h below.

62. *U.S. v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. U.S.*, 398 U.S. 333 (1970), discussed at §§ 5h and j, respectively.

63. Act of 29 June, 1906, ch. 3592, 34 Stat. 596 at 598.

all applicants for naturalization the following question: "If necessary, are you willing to take up arms in defense of this country?"

In 1927, a Hungarian woman named Rosika Schwimmer, a pacifist lecturer and writer, was asked that question when she applied for naturalization as a citizen of the United States. Although she was willing to take the more generalized oath, she refused to answer this question affirmatively, stating that she was an uncompromising pacifist and would not personally take up arms, regardless of whether other women were compelled to do so—an eventuality that had not then arisen. She was denied citizenship, and she challenged that denial in the circuit court of appeals, which reversed the district court and ordered her naturalized. The government appealed to the U.S. Supreme Court.

Justice Pierce Butler, writing for the court, announced that applicants for citizenship bear the burden of satisfying the court that they have the requisite qualifications for citizenship, among which is "the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises." The applicant had indicated not only an unwillingness to do so but an intention to speak and write in support of pacifism in such a way as might encourage others to refuse to bear arms in defense of the country.

> The influence of conscientious objectors against the use of military force in defense of the principles of our government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve, does not lessen their purpose or power to influence others....
>
> The fact that she is an uncompromising pacifist with no sense of nationalism but only a cosmic sense of belonging to the human family64 justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws. And her testimony clearly suggests that she is disposed to exert her powers to influence others to such opposition.
>
> A pacifist in the general sense of the word is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Constitution and policy of our government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization.[65]

Not content to leave it at that, Justice Butler added a gratuitous and pejorative characterization of pacifists and conscientious objectors that at best would apply only to a tiny minority, most of whom were imprisoned, not because of conscience,

64. Though not marked with quotation marks, these terms had been used by the applicant in her testimony and were quoted earlier in the opinion.

65. *U.S. v Schwimmer*, 279 U.S. 644 (1929).

but because they refused on account of German ancestry to fight against Germany in World War I.

> It is shown by official records and everywhere well known that during the recent war there were found among those who described themselves as pacifists and conscientious objectors many citizens—though happily a minute part of all—who were unwilling to bear arms in that crisis and who refused to obey the laws of the United States and the lawful commands of its officers and encouraged such disobedience in others. Local boards found it necessary to issue a great number of noncombatant certificates, and several thousand who were called to camp made claim because of conscience for exemption from any form of military service. Several hundred were convicted and sentenced to imprisonment for offenses involving disobedience, desertion, propaganda and sedition. It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence by the Naturalization Act.

This tendentious harangue was probably typical of the viewpoint prevailing in the country during and after World War I with respect to conscientious objectors, and it resulted in this instance in reversal of the circuit court of appeals and affirmation of the district court's denial of Madame Schwimmer's application.

Three justices dissented. One of them, the redoubtable Justice Oliver Wendell Holmes, wrote a memorable statement recognizing the honorable history of pacifism and conscientious objection to military service, in which he was joined by Justice Louis Brandeis. (Justice Edward Sanford simply stated that he would uphold the circuit court.)

> The applicant seems to be a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States.... [Her views that are thought to disqualify her] are an extreme opinion in favor of pacifism and a statement that she would not bear arms to support the Constitution. So far as the adequacy of her oath is concerned, I can hardly see how that is affected by her statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to.... Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be. Her particular improvement looking to the abolition of war seems to me not materially different in its bearing on this case from a wish to establish cabinet government as in England, or a single house, or one term of seven years for the President. To touch a more burning question, only a judge mad with partisanship would exclude because the applicant thought that the 18th Amendment [barring "intoxicating liquors"] should be repealed....
>
> She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last

> resort, and, even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace. The notion that the applicant's optimistic anticipations would make her a worse citizen is sufficiently answered by her examination, which seems to me a better argument for her admission than any that I can offer. Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as life within, this country. And, recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief, and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.

The *Schwimmer* case does not represent a salient role for religion in the conscientious objection to bearing arms, despite Justice Holmes' parting shot or a reference by the applicant that "My `cosmic consciousness of belonging to the human family' is shared by all those who believe that all human beings are children of God," since she did not state that that was her own belief. But the next case dealt with a more clearly religious conscience.

b. *U.S. v. Macintosh* (1931). Douglas C. Macintosh was a Canadian, a professor at the Yale Divinity School, who sought naturalization as a U.S. citizen. He was denied because he refused to state in advance that he would fight in any war in which the United States was involved. He said he would bear arms only if he felt the war was morally justifiable, since he put allegiance to God above allegiance to any government. In his brief in the U.S. Supreme Court the argument was advanced that citizens enjoy a right of conscientious objection that was being denied to those seeking naturalization: "That is the manifest result of the fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so."[66]

Justice George Sutherland, writing for the court, rejected this claim.

> This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him.... The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers..., which

66. Quotation from respondent's brief.

> include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to this objections or his views in respect of the justice or morality of the particular war or of war in general....
>
> The applicant for naturalization here is unwilling to become a citizen with this understanding. He is unwilling to leave the question of his future military service to the wisdom of Congress where it belongs, and where every native-born or admitted citizen is obliged to leave it. In effect, he offers to take the oath of allegiance only with the qualification that the question whether the war is necessary or morally justified must, so far as his support is concerned, be conclusively determined by reference to his opinion.
>
> When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident...that he means to make *his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hand. We are a Christian people according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a nation with the duty to survive; a nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well as those made for war as those made for peace, are not inconsistent with the will of God.
>
> The applicant here rejects that view.... [He] discloses a present and fixed purpose to refuse to give his moral or armed support to any future war in which the country may be actually engaged, if, in his opinion, the war is not morally justified, the opinion of the nation as expressed by Congress to the contrary notwithstanding....
>
> It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by law, or forego the privilege of citizenship. There is no middle choice. If one qualification of the oath be allowed, the door is opened for others with utter confusion as the probable result.[67]

Thus the court seemed to say that individual conscience must yield to the collective consciences of the majority, which would not ordain anything "inconsistent with the will of God," directly contradicting Professor Macintosh's explanation that "he recognized the principle of the submission of the individual citizen to the opinion of the majority in a democratic country; but he did not believe in having his own moral problems solved for him by the majority." Professor Macintosh, whose writings on ethical issues were read and respected by seminary students and other thoughtful Christians throughout the country, thus posed in his own person and with well-chosen words the immemorial conflict between the individual conscience and the will of the majority expressed in the laws, and—on this

67. *U.S. v. Macintosh*, 283 U.S. 605 (1931), emphasis in original.

occasion—the latter prevailed.

But the case elicited a distinguished dissent, written by Chief Justice Charles Evans Hughes and joined in by Justices Holmes, Brandeis and Harlan Fiske Stone, which put a much different light on the issue. First the chief justice cleared away most of what had exercised the majority:

> The question is not whether naturalization is a privilege to be granted or withheld. That it is such a privilege is undisputed. Nor, whether Congress has the power to fix the conditions upon which the privilege is granted. That power is assumed. Nor, whether the Congress may in its discretion compel service in the army in time of war or punish the refusal to serve. That power is not here in dispute. Nor is the question one of the authority of Congress to exact a promise to bear arms as a condition on its grant of naturalization. That authority, for the present purpose, may also be assumed.
>
> The question before the court is the narrower one whether the Congress has exacted such a promise. That the Congress has not made such an express requirement is apparent. The question is whether that exaction is to be implied from certain general words which do not it seems to me, either literally or historically, demand the implication. I think that the requirement should not be implied, because such a construction is directly opposed to the spirit of our institutions and to the historic practice of the Congress. It must be conceded that departmental zeal may not be permitted to outrun the authority conferred by statute. If such a promise is to be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivocal terms, and we should not, by judicial decision, attempt to perform what, as I see it, is a legislative function.

He then reviewed the requirements for naturalization specified in the statute and concluded that the applicant, Douglas Clyde Macintosh, met them all.

> Putting aside these specific requirements as fully satisfied, we come to the general conditions imposed by the statute. We find one as to good behavior during the specified period of residence preceding application. No applicant could appear to be more exemplary than Macintosh. A Canadian by birth, he first came to the United States as a graduate student at the University of Chicago, and in 1907 he was ordained as a Baptist minister. In 1909 he began to teach in Yale University and is now a member of the faculty of the Divinity School, Chaplain of the Yale Graduate School, and Dwight Professor of Theology. After the outbreak of the Great War, he voluntarily sought appointment as a chaplain with the Canadian Army and as such saw service at the front. Returning to this country, he made public addresses in 1917 in support of the Allies. In 1918, he went again to France where he had charge of an American Y.M.C.A. hut at the front until the armistice, when he resumed his duties at Yale University. It seems to me that the applicant has shown himself in his behavior and character to be highly desirable as a citizen and, if such a man is to be excluded from naturalization, I think the disqualification

> should be found in unambiguous terms and not in an implication which shuts him out and gives admission to a host far less worthy.

The chief justice noted that the oath in question, as prescribed by statute, is the same as the general oath of office taken by officers of the United States at all levels, and contains the provision, "that I will support and defend the Constitution of the United States against all enemies foreign and domestic," and so on.

> When we consider the history of the struggle for religious liberty, the large number of citizens of our country from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God, I find it impossible to believe that such persons are to be deemed disqualified for public office in this country because of the requirements of the oath which must be taken before they enter upon their duties.... There are other and most important methods of defense, even in time of war, apart from the bearing of arms. We have but to consider the defense given to our country in the late war, both in industry and in the field, by workers of all sorts, by engineers, nurses, doctors and chaplains, to realize that there is opportunity even at such a time for essential service in the activities of defense which do not require the overriding of such religious scruples. I think that the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience. While it has always been recognized that the supreme power of government may be exerted and disobedience to its commands may be punished, we know that with many of our worthy citizens it would be a most heart-searching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty. Many of their most honored exemplars in the past have been willing to suffer imprisonment or even death rather than to make such a promise. And we also know, in particular, that a promise to engage in war by bearing arms, or thus *to engage in a war believed to be unjust*, would be contrary to the tenets of religious groups among our citizens who are of patriotic purpose and exemplary conduct. To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of Congress but as repugnant to the fundamental principles of representative government.[68]

The reference to "a war believed to be unjust" foreshadowed an issue not present in the instant case but central to later controversies.[69]

> [T]he long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such

68. Ibid., Hughes dissent, emphasis added.

69. See *Gillette v. U.S.* and *Negre v. Larsen*, 401 U.S. 437 (1971), discussed at § 5k below.

service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state constitutions, and of acts of Congress....

Much has been said of the paramount duty to the state, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the state exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the state, the latter is supreme within its sphere, and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation....[70] One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience.[71] There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms. It would require strong evidence that the Congress intended a reversal of its policy in prescribing the general terms of the naturalization oath. I find no such evidence.[72]

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70. Emphasis added. These words were the basis for an amendment in the Selective Service Act of 1948 defining "religious training and belief" as the basis for exemption from military service for conscientious objectors. See § g below.

71. Emphasis added. These words—and those following—express a recognition of an important—even if utilitarian—rationale for exemption of conscientious objectors of many kinds from laws they find repugnant.

72. *U.S. v Macintosh, supra,* Hughes dissent.

The contrast between this spacious, humane and wise perspective and that of the wooden majority opinion is striking. It is a pity that one more member of the court was not drawn to this view rather than the other to prevent a miscarriage of justice in which the court judged itself more clearly than it did Professor Macintosh. The denial of citizenship to him, though ratified by the highest court in the land, he could wear as a badge of distinction because of the grounds on which it was decided. But the views of Hughes, Holmes, Brandeis and Stone were to prove more influential than the immediate case suggested.

c. *United States v. Bland* (1931). On the same day that it announced its decision in *Macintosh*, the court also announced a similar decision in a similar case, *U.S. v. Bland*,[73] denying citizenship to a Canadian woman who wrote into the oath of allegiance—"to defend the Constitution and laws of the United States against all enemies"—the interpolation "as far as my conscience as a Christian will allow." The same majority that had decided *Macintosh* reached the same conclusion in *Bland*: that applicants for citizenship are not free to modify the oath of allegiance prescribed by statute, and for the court to countenance such a modification would be "to amend the act and thereby usurp the power of legislation vested in another department of the government." (This was baldly asserted although the "statute" made no such requirement.)

Chief Justice Hughes again dissented, joined by Justices Holmes, Brandeis and Stone:

> The petitioner is a nurse who spent nine months in the service of our government in France, nursing United States soldiers and aiding in psychiatric work. She has religious scruples against bearing arms. I think that it sufficiently appears that her unwillingness to take the oath was merely because of the interpretation that had been placed upon it as amounting to a promise that she would bear arms despite her religious convictions. It was the opinion of the Circuit Court of Appeals that the appellant may properly take the oath according to its true significance and should be permitted to take it.... I think that the judgment below should be affirmed.[74]

d. *Hamilton v. Board of Regents* (1934). Next in this well-known line of cases by which the court struggled toward a fuller understanding of religious liberty and the rights of conscience was a challenge to the requirement of a state university that all students take a course in military science. Several students, who were members of the Methodist Church and sons of ministers of that church, enrolled at the University of California but refused to take the courses in the Reserve Officers Training Corps (ROTC) required by the State of California of all male students at the state university. They had petitioned the university and the State Board of Regents for exemption from this requirement and were denied. When they refused to take the military courses, they were suspended from the university, but with leave to apply

73. 283 U.S. 636 (1931).

74. *Bland, supra,* Hughes dissent.

for readmission whenever they might be willing to abide by this requirement. The students were unable to obtain equivalent education elsewhere in the state at comparable cost and so sued the Board of Regents.

The Supreme Court of the United States did not look favorably upon their suit. In an opinion written by Justice Pierce Butler (author of *U.S. v. Schwimmer*), the court viewed the case as follows:

> [A]ppellant's contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of "liberty" confers the right to be students in the state university free from obligation to take military training as one of the conditions of attendance.
>
> Viewed in the light of our decisions that proposition must at once be put aside as untenable.[75]

After reviewing *Schwimmer*, *Macintosh* and other decisions,[76] the court concluded:

> California has not drafted or called them to attend the university. They are seeking education offered by the state and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education. Plainly there is no ground for the contention that the regents' order... transgresses any constitutional right asserted by these appellants....

Justice Benjamin Cardozo added a brief concurring opinion, joined by Justices Brandeis and Stone, containing the significant assertion that "the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states."[77]

> Accepting that premise, I cannot find in the [Regents'] ordinance an obstruction by the state to "the free exercise" of religion as the phrase was understood by the founders of the nation, and by the generations that have followed....
>
> Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. Instruction in military science, unaccompanied here by any pledge of military service is not an interference by the state with the free exercise of religion....
>
> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war...or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so

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75. *Hamilton v. Board of Regents of the University of California*, 293 U.S. 245 (1934).

76. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), upholding a state compulsory vaccination law, discussed at § C2b below; and *University of Maryland v. Coale*, 165 Md. 224 (1933), refusal to take military training at state university, appeal dismissed for want of a substantial federal question.

77. *Hamilton, supra,* Cardozo concurrence. See discussion of the "incorporation" of the First Amendment in the Due Process Clause of the Fourteenth to make it applicable to the states, at IIA2a.

> exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle— which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

None of the dissenters in *Macintosh*—Hughes, Brandeis or Stone[78]—saw their way clear to dissent in this case, which involved an imposition by the state of conditions for admission to state benefits antithetical to the objector's conscience without showing a compelling state interest at stake—which, of course, was not the test at that time.

e. *In re Summers* (1945). One more case followed in this disappointing sequence before the tide turned. It involved not an immigrant seeking citizenship, but an attorney and professor of law seeking admission to the bar of the state of Illinois, which was denied by the justices of the Illinois Supreme Court on the ground that his pacifist religious beliefs would prevent his taking the required oath. The secretary of the Committee on Character and Fitness of the state bar wrote to the applicant:

> I think the record establishes that you are a conscientious objector, also that your philosophical beliefs go further. You eschew the use of force regardless of circumstances[,] but the law which you profess to embrace and which you teach and would practice is not an abstraction observed through mutual respect. It is real. It is the result of experience of man in an imperfect world, necessary we believe to restrain the strong and protect the weak. It recognizes the right even of the individual to use force under certain circumstances and commands the use of force to obtain its observance.
>
> * * *
>
> I do not argue against your religious beliefs or your philosophy of non-violence. My point is merely that your position seems inconsistent with the obligation of an attorney at law.[79]

Consequently, the committee concluded that the applicant was not qualified for admission to the bar, and the justices of the Illinois Supreme Court, who had the responsibility of supervising admissions to the bar, sustained the committee. The rejected applicant appealed to the U.S. Supreme Court, contending:

> The so-called "misconduct" for which petitioner could be reproached... is his taking the New Testament too seriously. Instead of merely reading or preaching the Sermon on the Mount, he tries to practice it. The only fault of the petitioner consists in his attempt to act as a good Christian in accordance with his interpretation of the Bible, and according to the dictates of his conscience. We respectfully submit that the profession of law does not shut its gates to persons who have qualified in all other respects even when they follow in the footsteps of that Great Teacher of mankind who delivered the Sermon on the Mount. We respectfully submit that under our Constitutional guarantees even good Christians who have

78. Justice Holmes had retired in 1932.

79. *In re Summers*, 325 U.S. 538 (1931), n. 3; ellipsis in original.

> met all the requirements for admission to the bar may be admitted to practice law.

When the Supreme Court granted *certiorari*, the justices of the Illinois Supreme Court sought to justify their refusal to admit the applicant to the bar on the ground of "petitioner's inability to take in good faith the required oath to support the Constitution of Illinois." This supposed inability was inferred from the applicant's "belief in nonviolence to the extent that the believer will not use force to prevent wrong, no matter how aggravated." The Illinois justices further observed that "Illinois has constitutional provisions which require service in the militia in time of war of men of petitioner's age group.... [The] petitioner has not made any showing that he would serve notwithstanding his conscientious objections."

The U.S. Supreme Court, in an opinion by Justice Stanley Reed, observed:

> We accept the allegation as to unwillingness to serve in the militia as established. While under... the Selective Training and Service Act... conscientious objectors to participation in war in any form now are permitted to do non-war work of national importance, this is by grace of Congressional recognition of their beliefs.... No similar exemption during war exists under Illinois law.... It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship.

The position of the Illinois justices was therefore affirmed.

Justice Black, however, filed a strong dissent, which was joined by Justices Douglas, Murphy and Rutledge.

> The State of Illinois has denied the petitioner the right to practice his profession and to earn his living as a lawyer. It has denied him a license on the ground that his present religious beliefs disqualify him for membership in the legal profession. The question is, therefore, whether a state which requires a license as a prerequisite for practicing law can deny an applicant a license solely because of his deeply-rooted religious convictions....
>
> The petitioner's disqualifying religious beliefs stem chiefly from a study of the New Testament and a literal acceptance of the teachings of Christ as he understands them....
>
> I cannot believe that a state statute would be consistent with our constitutional guarantee of freedom of religion if it specifically denied the right to practice law to all members of one of our great religious groups, Protestant, Catholic, or Jewish. Yet the Quakers have had a long and honorable part in the growth of our nation, and an amicus curiae brief filed in their behalf informs us that under the test applied to this petitioner, not one of them if true to the tenets of their faith could qualify

> for the bar in Illinois. And it is obvious that the same disqualification would exist as to every conscientious objector to the use of force, even though the Congress of the United States should continue its practice of absolving them from military service. The conclusion seems to me inescapable that if Illinois can bar this petitioner from the practice of law it can bar every person from every public occupation solely because he believes in non-resistance rather than in force. For a lawyer is no more subject to call for military duty than a plumber, a highway worker, a Secretary of State, or a prison chaplain.
>
> It may be, as many people think, that Christ's Gospel of love and submission is not suited to a world in which men still fight and kill one another. But I am not ready to say that a mere profession of belief in that Gospel is a sufficient reason to keep otherwise well-qualified men out of the legal profession, or to drive law-abiding lawyers of that belief out of the profession, which would be the next logical development.
>
> Nor am I willing to say that such a belief can be penalized through the circuitous method of prescribing an oath, and then barring an applicant on the ground that his present belief might prompt him to do or refrain from doing something that might violate that oath. Test oaths, designed to impose civil disabilities upon men for their beliefs rather than for unlawful conduct, were an abomination to the founders of this nation.[80] This feeling was made manifest in Article VI of the Constitution which provides that "no religious test shall ever be required as a Qualification to any Office or public trust under the United States"....
>
> The Illinois Constitution itself prohibits the draft of conscientious objectors except in time of war and also excepts from militia duty persons who are "exempted by the laws of the United States." It has not drafted men into the militia since 1864, and if it ever should again, no one can say that it will not, as has the Congress of the United States, exempt men who honestly entertain the views that this petitioner does. Thus the probability that Illinois would ever call the petitioner to serve in a war has little more reality than an imaginary quantity in mathematics.
>
> I cannot agree that a state can lawfully bar from a semi-public position a well-qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet been and may never be enacted. Under our Constitution men are punished for what they do or fail to do and not for what they think and believe. Freedom to think, to believe, and to worship, has too exalted a position in our country to be penalized on such an illusory basis.[81]

This dissent is reproduced here *in extenso* because it has been generally neglected and because it is a reflection in the law of church and state of the courts' efforts to grapple with the problem of religious believers' attempting to live out the implications of their beliefs in daily life and secular occupations in ways that come

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80. See reference to expurgatory oaths in *Davis v. Beason*, at § A2b above, and in *Cummings v. Missouri*, at ID1b.

81. *In re Summers*, *supra*, Black dissent.

into conflict with the customs, laws, and expectations of their more conventional neighbors. Here, as in *Bland*, *Macintosh* and *Schwimmer*, was an idealistic person of exceptional ability trying to be true to religious convictions that ran counter to prevailing norms and being rejected by society for that reason. Thus were lost to the citizenship of the United States and to the bar of Illinois persons who would have graced those stations more than many who felt no religious scruples in taking the required oaths.

In the case of *Summers* particularly, one can only attribute to the climate of public opinion in the midst of World War II the disposition of the Illinois Committee on Character and Fitness, the justices of the Illinois Supreme Court and five justices of the U.S. Supreme Court to bar from the bar of the state an unblemished attorney, who was also a professor of law, solely because he was a pacifist and thus was believed—by *them*, not by himself—to be unable to take an oath to defend the Constitution of Illinois against all enemies because they were convinced that those words must mean a willingness to bear *arms* in the *state* militia into which no one had been drafted for eighty years and from which he was exempt anyway because he was classified as a conscientious objector under federal law—a strained interpretation indeed!

f. *Girouard v. U.S.* (1946). The next year, however, the court reexamined its stance on conscientious objection to military service as a bar to naturalization in the case of a Canadian Seventh-day Adventist, who applied for U.S. citizenship, stating that because of his religious beliefs he was willing to serve in the armed forces in a noncombatant capacity only. The district court granted citizenship, but the circuit court of appeals reversed on the basis of *Schwimmer*, *Macintosh* and *Bland*. The Supreme Court granted *certiorari* in order to reexamine those authorities. Despite their slightly different fact patterns, they stood for the proposition—as Justice Douglas phrased it, writing for the new majority—"that an alien who refused to bear arms will not be admitted to citizenship."

> As an original proposition, we could not agree with that rule. The fallacies underlying it were, we think, demonstrated in the dissents of Mr. Justice Holmes in the *Schwimmer* case and of Mr. Chief Justice Hughes in the *Macintosh* case.
>
> The oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such finding a prerequisite of citizenship. To hold that it is required is to read it into the Act by implication. But we could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms....
>
> [T]he annals of the recent war show that many whose religious scruples prevented them from bearing arms, nevertheless were unselfish participants in the war effort. Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among noncombatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume

> all military risks to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that this role may be limited by religious convictions rather than by physical characteristics has no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost.
>
> * * *
>
> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.... The test oath is abhorrent to our tradition. Over the years Congress has meticulously respected that tradition and even in time of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied.... Cogent evidence would be necessary to convince us that Congress took that course.
>
> We conclude that the *Schwimmer*, *Macintosh* and *Bland* cases do not state the correct rule of law.[82]

Justice Douglas wrote for a majority composed of himself and Justices Black, Murphy, Rutledge and Harold Burton. A dissent was filed by Chief Justice Stone, joined by Justices Reed and Felix Frankfurter (Justice Jackson was away at the time serving as chief prosecutor in the Nuremberg war-crimes trials). The chief justice observed that he had dissented in *Macintosh* and *Bland* "for reasons which the Court now adopts as grounds for overruling them." In the meanwhile, in his view, Congress had repeatedly refused to amend the wording of the statute to permit conscientious objectors to become citizens. Therefore, he had concluded that *Schwimmer*, *Macintosh* and *Bland* stated the construction of the statute that Congress intended, and the court should not now overthrow that construction. But, as noted in the discussion of *Bob Jones University v. U.S.* (1983),[83] it is dubious judicial deference to presume congressional intent from silence or inaction, since there are many reasons other than deliberate intention why Congress may fail to act. Such deference is particularly unjustified where considerations as weighty as religious liberty are at stake.

In 1952 Congress adopted the court's position as expressed in *Girouard*, providing that a conscientious objector to military service may take the oath and

82. *Girouard v. U.S.*, 328 U.S. 61 (1946).

83. 461 U.S. 574 (1983), discussed at VC6c(4).

become a citizen if he or she can show "by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief."[84]

In *Girouard* the court made one of its infrequent explicit reversals, turning 180 degrees to a more gracious and humane view that men and women could be good and loyal citizens even though conscientiously opposed to military service. The next range of questions arose over whether the objecting conscience must be theistic, religious, or opposed to *all* wars.

g. *Sicurella v. U.S.* (1955). In 1940 the United States adopted the Selective Training and Service Act, with a provision exempting from combatant service any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[85] In 1948 Congress amended the statute to define the term "religious training and belief" to mean "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[86]

During the time conscription was in force—during World War II, the Korean War and the Vietnam War—innumerable cases arose testing every facet of the conscientious objector provision, and a number of them reached the U.S. Supreme Court.[87] Only those pertaining to the "religious" content of conscience will be dealt with here. An early example of this kind came before the court in the Korean War. In it a member of Jehovah's Witnesses had claimed exemption as a conscientious objector, been denied, refused induction and was convicted. His case turned on whether he was "opposed to participation in war in any form," which had been construed to mean opposition to participation in any and all wars.

Sicurella had been a Jehovah's Witnesses "minister" since age 17, and had been classified by his local draft board as a clergyman from 1948 until 1950, although he worked forty-four hours a week for Railway Express. In 1950 he was reclassified for general service, and he had then filed a conscientious objector claim in which he asserted:

> The nature of my claim is that: I am already in the Army of Jesus Christ serving as a soldier of Jehovah's appointed Commander Jesus Christ (2 Tim. 2:3 & 4). Inasmuch as the war weapons of the soldiers of Jesus Christ are not carnal, I am not authorized by his Commander to engage in carnal warfare of this world (2 Corinthians 10:3 & 4, Ephesians 6:11-18). Furthermore being enlisted in the army of Jesus Christ, I cannot desert the forces of Jehovah to assume the obligations of a soldier in an army of this world without being guilty of desertion and suffering the punishment meted out to deserters by Almighty God....

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84. Immigration and Nationality Act, 66 Stat. 163, 258 (1952).

85. 54 Stat. 885, 889 (1940).

86. Selective Service Act of 1948, 62 Stat. 604, 613 (1948). This wording is reminiscent of Chief Justice Hughes' dissent in *Macintosh*, discussed at § 5b above.

87. E.g., *Estep v. U.S.*, 327 U.S. 114 (1946), *Cox v. U.S.*, 332 U.S. 442 (1947).

This was certainly a unique way of stating a "pacifist" position, and strikingly presented the assertion of conflict of allegiances between the demands of the "world" and the commands of God as perceived by religious conscience. When asked, "Under what circumstances, if any, do you believe in the use of force?" he replied:

> Only in the interests of defending Kingdom Interests, our preaching work, our meetings, our fellow brethren and sisters and our property against attack. I (as well as all Jehovah's Witnesses) defend those when they are attacked and are forced to protect such interests and scripturally so.

This was clearly not the "turn-the-other-cheek" variety of pacifism seen in adherents of the nonresistant "peace churches" such as *Summers*,[88] but whether that meant willingness to fight physically and shed blood was less clear from his further comments:

> Because in doing so we do not arm ourselves or carry carnal weapons in anticipation of or in preparation for trouble or to meet threats. In doing so I try to ward off blows and attacks only in defense. I do not use weapons of warfare in defense of myself or the Kingdom interests. I do not retreat when attacked in my home or at meeting places, but will retreat on public or other property and shake the dust off my feet; so not giving what is holy to dogs and not throwing my pearls before swine (Matthew 10:14 & 7:6). So I retreat when I can do so and avoid a fight or trouble.

The Department of Justice had advised the Appeal Board that, since the registrant "will fight under some circumstances, namely in defense of his ministry, Kingdom Interests, and in defense of his fellow brethren," he was not entitled to the exemption. When the case reached the Supreme Court, the Justice Department sought to bolster its position by adducing further information about the supposed teaching of the Jehovah's Witnesses sect with regard to their expectations of fighting for Jehovah in the final, apocalyptic Battle of Armageddon, as portrayed in a copy of the *Watchtower* magazine submitted with its brief. The Supreme Court noted that there was no such literature in the record, and questioned whether it should consider material that had not been before the Appeal Board whose decision it was asked to review, "but we need not decide that here because in any event there is no substance to the Government's contention."

Justice Tom Clark, writing for all but two members of the court, stated the issue as follows:

> The question here narrows to whether the willingness to use of force in defense of Kingdom Interests and brethren is sufficiently inconsistent with petitioner's claim as to justify the conclusion that he fell short of being a conscientious objector. Throughout his selective service form, petitioner emphasized that the weapons of his warfare were spiritual, not carnal.... On their face, these statements make it clear that petitioner's defense of

88. See § 5e above.

> "Kingdom Interests" has neither the bark nor the bite of war as we unfortunately know it today. It is difficult for us to believe that the Congress had in mind this type of activity when it said the thrust of conscientious objection must go to "participation in war in any form...."
>
> * * *
>
> Granting that [the *Watchtower*] articles picture Jehovah's Witnesses as antipacifists, extolling the ancient wars of the Israelites and ready to engage in a "theocratic war" if Jehovah so commands them, and granting that Jehovah's Witnesses will fight at Armageddon, we do not feel that this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such commands since Biblical times and their theology does not appear to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons.
>
> We believe that Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets. We believe the reasoning of the Government in denying petitioner's claim is so far removed from any possible Congressional intent that it is erroneous as a matter of law.
>
> The Court of Appeals also rested its decision on the conclusion that petitioner's objection to participation in war was only a facet of his real objection to all governmental authority. We believe, however, that if the requisite objection to participation in war exists, it makes no difference that a registrant also claims, on religious grounds, other exemptions which are not covered by the Act. Once he comes within [the Act], he does not forfeit its coverage because of his other beliefs which may extend beyond the exemption granted by Congress.[89]

Justice Reed, author of *In re Summers*,[90] dissented.

> It is not important to the United States military strength that a few people eligible for military service are excused from combat and noncombatant duties as conscientious objectors. It is important to other American citizens that many without such scruples against war must serve while the few continue their assigned tasks with no exposure to danger greater than that of other civilians.
>
> Many, by reason of religious training or moral conviction, may be opposed to certain wars declared by the Nation. But they must serve because they do not meet the test of the statute.... The Court assumes that

89. *Sicurella v. U.S.*, 348 U.S. 385 (1955).

90. See § 5e above.

> Sicurella's conscience permits him to serve in theocratic wars, that is, those approved by Jehovah, such as the blood and flesh wars of the Israelites. Sicurella testified that he would use force in defense of "Kingdom Interests." Those words also seem to me to include theocratic wars. Under the assumptions of the Court and petitioner's statements, he is not covered by the statutory exemption. His position is inconsistent with his claimed opposition to war. I would require him to serve in the military service.

Justice Sherman Minton also dissented, partly on procedural grounds:

> The findings and classification made by the Selective Service Board and the Appeal Board are final.... This Court does not sit as a court of review. It is not our province to substitute our judgment of the facts for that of the Board or to correct the Board's errors of law unless they are so wanton, arbitrary and capricious as to destroy the jurisdiction of the Board....
>
> * * *
>
> Petitioner says he is opposed to fighting a secular war but is not opposed to fighting a religious war where the interests of his sect are involved. This does not meet the test of the statute.... On the contrary, he reserves the right to choose the wars in which he will fight. [He] refused even to be inducted for any limited kind of service, combatant or otherwise.... [He] and his sect will fight for Kingdom Interests, whatever that is, preaching work, their meetings, their fellow brethren and sisters, and their property. They do not, they say, carry carnal weapons in anticipation of attack, but they will use them in case of attack. This evidence clearly supports the District Court's finding of guilt; and the conclusion of the Selective Service Board based on such evidence was an allowable one.... There is not the slightest intimation of arbitrary or capricious conduct on the part of the Board... and, therefore,... I would affirm.

(Once again the question of conscientious objection to a particular war was raised but did not —yet—become the basis on which the majority disposed of the case.[91])

h. *U.S. v. Seeger* (1965). How "religious" must the conscience be to qualify for exemption from military service? This question came before the Supreme Court in the 1960s in the setting of growing controversy over the conflict in Vietnam. Three cases were consolidated for consideration of that question.

1. Seeger was convicted in New York of having refused to submit to induction after having been classified 1-A because he did not seem to fit the description in the Universal Military Training and Service Act of one who "by reason of religious training and belief is opposed to participation in war in any form," since "religious training and belief" was defined in the Act as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," and Seeger said he preferred to leave open the question of his belief in a Supreme Being. The Court of Appeals for the Second Circuit reversed his conviction, holding that the Supreme Being requirement distinguished between "internally derived and externally compelled beliefs" and was an impermissible classification under the Due

91. See *Gillette v. U.S.* and *Negre v. Larsen*, 401 U.S. 437 (1971), discussed at § k below.

Process Clause of the Fifth Amendment.

2. Jakobsen was also convicted in New York for refusal to submit to induction for similar reasons, and his conviction was reversed by the Court of Appeals. Jakobsen had said that he believed in "Goodness," "the Ultimate Cause for the fact of the Being of the Universe." Since man is akin to that Supreme Reality, his "most important religious law" was that "no man ought ever to willfully sacrifice another man's life as a means to any other end."

3. Forest Peter was convicted in California on the same charge for the same reasons, and the Court of Appeals affirmed. He had quoted a statement by the Rev. John Haynes Holmes to the effect that religion is "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands...," that it would be a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state. He said that he supposed "you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use."

Justice Clark, writing for a unanimous Supreme Court, reviewed these cases and the history of exemption of conscientious objectors from military service in the United States. He quoted Justice Stone (later Chief Justice) on the importance of respect for conscience:

> "[B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process."[92]

Reviewing the terms of the 1940 Selective Training and Service Act, Justice Clark noted:

> The Congress recognized that one might be religious without belonging to an organized church just as surely as minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war. Indeed, the consensus of the witnesses appearing before the congressional committees was that individual belief—rather than membership in a church or sect—determined the duties that God imposed upon a person in his everyday conduct; and that "There is a higher loyalty than loyalty to this country, loyalty to God." Thus, while shifting the test from membership in such a church to one's individual belief the Congress nevertheless continued its historic practice of excusing from armed service those who believed that they owed an obligation, superior to that due the state, of not participating in war in any form....
>
> * * *

92. *U.S. v. Seeger*, 380 U.S. 163 (1965).

> In amending the 1940 Act, Congress adopted almost intact the language of Chief Justice Hughes in *United States v. Macintosh*:
>
> "The essence of religion is belief in a relation to *God* involving duties superior to those arising from any human relation."
>
> By comparing the statutory definition with those words, however, it becomes apparent that the Congress deliberately broadened them by substituting the phrase "Supreme Being" for the appellation "God"....
>
> * * *
>
> Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: *A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption* comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.[93]

To show that this broadening of the meaning of "religious training and belief" was consonant with current religious thought, the court quoted from Paul Tillich, Bishop J.A.T. Robinson, Vatican Council II, and the Ethical Culture Society. Justice Douglas, in a concurring opinion, expatiated upon the diverse concepts of deity or transcendent being or ultimate reality to be found in Hinduism and Buddhism. Finding that all three petitioners fit its enlarged definition, that none were atheists, insincere or actuated by a "merely personal moral code," the court exonerated them all.

Seeger thus stands for the proposition that conscientious objection to military service is available to those whose conscientious convictions are based on a "sincere and meaningful" belief that "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." This represented acceptance by the court of a *functional* definition of religious belief rather than one based on membership in an organization or on the conceptual content of the belief, thus avoiding questions of adherence or nonadherence, of orthodoxy or heterodoxy. But even the *Seeger* formula might seem too restrictive to some claimants.

i. *U.S. v. Sisson* (1969). During the Vietnam conflict, many conscientious objectors' cases were handled by the courts, of which only a few were examined by the U.S. Supreme Court. Some of those decided by lower courts contained some memorable language on the importance of respecting the rights of individual conscience as well as critical comments on the policy of the U.S. government. One of those was a decision by Chief Judge Charles Wyzanski of the federal district court for the District of Massachusetts in the case of a young man, John Heffron Sisson,

93. Ibid.; emphasis in quotation from Hughes is in *Seeger*; emphasis in last paragraph added.

who had refused induction into the armed forces as ordered by his draft board.

After Sisson had been convicted in a jury trial, he entered a motion in arrest of judgment, and the court delivered a very significant decision. First, the judge observed that the court "has no jurisdiction to decide the 'political question' whether the military actions of the United States in Vietnam require as a constitutional basis a declaration of war by Congress." This question was much controverted at the time, but no court was willing to enforce the constitutional provision that only Congress had power to declare war; instead, it was construed that Congress, by approving appropriations for the armed forces' vast efforts in Indochina had, *sub silentio*, "ratified" the president's commitment of the nation to armed conflict there—a judicial fiction that led to the War Powers Act, designed to limit the president's ability to draw the nation into full-scale war by imperceptible increments.

The court examined the merits of Sisson's conscientious objector claim.

> Sisson does not now and never did claim that he is or was in the narrow statutory sense a religious conscientious objector.... on receiving the [conscientious objector] form, Sisson concluded that his objection not being religious, within the administrative and statutory definitions incorporated in that form, he was not entitled to have the benefit of the form. He, therefore, did not execute it.
>
> But, although the record shows no earlier formal indication of conscientious objection, Sisson's attitude as a non-religious conscientious objector has had a long history. Sisson himself referred to his moral development, his educational training, his extensive reading of reports about and comments on the Vietnam situation, and the degree to which he had familiarized himself with the U.N. charter, the charter and judgments of the Nuremberg Tribunal, and other domestic and international matters bearing upon the American involvement in Vietnam.[94]

Sisson went to Phillips Exeter Academy and Harvard, enlisted in the Peace Corps, but "after training he was, for reasons that have no moral connotations, 'deselected' in September, 1967." In 1968 he went to work for a Southern newspaper, which assigned him to work in Mississippi, at that time a "hot spot" of racial conflict.

> On the stand Sisson was diffident, perhaps beyond the requirements of modesty. But he revealed sensitiveness, not arrogance or obstinacy. His answers lacked the sharpness that sometimes reflect a prepared mind. He was entirely without eloquence. No line he spoke remains etched in memory. But he fearlessly used his own words, not mouthing formulae from court cases or manuals for draft avoidance.
>
> There is not the slightest basis for impugning Sisson's courage. His attempt to serve in the Peace Corps, and the assignment he took on a Southern newspaper were not acts of cowardice or evasion. Those actions were assumptions of social obligations. They were in the pattern of many conscientious young men who have recently come of age. From his education Sisson knows that his claim of conscientious objection may cost

94. *U.S. v. Sisson*, 297 F.Supp. 902 (1969).

him dearly. Some will misunderstand his motives. Some will be reluctant to employ him.

Nor was Sisson motivated by purely political considerations. Of course if "political" means that the area of decision involves a judgment as to the conduct of a state, then any decision as to any war is not without some political aspects. But Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience.

Thus, Sisson bore the burden of proving by objective evidence that he was sincere. He was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion.

Sisson's views are not only sincere, but without necessarily being right, are reasonable. Similar views are held by reasonable men who are qualified experts.

* * *

The First Amendment issues are open to Sisson in this and other courts even though Sisson did not raise them before the draft board or in any other step of the administrative process. What Sisson is here doing is challenging the constitutionality of the 1967 Act as applied to him. There was no realistic opportunity to make such a challenge until now. Whatever may be academic theory, no administrative agency, such as a draft board, believes it has power or, practically, would exercise power, to declare unconstitutional the statute under which it operates.... Under present practice the first time a contention of unconstitutionality of a statutory provision may effectively be made is in a court....

Indubitably Congress has constitutional power to conscript the generality of persons for military service in time of war....

But the precise inquiry this court cannot avoid is whether now Sisson may be compelled to submit to non-justiciable military orders which may require him to render combat service in Vietnam....

Every man, not least the conscientious objector, has an interest in the security of the nation. Dissent is possible only in a society strong enough to repel attack. The conscientious will to resist springs from moral principles. It is likely to seek a new order in the same society, not anarchy or submission to a hostile power. Thus conscience rarely wholly dissociates itself from the defense of the ordered society within which it functions and which it seeks to reform[,] not to reduce to rubble.

In parallel fashion, every man shares and society as a whole shares an interest in the liberty of the conscientious objector, religious or not. The freedom of all depends on the freedom of each. Free men exist only in free societies. Society's own stability and growth, its physical and spiritual prosperity[,] are responsive to the liberties of its citizens, to their deepest insights, to their free choices—"that which opposes, also fits."

* * *

The sincerely conscientious man, whose principles flow from reflection,

education, practice, sensitivity to competing claims, and a search for a meaningful life, always brings impressive credentials. When he honestly believes that he will act wrongly if he kills, his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general, but to a particular war or to a particular type of war. Indeed a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience, and a deeper spiritual understanding.

It is equally plain that when a nation is fighting for its very existence there are public and private interests of great magnitude in conscripting for the common defense all available resources, including manpower for combat.

But a campaign fought with limited forces for limited objects with no likelihood of a battlefront within this country and without a declaration of war is not a claim of comparable magnitude.

Nor is there any suggestion that in present circumstances there is a national need for combat service from Sisson as distinguished from other forms of service by him. The want of magnitude in the national demand for combat service is reflected in the nation's lack of calls for sacrifice in any serious way by civilians....

Sisson is not in a formal sense a religious conscientious objector. His claim may seem less weighty than that of one who embraces a creed which recognizes a Supreme Being, and which has as part of its training and discipline opposition to war in any form. It may even seem that the Constitution itself marks a difference because in the First Amendment reference is made to the "free exercise of" "religion," not to the free exercise of conscience. Moreover, Sisson does not meet the 1967 congressional definition of religion. Nor does he meet the dictionary definition of religion.

But that is not the end of the matter. The opinions in *United States v. Seeger*... disclosed wide vistas....

The rationale by which Seeger and his companions on appeal were exempted from combat service under the statute is quite sufficient for Sisson to lay valid claim to be constitutionally exempted from combat service in the Vietnam type of situation.

Duty once commonly appeared as the "stern daughter of the voice of God." Today to many she appears as the stern daughter of the voice of conscience. It is not the ancestry but the authenticity of the sense of duty which creates constitutional legitimacy.

Some suppose that the only reliable conscience is one responsive to a formal religious community of memory and hope. But in *Religion in the Making,* Alfred North Whitehead taught us that "religion is what the individual does with his own solitariness...."

Others fear that recognition of individual conscience will make it too easy for the individual to perpetrate a fraud. His own word will so often enable him to sustain his burden of proof. Cross-examination will not easily discover his insincerity.

Seeger cut the ground from under that argument. So does experience.

Often it is harder to detect a fraudulent adherent to a religious creed than to recognize a sincere moral protestant.... We can all discern Thoreau's integrity more quickly than we might detect some churchman's hypocrisy.

The suggestion that courts cannot tell a sincere from an insincere conscientious objector underestimates what the judicial process performs every day....

* * *

Sisson's case being limited to a claim of conscientious objection to combat service in a foreign campaign, this court holds that the free exercise of religion clause in the First Amendment and the due process clause of the Fifth Amendment prohibit the application of the 1967 draft act to Sisson to require him to render combat service in Vietnam.

The chief reason for reaching this conclusion after examining the competing interests is the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed....

When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. Law and morality are, in turn, debtors and creditors of each other. The law cannot be adequately enforced by the courts alone, or by courts supported merely by the police and the military. The true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. *When the law treats a reasonable conscientious act as a crime it subverts its own power*. It impairs the very habits which nourish and preserve the law.

The Supreme Court may not address itself to the broad issue just decided. Being a court of last resort, it unlike an inferior court, can confidently rest its judgment upon a narrow issue.... so it is incumbent on this court to consider the narrow issue, whether the 1967 Act invalidly discriminates against Sisson as a non-religious conscientious objector....

[T]he administrators [of Selective Service] and this court both agree that Congress has not provided a conscientious objector status for a person whose claim is admittedly not formally religious.

In this situation Sisson claims that even if the Constitution might not otherwise preclude Congress from drafting him for service in Vietnam, the Constitution does preclude Congress from drafting him under the 1967 Act. The reason is that this Act grants conscientious objector status solely to religious conscientious objectors but not to non-religious objectors.

Earlier this opinion noted that it is practical to accord the same status to non-religious conscientious objectors. Moreover, it is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings.[95]

95. Ibid.; emphasis added.

Consequently, the court held unconstitutional that portion of the draft law of 1967 providing exemption from military service only to religious objectors as violative of the religion clauses of the First Amendment. Since a statute had been declared unconstitutional by a district court, an action by the circuit court of appeals was not required, and an appeal was taken by the government directly to the U.S. Supreme Court. That court dismissed the appeal, since the government was not entitled to appeal in a criminal case a ruling equivalent to an acquittal.

The *Sisson* opinion has been quoted at some length, although from an "inferior" court, because it contains comments on the significance of conscience in the life of the nation more cogent than many from courts "of last resort." It also announced conclusions on nonreligious conscience later expressed—though less forthrightly—by the Supreme Court in *Welsh, infra*, and on objection to participation in a particular war later rejected by the Supreme Court in *Gillette* and *Negre, infra*.

j. *Welsh v. U.S.* (1970). Eventually the U.S. Supreme Court agreed to hear a case raising some of the issues that had been troubling the lower courts. It considered the case of Elliott A. Welsh II, a Los Angeles commodity broker, who was convicted for refusing induction after his conscientious objector claim was rejected as being "nonreligious." Justice Black, writing for himself and three other members of the court (Justices Douglas, William Brennan, and Thurgood Marshall), likened the case to that of Seeger, who, like Welsh, had been brought up in a religious (but not "peace-church") home, had drifted away from religious tutelage in adolescence, had not applied for conscientious objector (CO) status when he registered for the draft, but had done so subsequently when his ideas "did fully mature," as the court put it. In filling out the CO application, Seeger had put quotation marks around the word "religious," whereas Welsh had struck it out entirely. Both were acknowledged to be sincere in their beliefs, but both were considered by their draft boards and the lower courts to be insufficiently "religious" to qualify for the statutory exemption, which was limited to those who, "by reason of religious training and belief," are conscientiously opposed to "participation in war in any form."[96]

Justice Black performed prodigies of judicial legerdemain in bringing *Welsh* within the scope of the Act.

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

96. 50 USC 456(j).

Although he originally characterized his beliefs as nonreligious, he later upon reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were "certainly religious in the ethical sense of the word."...

The government also seeks to distinguish *Seeger* on the ground that Welsh's views, unlike Seeger's were "essentially political, sociological, or philosophical views or a merely personal moral code."... [T]he Government made the same argument about Seeger, and not without reason, for Seeger's views had a substantial political dimension. In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:

"I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to `defend' our way of life profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibilities *as a nation*."

We certainly do not think that [the statute's] exclusion of those persons with "essentially political, sociological, or philosophical views or a merely personal moral code" should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within the exclusion from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.... Once the Selective Service System has taken the first step and determined under the standards set out here and in *Seeger* that the registrant is a "religious" conscientious objector, it follows that his views cannot be "essentially political, sociological, or philosophical." Nor can they be a "merely personal moral code."

Welsh stated that he "believe[d] the taking of life—anyone's life—to be morally wrong." In his original... application he wrote the following:

"I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding `duty' to abstain from violence toward another person) is not `superior to those arising from any human relation.' On the contrary: *it is essential to every human relation*. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant...."

On the basis of these beliefs and the conclusion of the Court of Appeals that he held them "with the strength of more traditional religious convictions," we think Welsh was clearly entitled to a conscientious objector exemption. [The statute] requires no more. [It] exempts from military service *all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace* if they allowed

themselves to become a part of an instrument of war.[97]

As mentioned above, four members of the court subscribed to these rather strained arguments. Justice Harry Blackmun had just come on the court and "took no part in the consideration or decision of this case." If the other four justices disagreed with the Black opinion, a tie vote would have left the lower court's affirmation of Welsh's conviction in effect.

Justice Byron White wrote a cogent dissent.

> Whether or not *United States v. Seeger* accurately reflected the intent of Congress in providing draft exemptions for religious conscientious objectors to war, I cannot join today's construction of [the statute] extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology. Our obligation in statutory construction cases is to enforce the will of Congress, not our own; and... to include Welsh [in the exemption] exempts from the draft a class of persons whom Congress has expressly denied an exemption.
>
> For me that conclusion should end the case. Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. Whether or not that [exemption] is constitutional, Welsh had no First Amendment excuse for refusing to report for induction. If it is contrary to the express will of Congress to exempt Welsh, as I think it is, then there is no warrant for saving the religious exemption and the statute by redrafting it in this Court to include Welsh and all others like him....
>
> If I am wrong in thinking that Welsh cannot benefit from invalidation of [the exemption] on Establishment Clause grounds, I would nevertheless affirm his conviction; for I cannot hold that Congress violated the clause in exempting from the draft all those who oppose war by reason of religious training and belief. In exempting religious conscientious objectors, Congress was making one of two judgments, perhaps both. [The exemption] may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service. Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. On this basis, the exemption has neither the primary purpose nor the effect of furthering religion....
>
> Second, Congress may have granted the exemption because otherwise religious objectors would be forced into conduct which their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect.... Legislative exemptions for those with religious convictions against war date from colonial days.... However this Court might construe

97. *Welsh v. U.S.*, 398 U.S. 333 (1970). Emphasis added in final paragraph.

> the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds....
>
> [T]here is an arguable basis for [the exemption] in the Free Exercise Clause since, without [it], the law would compel some members of the public to engage in combat operations contrary to their religious convictions.... There being substantial roots in the Free Exercise Clause for [the exemptions] I would not frustrate congressional will by construing the Establishment Clause to condition exemption for religionists upon extending the exemption also to those who object to war on nonreligious grounds.
>
> We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment. "Neutrality," however, is not self-defining. If it is "favoritism" and not "neutrality" to exempt religious believers from the draft, is it "neutrality" and not "inhibition" of religion to compel religious believers to fight when they have special reasons for not doing so, reasons to which the Constitution gives particular recognition? It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. *The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech*.... Although socially harmful acts may as a rule be banned despite the Free Exercise Clause even where religiously motivated, there is an area of conduct that cannot be forbidden to religious practitioners but which may be forbidden to others. We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law at least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man's religion.... I am reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever.[98]

Justice White was joined by Chief Justice Warren Burger and Justice Potter Stewart. Justice John M. Harlan did not join either the Black opinion or the White one but filed a separate opinion that did not favor expanding the exemption to avoid finding it unconstitutional under the Establishment Clause or restricting it to clearly religious objectors as a provision justifiable under the Free Exercise Clause.

> Candor requires me to say that I joined the Court's opinion in *United States v. Seeger* only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today's decision convinces me that in doing so I made a mistake which I should now acknowledge....
>
> Today the prevailing opinion makes explicit its total elimination of the

98. Ibid., White dissent, emphasis added.

statutorily required religious content for a conscientious objector exemption....

In my opinion, the liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them. There are limits to the permissible application of that doctrine, and... those limits were crossed in *Seeger*, and even more apparently have been exceeded in the present case. I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether [the statute] in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. For reasons later appearing I believe it does, and on that basis I concur in the judgment reversing this conviction, and adopt the test announced by Mr. Justice Black, not as a matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified....

[I]t is a remarkable feat of judicial surgery to remove, as did *Seeger*, the theistic requirement of [the statute]. The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from "essentially political, sociological, or philosophical views or a merely personal moral code...."

Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity, even when nontheistic, and cults that represent schools of thought and in the usual case are without formal structure or are, at most, loose and informal associations of individuals who share common ethical, moral, or intellectual views.

When the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this veering off the path that has been plainly marked by the statute. Such a course betrays extreme skepticism as to constitutionality, and, in this instance, reflects a groping to preserve the conscientious objector exemption at all cost....

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....

The "radius" of this legislation is the conscientiousness with which an

> individual opposes war in general, yet the statute, as I think it must be construed, excludes from its "scope" individuals motivated by teachings of non-theistic religions, and individuals guided by an inner ethical voice that bespeaks secular and not "religious" reflection. It not only accords a preference to the "religious" but also disadvantages adherents of religions that do not worship a Supreme Being. The constitutional infirmity cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This in my view offends the Establishment Clause and is that kind of classification that this Court has condemned....
>
> The policy of exempting religious conscientious objectors is one of long-standing tradition in this country and accords recognition to what is, in a diverse and "open" society, the important value of reconciling individuality of belief with practical exigencies whenever possible. It dates back to colonial times and has been perpetuated in state and federal conscription statutes. That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity.
>
> When a policy has roots so deeply embedded in history, there is a compelling reason for courts to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it. Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional intent but as a patchwork of judicial making that cures the defect of under inclusion in [the statute] and can be administered by local boards in the usual course of business. Like the prevailing opinion, I also conclude that petitioner's beliefs are held with the required intensity and consequently vote to *reverse* the judgment of conviction.[99]

Because of its play of sharply conflicting and cogently argued views on conscientious objection and the First Amendment, this case is of much greater interest than the uncontested *Seeger* case. (In fact, some deep divisions that were glossed over in *Seeger* emerged in *Welsh*.) Possibly Justice Harlan had sought to persuade the Black bloc of four to declare the religious terms of the exemption unconstitutional, but they had demurred, perhaps fearing that, if Congress was unable to agree on the wording of a new exemption that would not only pass constitutional muster but would survive the cross-pressures and ever-unpredictable political dynamics of the legislative process (especially in the midst of an unpopular war when conscription itself was a subject of intense controversy), striking down the religious exemption might well result in *no* exemption at all.

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99. Ibid., Harlan concurrence in the judgment.

Not being able to persuade them, Justice Harlan had no alternative but to join them, rather lamely consenting to complicity in the very judicial "patchwork" he had been denouncing. He could not go with the dissenters, since they were on the "far side" of the middle bloc and would have upheld, not only the constitutionality of the exemption, but the conviction of Welsh and other nonreligious objectors.

There is considerable appeal—to those interested in advancing the needs and interests of religious bodies—in the dissenters' view that the Free Exercise Clause applies to *religion* and not to various other kinds of beliefs, however strongly held. But—as indicated at the beginning of this section[100]—"religion" has no monopoly on "conscience," and the quality that is inexactly referred to by that name is precious to civilization—and perhaps also to God—though not inspired or nurtured by formal religious faith or practice and though not paying express homage to the divine.

Both Congress and the several justices who had championed the cause of conscience had sought to protect the conscientious objector from the choice of having to violate the deepest of convictions or go to jail, but they lacked an adequate formula of words to do so without over- or underinclusion. The fact that conscience is a chief concern of religion and that most attention given it is found in religious communities and religious discourse has created the understandable misconception that "conscience" and "religion" are coterminous. Justice Oliver Wendell Holmes, dissenting in *Schwimmer*, and Chief Justice Charles Evans Hughes, dissenting in *Macintosh*, sensed this incongruence, and their insight eventually prevailed. Hughes' phrase "duties superior to those arising from any human relation" became part of the wording of the exemption. And Justice Douglas and his four colleagues in the majority in *Girouard* pointed toward a broader ambit for conscience. Justice Black, writing for the court in *Seeger* and *Welsh*, wrestled further toward trying to spell out what Congress, too, seemed rather incoherently to recognize, that conscientious objection was broader than membership in the historic "peace churches," that it was something—irrespective of its specific content—that the state should not violate, and that it wasn't just intellectual, transitory, superficial or prudential, but something that "would give them no rest or peace" if they defied it.

The words used by Congress to convey the final concern were particularly ill-chosen, since the most alert and sensitive of consciences will be formed and guided by rational reflection on history, politics, sociology, philosophy and may indeed be a "personal moral code." But in the absence of a better definition by Congress, the court perhaps had to do some redefining of its own, though clearly it contradicted the final proviso of the exemption. Its "patchwork" product, despite the adverse views of four of the justices, has held through the remaining period that conscription was in effect. What will happen, if and when conscription is again enacted, is anybody's guess, but one hopes something will have been learned from all the judicial time and thought devoted to the subject of conscientious objection to this point.

There was still another area of controversy that remained to be explored—one adumbrated in *Sisson* as well as in dissents in *Macintosh* and *Sicurella*—whether a person who objected to military service in some but not all wars could qualify for the

100 . See § A3 above.

exemption, and to that question the Supreme Court turned in 1971.

k. *Gillette v. U.S.* and *Negre v. Larsen* (1971). During the Vietnam conflict—and presumably during earlier wars—there had been a number of young men denied exemption from military service as conscientious objectors because—in adherence to the teachings of their religious traditions—they were opposed to serving in *some* wars, but not in *all* wars. The Roman Catholic Church, for instance, has a venerable doctrine concerning *just* wars, as distinguished from *unjust* ones, and some of its followers relied upon that distinction in maintaining that they would not participate in the Vietnam conflict because in their view it was not a "just" war. Some Lutherans and Calvinists made a similar distinction. Those of us who hoped that the courts would recognize in these "just war" objectors a position as conscientious and as fully a product of venerable and unquestionably "religious training and belief" as that of pacifists in the "peace church" tradition encouraged several cases in the courts that had impeccable religious antecedents. We were concerned that the Supreme Court, if confronted with a "selective objector"—one, who in the characterization of critics, wanted to "pick and choose which war he would fight in"—who was also not visibly religious in a conventional sense, like Sisson, would find the leap too long to take. So we pressed the *Negre* case with supportive *amicus* briefs because he was a devout Roman Catholic who was able to articulate a clear "just war" rationale for his objection. Unfortunately, the court linked his case with that of Gillette, who was a nonreligious objector, and we became (more) apprehensive about the outcome.

Gillette, a rock musician from Yonkers, New York, refused to report for induction as ordered by his draft board, and was convicted by a federal district court, which considered his case indistinguishable from *Sisson*, but refused to follow Judge Wyzanski's holding in that case. The circuit court of appeals upheld the conviction on the ground that Gillette's conscientious beliefs—he had said he would participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but not in American military operations in Vietnam, which he considered unjust—"were specifically directed against the war in Vietnam" rather than against "participation in war in any form."

Negre was a Roman Catholic gardener, who had immigrated to the United States from France with his family at age four, had attended Catholic schools until college, and after two years of junior college was inducted into the army. After completing advanced infantry training, he was assigned to service in Vietnam. At that point he applied for discharge as a conscientious objector to war. His application was denied, and he sought a writ of *habeas corpus*[101] from the federal district court in San Francisco, which was also denied, the denial was upheld on appeal, and the Supreme Court combined the case with *Gillette* to consider the issue of "selective" conscientious objection. Both men based their defense on the interpretation of the statute that defined the conscientious objection that qualified for exemption from

101. The writ of *habeas corpus* is the legal device for challenging an unjust imprisonment and requires the person responsible for the imprisonment to justify it to a court. The "Larsen" in the case-title was the wholly unsympathetic commander of the Army district in which Negre served. Although Negre had been acquitted by a general court martial of refusal to comply with an order to proceed to Vietnam, Larsen confined Negre in the stockade at the Presidio, where this writer visited him.

military service as opposition to "participation in war in any form." Although the wording is not unambiguous—"in any form" was read by the courts as modifying "participation" rather than "war"—Justice Marshall, writing for the court, professed to see no ambiguity:

> This language, on a straightforward reading, can bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war....
>
> A different result cannot be supported by reliance on the materials of legislative history. Petitioners and amici point to no episode or pronouncement in the legislative history... that tends to overthrow the obvious interpretation of the words themselves.
>
> It is true that the legislative materials reveal a deep concern for the situation of conscientious objectors to war, who absent special status would be put to a hard choice between contravening imperatives of religion and conscience or suffering penalties. Moreover, there are clear indications that congressional reluctance to impose such a choice stems from a recognition of the value of conscientious action to the democratic community at large, and from respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state. But there are countervailing considerations, which are also the concern of Congress, and the legislative materials simply do not support the view that Congress intended to recognize any conscientious claim whatever as a basis for relieving the claimant from the general responsibility or the various incidents of military service. The claim that is recognized...is a claim of conscience running against war as such. This claim, not one involving opposition to a particular war only, was plainly the focus of Congressional concern....
>
> *Sicurella v. United States* presented the only obvious occasion for this Court to focus on the "participation in war in any form" language.... In Sicurella a Jehovah's Witness who opposed participation in secular wars was held to possess the requisite conscientious scruples concerning war, although he was not opposed to participation in a "theocratic war" commanded by Jehovah. The Court noted that the "theocratic war" reservation was highly abstract—no such war had occurred since biblical times, and none was contemplated. Congress, on the other hand, had in mind "real shooting wars," and Sicurella's abstract reservations did not undercut his conscientious oppostion to participation in such wars. Plainly, Sicurella cannot be read to support the claims of those, like petitioners, who for a variety of reasons consider one particular "real shooting war" to be unjust, and therefore oppose participation in such a war.[102]

This much of the opinion was joined in by Justice Black, who also joined in the judgment. Justice Marshall turned to the petitioners' claim of discrimination between religions forbidden under the Establishment Clause. They asked "how their claims to

102 . *Gillette v. U.S.*, 401 U.S. 437 (1971).

relief from military service can be permitted to fail, while other religious claims are upheld by the Act," and that was indeed the gravamen of the "just war" objectors' complaint. Why should Quakers and Mennonites and Jehovah's Witnesses be exempt and Catholics and Lutherans not, when their conscientious objection is no less sincere and no less *religious* than the pacifist view?

> The critical weakness of petitioners' establishment claim arises from the fact that [the statute], on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war. The section says that anyone who is conscientiously opposed to all war shall be relieved of military service. The specific objection must have a grounding in "religious training and belief," but no particular sectarian affiliation or theological position is required....
>
> Properly phrased, petitioners' contention is that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions. This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in "just" and "unjust" wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths—and individuals whose personal beliefs of a religious nature include the distinction—cannot object to all wars consistently with what is regarded as the true imperative of conscience. Of course, this contention of de facto religious discrimination...cannot simply be brushed aside. The question of government neutrality is not concluded by the observation that [the statute] on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, "religious gerrymanders," as well as obvious abuses....
>
> [The exemption] serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions. There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, but no doubt the section reflects as well the view that "in the forum of conscience, duty to a moral power higher than the State has always been maintained." United States v. Macintosh....
>
> Naturally the considerations just mentioned are affirmative in character, going to support the existence of an exemption rather than its restriction specifically to persons who object to all war. The point is that these affirmative purposes are neutral in the sense of the Establishment Clause. Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." United States v. Macintosh....
>
> In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint. And while the objection must have roots in conscience and personality that are "religious" in nature, this

requirement has never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith.

In this state of affairs it is impossible to say that [the exemption] intrudes upon "voluntarism" in religious life, or that the congressional purpose...is to promote or foster those religious organizations that traditionally have taught the duty to abstain from participation in any war. A claimant...would be hard put to argue that [the statute] encourages membership in putatively "favored" religious organizations, for the painful dilemma of the sincere conscientious objector arises precisely because he feels himself bound in conscience not to compromise his beliefs or affiliations....

We conclude not only that the affirmative purposes underlying [the exemption] are neutral and secular, but also that valid neutral reasons exist for limiting the exemption to objectors to all war, and that the section therefore cannot be said to reflect a religious preference.

Apart from the government's need for manpower, perhaps the central interest involved in the administration of the conscription laws is the interest in maintaining a fair system for determining "who serves when not all serve." When the government exacts so much, the importance of fair, evenhanded, and uniform decision-making is obviously intensified. The government argues that the interest in fairness would be jeopardized by expansion of [the exemption] to include conscientious objection to a particular war. The contention is that the claim of relief on account of such objection is intrinsically a claim of uncertain dimensions, and that granting the claim in theory would involve a real danger of erratic or even discriminatory decision-making in administrative practice.

A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war." All the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion. Indeed, over the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise. Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events. Since objection may fasten on any of an enormous number of variables, the claim is ultimately subjective, depending on the claimant's view of the facts in relation to his judgment that a given factor or congeries of factors colors the character of the war as a whole. In short, it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse an objector, and there is considerable force in the government's contention that a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results...."

Of course, we do not suggest that Congress would have acted irrationally or unreasonably had it decided to exempt those who object to particular wars. Our analysis...is undertaken in order to determine the

> existence vel non[103] of a neutral, secular justification for the lines Congress has drawn. We find that justifying reasons exist and therefore hold that the Establishment Clause is not violated.

With respect to the Free Exercise Clause, Justice Marshall was more succinct.

> The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and *do not work a penalty against any theological position*. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And, more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies.[104]

This rather rambling and labored opinion is quoted at some length to demonstrate Justice Marshall's—and the court's—not altogether convincing effort to resolve the "selective conscientious objector" problem. The opinion was disingenuous to say that the statute "on its face, simply does not discriminate on the basis of religious affiliation or religious belief, *apart of course from beliefs concerning war*." Of course that was precisely what the dispute was all about: whether the statute discriminated *in effect* between religions on the basis of their religious beliefs concerning war! The same disingenuousness appeared again in the statement that "the conscription laws... are not designed to interfere with any religious ritual or practice, and *do not work a penalty against any theological position*"—except the "just-war" theological position as formulated by Thomas Aquinas and other theologians, whose adherents are subject to conscription for military service while followers of pacifist theologians are not!

No one was contending that the statute *on its face* discriminated against Catholics or Lutherans, or that it "interfere[d] with any religious ritual or practice." After brushing aside these "straw men," the opinion did concede that the contention about a subtle or de facto discrimination could not be brushed aside, but it proceeded in the main to do just that. It cited some general justifications for the exemption of conscientious objectors in general from military service,[105] but then rather lamely admitted that these justifications went "to support the existence of an exemption rather than its restriction specifically to persons who object to all war," which of course was the precise point that had to be justified.

No one was contending that Congress could not exempt conscientious objectors in general, but only that, *if it did do so*, it could not confine the exemption to those who adhered to one type of theological doctrine (pacifist) and exclude those whose objection was no less religious and no less sincere and no less binding with reference

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103 . Lat., "or not"—i.e., the existence or nonexistence of justification.

104 . *Gillette v. U.S.*, *supra;* emphasis added in this and preceding excerpt.

105 . Quoting Chief Justice Hughes' *dissent* in *Macintosh*, without identifying it as a dissent, though—since *Macintosh* was overruled by *Girouard*—perhaps the only valid part remaining *was* the dissent. Even so, it was usually customary to identify dissenting opinions as such to clarify ambiguities.

to the only war at issue simply and solely because they adhered to another type of theological doctrine (just war) that was willing to consider that there might be other wars—at another time and in another place and of another character—in which the believer might justifiably participate. The "affirmative purposes" of the exemption might be "neutral in the sense of the Establishment Clause," but the *effect* of the exemption, as upheld by the court, was to "prefer one religion over another" *with respect to essentially theological beliefs*, which American jurisprudence—rightly or wrongly—has held (since *Reynolds* and *Cantwell*[106]) to be the central element of religion.

It may not have been "the congressional purpose... to promote or foster those religious organizations that traditionally have taught the duty to abstain from participation in any war," but that was certainly the result. The court relied upon the integrity of the conscientious objector "not to compromise his beliefs or affiliations" to prevent his yielding to the congressionally created encouragement to join one of the peace churches to protect his aversion to participation in the current war from being violated, or at least to represent his conscientious objection as being directed against all wars rather than just against the only one currently being fought. It simply was not true to say that the statute, as interpreted by the court, did not "reflect a religious preference." It did.

Whether that was a necessary condition may be another matter. The government contended that the objection to a particular war could be rather open-ended, mingled with voluminous nonreligious considerations, subject to change from day to day as the fact-situation of the ongoing war—or the claimant's perception of it—might change, and difficult to sort out without a degree of theological calculus that could be characterized as "excessive entanglement." That consideration makes more sense than much of the rest of the court's opinion.

Whether it rises to the level of a justification for the seeming preference of one religion over another is another matter. In other contexts, the court has not considered the administrative difficulty of implementing the law sufficient justification for permitting unconstitutional conduct by government. It is conceivable that the Selective Service System in time could develop fair and uniform procedures for handling claims of "selective" conscientious objection—certainly as fair and uniform as those in effect under the then-existing interpretation of the law, which left room for much improvement.

At any event, the court was apparently determined to sustain the government's interpretation of the law and ultimately fell back on the intent of Congress. Whatever that intent may have been, it was not at all crystal clear in the actual wording of the statute, Justice Marshall and seven other justices to the contrary notwithstanding. The English words, in their present order, clearly state that the claimant for exemption must be "conscientiously opposed to participation in war in any form," which can mean opposition to any form of war or to any form of participation, but does not in either case require a commitment as to all future, hypothetical wars. The

106. *Reynolds v. U.S.*, 98 U.S. 145 (1878), discussed at § A2a above; *Cantwell v. Connecticut*, 310 U.S. 296 (1940), discussed at IIA2c.

government—and the court—simply imputed that meaning to those words, but they do not necessarily say that. The court could have read them to refer to a present conscientious objection to participation of any kind in any form of the existing war with far less distortion of the congressional wording than had occurred in *Seeger* and *Welsh*. If that proved *not* to be what Congress wanted, then Congress would have a ready remedy: to amend the statute to state its meaning more plainly.

Justice Douglas filed a lone dissent, likening Gillette's position to Sisson's.[107] He observed that "the question, can a conscientious objector, whether his objection be rooted in `religion' or in moral values, be required to kill? has never been answered by the Court." After quoting with approval from Chief Justice Hughes' dissent in *Macintosh*, Douglas concluded, with respect to *Gillette*:

> The law as written is a species of those which show an invidious discrimination in favor of religious persons and against others with like scruples....
>
> I had assumed that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment.
>
> This is an appropriate occasion to give content to our dictum in Board of Education v. Barnette:[108] "[F]reedom to differ is not limited to things that do not matter much.... The test of its substance is the right to differ as to things that touch the heart of the existing order."
>
> I would reverse this judgment.

With respect to *Negre*, he was more circumspect:

> I approach the facts of this case with some diffidence, as they involve doctrines of the Catholic Church in which I was not raised....
>
> Under the doctrines of the Catholic Church a person has a moral duty to take part in wars declared by his government so long as they comply with the tests of his church for just wars. Conversely, a Catholic has a moral duty not to participate in unjust wars....
>
> No one can tell a Catholic that this or that war is either just or unjust. This is a personal decision that an individual must make on the basis of his own conscience after studying the facts.
>
> Like the distinction between just and unjust wars, the duty to obey conscience is not a new doctrine in the Catholic Church. When told to stop preaching by the Sanhedrin, to which they were subordinate by law, "Peter and the apostles answered and said, `We must obey God rather than men.'" That duty has not changed. Pope Paul VI expressed it as follows: "On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of his conscience. In all his activity a man is bound to follow his conscience, in order that he may come to God, the end and purpose of all life."[109]
>
> At the time of his induction [Negre] had his own convictions about the Vietnam war and the Army's goals in the war. He wanted, however, to be

107 . See § 5i above.

108 . See § 6b below.

109 . Quoting the Declaration on Religious Freedom of Vatican II, discussed at § 3 above.

> sure of his convictions. "I agreed to myself that before making any decision or taking any type of stand on the issues, I would permit myself to see and understand the Army's explanation of its reasons for violence in Vietnam...."
>
> On completion of his advanced infantry training, "I knew that if I would permit myself to go to Vietnam I would be violating my own concepts of natural law and would be going against all that I had been taught in my religious training...." His sincerity is not questioned. His application for a discharge, however, was denied because his religious training and beliefs led him to oppose only a particular war which according to his conscience was unjust.
>
> For the reasons I have stated in my dissent in the Gillette case decided this day, I would reverse the judgment.[110]

It might have been possible for Gillette and Negre and others like them to have clothed their conscientious objection in wording more acceptable to the law, but they chose to state their actual beliefs as honestly as they were able rather than dissembling. For that they got several years in prison. When others, with less obstinate consciences, were able to enjoy student and occupational deferments, so that relatively few were required to serve in Vietnam, and civilians were put to relatively little inconvenience by the war, these men faced a difficult choice and were made to suffer—either way they chose—for obedience to conscience. It is not as though they could have gotten off "scot free" if their act of conscience were not considered a crime. Surely there were many forms of noncombatant or alternate service that they could and would have rendered without the nation's having to brand them criminals because they obeyed conscience.

l. ***Thomas v. Review Board*** **(1981)**. The Supreme Court dealt with conscientious objection in a more recent instance that arose in a civilian setting when conscription was no longer in effect. Eddie Thomas was a Jehovah's Witness who was employed in the Blau-Knox Foundry and Machinery Company in Indiana. At first he worked in the roll foundry making sheet steel for various industrial uses. After a year or so the roll foundry was shut down, and he was transferred to a department that made turrets for military tanks. Realizing that his work was helping to produce weapons of war, he investigated the company bulletin board where in-plant openings were listed and discovered that all of the departments were engaged in the production of weapons. Since no transfer to another department would take him out of work that he found repugnant to his conscience, he asked for a layoff. When that request was denied, he quit, explaining that he could not work on weapons without violating the teachings of his religion.

When he applied for unemployment compensation, the Review Board of the Indiana Employment Security Division denied his application on the ground that his termination was not based upon good cause arising in connection with his work. The decision of the Review Board was reversed by the Indiana Court of Appeals, which in turn was reversed by the Supreme Court of Indiana, ruling 3-2 that the statute "is

110. *Gillette, supra,* Douglas dissent.

not intended to facilitate changing employment or to provide relief for those who quit work voluntarily for personal reasons. [It] is to provide benefits for persons unemployed through no fault of their own."[111] The court thought that Thomas' views were more a "personal philosophic choice" than a religious belief, but even if they were religious convictions, the denial of unemployment benefits was "justified by the legitimate state interest in preserving the integrity of the insurance fund and maintaining a stable work force by encouraging workers not to leave their jobs for personal reasons." It also held that giving such benefits to persons who quit for religious reasons, while denying them to others who quit for nonreligious personal reasons, would violate the Establishment Clause of the First Amendment.

Chief Justice Burger, writing for the majority of the U.S. Supreme Court, stated:

> Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.... The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task.... However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.
>
> In support of his claim for benefits, Thomas testified:...
>
> "I really could not, you know, conscientiously continue to work with armaments. It would be against all of the...religious principles that...I have come to learn...." [ellipses in Burger text]
>
> * * *
>
> In reaching its conclusion, the Indiana [Supreme] court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs and that he was not able to "articulate" his belief precisely.... But, Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.
>
> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the

111 . *Thomas v. Review Board*, 391 N.E.2d 1127 (1979).

> members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.
>
> The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.... On this record, it is clear that Thomas terminated his employment for religious reasons.[112]

The chief justice examined the contention that Thomas simply did not qualify for unemployment compensation under the secular standards of the statute, which were entirely neutral with respect to religion. He recalled the statement in *Everson* to the effect that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."[113] He also adverted to *Sherbert v. Verner*, in which a Seventh-day Adventist had also been denied unemployment compensation after being fired for refusal to work on Saturday.[114]

> Here, as in *Sherbert*, the employee is put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*.... In both cases, the termination flowed from the fact that the employment, once acceptable, became religiously objectionable because of changed conditions.

The state had sought to justify its policy on two grounds.

> (1) to avoid the widespread unemployment and the consequent burden on the fund resulting if people were permitted to leave jobs for "personal" reasons; and (2) to avoid a detailed probing by employers into job applicants' religious beliefs.

The chief justice acknowledged that "these were by no means unimportant considerations," but held that they did "not justify the burden placed on free exercise of religion."

> There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment," or even to seriously affect unemployment.... Similarly, although detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no...reason to believe that the number of people terminating employment for religious reasons will be so great as to motivate employers to make such inquiries.

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112 . *Thomas v. Review Board*, 450 U.S. 707 (1981).

113 . This was Chief Justice Burger's paraphrase of *Everson v. Board of Education*, 330 U.S. 1 (1947), which was followed by a verbatim quotation from that decision that is not reproduced here.

114 . 374 U.S. 398 (1963), discussed in § 7c below.

This line of argument might seem to suggest that if more people were moved by religious belief to refuse to meet their employers' expectations, the state might have legitimate reason to deny unemployment compensation to all of them. The idea that unconventional exercises of conscience can be indulged because they are infrequent is a dangerous one, since it suggests that nonconforming conscience is idiosyncratic and marginal. If it should become more massive, it could no longer afford to be tolerated—indeed, would need to be repressed for the preservation of the "integrity" of the system—exactly the argument advanced by the state in this instance and in many others.[115] Chief Justice Burger, however, may only have been suggesting that the state's justifications did not rise to the level of countervailing the Free Exercise claim; if they did, then the court might need to determine if the state's interests could be served in some less intrusive or burdensome way.

The last contention considered by the court was that making provision for Thomas' religious convictions in the unemployment insurance system would have the effect of "establishing" those religious beliefs at the expense of those who quit work for nonreligious reasons, but the chief justice gave short shrift to that view.

> There is, in a sense, a "benefit" to Thomas deriving from his religious beliefs, but this manifests no more than the tension between the two religion clauses which the Court resolved in *Sherbert*:
>
> "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[116]

It should be borne in mind with respect to this consideration that unemployment compensation is not exactly luxurious consolation for the loss of a good job. In view of the many claimants whose loss of work is less justifiable than Thomas' (such as misfits whose employers characterize their departure as "reduction in force" so they can collect unemployment compensation as an inducement to quit without the hassle of firing), conscientious objection represents a very minor contribution to unemployment.

Justice Blackmun joined all but this final part of the court's opinion, and as to it, he concurred in the result, if not the argument.

Justice William Rehnquist filed the sole dissent, in which he expressed broad disagreement with the court's interpretation of both religion clauses.

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115. The very word "integrity" was used in this case and in *U.S. v. Lee*, 455 U.S. 252 (1982), discussed at § 9b below, where the state's argument to this effect prevailed. In that case, an Amish carpenter challenged, on grounds of free exercise, the requirement of payment of Social Security taxes for employees who were also Amish. The Supreme Court upheld that requirement as necessary to protect the "integrity" of the federal tax system, though there are probably even fewer Amish employers or employees than there are Sabbatarians.

116. *Thomas, supra*, quoting *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at § 7c below.

> The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment.... [T]he Court today reads the Free Exercise Clause more broadly than is warranted.... [I]t cannot be said that the State discriminated against Thomas on the basis of his religious beliefs or that he was denied benefits *because* he was a Jehovah's Witness. Where, as here, a state has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group....I believe that although a State could choose to grant exemptions to religious persons from state unemployment regulations, a state is not constitutionally compelled to do so.
>
> The Court's treatment of the Establishment Clause issue is equally unsatisfying. Although today's decision requires a State to provide direct financial assistance to persons solely on the basis of their religious beliefs, the Court nevertheless blandly assures us... that its decision "plainly" does not foster the "establishment" of religion. I would agree that the Establishment Clause, properly interpreted, would not be violated if Indiana voluntarily chose to grant unemployment benefits to those persons who left their jobs for religious reasons. But I also believe that the decision below is inconsistent with many of our Establishment Clause cases. Those cases, if faithfully applied, would require us to hold that such voluntary action by a state *did* violate the Establishment Clause.[117]

After recalling the "mechanistic 'no-aid-to-religion'" test of *Everson*, *Torcaso*[118] and *Schempp*,[119] Justice Rehnquist noted that the court currently was using the three-prong *Lemon* test: that "a state must have a secular legislative purpose,... a 'primary effect' that neither advances nor inhibits religion... [and that avoids] excessive entanglement with religion."[120]

> It is not surprising that the Court today makes no attempt to apply those principles to the facts of this case. If Indiana were to legislate what the Court today requires—an unemployment compensation law which permitted benefits to be granted to those persons who quit their jobs for religious reasons—the statute would "plainly" violate the Establishment Clause as interpreted in such cases as *Lemon* and *Nyquist*. First, although the unemployment statute as a whole would be enacted to serve a secular legislative purpose, the proviso would clearly serve only a religious purpose. It would grant financial benefits for the sole purpose of accommodating religious beliefs. Second, there can be little doubt that the primary effect of the proviso would be to "advance" religion by facilitating the exercise of religious belief. Third, any statute including such a proviso

117. *Thomas v. Review Board, supra,* Rehnquist dissent; emphasis in original.

118. *Torcaso v. Watkins*, 367 U.S. 488 (1961), discussed at VB2.

119. *Abington Township v. Schempp*, 374 U.S. 203 (1963), discussed at IIIC2b(2).

120. *Thomas, supra,* Rehnquist dissent, paraphrasing *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5.

> would surely "entangle" the State in religion far more than the mere grant of tax exemptions, as in *Walz*, or the award of tuition grants and tax credits, as in *Nyquist*. By granting financial benefits to persons solely on the basis of their religious beliefs, the State must necessarily inquire whether the claimant's belief is "religious" and whether it is sincerely held. Otherwise any dissatisfied employee may leave his job without cause and claim that he did so because his own particular beliefs required it....
>
> In sum, my difficulty with today's decision is that it reads the Free Exercise Clause too broadly and it fails to squarely acknowledge that such a reading conflicts with many of our Establishment Clause cases. As such, the decision simply exacerbates the "tension" between the two clauses.... Although I heartily agree with the Court's tacit abandonment of much of our rhetoric about the Establishment Clause, I regret that the Court cannot see its way clear to restore what was surely intended to have been a greater degree of flexibility to the federal and state governments in legislating consistently with the Free Exercise Clause.[121]

Justice Rehnquist's dissent was a very cogent essay on the seeming inconsistency of the court's treatment of the religion clauses. He considered that the "situations in which the Constitution may *require* special treatment on account of religion are... few and far between,"[122] but that governments should enjoy wide latitude in offering accommodations for religion if they should choose to do so. Likewise, he would limit the Establishment Clause to prohibiting "government support of proselytizing activities of religious sects by throwing the weight of secular authorities behind the dissemination of religious tenets"[123] or "purposeful assistance directly to the church itself or to some religious group... performing ecclesiastical functions."[124]

By thus reducing the scope of the two religion clauses, Justice Rehnquist would leave the state and federal governments to reach whatever accommodations of religion the political process might seem to require relatively unfettered by constitutional requirements. In this respect he evinced his usual deference to government at the expense of the rights of individuals ostensibly protected by the Constitution against the pressures of majorities and political powers. Governments—that is, the legislative and executive branches—have not always distinguished themselves as defenders of the unpopular, unconventional or politically powerless in the exercise of religious commitment, and it was precisely to protect those who could not rely on their own political "clout" that the Bill of Rights, and particularly the First Amendment, was adopted. Justice Rehnquist's analysis, acute as it was, did not persuade his colleagues on the court, who seemed more concerned to fashion protections for individual conscience than to pursue a perfect consistency with precedent. Justice Rehnquist's solicitude for the prerogatives of government

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121 . Ibid., Rehnquist dissent.

122 . Ibid., quoting Justice Harlan II, dissenting in *Sherbert v. Verner, supra,* ellipses in Rehnquist, emphasis added by this author.

123 . Ibid., quoting Justice Stewart's dissent in *Abington v. Schempp, supra.*

124 . Ibid., quoting Justice Stanley Reed's dissent in *McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948), discussed at IIIC1a.

somehow did not have the profound constitutional resonance of Justice Robert Jackson's words in *West Virginia v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[125]

That quotation from the important flag-salute case of 1943 provides a bridge to a rather minor area of Free Exercise litigation that produced a major advance in American jurisprudence, discussed at § 6 below.

m. Other Decisions on Conscientious Objection to Military Service. In the years following World War II and the Korean conflict, the Supreme Court of the United States dealt with several issues collateral to those discussed above involving the status of conscientious objectors to military service, where the contention was not over whether the objector was bona fide but whether the procedures used to process his application were constitutional.

(1) *Eagles v. Samuels* (1946). A Selective Service registrant claimed and was granted classification IV-D, which exempts from military service "students who are preparing for the ministry in theological or divinity schools." Subsequently, he appeared before an advisory panel on theological classifications composed of prominent laymen and rabbis of his faith. After interviewing him, the panel concluded that he was not "preparing in good faith for a career of service in the practicing rabbinate," and the local board was so informed, which reclassified him I-A. After subsequent rehearings, his classification was sustained, and he was inducted into the Army. He petitioned for a writ of *habeas corpus* and was released from military custody. The U.S. Supreme Court eventually reviewed his case and held, in an opinion by Justice Douglas, that the use of a theological advisory panel was not improper and the classification of I-A was not without justification. There was no dissent.

(2) *Eagles v. Horowitz* (1946). The fact-pattern in this case was not significantly different from the preceding case (decided the same day). The decision was announced by Justice Douglas upholding the action of Selective Service. There was no dissent.

(3) *U.S. v. Nugent* (1953). A conscientious objector to military service was convicted for failure to report for service after his draft board had refused to classify him as I-O. The Second Circuit Court of Appeals reversed his conviction because he had not been shown the report by the Department of Justice to the Selective Service Appeals Board and therefore was unable to refute negative information in it. The U.S. Supreme Court, in an opinion by Chief Justice Fred Vinson, reversed the court of appeals on the grounds that the selective service act did not require that such

125 . *West Virginia v. Barnette*, 319 U.S. 624 (1943), discussed at § 6b below.

information be disclosed. A vigorous dissent was entered (uncharacteristically on the side of judicial activism) by Justice Frankfurter, joined by Justices Douglas and Black.

> Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake and where prison may be the alternative to an abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies.[126]

(4) *Simmons v. U.S.* (1955). Two years later, in a similar fact-situation involving a Jehovah's Witness CO claimant, the majority came down on the other side of the same issue, saying in an opinion by Justice Clark:

> A fair resume is one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force. The remarks of the hearing officer at most amounted to vague hints, and these apparently failed to alert petitioner to the dangers ahead. Certainly they afforded him no fair notice of the adverse charges in the report. The Congress, in providing for a hearing, did not intend it to be conducted on the level of a game of blindman's buff. The summary was inadequate and the hearing in the Department was therefore lacking in fairness.[127]

The conviction of the claimant was therefore reversed. Justices Reed and Minton dissented.

(5) *Gonzales v. U.S.* (1955). On the same day, in an opinion also by Justice Clark, the conviction of another Jehovah's Witness CO was reversed for the same reason, Justices Reed and Minton again dissenting.[128]

(6) *Johnson v. Robinson* (1974). Almost twenty years later, the Supreme Court decided another controversy arising from Congress' provision for conscientious objectors. On this occasion, a CO who had served two years of alternate service in a hospital challenged the denial of educational benefits available to those who had served in the armed forces (including COs who had served as noncombatants). The court held that the difference in treatment did not violate the guarantees of Free Exercise or Equal Protection because there were valid reasons for the differential (e.g., two years of alternate service v. six years of active duty and reserve obligations). Justice Brennan wrote the opinion of the court, and only Justice Douglas dissented.[129]

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126 . *U.S. v. Nugent*, 346 U.S. 1 (1953), Frankfurter dissent.
127 . *Simmons v. U.S.*, 348 U.S. 397 (1955).
128 . *Gonzales v. U.S.*, 348 U.S. 407 (1955).
129 . *Johnson v. Robinson*, 415 U.S. 361 (1974).

(7) *U.S. v. American Friends Service Committee* (1974). Two employees of the American Friends Service Committee prevailed upon their employer to refuse to withhold 51.6 percent of their taxes from the government in order to assist them in making a symbolic gesture of protest against the use of that portion of their taxes for purposes related to war. The federal district court decided in their favor, and the government appealed directly to the Supreme Court, which reversed the district court in a per curiam opinion, holding that the Anti-Injunction Act barred the relief granted, since it prohibits any suits "for the purpose of restraining the assessment or collection of any tax." Only Justice Douglas dissented, insisting that the Free Exercise Clause protected the religious witness of the Quakers even against the Anti-Injunction Act. (No one contested that the government would get its taxes eventually; the conscientious objectors to payment of the taxes merely wanted a means to make their protest.)[130]

6. Symbolic Affirmations: Saluting the Flag

One of the most significant shifts in the Supreme Court's understanding of individual freedom occurred in the early 1940s in connection with the requirement common in public schools that all pupils should join in opening exercises each morning that included patriotic activities such as pledging allegiance to the flag and singing the national anthem. Jehovah's Witnesses had religious objections to saluting the flag on the grounds that it represented obeisance to a secular "idol" of the kind that should be given only to God. In some instances children of that faith refused to participate in the flag salute, an act (or refusal to act) that did not endear them to the school authorities or their fellow pupils, especially at a time when patriotic fervor was rising as World War II approached. Some students were expelled for this obduracy, and in due course cases testing the flag-salute requirement reached the courts. In at least three instances between 1938 and 1940, the Supreme Court declined to hear such cases.[131] Then in 1940 it accepted one.

a. *Minersville School District v. Gobitis* (1940). Justice Frankfurter delivered the opinion of the court.

> A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test....
>
> Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise.... The children

130. *U.S. v. American Friends Service Committee*, 419 U.S. 7 (1974).

131. See Miller, R.T. and R.F. Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court* (Waco, Tex.: Baylor Univ. Press, 1987), p. 57. One earlier case was *Fish v. Sandstrom*, 18 N.E.2d 841 (1939), in which New York's highest court unanimously struck down the conviction of Jehovah's Witnesses parents for truancy because of the expulsion of their daughter from public school for refusal to salute the flag.

> had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of scripture.
>
> The Gobitis children were of an age for which Pennsylvania makes school attendance compulsory. Thus they were denied a free education, and their parents had to put them into private schools. To be relieved of the financial burden thereby entailed, their father... brought this suit. He sought to enjoin the authorities from continuing to exact participation in the flag-salute ceremony as a condition of his children's attendance at the Minersville school.[132]

The trial court granted his plea, and the appellate court affirmed. Because these lower court decisions "ran counter to several per curiam dispositions" by the Supreme Court, it granted *certiorari* "to give the matter full reconsideration."

> We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment.
>
> Centuries of strife over the erection of particular dogmas as exclusive or all-comprehending faiths led to the inclusion of a guarantee for religious freedom in the Bill of Rights. The First Amendment, and the Fourteenth through its absorption of the First, sought to guard against repetition of those bitter religious struggles by prohibiting the establishment of a state religion and by securing to every sect the free exercise of its faith. So pervasive is the acceptance of this precious right that its scope is brought into question, as here, only when the conscience of individuals collides with the felt necessities of society.
>
> Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief—or even of disbelief in the supernatural—is protected, whether in church or chapel, mosque or synagogue, tabernacle or meetinghouse. Likewise the Constitution assures generous immunity to the individual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in government.

(This was probably an allusion to the court's upholding the right of Jehovah's Witnesses to denounce the Catholic Church in intemperate terms, in *Cantwell v. Connecticut*,[133] announced a week or two earlier the same year.)

> But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men. When does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? To state the problem is to recall the truth that no single

132 . *Minersville v. Gobitis*, 310 U.S. 596 (1940).

133 . 310 U.S. 296 (1940), discussed at IIA2c.

> principle can answer all of life's complexities. The right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others—even of a majority—is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration. Our present task then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other. But, because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith.

Thus far Justice Frankfurther had stated, with his usual elegance, a commendably sympathetic solicitude for the rights of conscience of the believer, moving far beyond those earlier jurists who had assumed, with very little discussion, that the will of the majority must invariably prevail over the dissident individual or minority. The Constitution adds weight to the claims of conscience so that at least a balancing must take place, and the claims of conscience are accorded even a slight advantage, or so it seemed to this point. But how did the weighing work out?

> In the judicial enforcement of religious freedom we are concerned with a historic concept. The religious liberty which the constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities[134]... [T]he general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable.... [T]he question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills.[135]

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134. The italicized passage was quoted in *Oregon v. Smith II*, 494 U.S. 872 (1990), discussed at § D2e below.

135. The reference may be to *Lovell v. Griffin,* 303 U.S. 444 (1938) and *Schneider v. Irvington,* 308 U.S. 147 (1939), discussed at IIA2b, which upheld the right of Jehovah's Witnesses to distribute leaflets despite antilittering ordinances.

* * *

> The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. "We live by symbols." The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution....
>
> To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence. The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate. And the effective means for its attainment are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag-saluting beyond the pale of legislative power. It mocks reason and denies our whole history to find in the allowance of a requirement to salute the flag on fitting occasions the seeds of sanction for obeisance to a leader.
>
> The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the education process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crotchety beliefs. Perhaps it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here at issue. But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it....

(With this oft-quoted characterization of the court as the "school board for the country," Justice Frankfurter struck the high note of his apostrophe to judicial self-restraint, a favorite theme of his, and one to which he sought to win each new member of the court.[136])

> That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for

136 . See Schwartz, Bernard, *Super Chief* (New York: N.Y. Univ. Press, 1983), pp. 40 ff.

> us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the
>
> minds of the other children which would themselves weaken the effect of the exercise.

Here Justice Frankfurter offered deference to a legislative discretion not attributed to the state's counsel but hypothesized: the state *might* have supposed that excusal "*might* introduce elements of difficulty into the school discipline" or "*might* cast doubts in the minds of the other children"—a chain of hypotheticals that would hardly have survived the test that Frankfurter's idol Oliver Wendell Holmes had suggested for hypothetical perils posed by dissident speech: "whether the words used are used in circumstances and of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."[137] Of course, *Gobitis* involved conduct rather than speech—or at least refusal to speak—but the principle was the same: there was no evidence, nor even a claim, that the excusal of a few children would threaten the school or the state or the Republic. Justice Frankfurter swept on to his peroration.

> The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process of inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. That is, the process may be utilized so long as men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are fully respected.[138]

Thus was the "free exercise of religion" conceded to "men" to "believe as they pleased," "to win others to their way of belief," and "to assemble in their chosen places of worship" corresponding to two themes of this work: (1) autonomy in internal affairs within the religious group, and (2) outreach beyond the religious group (at least evangelism), but the faithful would face some difficulties in trying to live out their faith in the secular world if the legislature did not see fit to excuse them from requirements that infringed the "free exercise of religion"—as Frankfurther saw it. They were not to be impeded in "the devotional ceremonies of their faith," but neither need they be excused from the devotional ceremonies of the secular faith in the nation—any more than the early Christians were to be excused from offering a pinch of incense on the altar of the deified emperor. Both ceremonies—of the first

137. *Schenck v. U.S.*, 249 U.S. 47, 52 (1919); Holmes writing for a unanimous court; emphasis added.

138. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

century or the twentieth—were surely designed to "safeguard the nation's fellowship," to secure "national unity," to foster "effective loyalty to the traditional ideal" of the nation, to preserve "the ultimate values of civilization." Surely a little coercion of religious dissidents was justifiable, Justice Frankfurter thought, for such exalted and important ends, lest they "*might* introduce elements of difficulty into the discipline" of the whole or "*might* cast doubts in the minds of" others!

Apparently Justice Frankfurter spoke for Chief Justice Hughes and Justices Owen Roberts, Black, Douglas, Murphy, and Reed. Justice James McReynolds concurred in the result. Only Justice Stone dissented, with a vigor that contributed to the remarkable reversal of the court on this issue within three years.

> The law which is [today] sustained is unique in the history of Anglo-American legislation. It does more than suppress freedom of speech and more than prohibit the free exercise of religion, which concededly are forbidden by the First Amendment and are violations of the liberty guaranteed by the Fourteenth. For by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions. It is not denied that such compulsion is a prohibited infringement of personal liberty, freedom of speech and religion, guaranteed by the Bill of Rights, except insofar as it may be justified and supported as a proper exercise of the state's power over public education. Since the state, in competition with parents, may through teaching in the public schools indoctrinate the minds of the young, it is said that in aid of its undertaking to inspire loyalty and devotion to constituted authority and the flag which symbolizes it, it may coerce the pupil to make affirmation contrary to his belief and in violation of his religious faith. And, finally, it is said that since the Minersville School Board and others are of the opinion that the country will be better served by conformity than by the observance of religious liberty which the constitution prescribes, the courts are not free to pass judgment on the Board's choice.
>
> Concededly the constitutional guaranties of personal liberty are not always absolutes.... But it is a long step, and one which I am unable to take, to the position that the government may, as a supposed educational measure and as a means of disciplining the young compel public affirmations which violate their religious conscience.
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> * * *
>
> [T]here are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions. Without recourse to such compulsion the state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country. I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties by requiring it to resort to the alternatives which do not coerce an affirmation

of belief.

The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them.... The very essence of the liberty which they guarantee is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection. I cannot conceive that in prescribing, as limitations upon the powers of government, the freedom of the mind and spirit secured by the explicit guaranties of freedom of speech and religion, they intended or rightly could have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection.

* * *

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist.... I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.[139]

In the ensuing few years, several changes came about.

Two changes in personnel occurred, when Justices Jackson and Rutledge replaced Justices Hughes and McReynolds. The Court was also likely affected both by the severe criticism to which its decision was subjected by legal scholars and many religious leaders and by the wave of public violence against the Witnesses by persons who apparently assumed that the Court... had rejected the movement.[140] In an unprecedented move,

139. *Gobitis, supra*, Stone dissent.

140. See description of children being beaten on their way home from school because of their refusal to salute the flag in Irons, P., *The Courage of Their Convictions* (New York: Free Press, 1988), pp.

> three members of the Court in effect invited a rehearing of the flag-salute issue. Dissenting in Jones v. Opelika I, Justices Black, Douglas and Murphy, who had surprisingly been in the Gobitis majority two years
>
> before, recanted. They had come to believe that Gobitis as well as Opelika I had been "wrongly decided."[141]

b. ***West Virginia v. Barnette*** **(1943)**. In 1943, when the United States had been involved in World War II for a year and a half, the Supreme Court took on another flag-salute case. The West Virginia State Board of Education had adopted in 1942 a resolution containing quotations from the *Gobitis* decision and requiring that all teachers and pupils in all public schools "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly."

Suit was brought in federal court to restrain enforcement of this requirement against Jehovah's Witnesses. A three-judge panel restrained enforcement of the flag-salute requirement as to plaintiffs and other similarly situated, simply ignoring *Gobitis* because the court thought it wrongly decided. The Board of Education appealed to the U.S. Supreme Court, and in June of 1943 that court rendered a decision delivered by Justice Robert H. Jackson that is one of the watershed holdings in the church-state and civil-liberties fields, not only because of its reversal of an earlier misstep, but because of the forceful and memorable language in which it was expressed.

> This case calls upon us to reconsider a precedent decision, as the Constitution throughout its history often has been required to do. Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.
>
> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceful and orderly. The sole conflict is between authority and rights of the individual. The State asserts the right to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude....
>
> * * *
>
> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of

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22-25.

141 . Miller and Flowers, *Toward Benevolent Neutrality, supra*, p. 57. *Jones v. Opelika*, 316 U.S. 584 (1942), is discussed at IIA2f.

> communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and actions, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.
>
> * * *
>
> It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.
>
> Whether the First Amendment to the Constitution will permit officials to offer observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous....
>
> Nor does this issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

This was the crucial fulcrum upon which the issue turned, one of the strategic recastings of a civil-liberties question from the exemption of *dissidents* to the limits of governmental power to coerce *anyone*.

> The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute

> discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the *Gobitis* decision.
>
> * * *
>
> It was...considered in the *Gobitis* case that functions of educational officers in states, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country."
>
> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes....
>
> The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena," since all the "effective means of inducing political changes are left free."

Having reduced Justice Frankfurter's deference to pedagogues to its proper perspective, Justice Jackson at last reached the apotheosis of Frankfurter's credo: judicial deference to the legislature. His reply to this contention was even more powerful when seen in context:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

This resounding affirmation of the responsibility of the courts to protect the constitutionally guaranteed rights of individuals and minorities is a touchstone against which judicial acts before and since can be measured. It might be characterized by critics as a manifesto of judicial "activism," but it is less so than Marshall's assertion

of the power of judicial review in *Marbury v. Madison*,[142] and both are simply announcements that the courts should do the work of *courts*, which legislatures are often unable or unwilling to do.

Justice Jackson explained that the "Due Process" Clause of the Fourteenth Amendment took on much more rigorous requirements when First Amendment liberties were at stake.

> The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect....
>
> Nor does our duty to apply the Bill of Rights to assertions of political authority depend upon our possession of marked competence in the field where the invasion of rights occurs.... [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

But the heaviest blow was yet to come.

> Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "national unity is the heart of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.
>
> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.
>
> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.

142. 5 U.S. (1 Cranch) 137, 177 (1803) asserting the Supreme Court's "province and duty"... "to say what the law is."

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.
>
> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Then followed the great pronouncement that is the crux of *Barnette* and makes it one of the landmarks of constitutional jurisprudence, surmounting even the monumental declarations that had preceded it in earlier sentences.

> *If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.* If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.
>
> The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is *affirmed*.[143]

143 . *West Virginia v. Barnette*, 319 U.S. 624 (1943); emphasis added.

Justices Black and Douglas concurred in a separate opinion focusing on the religious aspect.

> We are substantially in agreement with the opinion just read, but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.
>
> Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought to be inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong. We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments.
>
> The statute requires the appellees to participate in a ceremony aimed at inculcating respect for the flag and for this country. The Jehovah's Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God's displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge.
>
> No well ordered society can leave to the individual an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibitions, merely regulate time, place or manner of religious activity. Decisions as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.
>
> Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of expressed constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.
>
> Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy

> implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.[144]

Justice Frank Murphy, another repentant member of the *Gobitis* majority, also filed a separate concurrence.

> The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court. Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society....
>
> I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: "...all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness,..." Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.[145]

Justice Stone—who had since become chief justice—perhaps took some gratification from the fact that five members of the court now embraced the general point of view he had expressed in lone dissent in *Gobitis*, but he made no separate statement. Neither did Justice Rutledge, who had since come on the court. Both of them apparently concurred in silence.

Justices Reed and Roberts were listed as adhering (without written opinion) to the views expressed in *Gobitis*. Justice Frankfurter, author of the *Gobitis* opinion, which now retained only his own and two other votes, wrote an impassioned dissent in which he once again preached the gospel of judicial restraint—in vain.

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should

144 . Ibid., Black and Douglas concurrence.

145 . Ibid., Murphy concurrence.

> wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor Agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard....
>
> * * *
>
> We are not reviewing merely the actions of a local school board. The flag salute requirement...comes before us with the full authority of the State of West Virginia.... Practically we are passing upon the political power of each of the forty-eight states.... To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.... It is, of course, beyond our power to rewrite the State's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations...is outside our province to suggest.... [T]he real question is, who is to make such accommodations, the courts or the legislature?
>
> * * *
>
> The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief or curbs it. Children and their parents may believe what they please, avow their belief and practice it.... [They can] disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the constitution....
>
> Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation....[146]

In all his lengthy dissent, Justice Fankfurter never directly grappled with the majority's contention that there was no power in the government to attempt to coerce professions of affirmation of orthodoxies in matters of opinion and belief, which was the central and decisive achievement of *Barnette*.

About this important decision, one commentator has remarked:

> It seems, paradoxically, that the values of the religion clauses are preserved best when they are invoked least—that is, when one can prevail in a religion case at a higher level of generality by claiming that it doesn't matter that one's particular motives happen to be religious, since the

146 . Ibid., Frankfurter dissent.

> challenged imposition involves something the government cannot do to anyone in any event. This is the way the Supreme Court approached the matter some years ago in the famous flag-salute decision, *West Virginia Board of Education v. Barnette*...when, writing for the court, Justice Jackson found it unnecessary to inquire whether non-conformist beliefs will exempt one from the duty to salute if "we do not first find power to make the salute a legal duty." If the state does not have the power to compel something *at all*, it isn't the state's business whether your reason for objecting is political or religious, secular or sacred.[147]

So, in a sense, a minor church-state issue was resolved by lifting it out of the church-state context into the broader civil liberties ambit, where it became a monumental promontory of freedom, not just for adherents of dissident *religious* minorities, important as that would be, but for *everyone*. (It was also one of the steps in the court's gradual movement away from the stance of judicial restraint advocated by Holmes and Frankfurter, a theme revisited in latter days when Justice Scalia resurrected the defunct *Gobitis* decision in *Oregon v. Smith*,[148] despite its having been overruled by *Barnette*!) It not only put to rest the flag-salute issue, but pointed the solution to another problem for Jehovah's Witnesses that arose in the 1970s, discussed immediately below. (One wishes that a similar precedent had prevailed in India, where Jehovah's Witnesses have been punished for refusal to join in singing the national anthem in public schools.)

c. *Wooley v. Maynard* (1971). An interesting sequel to *Barnette* did not involve saluting the flag, but it followed the principle set forth in that case. New Hampshire adopted a statute requiring all passenger automobiles licensed in the state to bear on their license plates the state's motto, "Live Free or Die." Another statute prohibited the obscuration of figures or letters on any vehicular license plate.

One George Maynard and his wife, Maxine, fell afoul of these statutes by covering up the motto on their license plates. The Maynards were Jehovah's Witnesses who had moral, religious and political objections to the sentiments embodied in the motto and therefore refused to proclaim it by displaying it on their vehicles. On November 27, 1974, Maynard was issued a ticket for violating the law by covering part of his license plate. He was given a fine of $25, suspended during "good behavior." On December 28, 1974, he was cited again for the same offense. This time he was fined $50 and sentenced to six months in jail, both suspended but he was ordered to pay the $25 fine for the first offense. For reasons of conscience, he refused to pay either fine, and was sentenced to jail for fifteen days, which he served. On January 3, 1975, he was charged with a third violation, and he went to federal court seeking an injunction against the state on the grounds that the statute was unconstitutional.

A three-judge panel found in his favor and enjoined the state "from arresting and prosecuting [the Maynards] at any time in the future for covering over that portion

147. Tribe, Laurence, "Church and State in the Constitution," in Kelley, D.M., ed., *Government Intervention in Religious Affairs* (New York: Pilgrim Press, 1982), p. 36.

148. 494 U.S. 872 (1990), discussed at § D2e below.

of their license plates that contains the motto 'Live Free or Die.'"[149] The state appealed, and the U.S. Supreme Court noted probable jurisdiction. Chief Justice Burger wrote the opinion of the court.

> We are...faced with the question whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.
>
> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education v. Barnette*... (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind ...." Compelling the affirmative act of a flag salute [at issue in *Barnette*] involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."
>
> New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard"—or suffer a penalty, as Maynard already has. As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display "Live Free or Die" to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.
>
> Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates.... The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism, and state pride.[150]

The court observed that New Hampshire passenger license plates "normally

149 . 406 F.Supp. 1381 (1976).

150 . *Wooley v. Maynard*, 430 U.S. 705 (1971).

consist of a specific configuration of letters and numbers which makes them readily distinguishable from other types of plates, even without reference to the state motto," which is in much smaller characters than the serial numbers on the plate.

> Even were we to credit the State's reasons and "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose."[151]
>
> The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where 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 to avoid becoming the courier for such message.

At this point the court indulged itself in a sly footnote: "Appellants [the state] do not explain why advocacy of these values is enhanced by display on private citizens' cars but not on the cars of officials such as the Governor, Supreme Court Justices, Members of Congress, and Sheriffs" (which do not bear the state motto!). The court neglected to note the even more striking incongruity of putting people in jail for refusing to proclaim, "Live Free or Die!"

Justice White filed a two-page dissent, directed entirely to his distress that the court should allow a federal district court to issue an injunction against criminal prosecutions in state courts, in which he was joined by Justices Rehnquist and Blackmun.

Justice Rehnquist entered a broader dissent to the court's opinion, joined by Justice Blackmun, the gravamen of which was to reject the court's First Amendment analysis.

> I not only agree with the Court's implicit recognition that there is no protected "symbolic speech" in this case, but I think that that conclusion goes far to undermine the Court's ultimate holding that there is an element of protected expression here. The State has not forced appellees to "say" anything; and it has not compelled them to communicate ideas with nonverbal actions reasonably likened to "speech," such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture. The State has simply required that *all* noncommercial automobiles bear license tags with the state motto, "Live Free or Die." Appellees have not been forced to affirm or reject that motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes....
>
> The issue, unconfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of

151 . Quoting *Shelton v. Tucker*, 364 U.S. 479 (1960).

> which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.... [I]n this case, there is no *affirmation* of belief. For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually "asserting as true" the message....
>
> [T]here is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus [they] could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto.[152]

There is some cogency to this contention, but once again it would have the state telling the private citizen what he or she may or may not take offense at as contrary to religious conviction. That is not something the state is as well situated to do as the believer who feels that conviction and that offense. It is like a fat man leaning on a thin man and assuring him it doesn't hurt. If the thin man says he hurts, he is the one—and the only one—in a position to know. Rather than saying that there is no reason to take offense, the state's legitimate consideration is whether the offense is necessary because of some compelling interest, and here the state's contentions about the necessity of imprinting its motto on (some) license plates seem fatuous compared to the claim of conscience.

7. Sabbath Observance

One of the ways of focusing religious devotion is to sanctify or designate as holy certain aspects or elements of life for special veneration or abnegation. These places, times, substances or symbols are to be treated differently because of their sacred or taboo character. Many religions attach such special significance to certain hours, days, weeks, months or seasons, when conduct differs from the ordinary in obedience to religious duty, as when Muslims fast (during the day) throughout the month of Ramadan. One of the commonest cycles is the observance of a holy day each week, found in Jewish, Christian and Muslim traditions with varying degrees of insistence. Western culture has been strongly influenced by this rhythm, which was initiated among an obscure Semitic people in the Middle East, probably in preliterate times. When the oral tradition was eventually reduced to writing, it appeared as the fourth in a mnemonic series of commandments, one for each finger:

> Observe the sabbath day, to keep it holy, as the Lord your God commanded you. Six days you shall labor, and do all your work; but the seventh day is a sabbath to the Lord your God; in it you shall not do any work, you, or your son, or your daughter, or your manservant, or your maidservent, or your ox, or your ass, or any of your cattle, or the sojourner who is within your gates....[153]

Observance of the Sabbath became a central theme of Judaism, particularly among

152 . *Wooley v. Maynard, supra*, Rehnquist dissent.
153 . Deuteronomy 5:12-14a, RSV.

the more "orthodox" branches; meticulous regulations were developed to define what constituted "work" and when the sabbath began and ended. When Christianity branched off from Judaism, the *first* day of the week, rather than the seventh, was observed each week as a recurrent "little Easter" in celebration of Christ's resurrection, but some of the Judaic aspects of sabbath observance were continued or assimilated to Christian observance of the "Lord's Day"—*dies Dominica, Dimanche*, Sunday. When Christianity came to be recognized as the official religion of the Roman Empire, the Emperor Constantine decreed in A.D. 321 that Sunday should be set aside as a day of rest, a pattern that has been followed ever since in most Western societies, with greater or lesser degrees of rigor.

The prevailing view seems to have been that the Fourth Commandment applied to Christians, except that the "sabbath day" somehow had become *Sunday*. A few Christians, such as the Seventh-day Adventists and the Worldwide Church of God, agreed that Christians should keep the sabbath by refraining from worldly work and amusements, but insisted that the day to which that commandment applied was, and remains, Saturday. Still others contended that Christ set his followers free from the obligation to obey the Law of Moses, quoting the Apostle Paul: "You observe days, and months, and seasons, and years! I am afraid I have labored over you in vain!"[154]

However people may choose to observe their holy days, no problem is posed for the law of church and state unless they invoke the action of the state to compel observance by law—after the pattern of Constantine. Sometimes this is done to keep in line those adherents who are negligent in their voluntary performance of religious duty, sometimes to encourage and assist them (since it is not easy to refrain from work if one's employer requires labor on one's holy day), and sometimes because it is thought to be in furtherance of God's will for *everyone* to observe the custom of the day (including "the sojourner who is within your gates").

Some, indeed, have threatened rather stringent penalties in the law for violation of the holy day: "You shall keep the sabbath, because it is holy for you; every one who profanes it shall be put to death...."[155]

The first Sunday law in what is now the United States was instituted in the colony of Virginia in 1610 and provided similarly draconian penalties—not for working but for failing to go to church:

> Every man and woman shall repair in the morning to the divine service and sermons preached upon the Sabbath day, and in the afternoon to divine service, and catechising, upon pain for the first fault to lose their provision and the allowance for the whole week following; for the second, to lose the said allowance and also be whipt; and for the third to suffer death.[156]

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154. Galatians 4:10-11, RSV.

155. Exodus 31:14a, RSV.

156. Quoted in Pfeffer, Leo, *Church, State and Freedom* (Boston: Beacon Press, 1953), p. 229. Pfeffer added, "there is no record of any person suffering death for violation of the Sunday law in Virginia or elsewhere in America."

There is no dispute that Sunday laws were religious in their origin. The preamble of the New York law of 1695 said:

> Whereas the true and sincere worship of God according to His will and commandments is often profaned and neglected by many of the inhabitants and sojourners...who do not keep holy the Lord's Day but in a disorderly manner accustom themselves to travel, labor, walking...and the using of many other unlawful exercises and pastimes to the great scandal of the Holy Christian faith....[157]

Courts did not hesitate to endorse such protectionist sentiments. A New York court in 1861 declared:

> [T]he Christian religion and its ordinances [are entitled] to respect and protection as the acknowledged religion of the people.... It would be strange that a people, Christian in doctrine and worship... should in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law, the religion which is as dear to them as life.... Religious tolerance is entirely consistent with a recognized religion. Christianity may be conceded to be the recognized religion, to the qualified extent mentioned....[158]

A court in Arkansas in 1850, upholding the conviction of a grocer for keeping his store open on Sunday, characterized that offense as "highly vicious and demoralizing" and concluded:

> Sunday or the Sabbath is properly and emphatically called the Lord's day, and is one amongst the first and most sacred institutions of the Christian religion. This system of religion is recognized as constituting a part and parcel of the common law, and as such all of the institutions growing out of it or in any way connected with it, in case they shall not be found to interfere with the rights of conscience, are entitled to the most profound respect, and can rightfully claim the protection of the law-making power of the State. We think it will readily be conceded that the practice against which the act is directed, is a great and crying vice, and that, in view of its exceedingly deleterious effects upon the body politic, there cannot be a doubt that it falls appropriately under the cognizance of the law-making power.[159]

As time went by and the nation became more pluralistic, the courts began to rely upon secular considerations of health and welfare to justify such laws. In 1885, a justice of the U.S. Supreme Court explained in *Soon Hing v. Crowley*:

> Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and

157 . Ibid., p. 229.

158 . *Lindenmuller v. People*, 33 Barb. (N.Y.) 548 (1861), quoted in ibid., pp. 229-230.

159 . *Shovers v. State*, 10 Ark. 259 (1850), quoted in ibid., p. 230.

> moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the states.[160]

Such laws were not always deemed "beneficent and merciful" by those whose livelihood was derived from trade or business that was required to close on Sunday, and gradually those with strong enough political influence obtained amendments in their favor until most Sunday-losing laws were riddled with exceptions. The hardship of Sunday-closing laws fell most onerously upon observant Sabbatarians who closed their businesses to keep their own holy day on Saturday and then were required by law to remain closed on Sunday as well. Some states adopted "fair Sabbath" provisions permitting those who closed their places of business to observe their own holy day on a day of the week other than Sunday to remain open on Sunday so that they did not lose *both* of the best trading days each week. In other states such ameliorative legislation was vigorously opposed by Christian interests led by such advocacy organizations as the Lord's Day Alliance.[161]

With the adoption of federal legislation limiting the number of hours and days any individual worker could be required to work in a week, the health-and-welfare justification for Sunday-closing laws was weakened, and with the application of the religion clauses of the First Amendment to the states,[162] the way was cleared for the U.S. Supreme Court to consider whether the states could enforce Sunday-closing laws in the ways that had been virtually unquestioned in nineteenth-century America. In 1961 the Supreme Court considered four such cases.

a. *McGowan v. Maryland* (1961). On May 29, 1961, Chief Justice Earl Warren announced the decision(s) of the court on four similar cases that had been consolidated under the general heading of the "Sunday-Closing Cases." Two dealt with challenges primarily under the Establishment Clause and two under the Free Exercise Clause.

The first case announced was one arising from the conviction of seven employees of a large discount department store in Anne Arundel County, Maryland, for selling a loose-leaf binder, a can of floor wax, a stapler and a toy submarine in violation of Maryland's Sunday laws, which were a typical morass of detailed prohibitions and exceptions.

> Generally, this section prohibited, throughout the State, the Sunday sale of all merchandise *except* the retail sale of tobacco products, confectioneries, milk, bread, fruit, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals. Recently amended, this section also now

160. *Soon Hing v. Crowley*, 113 U.S. 703 (1885), quoted in ibid., p. 238.

161. One of the author's first involvements in church-state controversies was an effort in the late 1950s to obtain a "fair Sabbath" provision in the law of New York State, in which endeavor he found himself at odds with his own bishop and other Protestant hierarchs.

162. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), discussed at IIA2c. See also the discussion, "Does the First Amendment Apply to the States?" at IIA2a.

> *excepts* from the general prohibition the retail sale in Anne Arundel County of all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs.... [Another section] forbids all persons from doing any work or bodily labor on Sunday and forbids permitting children or servants to work on that day or to engage in fishing, hunting and unlawful pastimes or recreations. The section *excepts* all works of necessity and charity. [Another section] disallows the opening or use of any dancing saloon, opera house, bowling alley or barber shop on Sunday. However, [another section] *exempts*, for Anne Arundel County, the Sunday operation of any bathing beach, bathhouse, dancing saloon and amusement park, and activities incident thereto and retail sales of merchandise customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses. [Another section] makes generally unlawful the sale of alcoholic beverages on Sundays. However, [it] provide[s] various immunities for the Sunday sale of different kinds of alcoholic beverages, at different hours during the day, by vendors holding different types of licenses, in different political divisions of the State—particularly in Anne Arundel County.
>
> The remaining statutory sections concern a myriad of *exceptions* for various counties, districts of counties, cities and towns throughout the State. Among the activities allowed in certain areas on Sunday are such sports as football, baseball, golf, tennis, bowling, croquet, basketball, lacrosse, soccer, hockey, swimming, softball, boating, fishing, skating, horseback riding, stock car racing, and pool or billiards.... The taking of oysters and the hunting or killing of game is generally forbidden, *but* shooting conducted by organized rod and gun clubs is permitted in one county.... Local ordinances and regulations concerning certain limited activities supplement the state's regulatory scheme. In Anne Arundel County, for example, slot machines, pinball machines and bingo may be played on Sunday.[163]

This lengthy recital—not all of which has been reproduced here—illustrates the patchwork product of assiduous lobbying by localities, businesses and other interests and causes one to wonder how any items could be sold in Anne Arundel County that would *not* be legal. The appellants contended—with some apparent justification—that the classifications in the law offend the Equal Protection Clause of the Fourteenth Amendment because they "are without rational and substantial relation to the object of the legislation" and "render arbitrary the statute under which they were convicted," but the court was not persuaded.

> [This] Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.... A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

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163 . *McGowan v. Maryland*, 366 U.S. 420 (1961), emphasis added.

> It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or the enhancement of the recreational atmosphere of the day—that a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit; that those who go to the beach may wish ice cream or some other item normally sold there; that some people will prefer alcoholic beverages or games of chance to add to their relaxation; that newspapers and drug products should always be available to the public.

Having disposed of these and several other Fourteenth Amendment challenges, the court turned to the First Amendment. The appellants had claimed that the Sunday laws interfered with the free exercise of religion, but the court disregarded that contention since "appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing."

> In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities,"... we hold that appellants have no standing to raise this contention.

The court then grappled with the central issue: whether Sunday closing laws were an establishment of religion.

> Appellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion....
>
> The essence of appellants' "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day....
>
> There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character....
>
> * * *
>
> [D]espite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor. In the middle 1700's, Blackstone wrote, "[T]he keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables

> the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness."
>
> * * *
>
> Almost every State in our country presently has some type of Sunday regulation.... Some of our States now enforce their Sunday legislation through Departments of Labor. Thus have Sunday laws evolved from the wholly religious sanctions that originally were enacted.

The court related a brief history of the development of Sunday laws over the centuries, quoted Justice Stephen J. Field in *Soon Hing v. Crowley, supra*, reviewed the struggle for religious freedom in Virginia resulting in the repeal of all vestiges of the Anglican establishment *but not the statute banning Sunday labor*, and recapitulated the composition of the religion clauses of the First Amendment by the First Congress and their subsequent application to the states through the Fourteenth.

> An early commentator opined that the "real object of the amendment was...to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."[164] But, the First Amendment, in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion. Thus, this Court has given the Amendment a "broad interpretation... in the light of its history and the evils it was designed forever to suppress...."[165]
>
> * * *
>
> However, it is equally true that the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue....
>
> In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis on secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.
>
> Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in

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164. Citing Story, Joseph, *Commentaries on the Constitution* (Boston: Hilliard, Gray and Company, 1833) 3:728.

165. *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947); emphasis and ellipsis in original.

> industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significant for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.

With this background, the court then approached the Maryland statute. Noting some vestigial terminology—"Sabbath Breaking," "Lord's Day," and such—it nevertheless concluded that the recent amendments creating exceptions to the "blanket prohibition against Sunday work or bodily labor" suggested a clear departure from the old religious origins of the statute, making what might have been viewed as a constitutional infirmity into a constitutional virtue.

> [The] current stipulation that shops with only one employee may remain open on Sunday does not coincide with a religious purpose. These provisions, along with those which permit various sports and entertainments on Sunday, seem clearly to be fashioned for the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment. Coupled with the general proscription against other types of work, we believe that the air of the day is one of relaxation rather than one of religion.

As a parting shot, the court dealt with appellants' contention "that the State has other means at its disposal to accomplish its secular purpose...that would not even remotely or incidentally give state aid to religion...[as by] a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual." This would not, in the court's view, serve the same secular purpose.

> [T]he State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists a relative quiet and dissociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.
>
> Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends might spend together. Furthermore, it seems plain that the problems involved in

> enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision.
>
> Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion.[166]

Chief Justice Warren was joined in this opinion by Justices Black, Clark, Brennan, Charles Whittaker and Potter Stewart. Justice Frankfurter concurred in this and the other three Sunday closing cases in a lengthy opinion joined by Justice Harlan that will be treated below. Justice Douglas dissented in all four cases in a separate opinion also treated below.

A companion case from Pennsylvania, *Two Guys from Harrison Allentown v. McGinley*,[167] was very similar to *McGowan*, and so is not discussed separately.

b. *Braunfeld v. Brown* (1961). A slightly different question was presented by the other two suits the court considered at the same time under the general heading of Sunday-Closing Cases. In these two instances the plaintiffs were Orthodox Jews, whose religious beliefs required them to abstain from work on their Sabbath—from sundown on Friday until sundown on Saturday. Because of that obligation they closed their places of business on Saturday, but had been accustomed to remain open on Sunday. The enforcement of a Sunday closing law against them deprived them of a second day's business and threatened economic disaster, thus imposing a heavy burden on their free exercise of religion.

The opinion written by Chief Justice Warren acknowledged this burden but held it to be incidental to a legitimate state objective.

> Concededly, appellants and all other persons who wish to work on Sunday, will be burdened economically by the State's day of rest mandate....
>
> Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden.... But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.
>
> However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions....

166 . *McGowan v. Maryland*, *supra*.

167 . 366 U.S. 582 (1961).

> Thus, in *Reynolds v. United States*, this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. And, in *Prince v. Massachusetts* this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work.
>
> It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest.... But, again, that is not the case before us because the statute at bar does not make unlawful any religious practice of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practice or subjecting themselves to criminal prosecution....
>
> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature....
>
> Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference.... Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.
>
> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. 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. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[168]

In these sentences the court was beginning to formulate the thoughts that were to become elements in the tests of Free Exercise set forth in *Sherbert v. Verner*[169] and

168 . *Braunfeld v. Brown*, 336 U.S. 599 (1961).

169 . 374 U.S. 398 (1963), discussed immediately below.

the tests of establishment outlined in *Schempp* and *Lemon*.[170]

> However, appellants...contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday. By such regulation, appellants contend, the economic disadvantages imposed by the present system would be removed and the state's interest in having all people rest one day would be satisfied.
>
> A number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity....
>
> Additional problems might...be presented by a regulation of this sort. To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's beliefs, a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees. Finally, in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring. For all of these reasons, we cannot say that the... statute before us is invalid, either on its face or as applied.[171]

Thus the court concluded that a state could, if it chose, exempt Sabbatarians from its Sunday closing laws but was not constitutionally required to do so.

The opinion written by the chief justice in this case was joined by Justices Black, Clark and Whittaker. Justice Harlan concurred in the result. Justices Brennan and Stewart concurred in the rejection of the Establishment and Equal Protection claims (which had been dealt with in *McGowan* and *Two Guys*, *supra*), but dissented as to the disposition of the Free Exercise claims. Justices Frankfurter and Harlan rejected the Free Exercise claim in a separate opinion, and Justice Douglas dissented as to all claims in all four cases. (The companion Free Exercise case, *Gallagher v. Crown Kosher Super Market, Inc.*, did not raise significantly different issues and so is not

170. *Abington v. Schempp*, 374 U.S. 203 (1963), discussed at IIIC2b(2) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5.

171. *Braunfeld v. Brown, supra*.

treated separately here.) Thus the Establishment cases were divided by eight to one and the Free Exercise cases by a narrower margin. In *Gallagher* the vote was six to three and in *Braunfeld* five to four (since Frankfurter would have remanded it for trial to prove the arbitrariness of the statute).

Justice Frankfurter wrote a long concurrence, which did not add a single new substantive idea to those in the majority or plurality opinions, but just illustrated them in much greater detail. (The chief justice had tried to dissuade Justice Harlan from joining the Frankfurter concurrence, but without success.[172])

Justice Douglas dissented in all four cases because he felt that Sunday laws were inescapably religious laws and represented an attempt by the religious majority to force its views on others.

> The question is not whether one day out of seven can be imposed by a State as a day of rest. The question is not whether Sunday can by force of custom and habit be retained as a day of rest. The question is whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority.
>
> * * *
>
> ...I do not see how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors.... [I]f a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government.... The idea, as I understand it, was to limit the power of government to act in religious matters, not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.
>
> * * *
>
> The "establishment" clause protects citizens... against any law which selects any religious custom, practice or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it.
>
> * * *
>
> The issue of these cases would therefore be in better focus if we imagined that a state legislature, controlled by orthodox Jews and Seventh-Day Adventists, passed a law making it a crime to keep a shop open on Saturdays. Would a Baptist, Catholic, Methodist or Presbyterian be compelled to obey that law or go to jail or pay a fine?
>
> * * *
>
> We have then in each of the four cases Sunday laws that find their source in Exodus, that were brought here by the Virginians and by the Puritans, and that are today maintained, construed, and justified because they respect the views of our dominant religious groups and provide a needed day of rest.
>
> The history was accurately summarized a century ago by Chief Justice Terry of the Supreme Court of California in *Ex parte Newman*:

172 . Schwartz, B., *Super Chief*, *supra*, p. 381.

* * *

> "The legislature cannot compel the citizen to do that which the Constitution leaves him free to do or omit, at his election. The act violates as much the religious freedom of the Christian as the Jew. Because the conscientious views of the Christian compel him to keep Sunday as a Sabbath, he has the right to object, when the Legislature invades his freedom of religious worship to compel him to do that which he has right to omit if he pleases...."

* * *

No matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities....

It seems to me plain that by these laws the States compel one, under sanction of law, to refrain from work or recreation on Sunday because of the majority's religious views about that day....

* * *

The State can, of course, require one day of rest a week: one day when every shop or factory is closed. Quite a few States make that requirement. Then the "day of rest" becomes purely and simply a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the "weaker brethren," to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there by any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities that violated Moslem scruples?

There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the "free exercise" of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community. Hence I would declare each of these laws unconstitutional as applied to the complaining parties, whether or not they are members of a sect which observes as its Sabbath a day other than Sunday.[173]

Justice Brennan dissented with respect to the Free Exercise claims in *Braunfeld* and *Gallagher*.

> The Court has demonstrated the public need for a weekly surcease from worldly labor, and set forth the considerations of convenience which have led the Commonwealth of Pennsylvania to fix Sunday as the time for that respite.
>
> I would approach this case differently, from the point of view of the individuals whose liberty is—concededly—curtailed by these enactments. For the values of the First Amendment...look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.

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173 . *McGowan v. Maryland, supra*, Douglas dissent (in all four cases).

The appellants are small retail merchants, faithful practitioners of the orthodox Jewish faith.... In [their] business area Friday night and Saturday are busy times; yet...true to their faith, [they] close during the Jewish Sabbath, and make up some, but not all, of the business they lost by opening on Sunday.... [Their] ability...to earn a livelihood will be greatly impaired by closing their business establishment on Sundays.... Braunfeld will be unable to continue in business if he may not stay open on Sunday and he will thereby lose his capital investment. In other words, the issue in this case...is whether a State may put an individual to a choice between his business and his religion. The Court today holds that it may. But I dissent, believing that such a law prohibits the free exercise of religion.

* * *

[I]n this case the Court seems to say, without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose.

* * *

What, then, is the compelling state interest which impels Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation on appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in Reynolds, for the custom of resting one day a week is universally honored, as the Court has amply shown.... It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

It is true, I suppose, that the granting of such an exemption would make Sunday a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania.... The Court conjures up several difficulties with such a system which seem to me more fanciful than real. Non-Sunday observers might get an unfair advantage, it is said. A similar contention against the draft exemption for conscientious objectors (another example of the exemption technique) was rejected with the observation that "its unsoundness is too apparent to require" discussion. Selective Draft Law Cases.[174] However widespread the complaint, it is legally baseless, and the State's reliance upon it cannot withstand a First Amendment claim. We are told that an official inquiry into the good faith with which religious beliefs are held might be itself unconstitutional. But this Court indicated otherwise in United States v.

174 . See *Arver v. U.S.*, 245 U.S. 366 (1918), discussed at § 5 above.

> Ballard. Such an inquiry is no more an infringement of religious freedom than the requirement imposed by the Court itself in McGowan v. Maryland, decided this day, that a plaintiff show that his good faith religious beliefs are hampered before he acquires standing to attack a statute under the Free Exercise Clause of the First Amendment. Finally, I find the Court's mention of a problem under state antidiscrimination statutes almost chimerical. Most such statutes provide that hiring may be made on a religious basis if religion is a bona fide occupational qualification. It happens, moreover, that Pennsylvania's statute has such a provision.
>
> In fine, the Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. The Court would justify this result on the ground that the effect on religion, though substantial, is indirect. The Court forgets, I think, a warning uttered during the Congressional discussion of the First Amendment itself: "...the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand...."[175]

Justice Stewart wrote a brief dissent:

> I agree with substantially all that Mr. Justice BRENNAN has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.[176]

Ironically, after the Supreme Court had upheld the constitutionality of Sunday-closing laws, such laws began to become unfashionable and gradually fell into desuetude in most jurisdictions, as also happened to "released time" programs of religious instruction of public school pupils (outside public school premises) after the court had upheld such programs in *Zorach v. Clauson*.[177]

c. *Sherbert v. Verner* (1963). Two years later, the court's views on Sabbath observance seem to have shifted, due in part to changes in its membership. Justices Whittaker and Frankfurter were no longer present, and Justices Byron White and Arthur Goldberg had taken their places. The court's attention was given to another kind of Sabbatarian problem, this one involving denial of unemployment compensation for loss of job because of religious duty.

A Seventh-day Adventist woman was employed at a textile mill near Spartanburg, South Carolina, which operated five days a week. In 1959 the mill instituted a six-day week, requiring employees to work on Saturday also. Mrs. Sherbert refused to work

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175 . *Braunfeld v. Brown, supra,* Brennan dissent.

176 . Ibid., Stewart dissent.

177 . 343 U.S. 306 (1952), discussed at IIIC1b.

on Saturday, her Sabbath, and was dismissed by her employer. She applied at three other textile mills in the vicinity, but none had a five-day work schedule available, so she applied for unemployment compensation. The State Employment Security Commission denied her application on the ground that she was ineligible because she refused available work "without good cause" (as required by South Carolina law). Mrs. Sherbert took the matter to court, and lost in the state courts.

The U.S. Supreme Court took the case and reversed the state courts by a vote of seven to two. The court's opinion was announced by Justice Brennan in one of the most important Free Exercise cases in U.S. history—second only to *Wisconsin v. Yoder*,[178] the two marking the high-water level to date for the protection of the free exercise of religion.

Observing that the court had sustained restrictions on religiously motivated conduct when it "posed some substantial threat to public safety, peace or order," Justice Brennan noted that no such threat was posed in this instance.

> Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of [her] religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate...." *NAACP v. Button*.
>
> We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For "[i]f 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." *Braunfeld v. Brown*.[179] Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed

178 . 406 U.S. 105 (1972), discussed at IIIB2.

179 . 336 U.S. 599 (1961), discussed immediately above. The quoted passage, which did not underlie the holding in *Braunfeld*, may be said to have been mere dicta in that case, but became something more in the context of *Sherbert*'s holding.

against appellant for her Saturday worship.[180]

The court dealt rather quickly with the doctrine of "unconstitutional conditions," which it had treated more extensively in other contexts, specifically in *Speiser v. Randall* (denial of tax exemption for failure to subscribe to a loyalty oath curtails free speech rights).[181] The doctrine has been stated as follows: "...[G]overnment may not condition receipt of its benefits upon the nonassertion of constitutional rights even if receipt of such benefits is in all other respects a `mere privilege.'"[182]

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege....
>
> To condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

As a kind of "clincher," Justice Brennan noted that South Carolina law protects *Sunday* observers from encountering Mrs. Sherbert's dilemma.

> When in times of "national emergency" the textile plants are authorized...to operate on Sunday, "no employee shall be required to work on Sunday...who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious...objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner...." The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.
>
> We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. 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." Thomas v. Collins.[183] No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work.... [T]here is no proof whatever to warrant such fears of malingering or deceit as those which the

180 . *Sherbert v. Verner*, 378 U.S. 398 (1963).

181 . 357 U.S. 513 (1958).

182 . Quoting Tribe, L., *American Constitutional Law*, *supra*, 2d. ed., § 10-8, p. 681.

183 . These oft-quoted words, cited to *Sherbert*, are actually from a much earlier case involving the free-speech rights of a labor organizer. 323 U.S. 516 (1945).

> respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs—a question as to which we intimate no view since it is not before us—it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even, if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.[184]

Justice Brennan sought—without entire success, in the view of three justices, one concurring and two dissenting—to distinguish the instant case from *Braunfeld*.[185]

> In these respects then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown*. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants']... religious beliefs more expensive." But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the court found, only by declaring Sunday to be that day of rest. Requiring exemption for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.

In conclusion, Justice Brennan dealt with the charge that the court's holding would be an "establishment" of religion and with other contentions.

> In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties. Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the

184. The threshold reason the court did not accord weight to the state's asserted interests was because they were not raised in the court below, and "we are unwilling to assess the importance of an asserted state interest without the views of the state court."

185. Discussed immediately above.

> cause of their unemployment.[186] This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society. Finally, nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammendans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." Everson v. Board of Education.

Justice Douglas wrote a concurring opinion expressing his sensitivity to "establishment" problems and reiterating his dissent in the "Sunday Blue Law Cases."

> [M]any people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of "police" or "health" regulations reflecting the majority's views.
>
> Some have thought that a majority of a community can, through state action, compel a minority to observe their particular religious scruples so long as the majority's rule can be said to perform some valid secular function. That was the essence of the Court's decision in the Sunday Blue Law Cases, a ruling from which I then dissented and still dissent.
>
> * * *
>
> The result [in this case] turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages.
>
> This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples. The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.[187]

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186. But see *Thomas v. Review Board,* 450 U.S. 707 (1981), in which denial of unemployment compensation because of conscientious objection to working on armaments was held unconstitutional; discussion at § A5l above.

187. This sentence was quoted frequently in later years, often in a context of which Justice Douglas might not have approved. See *Bowen v. Roy*, 476 U.S. 693 (1986), discussed at § 9g below; and *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), discussed at § E1i below.

> Those considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her, not as a Seventh-day Adventist, but as an unemployed worker. Conceivably these payments will indirectly benefit her church, but not more so than does the salary of any public employee. Thus, this case does not involve the problems of direct or indirect state assistance to the religious organization—matters relevant to the Establishment Clause, not in issue here.[188]

Justice Stewart concurred in the result of this case but not in the reasoning that led to it, particularly the effort to distinguish the present case from *Braunfeld*.

> Although fully agreeing with the result which the Court reaches in this case, I cannot join the Court's opinion. This case presents a double-barreled dilemma, which in all candor I think the Court's opinion has not succeeded in papering over. The dilemma ought to be resolved.
>
> * * *
>
> I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth. And I regret that on occasion, and specifically in *Braunfeld v. Brown*, the Court has shown what has seemed to me a distressing insensitivity to the appropriate demands of this constitutional guarantee.
>
> * * *
>
> I cannot agree that today's decision can stand consistently with *Braunfeld v. Brown*. The Court says that there was a "less direct burden upon religious practices" in that case than in this. With all respect, I think the Court is mistaken, simply as a matter of fact. The *Braunfeld* case involved a state *criminal* statute. The undisputed effect of that statute, as pointed out by Mr. Justice BRENNAN in his dissenting opinion in that case, was that "'Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment.' In other words, the issue in this case—and we do not understand either appellees or the Court to contend otherwise—is whether a State may put an individual to a choice between his business and his religion."
>
> The impact upon the appellant's religious freedom in the present case is considerably less onerous. We deal here not with a criminal statute, but with the particularized administration of South Carolina's Unemployment Compensation Act. Even upon the unlikely assumption that the appellant could not find suitable non-Saturday employment, the appellant would be denied a maximum of 22 weeks of compensation payments. I agree with the Court that the possibility of that denial is enough to infringe upon the appellant's constitutional right to the free exercise of her religion. But it is clear to me that in order to reach this conclusion the Court must explicitly

188 . *Sherbert v. Verner, supra*, Douglas dissent.

> reject the reasoning of *Braunfeld v. Brown*. I think the *Braunfeld* case was wrongly decided and should be overruled, and accordingly I concur in the result reached by the Court in the case before us.[189]

The majority had approached the case from the standpoint of the religious believer conscientiously trying to observe the requirements of her faith amid the exigencies of the workplace, and when she could not accommodate the one to the other and had to leave the workplace, being denied unemployment compensation on the ground that she had quit her job "without good cause." The minority approached the case from the standpoint of the state trying to protect the employment market from sharp economic dislocations. Thus Justice Harlan, joined by Justice White, filed a dissent that followed in the precedent of *Braunfeld*.

> Today's decision is disturbing both in its rejection of existing precedent and in its implications for the future....
>
> South Carolina's Unemployment Compensation Law was enacted in 1936 in response to the grave social and economic problems that arose during the depression of that period. As stated in the statute itself:
>
> "Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; *involuntary unemployment* is therefore a subject of general interest and concern...." (Emphasis added.)
>
> Thus the purpose of the legislature was to tide people over, and to avoid social and economic chaos, during periods when *work was unavailable*. But at the same time there was clearly no intent to provide relief for those who for purely personal reasons were or became *unavailable for work*....
>
> The South Carolina Supreme Court has uniformly applied this law in conformity with its clearly expressed purpose. It has consistently held that one is not "available for work" if his unemployment has resulted not from the inability of industry to provide a job but rather from personal circumstance, no matter how compelling....
>
> With this background this Court's decision comes into clearer focus. What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions. Such a holding has particular significance in two respects.
>
> First, despite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*, which held that it did not offend the "Free Exercise" Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday. The secular purpose of the statute before us today is even clearer than that involved in *Braunfeld*. And just as in *Braunfeld*—where exceptions to the Sunday closing laws for Sabbatarians would have been inconsistent with the purpose to achieve a uniform day of rest and would have required case-by-case inquiry into religious beliefs—so here, an exception to the rules of eligibility based on

189 . Ibid., Stewart concurrence in the judgment.

religious convictions would necessitate judicial examination of those convictions and would be at odds with the limited purpose of the statute to smooth out the economy during periods of industrial instability. Finally, the indirect financial burden of the present law is far less than that involved in *Braunfeld*. Forcing a store owner to close his business on Sunday may well have the effect of depriving him of a satisfactory livelihood if his religious convictions require him to close on Saturday as well. Here we are dealing only with temporary benefits, amounting to a fraction of regular weekly wages and running for not more than 22 weeks. Clearly, any differences between this case and *Braunfeld* cut against the present appellant.

Second, the implications of the present decision are far more troublesome than its apparent narrow dimensions would indicate at first glance. The meaning of today's holding...is that the State...must *single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (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 limits 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 requirement for persons like the appellant. The constitutional obligation of "neutrality" is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. The State violates its obligation of neutrality when, for example, it mandates a daily religious exercise in its public schools, with all the attendant pressures on the school children that such an exercise entails. But there is, I believe, enough flexibility to the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

For very much the same reasons, however, I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case. *Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between*, and this view is amply supported by the course of constitutional litigation in this area. Such compulsion...is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires.[190]

The course of development of the court's views on this case is interesting.

190. Ibid., Harlan dissent. Latter emphasis added, indicating a classic minimalist view of the Religion Clauses.

According to a biographer of Chief Justice Warren, the vote to take the case found Warren, Douglas, Brennan, Stewart and Goldberg in favor, Hugo Black, Clark, Harlan and White against. Warren assigned the opinion to Brennan, and his first draft asserted that relief was available in instances where the employer altered the work schedule in such a way that it came into conflict with an otherwise satisfied employee's religious obligations (exactly the *Sherbert* case). But only Justice Clark was willing to join so narrow a holding. Brennan broadened it to suggest that the statute did not purport to disqualify all persons who were unemployed for personal reasons, and Warren, Black and Goldberg agreed to join also. Brennan made some changes, both in the *Sherbert* opinion and in his concurrence in *Schempp*—issued the same day—to respond to points in the separate opinions of Stewart, Douglas and Harlan. The *Sherbert* opinion went through six drafts before its issuance on June 17, 1963.[191]

In the end, seven of the court's members supported the result and five the court's opinion (possibly six, in the sense that Justice Douglas did not indicate disagreement with it although he wrote a separate, concurring opinion). Only Justices Harlan and White dissented. That outcome reflected the vote taken in the April 26, 1963, conference, when Warren, Black, Douglas, Clark, Brennan, Stewart and Goldberg all agreed that the South Carolina court's decision should be reversed. There were apparently no waverers on that view, judging from the fact that two who voted against taking the case—Black and Clark—were early to join the Brennan opinion, and Douglas and Stewart were emphatic in their agreement with the result.

It is remarkable that seven of the nine saw the situation from the standpoint of the religious person's dilemma rather than from that of the state's apparent original purpose—which had conceivably been broadened in application in the three decades since the Depression. More might have been made of the phrase in the statute—"without good cause"—as an intermediate consideration; that a State providing unemployment compensation cannot predicate eligibility upon the supposition that unavailablity for work because of religious obligations is "without good cause." The Free Exercise Clause would seem to require that reasons of conscience and religious obligation cannot be characterized as "without good cause." They may be viewed as "personal" reasons, but perhaps less subject to the applicant's control than some other reasons for unavailability now qualifying for unemployment compensation, such as going on strike![192]

In any event, *Sherbert* represents an important decision upholding the principle of religious liberty, and remained sound law until *Oregon v. Smith* (1990) repudiated the "compelling state interest" test for the free exercise of religion.[193]

d. *Dewey v. Reynolds Metals Co.* (1971). In implementation of the Civil Rights Act of 1964, in 1966 the Equal Employment Opportunity Commission (EEOC) instituted a guideline that placed on the employer an obligation "to accommodate to

191 . Schwartz, B., *Super Chief, supra,*, pp. 468-470.

192 . Some states deny unemployment benefits to strikers.

193 . *Oregon v. Smith*, 494 U.S. 872 (1990), discussed at § D2e below.

the reasonable religious needs of employees...where such accommodation can be made without serious inconvenience to the conduct of the business."[194] This guideline was revised in 1967 to read that employers were required "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employers' business."[195]

In 1970 the Sixth Circuit Court of Appeals held that an employee who had been discharged for refusal to work on Sundays had not been the victim of an unlawful employment practice because the system used by the employer to assign Sunday work was not discriminatory in its purpose or effect, and the employer had made a reasonable accommodation of the employee's religious beliefs by giving him the opportunity to secure a replacement for his Sunday assignments.[196] The U.S. Supreme Court was evenly divided on this case, and so by a 4-4 vote, the lower court's decision was affirmed.[197]

e. The Randolph Amendment (1972). The Civil Rights Act of 1964 contained the following provision with respect to private employers (Title VII):

> (a) 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 individuals race, color, *religion*, sex, or national origin.[198]

When Congress was reviewing Title VII in 1972, Senator Jennings Randolph (D.-W.Va.) a Seventh-day Baptist, arose to draw attention to the effect of decisions such as *Dewey, supra,* and to clarify the matter by legislation. He offered an amendment modeled on the EEOC guideline designed to protect Saturday Sabbatarians like himself from employers who refuse "to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days."[199]

"His amendment was unanimously approved by the Senate on a roll-call vote, and was accepted by the Conference Committee, whose report was approved by both Houses."[200] It read as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[201]

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194 . 29 CFR § 1605.1, 31 Fed. Reg. 8370 (1966), as cited in *TWA v. Hardison*, 432 U.S. 63 (1977).
195 . 29 CFR §1605.1, 32 Fed. Reg. 10298 (1967), as cited in *TWA v. Hardison, supra.*
196 . *Dewey v. Reynolds Metals Co.,* 429 F.2d 324 (1970).
197 . 402 U.S. 689 (1971).
198 . 42 U.S.C. § 2000e-2(a)(1), emphasis added.
199 . 118 Cong. Rec. 704 (1972), cited by Marshall,dissenting in *TWA v. Hardison, supra.*
200 . *Hardison, supra,* Marshall dissent.
201 . 42 U.S.C. § 2000e (j).

(It is curious to find this requirement presented as a definition of "religion" as though if any employer was unable to accommodate an employee's religious observance or practice, it ceased to be "religion.")

f. *Parker Seal Co. v. Cummins* (1976). Paul Cummins was a supervisor in the plant of the Parker Seal Company in Berea, Kentucky. He was a member of the Worldwide Church of God, a strictly Sabbatarian Christian body headquartered in Pasadena, California.[202] Because of his religious convictions Cummins refused to work on Saturdays. The company bore with him for more than a year, though other supervisors were compelled to work more often on Saturdays to cover for him. Their rising resentments eventually led the company to fire him, and he took his case to court under the Randolph proviso.

The Sixth Circuit Court of Appeals, because of the events intervening since *Dewey*, this time found in the Sabbatarian's favor, concluding that the company had not tried hard enough to accommodate him. The U.S. Supreme Court again divided 4-4 (with Justice John Paul Stevens disqualifying himself), and so the Sixth Circuit's decision was left standing.[203] This remained the law—of the Sixth Circuit at least—until the next year when the Supreme Court got off the fence and in *TWA v. Hardison* tipped heavily (7-2) against the accommodation of Sabbatarians.

g. *Trans World Airlines v. Hardison* (1977). This case arose in Kansas City, Missouri, where Trans World Airlines (TWA) operated a large maintenance base for servicing its extensive flight systems. In 1967 Larry G. Hardison was hired by TWA to work in the Stores Department of its Kansas City installation, a department that needed to be functioning round-the-clock every day of the year. Whenever an employee was absent, a supervisor had to cover the job or another employee had to be shifted from another department, at whatever disadvantage to other areas of work.

Job assignments in the Kansas City plant were made on the basis of seniority under a system that had been agreed upon by the company and the International Association of Machinists and Aerospace Workers (IAM) through collective bargaining. The union steward assigned job openings and shift duty on the basis of seniority, with the most senior employees getting first choice of job and shift assignments. Less senior employees got what was left, with the least senior being obliged to fill in when the steward was unable to find anyone to volunteer for a particular time or task.

In 1968 Hardison became an adherent of the Worldwide Church of God, which required abstinence from work from sunset on Friday until sunset on Saturday. Hardison told Everett Kussman, manager of the Stores Department, of his commitment to Sabbath observance, and Kussman agreed that the union steward should seek a job swap for Hardison or a change of days off. He stated that Hardison would have his days off whenever possible if Hardison would work on the traditional holidays when others wanted off, and he offered to try to find Hardison a job more

202 . See reference to this body at IE1a.

203 . *Parker Seal Co. v. Cummins,* 516 F.2d 544 (1976), affirmed by an equally divided court, 429 U.S. 65 (1976). The next year, the court granted rehearing and remanded the case, 433 U.S. 903 (1977), for further consideration in light of *TWA v. Hardison, infra*.

compatible with his religious beliefs. For a while the problem was resolved by Hardison's working the 11 PM-7 AM shift, which permitted him to observe his Sabbath (at least during the day).

Then Hardison bid for and received a transfer to another building, which had its own seniority list. In his previous position he had had enough seniority to observe his Sabbath regularly, but in his new position he was at the bottom of the list. He was asked to work Saturdays when another employee went on vacation. The company agreed to permit a readjustment of work assignments for him, but the union was unwilling to violate the seniority system agreed to in its contract with the company. The company rejected a counterproposal that he work only four days a week, since his job was essential, and on weekends he was the only available person on his shift to perform it.

> To leave the position empty would have impaired Supply Shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.[204]

When this impasse was reached, Hardison refused to appear for work on Saturdays. After a hearing he was discharged for insubordination for refusal to work during his designated shift. Hardison eventually sued both TWA and IAM, charging religious discrimination in violation of Title VII. The trial court found that the defendants had made "reasonable accommodations" for Hardison's religious beliefs. Any further accommodations would have worked an "undue hardship" on the employer.

The Eighth Circuit Court of Appeals reversed the judgment, and the U.S. Supreme Court granted *certiorari*. In an opinion by Justice White it reviewed the Circuit Court's conclusions to the effect that TWA could have resorted to one of three possible alternatives without undue hardship:

1. It could have permitted Hardison to work a four-day week. This would have necessitated assigning another worker to cover his slot on the fifth day, but the Circuit Court did not consider that an undue hardship; or

2. The company could have filled Hardison's shift with any one of at least 200 other personnel able to do the job, which would have involved premium overtime pay, but the Circuit Court did not think that an undue hardship for a company as large as TWA; or

3. The company could have arranged a swap between Hardison and another employee for the Sabbath days or another shift. This might have involved a breach of the seniority system in the labor contract, but the Circuit Court said it had not been determined whether the accommodation required by the statute stopped short of transgressing seniority rules, and it was not obliged to settle that question because the company had not sought a variance in the seniority system, and so the union had not

204 . *TWA v. Hardison*, 432 U.S. 63 (1977).

responded with a judgment whether it was possible or not. The company had simply left the entire matter to the union steward, who—the Circuit Court said— "likewise did nothing."

The Supreme Court viewed the matter differently:

> We disagree with the Court of Appeals in all relevant respects. It is our view that TWA made reasonable efforts to accommodate and that each of the Court of Appeals' suggested alternatives would have been an undue hardship within the meaning of the statute....
>
> It might be inferred from the Court of Appeals' opinion and from the brief of the EEOC in this Court that TWA's efforts to accommodate were no more than negligible. The findings of the District Court, supported by the record, are to the contrary.

The court pointed to several things that had been done by the company:

1. Several meeting were held with Hardison in an effort to find a solution;
2. It did accommodate his observance of special religious days (presumably annual rather than weekly ones);
3. It authorized the union steward to search for someone who would swap shifts;
4. It also attempted, but without success, to find him another position.

The district court had considered that TWA had done as much as could be reasonably expected within the seniority system. The Supreme Court disagreed with the circuit court's contention that a variance from the seniority system had never been posed to the union. On the contrary, that consideration was in view from the beginning and was not acceptable to the union.

Hardison and the EEOC contended that the statutory obligation imposed by Title VII takes precedence over the collective bargaining contract and the seniority rights of other employees. The Supreme Court thought otherwise.

> We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do 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. Without a clear and express indication from Congress, we cannot agree... that an agreed-upon seniority system must give way, when necessary to accommodate religious observances.
>
> * * *
>
> It was essential to TWA's business to require Saturday and Sunday work from at least a few employees even though most employees preferred those days off. Allocating the burdens of weekend work was a matter for collective bargaining. In considering criteria to govern this allocation, TWA and the union had two alternatives: adopt a neutral system, such as seniority, a lottery, or rotating shifts; or allocate days off in accordance with the religious needs of its employees. TWA would have had to adopt the latter in order to assure Hardison and others like him of

> getting the days off necessary for strict observance of their religions, but it could have done so only at the expense of others who had strong, but perhaps nonreligious reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.
>
> Title VII does not contemplate such unequal treatment.... It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny this shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

The court gained support for that view from the fact that Title VII itself contains a recognition of the validity of seniority as a countervailing consideration. Section 703(h) provides:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system...provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin....[205]
>
> There has been no suggestion of discriminatory intent in this case.... TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations.

The court also rejected the circuit court's other two suggestions—to let Hardison work a four-day week or to assign other employees to work overtime at premium wages to fill his Saturday vacancy.

> Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or as higher wages.
>
> To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion....
>
> As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment.... [W]e will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

Therefore, the court of appeals was reversed, with only two dissenting votes. These were cast by the most "liberal" members of the "Burger" Court: Justice Marshall wrote the dissent, which was joined by Justice Brennan.

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205 . 42 U.S.C. § 2000e-2(h).

> Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act don't really mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise. I therefore dissent.
>
> With respect to each of the proposed accommodations of respondent's religious observances that the Court discusses, it ultimately notes that the accommodation would have required "unequal treatment"... in favor of the religious observer. That is quite true. But if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with "sound and fury," ultimately "signif[y] nothing."
>
> The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee. In some of the reported cases, the rule in question has governed work attire; in other cases it has required attendance at some religious function; in still other instances, it has compelled membership in a union; and in the largest class of cases, it has concerned work schedules. What all these cases have in common is an employee who could comply with the rule only by violating what the employee views as a religious commandment. In each instance, the question is whether the employee is to be exempt from the rule's demands. To do so will always result in a privilege being "allocated according to religious beliefs..." unless the employer gratuitously decides to repeal the rule in toto. What the statute says, in plain words, is that such allocations are required unless "undue hardship" would result.

Justice Marshall reviewed the legislative history of the Randolph amendment and observed, "[T]he Court today, in rejecting any accommodation that involves preferential treatment, follows the *Dewey* decision in direct contravention of congressional intent" [which had been to overcome the decision in *Dewey v. Reynolds Metals*[206]].

> The Court's interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of petitioners' constitutional challenge unnecessary.... Moreover, while important constitutional questions would be posed by interpreting the law to compel

206 . 402 U.S. 689 (1971), discussed at § d above.

employers (or fellow employees) to incur substantial costs to aid the religious observer, not all accommodations are costly, and the constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule. Indeed, this Court has repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties,[207] even when the exemption was in no way compelled by the Free Exercise Clause.[208]

* * *

If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer. Thus, I think it beyond dispute that the Act does— and, consistently with the First Amendment, can—require employers to grant privileges to religious observers as part of the accommodation process.

Once it is determined that the duty to accommodate sometimes requires that an employee be exempted from an otherwise valid work requirement, the only remaining question is whether this is such a case: did TWA prove that it exhausted all reasonable accommodations, and that the only remaining alternatives would have caused undue hardships on TWA's business. To pose the question is to answer it, for all that...TWA had done...was that it "held several meetings with [respondent]...[and] authorized the union steward to search for someone who would swap shifts...." To conclude that TWA, one of the largest air carriers in the nation, would have suffered undue hardship had it done anything more defies both reason and common sense....

To begin with, the record simply does not support the Court's assertion, made without accompanying citations, that "[t]here were no volunteers to relieve Hardison on Saturdays".... Everett Kussman, the manager of the department in which respondent worked, testified that he had made no effort to find volunteers..., and the Union stipulated that its steward had not done so either.... Thus, contrary to the Court's assumption, there may have been one or more employees who, for reasons of either sympathy or personal convenience, willingly would have substituted for respondent on Saturdays until [he] could either regain the non-Saturday shift he had held for the three preceding months or transfer back to his old department where he had sufficient seniority to avoid Saturday work. Alternatively, there may have been an employee who preferred respondent's Thursday-Monday daytime shift to his own; in fact, respondent testified that he had informed Kussman and the Union steward that the clerk on the Sunday-Thursday night shift (the "graveyard" shift) was dissatisfied with his hours.... Thus, respondent's religious observance might have been

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207. Citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discussed at IIIB2; *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at § c above; and *Zorach v. Clauson*, 343 U.S. 306 (1952), discussed at IIIC1b.

208. Citing *Gillette v. U.S.*, 401 U.S. 437 (1971), discussed at § 5k above, and *Welsh v. U.S.*, 343 U.S. 306 (1970), discussed at § 5j above.

> accommodated by a simple trade of days or shifts without necessarily depriving any employee of his or her contractual rights and without imposing significant costs on TWA. Of course, it is also possible that no trade—or none consistent with the seniority system—could have been arranged. But the burden under the EEOC regulation is on TWA to establish that a reasonable accommodation was not possible.... Because it failed either to explore the possibility of a voluntary trade or to assure that its delegate, the Union steward, did so, TWA was unable to meet its burden.
>
> Nor was a voluntary trade the only option open to TWA that the Court ignores; to the contrary, at least two other options are apparent from the record. First, TWA could have paid overtime to a voluntary replacement for respondent— assuming that someone would have been willing to work Saturdays for premium pay— and passed on the cost to respondent. In fact, one accommodation Hardison suggested would have done just that by requiring Hardison to work overtime when needed for regular pay. Under this plan, the total overtime cost to the employer— and the total number of overtime hours available for other employees—would not have reflected Hardison's Sabbath absences. Alternatively, TWA could have transferred respondent back to his previous department where he had accumulated substantial seniority, as respondent also suggested. Admittedly, both options would have violated the collective-bargaining agreement; the former because the agreement required that employees working over forty hours receive premium pay, and the latter because the agreement prohibited employees from transferring departments more than once every six months. But neither accommodation would have deprived any other employee of rights under the contract or violated the seniority system in any way. Plainly an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations.... Thus I do not believe it can be even seriously argued that TWA would have suffered "undue hardship" to its business had it required respondent to pay the extra costs of his replacement, or had it transferred respondent to his former department.
>
> What makes this case most tragic, however, is not that respondent Hardison has been needlessly deprived of his livelihood simply because he chose to follow the dictates of his conscience. Nor is the tragedy of the case exhausted by the impact it will have on thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for worshipping their God. The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today's decision is erased.[209]

It seems incredible—unless there are facts or considerations that were not expressed by majority or minority—that the seven members of the court who were in the majority—Chief Justice Burger and Associate Justices Stewart, White,

209 . *Hardison, supra,* Marshall dissent.

Blackmun, Lewis Powell, Rehnquist and Stevens—were content to let TWA and the Union off with this token accommodation without modifying the majority opinion in some way to neutralize Marshall's eloquent and devastating dissent, which revealed the supposed accommodations of Hardison's religious needs to be little more than a few fruitless meetings and a lot of empty posturings. There was no explanation of why Hardison couldn't be transferred back to his previous building—after the lapse of six months, if necessary—with exactly such an overtime trade-off as he proposed in the interim.

It is commendable that two justices who were usually among the most solicitous of the rights of organized labor were sufficiently exercised over this situation to write such a vigorous and informative dissent. They succeeded in making *TWA v. Hardison* appear to be one of the court's poorest and least defensible decisions and a true disservice to religious liberty.

To be sure, it turned largely on the facts—or non-facts—of this particular case. If Hardison could have been accommodated as readily and inexpensively as the dissent claimed, there was no justification for letting TWA and other employers similarly situated off the hook for such unimaginative and utterly nonaccommodating performance. But what if the facts were as the majority thought they were? What if there were no such inexpensive accommodations available as the dissent contended? To what lengths would the statute require employers to go to accommodate religious "oddballs" who did not conform to the requirements of the workplace? To what extent *should* a statute require accommodation—whether the Randolph amendment did so or not (and surely Jennings Randolph meant it to do more than the court construed it to do)? As the majority observed, there was no definition in the statute of "reasonable accommodation" or "undue hardship," but it was utterly unacceptable to say that anything beyond "*de minimis* cost" would be "undue hardship." *De minimis* is familiar from the Latin phrase *De minimis non curat lex*—the law does not concern itself with "trifles"—and TWA's performance was certainly trifling. If an employer can be absolved of responsibility under Title VII for as minimal an accommodation as TWA offered—or rather *merely* offered; it didn't even produce—then there is nothing left of the Randolph amendment. But how far should it go?

The majority had some cogency on its side when it balked at what it thought would be requiring other employees against their will to pay the price of Hardison's religious obligations, but Hardison was not demanding that; he offered to make up any overtime cost to the company. But suppose no other workers wanted to take his Saturday shift even for premium pay? What if the employee did not have the seniority in a former department to protect his Saturday off? What if the employer's workforce was too small to shift employees around to cover the absence of Sabbath-keepers? At some point, the cost does become an undue hardship. While seniority systems and collective-bargaining contracts are not sacrosanct, they do represent hard-won achievements of labor-management peace. And accommodation of one determined Sabbatarian in a workforce of 200 may be manageable, but what if the Worldwide Church of God or the Seventh-day Adventists were to enjoy a wildfire success in evangelism and convert 20—or 100—members of the workforce? Then accommodation could become a truly undue hardship!

But at present—fortunately or unfortunately, depending on the point of view—the prevalence of committed Sabbath-observers is not one of the major threats to industrial relations, and there is room for more accommodation than many employers or unions want to be bothered with. It was to get past the "don't-bother-me-with-trifles" level of nonaccommodation that Senator Randolph—the only (Christian) Sabbatarian in Congress at the time (which shows how numerically nonacute the problem is)—introduced his amendment, and Congress passed it. And then the Supreme Court gutted it in *TWA v. Hardison* (with the concurrence of those justices who are known to oppose "activism" or "legislation" by the courts!).

Whatever court or Congress may conclude, those who think religious liberty one of the most important of the guarantees of the American Constitution will not want to see men and women who are conscientiously trying to obey the will of God as they see it casually brushed aside by the preoccupied busy-ness of the secular world. They will not want to claim that the duties of religion should take precedence over everything else—precisely because they (usually) believe that God is concerned about other people and their needs too. But they want them to get at least as much consideration as the drive to make a *huge* profit rather than just a big one, or the all too-human propensity to cling to the *status quo*.

If the matter is serious enough for one to give up a good job rather than to work on one's Sabbath, it should be treated with commensurate seriousness by one's employer—if for no other reason than that a person showing that degree of conscientiousness can often be a valuable asset to the employer if some of that energy and character can be enlisted for the advancement of the work-product. Even if it cannot, the employer should recognize that people who try to obey conscience are usually potential pillars of the community (whether or not of the workforce), and are more deserving of consideration and encouragement than those who "don't give a damn."

To some, these considerations may seem merely prudential or utilitarian, as though one should respect conscience only if—and to the extent—that it visibly contributes to the efficiency of the business or the upbuilding of conventional values. That is too narrow an interpretation of the argument, which is intended only to suggest that people whose "conscience" is vigorous enough to lead them into potentially costly nonconformity are people with something unusual to give the world—even if its utility—or even tolerability—may not be immediately apparent.

Somewhere between a claim that overrides everything else and a "trifle"—somewhere commensurate with the price the believer is willing to pay—is the weight that should be given the nonconforming conscience. There may be instances of "fanatics" whose religion seems to pose an "undue hardship" for those around them. It would be unfair to expect an employer to put up with every demand couched in the name of religion, for that is one of the guises that various kinds of mental and emotional disturbance may take, so an "escape hatch" of undue hardship is necessary.

But Hardison's religious obligations were finite, rational and not unprecedented, and his offers to help bear the cost were certainly reasonable. There is no reason an employer should not be expected to give such concerns a degree of attention and

accommodation commensurate with their importance to the employee. That is what the Randolph amendment should be seen to require, and what the "free exercise of religion" ought to be understood to entail even if there were no Randolph amendment or Title VII of the Civil Rights Act. That is how civilized people who respect the working of God in one another's lives should treat each other because that is how they would want to be treated themselves. But until the Golden Rule is effectively engraved in everyone's heart, society will probably have to rely on some written statutes, and the Supreme Court dealt a setback to that cause in *TWA v. Hardison*!

h. *Thornton v. Caldor* (1985). Although there were some lower-court cases involving the employment problems of Sabbatarians in the succeeding years, the next decision of note in this area by the U.S. Supreme Court was announced in 1985. It involved a *Sunday* observer, and a Presbyterian at that, who was not even living at the time of the decision. He had been manager of the men's and boy's clothing department of the Waterbury, Connecticut, branch of Caldor, Inc., during the time that such stores were closed on Sundays as required by state law.

That law was held unconstitutionally vague by a state court in 1976,[210] and the legislature revised the law to permit certain kinds of businesses to operate on Sunday. It also guaranteed employees the right not to work on the Sabbath of their religious faith. Caldor opened its stores for Sunday business, requiring its managers to work every third or fourth Sunday. Thornton complied for a while, but in 1979 he informed his employer that he would no longer work on Sunday because he observed that day as his Sabbath. Caldor offered to transfer him to a management job in a Massachusetts store that was closed on Sundays or to give him a nonsupervisory job, at a lower salary, that would not require Sunday work. Thornton declined both alternatives, and Caldor imposed the latter. He resigned two days later and filed a grievance with the State Board of Mediation and Arbitration, which upheld his claim and ordered him reinstated with back pay and compensation for lost fringe benefits.

The case went to court and the superior court affirmed the ruling, but the Supreme Court of Connecticut reversed, holding that the statute did not have a "clear secular purpose," that its primary effect was to advance religion because it conferred a benefit on an explicitly religious basis, and that in requiring the government to decide what kind of activities constituted Sabbath observance in order to assess employee's sincerity, it created excessive entanglement of government with religion. By that time Donald Thornton had passed to his reward, but his estate was recognized to represent his continued interest in obtaining the award of back pay and benefits for his heirs.

The U.S. Supreme Court agreed to hear the case and announced its decision in an opinion written by Chief Justice Burger and joined by all other members of the Court but Justice Rehnquist. After setting forth the facts outlined above, the court offered the following analysis:

> The Connecticut statute challenged here guarantees every employee, who "states that a particular day of the week is observed as his Sabbath," the right not to work on his chosen day.... The State has thus decreed that

210. *State v. Anonymous*, 33 Conn. Supp. 55, 364 A.2d 244 (Com.Pl. 1976).

> those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers. The statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath.
>
> In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or the interests of the employer or those of other employees who do not observe a Sabbath. The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.
>
> There is no exception under the statute for special circumstances, such as the Friday Sabbath observer employed in an occupation with a Monday through Friday schedule—a school teacher, for example; the statute provides for no special consideration if a high percentage of an employer's workforce asserts rights to the same Sabbath.... Finally, the statute allows for no consideration as to whether the employer has made reasonable accommodation proposals.
>
> This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand:
>
> "The First Amendment...gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[211]
>
> As such, the statute goes beyond having an incidental or remote effect of advancing religion.... The statute has a primary effect that impermissibly advances a particular religious practice... [Thus, it] violates the Establishment Clause of the First Amendment.[212]

Justice Rehnquist dissented without opinion, but his views may have been similar to his dissent in *Larkin v. Grendel's Den*,[213] in which he contended that the state should have wide latitude in seeking to accommodate conflicting interests within its purview.

Justice Sandra Day O'Connor filed a concurring opinion in which Justice Marshall joined. This concurrence expressed agreement with the majority opinion but added:

> I do not read the Court's opinion as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act are similarly invalid. These provisions preclude employment discrimination based on a person's religion and require private employers to reasonably

211 . *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58 (CA2 1953), discussed at § 10a below.

212 . *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

213 . 459 U.S. 116 (1982), discussed at VB4.

> accommodate the religious practices of employees unless to do so would cause undue hardship to the employer's business.... Like the Connecticut Sabbath Law, Title VII attempts to lift a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause.... The provisions of Title VII must therefore manifest a valid secular purpose and effect to be valid under the Establishment Clause. In my view, a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment to all groups in our pluralistic society.... Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an antidiscrimination law rather than an endorsement of religion or a particular religious practice.[214]

In this instance Connecticut had afforded Sabbatarians (including Sundaytarians) too broad a measure of relief. In giving them an absolute, unilateral and unreviewable "veto power" over their employers and fellow employees, Connecticut had made the same kind of error as had Massachusetts in giving churches an absolute, unilateral and unreviewable "veto power" over whether a liquor license could be awarded to premises within a certain radius of the church, which provision the Supreme Court struck down in *Larkin v. Grendel's Den*, *supra*, describing it as an impermissible delegation of legislative authority to a private, religious body.

But what kind of protection could or should the Connecticut legislature have given? If it had written in limitations such as "reasonable accommodation" or "without undue hardship," they might have been whittled down to *de minimis* trifles, as in *TWA v. Hardison, supra*, affording no meaningful protection to people like Donald Thornton trying to observe their day of holy time.

Is America too busy, bustling and polyglot a place for people (who wish to do so) to observe their Sabbath by not working on a particular day each week? The old Lord's Day Alliance was thought rigid and fanatical by some because it wanted to prevent *everyone* by law from doing any commercial work on Sunday. As was seen earlier, such a regime can be unjust to Jews and other Sabbatarians. Partly for this reason Sunday-closing laws are now largely dead letters, at least in most urban areas. So now many kinds of businesses in many states run seven days a week, and people like Hardison and Thornton are allowed little or no choice in following their sense of religious duty other than to give up their jobs. Does this suggest that, once the rigid limits are relaxed, they become riddled with exceptions and then are swept away by the relentless pressures of the secular marketplace? Perhaps so. Rigidity is always easier to define and maintain than flexibility. But one should not forget that, while the strict Sunday-closing regime of an earlier day may have been congenial to (some) Christians' religious habits and inclinations, it was no more conducive to general religious *liberty* than its opposite, the unrestricted, wide-open, seven-days-a-week,

214 . *Thornton v. Caldor, supra,* O'Connor concurrence.

24-hours-a-day regimen of the blast furnace and the discount shopping center.

True religious liberty, in this respect, would be an arrangement in which those who wished to work on Sundays could do so, and those who wished *not* to work on Sundays could do so, and each could benefit from the complementary preferences of the other. But anyone who has tried to accommodate the various needs, entitlements and availabilities of a number of employees in order to insure round-the-clock coverage of hospital wards knows that such scheduling is a nightmare even without taking account of Sabbatarian preferences. What with seniority, vacations, illness, maternity leave, state and federal overtime restrictions and a hundred other variables, the modern employer needs a mainframe computer to handle routine work scheduling.

Religious obligations should be given as much consideration as any of these, but too often they are viewed as mere personal predilections, if not peculiarities. When other parameters of personnel deployment are enforceable by law or written into a union contract, religious commitments may seem more readily "adjustable," if not disregardable. As a result the religious aspects of people's lives can be progressively marginalized until they virtually disappear. If there is to be no common day of rest or holy time, as the Supreme Court warned in *McGowan* and *Braunfeld*, then when will families have a chance for a day each week they can spend together? When can churches and synagogues schedule their services so that more than a fraction of their members can attend?

This is only one area in which the practice of the faith is sought to be protected, but it may suggest a pattern possible in others. If there are no effective mechanisms—such as law—to protect such practice from the economic and social pressures of the secular world, they will become more and more peripheral. And if they are to be protected by law, how can it be done reasonably rather than rigidly, so that the law does not produce greater hardship than it remedies?

i. *Hobbie v. Unemployment Commission* (1987). In 1986 the Supreme Court agreed to hear a case so similar to *Sherbert v. Verner*[215] that observers wondered why the court did not simply dispose of the case by a brief *per curiam* order enforcing that precedent. When the decision was announced on February 25, 1987, it became apparent that this case was taken in part at least to carry on an internal dialogue that began with *Bowen v. Roy*[216] in the previous session, in which Chief Justice Burger had introduced a weakened free-exercise test that had attracted only two votes in addition to his own. By the time *Hobbie* was decided, Chief Justice Burger had retired, Justice Rehnquist had become chief justice, and Antonin Scalia had been added to the court. In this new configuration it was noteworthy that eight justices agreed on the judgment, six of them (including Justice Scalia) joining in a resounding rebuff to the Burger formula of *Bowen v. Roy*. The actual holding with respect to unemployment compensation for a Sabbatarian was completely upstaged by the debate over the correct rule of Free Exercise, with only the new chief justice dissenting. Justice Brennan delivered the opinion of the court, in which Justices

215 . 374 U.S. 398 (1963), discussed at § c above.

216 . 476 U.S. 694 (1986), discussed at § 9g below.

White, Marshall, Blackmun, O'Connor and Scalia joined.

Paula Hobbie was employed as a jeweler in Florida. After several years of service, she informed her employer that she had become a Seventh-Day Adventist and would no longer be able to work from sundown Friday to sundown Saturday. She was subsequently discharged for refusal to meet the terms of her employment. When she applied for unemployment compensation benefits, these were denied because her refusal to work scheduled shifts was held to be "misconduct connected with her work." The Florida Unemployment Appeals Commission saw this case as different from *Sherbert v. Verner*,[217] which also involved a Sabbatarian whose unemployment compensation the Supreme Court had restored, because Paula Hobbie had become a Seventh-Day Adventist *after* entering into her employment. This was the only significant distinction between this case and *Sherbert*, and one which the Supreme Court did not consider significant at all, as will be seen. Justice Brennan wrote:

> Under our precedents, the Appeals Commission's disqualification of [Hobbie] from receipt of benefits violates the Free Exercise Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.... We see no meaningful distinction between Sherbert, Thomas,[218] and Hobbie. We again affirm, as stated in Thomas:
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> "Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While this compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." (emphasis added [by Justice Brennan]).

Justice Brennan rejected the claim that Paula Hobbie's post employment conversion was constitutionally significant.

> The Appeals Commission...attempts to distinguish this case by arguing that, unlike the employees in *Sherbert* and *Thomas*, Hobbie was the "agent of change" and is therefore responsible for the consequences of the conflict between her job and her religious beliefs. In *Sherbert* and *Thomas*, the employees held their respective religious beliefs at the time of hire; subsequent changes in the conditions of employment made *by the employer* caused the conflict between work and belief. In this case, Hobbie's beliefs changed during the course of her employment, creating a conflict between job and faith that had not previously existed. The Appeals Commission contends that "it is...unfair for an employee to adopt religious beliefs that conflict with existing employment and expect to continue the employment without compromising those beliefs" and that this "intentional disregard of the employer's interests...constitutes misconduct."[219]

In the view of the Florida Unemployment Commission, the employee had no

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217. *Supra*, § c above.

218. *Thomas v. Review Board*, 450 U.S. 707 (1981), discussed at § 5l above.

219. *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987).

business letting herself be converted to a faith that was inconsistent with her employer's business interests. But the Supreme Court was not inclined to accept this doctrine of faith-shopping in order to suit the employer's convenience.

> In effect, the Appeals Commission asks us to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so. The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired. The timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened....

This was an important addition to Free Exercise jurisprudence, comparable to *Thomas*' holding that a claimant does not lose Free Exercise rights because still struggling to formulate his or her religious beliefs or because other adherents of the same faith do not find the same job demands objectionable. *Hobbie* thus stands for the teaching that the Holy Spirit need not be put on "hold" until one is in a more conducive job situation; the Free Exercise Clause protects recent converts as fully as long-time adherents. The government must maintain neutrality toward conversion, neither rewarding nor penalizing a change of faith.[220]

The real gravamen of the decision, however, was directed to the dispute that had surfaced in *Bowen v. Roy*.

> Both *Sherbert* and *Thomas* held that...infringements [of free exercise] must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest. The Appeals Commission does not seriously contend that its denial of benefits can withstand strict scrutiny; rather it urges that we hold that its justification should be determined under the less rigorous standard articulated in Chief Justice Burger's opinion in *Bowen v. Roy*: "the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." Five Justices expressly rejected this argument in *Roy* [Blackmun, O'Connor, Brennan, Marshall and White]. We reject the argument again today. As Justice O'Connor pointed out in *Roy*: "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."

In the interim since *Roy*, the court had lost the chief proponent of the reduced free exercise test (Burger) and in his place had gained a new justice (Scalia) reputed to be more reliably conservative than most members of the court, yet who joined the majority in rejecting the Burger Regression. (Yet it was only a few years later that Justice Scalia himself wrote an opinion for the majority of the court *endorsing* the Burger doctrine in *Oregon v. Smith*![221])

Justice Powell attempted to minimize this slap at the three-justice opinion in *Roy*.

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220 . See discussion of conversion at IIA and IIB.

221 . 494 U.S. 872 (1990), discussed at § D2e below.

> The Court properly concludes that *Sherbert v. Verner* and *Thomas v. Review Board*...control the decision in this case.
>
> * * *
>
> This Court's decision last term in *Bowen v. Roy* did nothing to undercut the applicability of *Sherbert* and *Thomas* to the present case. A plurality in *Roy* indicated that "some incidental neutral restraints on the free exercise of religion," such as the requirement that applicants for Social Security benefits use assigned numbers, need not be supported by a compelling justification.
>
> * * *
>
> The Court recognizes in a footnote that the reasoning of *Roy* does not apply to this case. Instead of relying on this distinction, however, the Court reaches out to reject the reasoning of *Roy in toto*. This strikes me as inappropriate and unnecessary. Given its context, the Court's rejection of *Roy*'s reasoning is dictum. The proper approach in this case is to apply the established precedent of *Sherbert* and *Thomas*. Because the Court goes further, I concur only in the judgment.[222]

This was a curious contention by Justice Powell, who retired at the end of that term, removing the second vote for the Burger Regression in *Roy*. The group of three justices who supported that view (Burger, Powell and Rehnquist) did not speak for the court on that point, though Burger's opinion commanded eight votes on another point—that an objecting individual could not require the government to adapt its internal processes to his religious objections—but he lost four of them on this one. So the Burger Regression did not represent the court's reasoning in *Roy*. The *Hobbie* court was not trying to overrule the decision reached in *Roy* but to make clear that it was never reached because a majority had rejected it then and continued to reject it (with an additional vote—Scalia's). Yet—incredibly—other advocates, including the solicitor general of the United States, continued to cite the Burger Regression in the second part of *Roy* as though it were the law of the land![223] The *Hobbie* court was merely trying to set the record straight, and Justice Powell called it mere "dictum." But the "plurality" opinion in *Roy* that started this internecine feud was not even dictum because it was not essential to a majority holding in that case.

The majority opinion disposed of one other matter that often arises in such cases: the contention by the government that if it were to accommodate the claimant's free exercise claim the result would be an Establishment of Religion.

> Finally, we reject the Appeals Commission's argument that the awarding of benefits to Hobbie would violate the Establishment Clause. This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause. See, e.g., Wisconsin v. Yoder (judicial exemption of Amish children from compulsory attendance at high school);

222 . *Hobbie, supra*, Powell concurrence in the judgment.

223 . Brief *amicus curiae* of the United States in *Hobbie*, p. 15.

> Walz v. Tax Comm'n (tax exemption for churches).[224] As in Sherbert, the accommodation at issue here does not entangle the State in an unlawful fostering of religion:
>
> "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshipers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[225]

Chief Justice Rehnquist contented himself with a one-line dissent: "I adhere to the views I stated in dissent in *Thomas v. Review Board*.... Accordingly, I would affirm [the lower court]."

Justice Stevens concurred in the judgment, basing his opinion on his unique approach to free exercise, treating it as though it were a footnote to Equal Protection.

> The State of Florida provides unemployment benefits to those persons who become "unemployed through no fault of their own," but singles out the religiously-motivated choice that subjected Paula Hobbie to dismissal as her fault and indeed as "misconduct connected with...work." The State thus regards her "religious claims less favorably than other claims," see *Bowen v. Roy* (Stevens, J., concurring in part and concurring in the result). In such an instance, granting unemployment benefits is necessary to protect religious observers against unequal treatment.[226]

So ended the *Hobbie* case, adding its little increment and its important reaffirmation to the Free Exercise cases that preceded it.

An interesting—and distressing—postscript to *Hobbie* was the contribution of Solicitor General of the United States Charles Fried, whose office filed a brief *amicus curiae* in the Supreme Court that registered the low-water mark to that date for defense of religious liberty. That brief made two appalling contentions:

1. That Free Exercise claims should generally not be entertained when the state's actions, rather than prohibiting or directly seeking to discourage a religious practice, have an indirect and unintended disadvantaging impact on an individual's choice to engage in a particular religious practice.[227]
2. That the Free Exercise Clause itself is directed, not against laws "respecting" the free exercise of religion or "abridging" it [as in the case of the Establishment Clause or the Free Speech Clause, respectively], but only against those "prohibiting" it; so long as a law does not with relative directness proscribe a religious practice or require behavior contrary to religious belief, it is not in evident conflict with the

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224. 406 U.S. 205 (1972), discussed at IIIB2, and 397 U.S. 644 (1970), discussed at VC6b(3), respectively.

225. *Hobbie, supra,* majority opinion, quoting *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at § c above.

226. *Hobbie, supra*, Stevens concurrence in the judgment.

227. Brief *Amicus Curiae* of the United States in *Hobbie*, September 1986, p. 4.

express terms of the free exercise clause.[228]

The first of these contentions reflected the stance of the United States as a party in *Bowen v. Roy* defending the requirement of a Social Security number in all cases as a condition for receiving public assistance, and the solicitor general quoted from the chief justice's opinion in *Roy* as though it expressed the holding of the court on this subject, which it did not.

The second contention is a unique and literalistic interpretation of the First Amendment that is virtually unprecedented. The solicitor general cut new cloth in contending that the Free Exercise Clause is "more narrowly focused"—as he so delicately phrased it—than the Free Speech and Free Press Clauses that follow it because the term "prohibiting" is used in the Free Exercise Clause, while "abridging" is used in the clauses that follow:

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

Thus what may have been a merely stylistic choice of synonyms was treated by the solicitor general as a crucial nuance with portentous implications that placed the free exercise of religion on a lower level of protection than the freedoms that follow it—surely a conclusion for which no support can be found in the reports of the discussion of this amendment in the First Congress!

The solicitor general referred throughout his *amicus* brief in *Hobbie* to the claims of the appellant—that her religious practice could not be burdened unless the state could prove a compelling interest that could be served in no less burdensome way—as "the extreme theory" of the Free Exercise Clause, though it had been standard hornbook law since *Sherbert* (1963).

A group of organizations concerned about religious liberty, at the instigation of Marc Stern of the American Jewish Congress, sent a letter to the attorney general of the United States immediately after the Fried brief was filed protesting the government's apparent effort to undercut the settled law of the Free Exercise Clause. The letter said, "We are hard pressed to identify any interest of the United States which justifies the taking of such a position." And indeed, it was ironic that the top lawyer of the Reagan administration, which represented itself to be a stalwart champion of religion, should be the one to mount this unprecedented attack on Free Exercise. Religionists might well muse, "With friends like that, who needs enemies?" Yet it was only a few years later that the Burger-Fried Regression became the law of the land in *Oregon v. Smith, supra*!

j. *Frazee v. Illinois* (1989). Again in 1989 the Supreme Court harkened to the witching call of denial of unemployment compensation for exercise of conscience. This time the distinguishing feature was that William Frazee's refusal to work on Sunday was not attributable to a tenet of a recognized religious faith of which he was an adherent—as required by the state. He had the temerity to refuse a retail position

228 . Ibid., pp. 6,7.

offered him by Kelly Services because the job would have involved working on Sunday, and Frazee explained that, as a Christian, he could not work on "the Lord's Day," although he did not belong to any church imposing such a prohibition. When he subsequently applied for unemployment compensation, the Illinois Department of Employment Security denied his application. He appealed to the Employment Security Board of Review, which held that "when a refusal of work is based on religious convictions, the refusal must be based on some tenets or dogma accepted by the individual of some church, sect or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable." Frazee took the matter to state courts, which upheld the denial of compensation on the ground that he had refused an offer of suitable work "without good cause."

The Supreme Court of the United States noted probable jurisdiction and rendered its decision *per* Justice White, writing for a unanimous court.

> It is true, as the Illinois court noted, that each of the claimants in [our earlier unemployment compensation] cases was a member of a particular religious sect, but none of those decisions turned on that consideration or on any tenet of the sect involved that forbade the work the claimant refused to perform. Our judgments in those cases rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question. Never did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief....
>
> There is no doubt that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause." *Thomas, supra*. Purely secular views do not suffice. Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause. We do not face problems about sincerity or about the religious nature of Frazee's convictions, however. The courts below did not question his sincerity, and the State concedes it....
>
> Frazee asserted that he was a Christian, but did not claim to be a member of a particular Christian sect. It is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause. *Thomas* settled that much. Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization....
>
> As was the case in *Thomas* where there was "no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large

> enough to create `widespread unemployment,' or even to seriously affect unemployment," there is nothing before us in this case to suggest that Sunday shopping, or Sunday sporting, for that matter, will grind to a halt as a result of our decision today. And, as we have said in the past, there may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion. No such interest has been presented here.[229]

The judgment of the Illinois court was therefore reversed, and Frazee was accorded his unemployment compensation. In a footnote the court added a thought that lent a fitting fillip to this line of cases.

> 2. We noted in *Thomas*...that an asserted belief might be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." But that avails the State nothing in this case. As the discussion of the Illinois Appellate Court itself indicates, claims by Christians that their religion forbids Sunday work cannot be deemed bizarre or incredible.

In fact, Christians who refrain from labor on "the Lord's Day"—especially those who do so though not church members—are so few in number that society ought to be able to indulge them to the extent of a few weeks' unemployment compensation in (secular) celebration of their existing at all!

k. ***Ansonia Board of Education v. Philbrook*** **(1986).** Further fine-tuning of the Sabbath-observer's claim to unemployment compensation came from Connecticut, where a teacher of high-school business courses in 1968 became a convert to the Worldwide Church of God, which required of its members abstention from secular employment on designated holy days, causing Philbrook to miss six school days each year. The bone of contention in this case was whether he could obtain leave with pay for these absences. The labor agreement in effect for teachers at his school system was relatively generous, granting each teacher 18 days of sick leave per year, cumulative to 180 days, usable for purposes other than illness as specified in the contract. Each teacher was allowed three days' leave each year for mandatory religious holidays, which were not charged against the teacher's annual or accumulated sick leave.

That provision left Philbrook with three days uncovered, and he sought to have applied to that purpose a provision permitting use of up to three days' accumulated leave each year for "necessary personal business," but those days could only be applied to uses not otherwise specified in the contract. Thus, an employee wishing to attend more than three leave days to attend the convention of a national veterans organization could not use personal leave for that purpose because it was one of the uses already provided for in the contract. The same principle made that arrangement unusable for any religious activity or observance—because it was already provided for in the contract. As an alternative arrangement, Philbrook offered to pay the cost of a substitute teacher ($30 a day) while receiving his full pay ($130 a day) for the

229 . *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).

days missed. The school board rejected both of these proposals, and Philbrook went to court.

The Supreme Court of the United States eventually took the case and concluded in an opinion by Chief Justice Rehnquist that "an employer has met its obligation [to accommodate] when it demonstrates that it has offered a reasonable accommodation to the employee."

> We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation.... The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.[230]

l. ***Equal Employment Opportunity Commission v. Dillard Department Stores*** **(1995).** A new voice was heard in the arena of accommodation of Sabbath/Sunday observance in 1990, when Patricia Pokorny, a Lutheran and an employee of Dillard's Galleria Department Store in St. Louis, was ordered to report for work one Sunday a month. She refused to do so, saying it was against her religion to work on Sunday. She was told she would be terminated on the third instance of failure to appear for work on Sunday as scheduled. On May 9, 1990, she filed a charge of religious discrimination against Dillard's with the Equal Employment Opportunity Commission, which began an investigation of the case. During that inquiry, Dillard's defended its "no excuses" policy requiring every employee without exception to work some Saturdays and some Sundays regardless of their religious beliefs or practices. Various supervisors asserted that no one would be hired by Dillard's who would not meet that requirement. The manager insisted that permitting even one employee to avoid work on her Sabbath would be an undue hardship for the store.

The St. Louis District EEOC concluded that Patricia Pokorny was subject to employment discrimination under Title VII of the Civil Rights Act of 1964—the first classwide religious accommodation hiring case undertaken by EEOC, which sought an injunction against Dillard's policy and practice in federal district court. Dillard's defended its policy as necessary in a time when its competitors were all open on Sundays and volume of business on that day was increasing; to fail to be adequately staffed on that day would put Dillard's at a competitive disadvantage. Making an exception for Sabbatarians would create strife among employees, and indeed the requirement that Ms. Pokorny begin working on Sundays was imposed when a new area sales manager was apprised of complaints from other employees that Ms. Pokorny was not being required to work on Sundays as they were. Dillard's declined EEOC's invitation to negotiate a settlement of the issue that would provide for compliance with Title VII in ways least onerous to the business, so EEOC took the matter to court.

After several years of discovery and motion practice, Dillard's threw in the sponge and agreed to a settlement stipulation that was approved by the court and hailed by EEOC as a possible model for other employers. Dillard's agreed to rehire Ms. Pokorny if she reapplied, without regard to her unavailability on Sundays, and to

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230 . *Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. 60 (1986).

"make reasonable accommodations for her sincerely-held religious objections to working on the Sabbath." In any event, she and several applicants who had been fired or denied employment because of religious objection to working on Saturday or Sunday would be indemnified for gross backpay to an aggregate maximum of $30,000. It agreed to employ up to ten applicants who had been rejected during the several years of litigation because of their unavailability on Saturday or Sunday for religious reasons only, if they met Dillard's standards in other respects. Dillard's also agreed to issue a new policy on religious accommodation, to notify all its St. Louis managers and supervisors thereof, and to post a notice of that policy at its St. Louis Galleria store, to read as follows:

> Dillard Department Stores, Inc. will not condone or support any discrimination against employees or applicants based upon a person's sincerely-held religious beliefs or practices. When the religious beliefs or practices of an employee or an applicant come into conflict with any work-related rule or policy, Dillard Department Stores, Inc. will make a reasonable effort to identify an appropriate accommodation. An accommodation will be offered whenever this can be done without creating an undue hardship for the employer.
>
> The following specific rules and procedures apply to protect persons whose religious beliefs prevent them from working on a Saturday or Sunday Sabbath. Note that some persons strictly observe a Saturday Sabbath that begins at sundown on Friday.
>
> 1. It is Dillard's policy that employees will not tell prospective applicants, orally or in writing, that applicants or employees must work on Saturdays or on Sundays, nor will they attempt to screen out or discourage applicants who cannot work on Saturday or Sunday.
>
> 2. It is Dillard's policy that hiring officials will not ask prospective job applicants about their religious objections to working on particular days (although they may ask applicants whether they have any non-religious objections to working on particular days).
>
> 3. It is Dillard's policy to hire applicants without regard to any scheduling issues created by their religious beliefs or practices.
>
> 4. Dillard's will not delay hiring an applicant because of a need for religious accommodation, nor shall Dillard's require an employee to work on his/her Sabbath contrary his/her sincerely-held religious beliefs.
>
> 5. After hire, Dillard's may inquire about a need for a religious accommodation for any employee expressing a sincere desire for religious accommodation because of a religious practice or belief that is inconsistent with performing work for Dillard's on the Sabbath. Dillard's will make a reasonable accommodation within a reasonable period after notification of the need for accommodation (e.g., through the end of the monthly scheduling period) that is designed to enable the employee to follow his/her religious practice or belief without discipline or discharge. Dillard's will make reasonable efforts to schedule so as to minimize the

> loss of hours attributable to the accommodation.[231]

This settlement stipulation represented a substantial about-face for Dillard's and a new note in the every-day-a-work-day marketplace. Though the "reasonable" modifier and the "undue hardship" limitation were not further specified, EEOC will be keeping an eye on the situation to see that it does not become a loophole for evading the intent of the law. This very significant initiative by EEOC can become an important corrective to the Supreme Court's watering-down of Title VII in *Hardison*.

8. Jury Duty

One of the civic obligations to which a few people have conscientious objections is jury duty. The first time this question arose was in 1943 in the state of Washington.

a. *U.S. v. Hillyard* (1943). One Albert E. Hillyard was called to serve as a juror in the Eastern District of Washington, but he refused on the grounds that he was a Jehovah's Witness. Judge Lewis B. Schwellenbach characterized his reasoning to be "that the obligations imposed by God are superior to those enacted by temporal government."

> While the defendant demonstrated his sincerity by expressing his willingness to submit to whatever punishment the court should impose, I felt that his refusal constituted such a challenge to the authority of the court as to require more formal inquiry and consideration. Consequently, I requested the United States Attorney for this District to prepare the necessary pleadings and issued an order citing the defendant to show cause why he should not be punished for contempt.... The compulsory attendance of jurors is necessary if the requirement of the representative character of a jury...is to be met.[232]

The defendant appealed to the religion clauses of the First Amendment as justification for his refusal to serve. The judge was obviously nonplussed by the situation, but rather than resorting reflexively to the contempt power, he sought to approach the problem in a rational way.

> I must confess an utter inability to...reconcile the Jehovah's Witnesses' abhorrence for human institutions with the alacrity with which they rush into the protecting arms of the courts whenever they become involved in controversy with our civil or military authorities.[233] At the same time, I am aware that it is the recognition of the divergence of thought and difficulties of comprehension in matters involving religion and conscience which requires the approach to a problem such as this by mental processes entirely divorced from the ordinary rules of logic.

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231. Stipulation and Order Dismissing Case, Exhibit A, EEOC v Dillard Dep't Stores, Inc., No. 4:93-CV-1771 (E.D. Mo., March 30, 1995) (George F. Gunn, Jr., J.).

232. *U.S. v. Hillyard*, 52 F.Supp. 612 (1943).

233. Referring to *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), discussed at IIA2i; *Martin v. Struthers*, 319 U.S. 141 (1943), discussed at IIA2j; *Douglas v. Jeannette*, 319 U.S. 157 (1943), discussed at IIA2k; *West Virginia v. Barnette*, 319 U.S. 624 (1943), discussed at § A6b above.

* * *

> The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.[234]

He reviewed the historical conditions that obtained at the time the First Amendment was drawn up, including Virginia's "Bill establishing provisions for Teachers of the Christian Religion," which evoked Madison's great "Memorial and Remonstrance." He quoted a portion of the Madisonian wisdom, italicizing part of it.

> *It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to Him. This duty is precedent, both in order of time and in degree of obligation to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Universe. And if a member of Civil Society, who enters into any subordinate association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.*

He also quoted, again with italics, from Jefferson's "Act for the Establishment of Religious Freedom in Virginia," which flowed from the defeat of Patrick Henry's bill for providing teachers of the Christian religion at public expense: "*That it is time enough for the rightful purposes of civil government, for its officers to interpose when principles break out in overt acts against peace and good order.*" With that analysis, Judge Schwellenbach concluded:

> Thus reading the amendment in the light of the "history of the times," with the knowledge of the views of the two men most responsible for it, and with the interpretation the Supreme Court has placed on it, I feel constrained to resolve the very considerable doubt in my mind in favor of the defendant. While I cannot understand defendant's reasoning and cannot accept his conclusion, I must admit that his refusal to serve does not amount to a breaking out "into overt acts against peace and good order." I have no fear that the prestige of this court will be diminished by this result. Fortunately, in this country the dignity of a court does not depend on its use of power. Oftentimes a free government can best demonstrate its strength by frugality in its use. Power need not always beget force. Only those who need rely on power must always use it. The action will be dismissed.

Here seems to have spoken a truly humane and humble judge, who did not feel the need to refer to himself in the third person as "the Court" (capitalized), or peremptorily to rattle the saber of the contempt power. But one wonders why refusal to serve on a jury was not an "overt act," as opposed to belief or speech. Though his instincts were right, his analysis was still captive to the belief/action

234 . Citing *Reynolds v. U.S.,* 98 U.S. 145 (1878), discussed at § A2a above.

dichotomy of *Reynolds*, and perhaps for that reason was not followed in the next case involving refusal to serve on a jury.

b. *In re Jenison* (1963). Twenty years later, a Mrs. Laverna H. Jenison was called to jury duty in Renville County District Court in Minnesota on November 13, 1962, and was selected to sit on a civil case. As the clerk of the court was about to administer the oath, she rose and said, "Sir, I cannot serve on this jury. I cannot judge." The judge responded, "The Court has told you that you must serve, and you will remain where you are and serve as a juror in this case." Mrs. Jenison replied. "Well, I'll pronounce no judgment. I can't. It's against my Bible teaching. My Bible tells me `Judge not, so you will not be judged.'" The judge said, "In view of your statements the Court holds you in contempt of Court. You will stay in the courtroom and the Court will deal with you summarily during recess time."

At that time the judge examined her further and discovered that she had acted as a juror in 1984, but "had subsequently experienced a change in her religious beliefs which prevented her from again serving." (Her religious affiliation was not identified.) The judge stated, "Now, the Court has told you that the Court cannot excuse you. The law makes no provision for such an excuse, and the Court will ask you now once more whether you will now perform jury duty when called upon." Mrs. Jenison said, "I cannot." So the judge announced:

> The Court finds and determines that Mrs. Owen Jenison is guilty of contempt of Court in refusing to serve as a juror and you may now step in front of the Clerk's desk and the Court will impose sentence.
>
> It is considered and adjudged that as punishment for contempt of Court you be sentenced to the County Jail of Renvill County for a period of thirty days.
>
> It is further ordered that you may purge yourself of contempt at any time during said period if you will indicate to the Sheriff that you wish to be relieved and are willing to do your civic duty.[235]

Seven days later she was released from jail pending review of her case by the Supreme Court of Minnesota, which held:

> We are of the opinion that the duty imposed on every citizen who is otherwise qualified to serve on a petit jury does not prohibit the free exercise of religion or interfere with the right to worship God according to conscience, and that refusal to serve is inconsistent with the peace and safety of the state.
>
> * * *
>
> No concept in our Anglo-Saxon tradition is more firmly entrenched or more an integral part of our democratic heritage than the right of every citizen to be tried by a jury of his peers. To sanction the disqualification of a juror because of a conviction that is at variance with such a basic

235. *In the Matter of Contempt Proceedings in re Mrs. Owen Jenison*, 120 N.W.2d 515 (1963). This was also the source of the colloquy quoted in the preceding paragraphs.

> institution is to invite the erosion of every other obligation a citizen owes his community and his country.[236]

In passing, the court remarked, "We do not subscribe to the holding in U.S. v. Hillyard.... The Federal court's opinion contains a scholarly analysis...but the conclusions reached do not persuade us."

Thus the state supreme court upheld Mrs. Jenison's sentence although Minnesota law permitted (but did not require) women to be excused from jury duty just for being women!

The case was appealed to the U.S. Supreme Court, which granted *certiorari*, vacated the judgment, and remanded the case for further consideration "in light of *Sherbert v. Verner*,"[237] which had been decided in June of the same year, *after* the Minnesota court had acted. In December of 1963, the Minnesota Supreme Court gave its second decision in this case.

> Upon reconsideration we have come to the conclusion that there has been an inadequate showing that the state's interest in obtaining competent jurors requires us to override relator's right to the free exercise of her religion. Consequently we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any persons whose religious convictions prohibit compulsory jury duty shall henceforth be exempt....
>
> [I]n the instant case relator has convincingly demonstrated her sincerity by preferring jail to the compromise of her religious faith. Accordingly, she is discharged from further obligation to serve as a petit juror, her conviction for contempt is reversed, and a judgment of acquittal will be entered.[238]

There has been no report in ensuing years that Minnesota was swamped with jurors refusing to serve on grounds of religious conscience. The supposition that one person's being excused for reasons of conscience will open the floodgates to mass claims of exemption has rarely been substantiated, yet it has served as a hypothetical peril repeatedly invoked against any exercise of conscience that might mildly inconvenience the state.

It is not easy for a person to stand up against the august power of the state and to resist its demands in the name of conscience. Most people do not like to make a spectacle of themselves by such unfashionable nonconformity—particularly in the name of religion—especially when the consequences can be fine or imprisonment. But even without those criminal sanctions, the number willing to risk scorn and obloquy for religiously motivated dissent will not be large. Rather than being punished or ridiculed, they should be honored for being willing to hold to what they believe God requires of them against all the threats of authority and all the aspersions of the neighbors.

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236 . Ibid.

237 . *In re Jenison Contempt Proceedings*, 375 U.S. 14 (1963).

238 . *In re Jenison (II)*, 125 N.W.2d 588 (1963).

Sherbert v. Verner[239] in this instance showed itself to be an important bulwark against the natural tendency of judicial thinking evidenced in the lower courts' initial handling of this case by shifting the burden of proof from the dissident (to justify disobedience) to the government (to justify its requirement). That shift represented a huge advance in the constitutional protection of the individual's effort to live out the teachings of religious faith in an all-too-often inhospitable world. Unfortunately, the bulwark provided by *Sherbert* was swept away in the debacle of *Oregon v. Smith* in 1990.[240]

9. Social Security and Photograph on License

Some people have objections of conscience to inclusion in the Social Security system because they believe that reliance on insurance of any sort is an evidence of distrust in Divine Providence. Some groups, like the Amish, operate on the principle of providing for their own aged and disabled members within the close-knit religious community. Consequently, they do not need and will not accept Social Security benefits, so they were excused by Congress from the obligation to pay taxes into the Social Security system.

a. Congress Accommodates the Amish. In 1950 Congress added to the Internal Revenue Code a new section—now § 1402(g)—exempting "Members of Certain Religious Faiths" from the Tax on Self-Employment Income that goes to pay Old Age, Survivors, and Disability Insurance (Social Security) levied by Section 1401(a). In order to avoid naming specific religious bodies as the beneficiaries of this provision, Congress adopted a description that applied to them without naming them, a functional description that made clear why they need not be included.

> 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 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....[241]

In order to qualify for this exception, the sect in question must have been in existence since 1950 and must satisfy the secretary of Health and Human Services that "it is the practice, and has been for a period of time which he deems to be substantial, for members of such sect...to make provision for their dependent members which in his judgment is reasonable in view of their general level of living."[242]

This accommodation was available to those members of such sects who were self-employed—as most of them were, being mainly independent farmers—but not for those who were employers or employees. What, then, was the status with

239 . 374 U.S. 398 (1963), discussed at § 7c above.
240 . 494 U.S. 872 (1990), discussed at § D2e below.
241 . I.R.C. § 1402(g)(1).
242 . Ibid. § 1402(g)(1)(D).

respect to Social Security of Amish employers and employees? That question reached the U.S. Supreme Court in 1982.

b. *U.S. v. Lee* (1982). Edwin Lee thought that the principle expressed by Congress in Section 1402(g) (see above) should apply to employers and employees as well as self-employed persons fitting the description in that section. He was a self-employed Amish farmer, but he occasionally hired other Amish men to work on his farm and in his carpentry shop. From 1970 to 1977 he "failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees or pay the employer's share of social security taxes." The Internal Revenue Service in 1978 assessed him $27,000 for unpaid employment taxes. He paid one quarter's installment and sued for refund, claiming that imposition of the tax violated the Free Exercise rights of himself and his Amish employees.

The district court agreed, analogizing the situation to the provision Congress had made for self-employed Amish. A direct appeal was taken to the U.S. Supreme Court. Chief Justice Burger wrote the opinion for a unanimous court.

> The exemption provided by § 1402(g) is available only to self-employed individuals and does not apply to employers or employees.... Thus any exemption from payment of...social security taxes must come from a constitutionally required exemption.
>
> The preliminary inquiry in determining the existence of a constitutionally required exemption is whether the payment of social security taxes and the receipt of benefits interferes with the Free Exercise rights of the Amish. The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system. Although the government does not challenge the sincerity of this belief, [it] does contend that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance. 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.... We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their Free Exercise rights....
>
> [That] is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.
>
> Because the social security system is nationwide, the governmental interest is apparent. The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees. The social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans. The design of the system requires support by mandatory contributions from covered

> employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system.[243]

Allowing people to opt out of the program would never do.

> [A] comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer. Thus, the government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.
>
> The remaining inquiry is whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest.... The difficulty in attempting to accommodate religious beliefs in the area of taxation is that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference."[244] The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would "radically restrict the operating latitude of the legislature."[245]
>
> Unlike the situation presented in Wisconsin v. Yoder, it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes.... 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. 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. Because 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.
>
> Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. In § 1402(g) Congress granted an exemption, on religious grounds, to self-employed Amish and others. Confining the...exemption to the self-employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own "welfare" system are distinguishable from the generality of wage

243 . *United States v. Lee*, 455 U.S. 252 (1982).

244 . Quoting *Braunfeld v. Brown*, 336 U.S. 599 (1961), discussed at § 7b above.

245 . Again quoting *Braunfeld*.

earners employed by others.

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.... The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

Justice Stevens filed an opinion that was even less hospitable to the claims of conscience than the chief justice's opinion.

According to the Court, the religious duty must prevail unless the government shows that enforcement of the civic duty "is essential to accomplish an overriding governmental interest." That formulation of the constitutional standard suggests that the Government always bears a heavy burden of justifying the application of neutral general laws to individual conscientious objectors. In my opinion, it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability.

Congress already has granted the Amish a limited exemption from social security taxes. As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case. As a matter of fiscal policy, an enlarged exemption probably would benefit the social security system because the nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits.... Thus, if we confine the analysis to the Government's interest in rejecting the particular claim to exemption at stake in this case, the constitutional standard as formulated by the Court has not been met.

The Court rejects the particular claim of this appellee, not because it presents any special problems, but rather because of the risk that a myriad of other claims would be too difficult to process. The Court overstates the magnitude of this risk because the Amish claim applies only to a small religious community with an established welfare system of its own. Nevertheless, I agree with the Court's conclusion that the difficulties associated with processing other claims to tax exemption on religious grounds justify a rejection of this claim. I believe, however, that this reasoning supports the adoption of a different constitutional standard than the Court purports to apply.

The Court's analysis supports a 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. Because I agree with that holding, I concur in the judgment.[246]

Here was a curious spectacle: nine judges of the highest court in the land uniting in defense of the social security system against the onslaught of a handful of humble Amish artisans. If they were to be the only employers or employees ever to be excused from an otherwise universal obligation to support that system, there might be a faint color of justification for such judicial militancy. But at the time the decision was delivered, vast ranges of employers and their employees were exempt: *all* public employees, local, state and national, *including federal judges*, and all nonprofit organizations (though they have since been included in the system).

And the chief justice used several devices of rhetoric (rather than logic) that the Supreme Court had often rejected when employed by lower courts:

1. *Ipse Dixit*. The portentous assertion of expert wisdom unsupported by evidence: "This mandatory participation is indispensable to the fiscal vitality of the social security system.... A...system...providing for voluntary participation...would be...difficult, if not impossible, to administer" (which was belied with equal authority and no greater evidence by Justice Stevens: "As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case.").

2. *The Slippery Slope*. Granting this exemption would supposedly open the door to a host of others that could disrupt the system completely. "The tax system could not function if denominations were allowed to challenge [it] because tax payments were spent in a manner that violates their religious belief." Of course, as Justice Stevens also noted, all that is at stake here is the exemption of a small and unique group who do not use the *benefits* of the particular insurance program and thus should not be required to *pay* for it—a very different situation from those wishing to be excused from paying all or part of their income taxes, which go into the general revenues of the state used for all purposes. It is possible that Justice Stevens misspoke when he said it would benefit the social security system to exclude the Amish completely because their nonpayment of taxes would be "more than offset by the elimination of their right to collect benefits." That was an empirical question on which it is doubtful that he or anyone else possessed the requisite data. The whole point is that, for religious reasons, they would not *collect* the benefits, whether they paid the tax or not.[247]

3. *Sacrifice of Freedom Necessary for the Defense of Freedom.* Whenever a court decides to deny a claimed exercise of liberty, it often prefaces the denial with an avuncular assurance that it is necessary in order to maintain the very system that

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246. *U.S. v. Lee*, *supra,* Stevens concurrence in the judgment.

247. There would be legitimate problems for the Social Security system if Amish employers were excused from paying the employer's share of Social Security for *non*-Amish employees, or where Amish employees worked for *non*-Amish employers. But the exception could be limited to *Amish employees* working for *Amish employers*, as in the instant case. "Portability" of Social Security benefits from one employer to another is an important feature of the system, but similar adjustments could be made if Amish employees went to work for non-Amish employers, and conversely.

makes such liberties possible. "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." This is, of course, a profound truism, and advances the analysis not a bit, other than to suggest an expectation that the inconsiderate petitioners should repent of their turbulent demands that threaten the very system so essential to the maintenance and exercise of (other) freedoms. It does not of itself show that the claimed freedom at issue may not also be properly exercised.

Why did the entire court (with the partial—and damaging—demurrer of Justice Stevens) subscribe to this rhetorical exercise so unlike its usual rigor? Three reasons are possible, though they can only be conjectural:

A. Courts are very reluctant to meddle with the tax structure. It is already so complicated and illogical that many judges devoutly prefer to leave it alone.

B. Perhaps some of the members of the Court who had upheld the claims of the Amish in *Wisconsin v. Yoder*[248] (Burger, Brennan, White, Marshall, Blackmun) had smarted under the scholarly criticisms of that decision for (supposedly) making the Amish the "established" religion of the nation and wanted to demonstrate that they were not in thrall to that group.

C. Another factor is the somewhat strained excursion to cast a minatory frown in the direction of war-tax resistors. One observer referred to this case as "the Bishop Hunthausen Decision,"[249] since the Roman Catholic Bishop of Seattle, Raymond G. Hunthausen, had been making headlines by urging those opposed to the arms race to withhold payment of taxes used to purchase armaments. Perhaps the court was "beating Bishop Hunthausen over Edwin Lee's back"—using the occasion of a hapless Amish carpenter's not unreasonable expectation of exemption from Social Security tax to send a message to those who might be thinking of holding up on their *income* tax payments for other reasons of conscience.

Justice Stevens' separate opinion, welcome though it might be for pricking some of the chief justice's rhetorical balloons, was less welcome for its message that at least one member of the court would entertain a retreat from the Free Exercise test established by the court in *Sherbert* and confirmed in *Yoder*. At least the chief justice was *purporting* to use the "compelling state interest" test—"overriding... interest," "very high" interest, interest of a "high order"—even though the actual state interest seemed almost trivial in view of the existing vast exceptions to the Social Security tax obligation. To shift the burden to the conscientious objector to justify exemption from a law burdening religious liberty would be a sad regression indeed. Yet the court itself did worse than that eight years later, when Justice Stevens joined four other justices to announce that the government need not prove a "compelling state interest" to justify burdening religious practice, and that the conscientious objector could not justify exemption on any free exercise basis from a neutral law of general application that did not explicitly target religion or religious practice.[250]

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248 . 406 U.S. 205 (1972), discussed at IIIB2.

249 . The Rev. Dean H. Lewis, then director of the Advisory Council on Church and Society of the United Presbyterian Church in the U.S.A., and chair of the Committee on Religious Liberty of the National Council of Churches.

250 . *Oregon v. Smith*, 494 U.S. 872 (1990), discussed at § D2e below.

c. *Stevens v. Berger* (1977). A case from Long Island concerned a symbolic aspect of the Social Security system that bothered more than one person's conscience—the requirement that everyone be assigned and use in various of life's transactions a Social Security number.

Decision was given by federal Judge Jack B. Weinstein of the Eastern District of New York.

> The Stevens family was receiving Home Relief aid from the state, supplementing their below-subsistence private income.... In January 1976, they received notice from the Suffolk County Department of Social Services that they were to supply a photostatic copy of each child's social security card, as required by New York Welfare Regulations.
>
> The Stevenses replied that the children had no social security numbers and that, because of their religious convictions, the parents would not obtain such numbers for them. They explained that, in their view, the use of social security numbers was a device of the Antichrist, and that they feared the children, if numbered in this way, might be barred from entering Heaven. (The adult Stevenses had obtained social security numbers years earlier, before developing their current convictions, and these numbers had been duly supplied to the Department of Social Services.)
>
> Hoping to find some compromise solution, the Stevenses sought to cooperate with the department to develop an alternative way to identify their children for the welfare system's record-keeping needs. The offer was rejected. The Stevens unsuccessfully challenged the decision of cease aid at a hearing before the county.... A temporary injunction restored the plaintiffs to the relief rolls.
>
> * * *
>
> Not every belief put forward as "religious" is elevated to constitutional status. As a threshold requirement, there must be some reasonable possibility 1) that the conviction is sincerely held and 2) that it is based upon what can be characterized as theological, rather than secular—e.g., purely social, political or moral views....
>
> The court, in undertaking this difficult and sensitive factfinding task, recognizes stringent limitations on its right of inquiry. Under the United States Constitution, an individual's right to believe in anything he or she chooses is unquestioned. Religous beliefs are not required to be consistent, or logical, or acceptable to others. Government questioning of the truth or falsity of the beliefs themselves is proscribed by the First Amendment. A religious belief can appear to every other member of the human race preposterous, yet merit the protection of the Bill of Rights. Popularity, as well as verity, are inappropriate criteria....
>
> When, however, an individual seeks to act on a belief, and that action poses a threat or inconvenience to other citizens, or to some important aspect of public law or policy, the requirements of an ordered society may demand that the courts make limited inquiry into bona fides. The difficulty of the investigation is compounded where the relevant belief

does not, on its face, fit into any generally recognizable religious framework....

Delicacy in probing and sensitivity to permissible diversity is required, lest established creeds and dogmas be given an advantage over new and changing modes of religious belief. Neither the trappings of robes, nor temples of stone, nor a fixed liturgy, nor an extensive literature or history is required to meet the test of beliefs cognizable under the Constitution as religious. So far as our law is concerned, one person's religious beliefs held for one day are presumptively entitled to the same protection as the beliefs of millions which have been shared for thousands of years. Nevertheless, it is—as a matter of evidence and probative force—far easier to satisfy triers that beliefs are religious if they are widely-held and clothed with substantial historical antecedents and traditional concepts of a deity than it is where such factors are absent. Judges recognize intellectually the existence of new religious harmonies, but they respond more readily and feelingly to the tones the founding fathers recognized as spiritual.

* * *

David and Virginia Stevens are members of the St. John's Lutheran Church in Massapequa, New York. They characterize their religion not as Lutheranism, but as "Messianic Judaism." They profess a belief in both the Old and the New Testaments, and view Christ not as the founder of a new faith but as the Messiah of the Jews. Among their religious traditions are the keeping of Shabbot [Sabbath] as well as other Jewish holy days and festivals.

After observing plaintiffs during the trial, after hearing their testimony and that of their minister, Pastor Jack Hickman, and after considering all the other evidence, the court is left with no doubt of the sincerity of their belief regarding social security numbers....

Once the question of sincerity is resolved, the next question is whether the belief is rooted in what may loosely be characterized as theological conviction, or whether it is the expression of some political or social ideology. The evidence is overwhelming that the belief is one which would meet any reasonable test of what is "religious".

* * *

It is clear from the evidence that plaintiffs' views have their roots, not in secular civil-libertarianism, but in religion.... theirs is the world of the spirit, not of the flesh....

The primary source to which the plaintiffs point in support of their beliefs is biblical: the thirteenth chapter of the New Testament Book of Revelation. The American Lutheran Church, the denomination to which the Stevenses belong, apparently does not have a doctrinal interpretation of Chapter 13, or any doctrine generally concerning the Antichrist. Instead, testimony credited by the court indicated, individual members are encouraged to study the Bible and develop for themselves a personal understanding of its teachings. Thus, it is not surprising to find the Stevenses hold highly individualized beliefs as part of their general adherence to an orthodox religious tradition....

* * *

[I]n western theology, a long and deep-seated tradition exists of conflict between God and state—more specifically, a belief that an omnipowerful state will usurp the place of God on earth, and destroy those who will not make obeisance to the state. Out of this tradition comes, according to plaintiffs, the scriptural reference to what plaintiffs' witnesses refer to as the "mark of the Beast"—in the Stevenses' view, social security numbers.

The plaintiffs' expert, Dr. Willis E. Elliott..., explained that the Book of Revelation was written about A.D. 96, a particularly bleak time for early Christians who faced genocide under the edicts of the Roman emperor Domitian. Yet the imagery, apocalyptic tone, and the central concern with the figure of an Antichrist, he said, is adapted from earlier sources [such as the book of Daniel]....

Daniel, like Revelation some two-and-a-half centuries later, grew, according to the testimony, out of a historical context threatening destruction of a religious group. The original model of the Antichrist, Antioches Epiphanes, was king of Syria from 175 to 163. During his reign, Antiochus attempted to Hellenize his domain, and part of his program for accomplishing cultural homogenization was the destruction of the Jewish religion. Instead, he inspired the revolt of the Maccabees.

* * *

The threat of annihilation for the early Christians, plaintiffs explain, began with Emperor Nero who fixed the blame for the great fire that destroyed Rome in 64 A.D. on that fledgling religious community. The persecution was continued under Domitian. Once more, secular authority came into direct conflict with religious authority. The imagery of the Antichrist was particularly apt as applied to Roman emperors who elevated themselves above the temporal by claiming deification and the right to be worshipped as well as obeyed. This was the ultimate forging together of church and state, and the vision drawn upon by John of Patmos in composing the Book of Revelation.

The fear expressed by the Stevenses of rendering too much to Caesar is not, according to the uncontradicted testimony, too different from the fear expressed by St. John, although the historical context is radically different. John was urging Christians not to compromise their faith by paying lip service to the cult of the emperor—that is to say, worship of the state.

* * *

The "mark of the Beast" is what, according to plaintiffs' experts, sorts out those who are in favor with the temporal powers from those who will not survive the regime.... What the "mark," as referred to by John, was cannot be identified with certainty.... Dr. Elliott, in his expert testimony at trial, offered an...explanation:

> [The emperor's priests] were functioning, not as we would think religious priests would, but rather as police to bring in the Christians and they had to have some way of identifying these Christians and they would ask them for their pass.
>
> Their pass was called a libellus, made of papyrus...—we have some of these from way back in the first century—and it said: I have sacrificed to the Emperor and then it had the signature.

> All you had to do to sacrifice was to place a pinch of incense on the altar of...the Emperor, and that was it.
>
> You signed, the priest signed, and every time you got nailed by the police, you could show your passport.
>
> If you didn't have it, the libellus, you could be dragged into court and executed the same day. This was instant death.
>
> That is the mark of the beast.

While these highly scholarly explanations of the meaning of the mark are all plausible, the interpretation of the Stevenses that it is a number is also straightforward. The Scripture speaks of the number of the Beast, and says that it is 666.... [That number may be derived from the numerical equivalent of the letters.] It may stand for the Emperor Domitian. Or it may refer to Nero. In either case, the number represented ruthless power backed by the forces of the Roman Empire and pitted against a discrete sect of religious nonconformists.

The meaning of the mark to theologians—whatever they believe the mark to have been—is strikingly similar to the meaning for the Stevenses, who see a potential for abuse of the spiritual side of humanity in a number that could act as a universal identifier....

Since having a social security number in this society has become a prerequisite for so many of the society's benefits (both from the public and private sectors), no great leap of imagination is necessary to travel from the exegesis of Revelation to the plaintiffs' belief that such numbers could function, if the state were to become too powerful, like the mark of the Antichrist spoken of in the biblical text.

* * *

What is, in essence, involved is a balancing of the interests of the plaintiffs in the free exercise of their religion against the government interest in the challenged policy or statute....

There is no case law determining whether the state and federal governments can meet the compelling state interest test so far as the use of social security numbers is concerned. Analogous cases indicate that they cannot.[251]

* * *

Only one witness testified that the need for the Stevens children to have social security numbers was substantial. The Assistance Commissioner of the New York State Department of Social Services in charge of Field Operations, testified that because the number of welfare recipients has increased at the same time that the number of programs through which aid is filtered has proliferated, the problems of fraud are great. In some instances, employed persons supplement their incomes illegally by continuing to collect unemployment benefits. In others, applicants have overstated the number of children and other dependents making up their household to increase the amount of their aid.

There can be no doubt that the use of social security numbers, combined with computers, is an important tool to combat such instances of welfare

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251 . Citing *Sherbert v. Verner*, 374 U.S. 398 (1963).

> fraud. Admittedly, however, the number is not a perfect device, since millions of people are estimated to hold more than one number or to share a number. But the evidence produced by the state was entirely unconvincing. It did not prove that the Stevenses, or those few others who might share their beliefs, pose insurmountable problems if their social security numbers cannot be fed into the maws of welfare computers.
>
> There is no suggestion of a threat sufficient in size to compromise the orderly administration of the state or national welfare program, or to render the statutory and regulatory scheme unworkable....
>
> The feasibility of devising some alternative to deal with persons like the Stevenses is suggested by the model of the federal Internal Revenue Service, which has developed other ways to identify members of the clergy who have opted out of the social security system.[252] First Amendment principles demand that such an effort be made.... With the willingness of the plaintiffs to co-operate a matter of record, some method of satisfying both the demands of the temporal and of the Divine can be found.[253]

Judge Weinstein devoted many pages of this opinion to weighing the expert testimony on historical and scriptural analyses, of which only a portion is reproduced here. Some ambiguities remained, however; was the "mark" of the Beast the same as the "number" of the Beast?[254] Was it a single mark (or number) to be stamped upon, or required of, all persons as a pass or safe-conduct? Or was it a different and unique number for each individual, enabling them to be catalogued and identified from all others (as in Social Security numbers)? When was the use of such credentials to qualify for civic benefits permissible and when not? These aspects of the scriptural teaching and/or the plaintiffs' understanding of it remained unclear. But the principle espoused was not affected by uncertainties about such details: the plaintiffs had a sincere religious belief that prevented their compliance with governmental requirements, and the government(s) involved had not demonstrated an interest in enforcing compliance by the only known objectors to outweigh their interest in adherence to their religious duty.

d. *Callahan v. Woods* (1984). A subsequent case dealt with the same issue.

> In 1979 Robert Dale Callahan sought to enjoin the Director of the California Department of Social Services and the [U.S.] Secretary of [Health and Human Services] from requiring him to obtain a social security number [SSN] for his infant daughter, Serena, in order to receive [Aid for Families with Dependent Children] benefits to which his family was otherwise entitled. Callahan claimed that compliance with the regulation requiring an SSN would impermissibly burden his first amendment right to free exercise of his religious beliefs. Specifically, he claimed that the *Book of Revelation* condemns the use of a universal number to designate a human being because such a number is the "mark of the

252 . See § e below.

253 . *Stevens v. Berger*, 428 F.Supp. 896 (E.D.N.Y. 1977).

254 . See further discussion under § d following.

> beast" through which the Antichrist seeks to control mankind. Callahan therefore refused to force his daughter to assume that mark.[255]

The idea in *Revelation* seemed to be that everyone was supposed to be stamped with the *same* number or name—666—to show that they owed fealty to the beast, not that each individual would be assigned a *different* number. Nevertheless, there is a certain primordial uneasiness that many people may feel at the prospect of being assigned a serial number by which he or she is to be identified throughout life that may resonate to the image in *Revelation* and lead some to rebel against becoming a faceless, nameless number in the world.

The district court had concluded that, although Callahan's beliefs were sincere, they were being applied in a purely secular context and therefore could not be "rooted in religious belief."[256] The Ninth Circuit had reversed, holding that Callahan's beliefs were indeed religious and therefore entitled to protection under the First Amendment. It remanded the case to the district court to consider (1) the extent to which Callahan's beliefs were burdened by the government's requirement of a Social Security number; and (2) whether the government regulation was the least restrictive means of achieving some compelling state interest.[257]

> On remand, the district court...determined that the burden on Callahan, though substantial, was heavily outweighed by the government's compelling interest in having aid recipients classified by SSNs, and that the requirement is the least restrictive means of administering efficiently an enormous social welfare program.[258]

The Ninth Circuit once again took the case to determine whether "the district court was correct in ruling as a matter of law that a regulation requiring the assignment of a number to *every* social security recipient is the least restrictive means of furthering a compelling state interest?" Judge Dorothy W. Nelson wrote the opinion for herself and Judges Alfred T. Goodwin and Harry Pregerson.

> The government must shoulder a heavy burden to defend a regulation affecting religious actions. It is usually said that the challenged regulation must be the least restrictive means of furthering a compelling state interest.
>
> Commentators have observed that, because of its broad and indefinite nature, this test is often inadvertently reduced to an inquiry which stops after the discovery of a compelling state interest.[259] The purpose of almost any law, however, can be traced to a fundamental concern of government. Balancing an individual's religious interest against such a concern will inevitably make the former look unimportant. It is therefore the "least restrictive means" inquiry which is the critical aspect of the free exercise

255. *Callahan v. Woods*, 735 F.2d 1269 (CA9 1984).

256. *Callahan v. Woods*, 479 F.Supp. 621 (N.D.Cal. 1979).

257. *Callahan v. Woods*, 658 F.2d 679 (1981).

258. Referring to *Callahan v. Woods*, 559 F.Supp. 163 (1982).

259. Citing Tribe, *American Constitutional Law*, 1st ed. (Mineola, N.Y.: Fndn. Press, 1978), § 14-10, p. 855.

> analysis. This prong forces us to measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals rather than to all individuals except those holding a conflicting religious conviction.... If the compelling state goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest. A synthesis of the two prongs is therefore the question whether the government has a compelling interest in not exempting a religious individual from a particular regulation.[260] Such a formulation prevents the government from relying on its generally great interest in maintaining the underlying rule or program for unexceptional cases.
>
> This court has adopted a method of analyzing free exercise claims which accurately reflects the relevant concerns. In determining whether a neutrally based statute violates the free exercise clause, we consider three factors:
>
> (1) the magnitude of the statute's impact upon the exercise of religious belief,
>
> (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of religious belief; and
>
> (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state....

One wishes the U.S. Supreme Court had been as thorough in applying its own Free Exercise test in *U.S. v. Lee, supra*, in which it never reached the third element: whether the (undoubtedly vital) Social Security system would have been utterly disrupted by exempting a handful of Amish employers and employees.

> We conclude that the SSN requirement substantially interferes with the free exercise of Callahan's religious beliefs. Accordingly, the compelling state interest test applies....
>
> We have no trouble concluding that the AFDC program, which reaches millions of American families each month, promotes a government interest of the highest importance....
>
> We conclude...that the SSN regulation promotes a compelling state interest....
>
> We now turn to the most critical aspect of our free exercise inquiry: the extent to which exempting Callahan from the SSN requirement would impede the goal of administrative efficiency.
>
> The affidavits submitted below fail to address the potential cost, financial or otherwise, of exempting one person from the SSN requirement. They state only that "conversion to...a non-numerical system would cost in excess of 900 million dollars." There was no evidence below, however, that the exemption of one person from the number requirement would mandate the development of an entire non-numerical system.

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260. Citing *Sherwood v. Brown*, 619 F.2d 47 (CA9 1980), discussed at § E2b below (compelling state interest in not exempting Sikh from Navy helmet requirement because absence of a single helmet would endanger the entire crew).

> There was also no evidence that any more than one person holds Callahan's religious beliefs. Absent such evidence, the district court was completely unable to address the third, and most critical, prong of the free exercise inquiry....
>
> We therefore choose to remand this case for the district court to consider whether the government had a reasonable opportunity to establish the cost of exempting Callahan. If it finds that the government passed up this opportunity, we direct the court to enter judgment for Callahan.[261]

Apparently judgment was entered for Callahan, for no further citations appear to this case after the Ninth Circuit's opinion in 1984, which is cited in subsequent cases as the prevailing view on this issue, even by courts that declined to follow it. A similar case was eventually decided by the U.S. Supreme Court (discussed in § f below) in a manner that was not nearly as perspicacious as the Ninth Circuit's decision in *Callahan v. Woods* but did not even refer to it.

e. The "Conscience Clause." Congress in 1967 made another provision for a special category of conscientious objectors to Social Security tax in addition to the Amish. Section 1402(e) of the Internal Revenue Code provides an exemption for certain "Ministers, Members of Religious Orders, and Christian Science Practitioners" who are "conscientiously opposed to, or because of religious principles [are] opposed to, the acceptance...of any public insurance which makes payments in the event of death, disability, old age, or retirement or makes payments toward the cost of...medical care."[262] This exemption was similar to that of the Amish but did not require membership in a religious sect that has a doctrinal objection to public insurance and cares for its own disabled members. The exemption must be claimed within the second year of an applicant's earning career and was an irrevocable choice until a 1977 amendment permitted a brief "window" for reconsideration during the first full taxable year following the amendment.[263]

The author was consulted by a young person who had just completed seminary training and was about to embark on a career as a Presbyterian clergyperson, and she had apparently been advised in seminary that it might be economically prudent to apply for this exemption and then to devote the income that would otherwise have been paid into Social Security to setting up investments in money-market funds or other securities or private insurance that would bring a higher return or more advantageous terms than the public insurance program. There was no question of "conscience" or "religious principle" entering into it at all; it was just a matter of prudent calculation. Needless to say, the author did not encourage this exploitation for mercenary gain of a provision designed to honor conscience.

f. *Quaring v. Peterson* (1984). Similar enough to conscientious objection to a Social Security number to be treated here is an objection to the requirement that one's photograph appear on one's driver's license. Nebraska was one of 47 out of the 50 states that in 1984 required a frontal facial photograph to be affixed to all drivers'

261 . *Callahan v. Woods*, 736 F.2d 1269 (1984).

262 . 26 U.S.C. 1402(e).

263 . P.L. 95-216, § 316, effective 12/20/77.

licenses. A woman named Frances Quaring objected to this requirement and, when she was consequently denied a driver's license, sued in federal court, which enjoined the state to issue the license. The state appealed, and the Eighth Circuit affirmed in an opinion from which the following excerpts are taken.

> Quaring's refusal to allow herself to be photographed is simply her response to a literal interpretation of the second commandment, not unlike the response of the Old Order Amish to the Epistle of Paul to the Romans... "be not conformed to this world...." The second commandment, the basis for her beliefs, expressly forbids the making of "any graven image or likeness" of anything in creation. Exodus 20:4.[264]
>
> It is also clear that Quaring sincerely holds her religious beliefs. As the district court observed,
>
> > At trial [Quaring's]...behavior in every way conforms to the prohibition as she understands it: her home contains no photographs, television, paintings, or floral-designed furnishings, and, as she testified, she goes so far as to remove or obliterate pictures on food containers.
>
> Because Quaring's beliefs are based on a passage from scripture, receive some support from historical and biblical tradition, and play a central role in her daily life, they must be characterized as sincerely held religious beliefs.
>
> Having examined the religious nature and sincerity of Quaring's beliefs, we next turn to the question whether Nebraska's photograph requirement infringes upon those belief. Although the Nebraska officials correctly point out that the photograph requirement in no way compels Quaring to act in violation of her conscience [presumably because she doesn't have to carry a driver's license?], the Supreme Court has noted that "this is only the beginning, not the end of our inquiry...."[265] Under the proper analysis, a burden upon religion exists when "the state conditions receipt of an important benefit upon conduct proscribed by a religious faith...thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."[266]
>
> Clearly, a burden upon Quaring's free exercise of her religion exists in this case. The state refuses to issue Quaring a driver's license unless she agrees to allow her photograph to appear on the license, a condition that would violate a fundamental precept of her religion. Moreover, in refusing to issue [her] a driver's license, the state withholds from her an important benefit. Quaring needs to drive a car for numerous daily activities, which include managing a herd of dairy and beef cattle, helping her husband manage a thousand-acre farming and livestock operation, and working as a bookkeeper in a community ten miles from home. By requiring Quaring to comply with the photograph requirement, the state places an unmistakable burden upon her exercise of her religious beliefs....

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264 . *Quaring v. Peterson*, 728 F.2d 1121 (CA8 1984). The first two sentences of the excerpt are in the reverse order of their occurrence in the opinion.

265 . Citing *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at § 7c above.

266 . Citing *Thomas v. Review Board*, 450 U.S. 707 (1981), discussed at § 5l above.

* * *

The state may justify a limitation on religious liberty by showing that it is the least restrictive means of achieving a compelling state interest....

The Nebraska officials argue that Quaring's interest in exercising her religion must be subordinated to the state's more compelling interest in requiring that driver's licenses contain a photograph of the licensee.[267]

In justifying their refusal to grant Quaring an exemption to the photograph requirement, the Nebraska officials advance several state interests. First, they point out that by ensuring that only persons with valid driver's licenses operate motor vehicles, the state promotes a compelling interest in public safety.... They contend that only driver's licenses containing a photograph of the licensee can provide police officials with an accurate and instantaneous means of identifying a motorist. For this reason, at least 47 states require photographs of the licensee to appear on driver's licenses. The Nebraska officials contend that an exemption to the photograph requirement would undermine the state's interest in ensuring that only licensed motorists drive on its roads.

Although quick and accurate identification of motorists surely constitutes an important state interest, we disagree with the Nebraska officials' contention that the state's interest is so compelling as to prohibit selective exemptions to the photograph requirement. Indeed, Nebraska law already exempts numerous motorists from having a personal photograph on their license.... [P]hotographs of the licensee are not required on learner's permits, school permits issued to farmers' children, farm machinery permits, special permits for those with restricted or minimal driving ability, or temporary licenses for individuals outside the state whose old licenses have expired. In addition, motorists licensed in the few states that do not require photograph licenses[268] presumably drive through Nebraska on occasion, and those persons would be unable to present driver's licenses containing their photographs. Because the state already allows numerous exemptions to the photograph requirement, the Nebraska officials' argument that denying Quaring an exemption serves a compelling state interest is without substantial merit.

The Nebraska officials also argue that the state's compelling interest in ensuring the security of financial transactions justifies their refusal to exempt Quaring from the photograph requirement. Again, we disagree. Although a photograph license obviously serves an important state interest in facilitating the identification of persons writing checks or using credit cards, granting Quaring an exemption will not undermine that interest. Many people already engage in financial transactions without the benefit of a photograph license for identification: some are exempt from the photograph requirement, and some do not have any license because

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267. In the margin the court noted that three other courts had considered the issue. Two upheld the state—*Dennis v. Charnes*, 571 F.Supp. 462 (D.Colo. 1983) and *Johnson v. Motor Vehicle Div.*, 593 P.2d 1363 (1979), and one did not—*Bureau of Motor Vehicles v. Pentecostal House*, 380 N.E.2d 1225 (1978).

268. Including New York, "one of the Nation's most populous states," noted the court in the margin, though since 1986 it has required a photograph for driver's licenses.

> they do not drive. Issuing Quaring a license without her photograph places her in the same position as these people. In any event...people may freely refuse to do business with Quaring if she is unable to present adequate identification.
>
> Finally, the Nebraska officials argue that the administrative burden of considering applications for exemptions from the photograph requirement also constitute a compelling state interest. They point out that establishing uniform criteria for granting exemptions will be difficult because 95 testing centers in Nebraska issue driver's licenses. They also argue that the religious nature of the claimed exemption will exacerbate this problem. The state would have to probe into the sincerity and religious nature of an applicant's belief, and applicants could easily show religious grounds as the basis for their objection to the photograph requirement. [They] fear that unless the state establishes an elaborate and expensive mechanism to consider requests for religious exemptions, exemptions to the photograph requirement will be available virtually on demand.
>
> Although Nebraska plainly has an interest in avoiding the administratively cumbersome task of considering applications for religious exemptions, its interest is not compelling. A state's interest in avoiding an administrative burden becomes compelling only when it presents administrative problems of such magnitude as to render the entire statutory scheme unworkable....[269] The record contains no evidence, however, that allowing religious exemptions to the photograph requirement will jeopardize the state's interest in administrative efficiency. Persons seeking an exemption on religious grounds are likely to be few in number. Indeed, few persons will be able to demonstrate the sincerity of their religious beliefs by showing that they possess no photographs or pictures.... Thus, none of the interests the Nebraska officials advance are sufficient to justify the burden upon Quaring's religious liberty.
>
> The Nebraska officials argue that providing an exemption for Quaring on the basis of her religion creates an impermissible establishment of religion. We disagree. In some cases, the free exercise clause requires a state to make a reasonable accommodation of religion.... Such accommodation does not constitute an establishment of religion.[270]

To this opinion one judge dissented. Judge George G. Fagg simply agreed with the state that it was important for police officers in the field to be able to make an accurate and instantaneous identification of a person claiming to be entitled to drive a car. He felt that the exceptions to the requirement cited by the majority were only provisional or marginal cases and did not constitute "any meaningful comparison with the state's regular license holders." If the requirement conflicted with Quaring's religious beliefs, that was too bad.

> I have no quarrel with the majority's observation that Quaring may experience daily inconvenience because she cannot drive a motor vehicle. Her difficulties, however, are not insurmountable and she is not the only

269 . Citing *Sherbert, supra*, at 408-409.

270 . *Quaring v. Peterson, supra.*

> person that has been faced with the need to make lifestyle adjustments precipitated by nonconformity with driver's license requirements. Not insignificantly, and as the majority notes, Quaring's religious beliefs are "unusual in the twentieth century" and "the photographic requirement in no way compels Quaring to act in violation of her conscience." I cannot say that the state's legitimate requirement of a photographic identifier has placed impermissible pressure on Quaring to modify her behavior and violate her beliefs to the end of obtaining driving privileges upon the roadways of Nebraska.... This is an instance where a religious belief must yield to the common good.[271]

This case illustrates how a lower court could readily apply the "technology" of the "free-exercise test" of *Sherbert, Lee*, and *Thomas* to a factual situation and weigh the evidence under the headings of:

1. Religiousness and sincerity of objection;
2. Burden placed upon the religious practice by state action;
3. Importance of the state's interest;
4. Can it be served in a less restrictive way?

It did not, of course, assure that all judges would accord the same weight to the elements in each step, but it at least provided an analytical mechanism that would prevent a judge from simply leaping to an intuitive conclusion. A judge was obliged at a minimum to go through the exercise of rationalizing his or her conclusion in terms that a higher court could review.

The U.S. Supreme Court reviewed this case (*sub nomine Jensen v. Quaring*), and, in the absence of Justice Powell, split four to four, leaving the Eighth Circuit's decision standing and the score for lower courts adjudicating this question 2-2. Another case of the same kind thus could easily go either way. From the standpoint of those concerned about protection of the individual conscience, the Eighth Circuit's decision seems persuasive, and the Supreme Court's dividing evenly on the question, distressing—a harbinger of hard times for free exercise, which indeed set in with *Oregon v. Smith* in 1990.[272]

g. *Bowen v. Roy* (1986). Recurring to an earlier theme, another case arose involving religious objections to use of a Social Security number, similar to *Callahan v. Woods*.[273] In this instance the objectors were Stephen Roy and Karen Miller, parents of a two-year old daughter, Little Bird of the Snow. Roy was a member of the Abenaki tribe of American Indians, and he contended that his Native American religious beliefs prohibited him from obtaining or utilizing a Social Security number for his daughter in applying for Aid to Dependent Children or food stamps for her, as required by law. When he was denied these two forms of aid for her because he refused to supply a Social Security number, he went to court. When questioned by the federal district court, Roy explained his beliefs.

> [H]e asserts a religious belief that control over one's life is essential to

271 . Ibid., Fagg dissent.

272 . See discussion at § D2e below.

273 . See § d above.

> spiritual purity and indispensable to "becoming a holy person." Based on recent conversations with an Abenaki chief, Roy believes that technology is "robbing the spirit of man." In order to prepare his daughter for greater spiritual power, therefore, Roy testified to his belief that he must keep her person and spirit unique and that the uniqueness of the social security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.[274]

On the last day of trial it was discovered that Little Bird of the Snow had already been assigned a Social Security number, but Roy testified that her spirit would be robbed only by "use" of the number. The district court denied his request for damages but did grant injunctive relief to the extent of restraining the secretary of Health and Human Services (then Margaret Heckler, in 1986 Otis Bowen) from "making any use of the social security number which was issued in the name of Little Bird of the Snow Roy" and from denying assistance to her until her 16th birthday because of refusal to supply a Social Security number.

The U.S. Supreme Court noted probable jurisdiction and devoted many pages to this problem, not all of them entirely edifying. The judgment of the court was announced by the Chief Justice Warren Burger, joined by seven other justices as to parts I and II, but by only Justices Powell and Rehnquist in part III. The chief justice divided the problem in two parts: (1) the objection to the state agency's utilization of the Social Security number (already in its possession) in providing benefits to Little Bird of the Snow to which she was otherwise entitled, and (2) the objection to the requirements that *applicants* must *provide* the number to qualify for the benefits. With regard to the first question he wrote (on behalf of eight justices):

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter....
>
> As a result, Roy may no more prevail on his religious objection to the Government's use of a social security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures....
>
> We therefore hold that the portion of the District Court's injunction that permanently restrained the Secretary from making any use of the social

274 . *Bowen v. Roy*, 478 U.S. 694 (1986).

security number that had been issued in the name of Little Bird of the Snow must be vacated.

It was on this holding with respect to point (1) that eight justices concurred. On point (2), however, the chief justice recruited only two other votes, so it was *not* the opinion of the court.

> The statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable. There is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs.... It may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons. Rather, it is appellees who seek benefits from the Government and who assert that, because of certain religious beliefs, they should be excused from compliance with a condition that is binding on all other persons who seek the same benefits from the Government.
>
> This is far removed from the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First Amendment. We are not unmindful of the importance of many governmental benefits today or of the value of sincerely-held religious beliefs. However, while we do not believe that no government compulsion is involved, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.
>
> * * *
>
> We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard. A governmental burden on religious liberty is not insulated from review simply because it is indirect...; but the nature of the burden is relevant to the standard the Government must meet to justify the burden.
>
> The general governmental interests involved here buttress this conclusion. Governments today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires certain conditions and restrictions. Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference. Moreover, legitimate interests are

implicated in the need to avoid any appearance of favoring religious over nonreligious applicants.

The test applied in cases like *Wisconsin v. Yoder*... is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest. Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in application, is a reasonable means of promoting a legitimate public interest.

We reject appellees' contention that *Sherbert* and *Thomas* compel affirmance. The statutory conditions at issue in those cases provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, toward religion.... In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption.

Here there is nothing whatever suggesting antagonism by Congress towards religion generally or towards any particular religious beliefs. The requirement that applicants provide a Social Security number is facially neutral and applies to all applicants for the benefits involved. Congress has made no provision for individual exemptions to the requirement in the two statutes in question.

* * *

Appellees may not use the Free Exercise Clause to demand government benefits, but only on their own terms, particularly where the insistence works a demonstrable disadvantage to the Government in the administration of the programs.... We conclude that the Congress's refusal to grant appellees a special exemption does not violate the Free Exercise Clause.

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.[275]

What the district court understood to be "consistent with this opinion" with respect to the second point is obscure, since the "we" in the latter part of the opinion represented only three votes out of nine. The other six, however, did not agree on a

275 . Ibid., opinion of three justices only.

single opinion in opposition, but dispersed into several factions.

Justice Blackmun announced, "I join only Parts I and II of the opinion written by the Chief Justice." Those parts dealt with point (1) above; Part III dealt with point (2). He explained his views as follows:

> I agree that the portion of the District Court's judgment that enjoins the Government from using or disseminating the social security number already assigned to Little Bird of the Snow must be vacated. I would also vacate the remainder of the judgment and remand the case for further proceedings, because once the injunction against use or dissemination is set aside, it is unclear on the record presently before us whether a justiciable controversy remains with respect to the rest of the relief ordered by the District Court.... It is possible... that appellees still would have an independent religious objection to their being forced to cooperate actively with the Government by themselves providing their daughter's social security number on benefit applications.... [or] they may simply be unwilling to apply for benefits without an assurance that the application will not trigger the use of the number. Conversely, it is possible that the Government, in a welcome display of reasonableness, will decide that since it already has a social security number for Little Bird of the Snow, it will not insist that appellees resupply it.

At this point Justice Blackmun introduced a footnote intimating a certain skepticism about such "reasonableness":

> 1. Unfortunately, I cannot agree that such flexibility on the Government's part is assured either by the Government's earlier argument to the District Court that the case should be dismissed as moot, or by regulations providing special assistance to handicapped applicants and applicants who cannot read and write English.... What the Government does not say is that it in fact will adopt this construction, which it does not appear to have followed in the past. It is worth recalling that the Government's response to appellee's refusal to supply a social security number for their daughter was not to assign her a number unilaterally, or to offer to do so, but rather to cut off benefits for the child.[276]

Here Justice Blackmun seems to have expressed an accurate reading of the contemporary bureaucratic mind, whose impulse is not to seek to *help* those entitled to benefits to obtain them but to *deny* such help if all the blanks in the application form are not filled in, even when the statute and regulations specify that the agency will *assist* the applicants to fill out the forms.[277]

> Since the proceedings on remand might well render unnecessary any discussion of whether appellees constitutionally may be required to provide a social security number for Little Bird of the Snow in order to obtain government assistance on her behalf, that question could be said not to be properly before us. I nonetheless address it...because the rest of

276 . Ibid., Blackmun opinion, n. 1.

277 . See also n. 7 in Burger opinion.

> the Court has seen fit to do so.... Indeed, for the reasons expressed by Justice O'Connor... I think the question requires nothing more than a straight-forward application of *Sherbert*, *Thomas* and *Wisconsin v. Yoder*... that...the Government may not deny assistance to Little Bird of the Snow solely because her parents' religious convictions prevent them from supplying the Government with a social security number for their daughter.

Justice Stevens had his own approach to the two questions addressed by the court.

> Members of the Abenaki Indian Tribe are unquestionably entitled to the same constitutional protection against governmental action "prohibiting the free exercise" of their religion as are adherents of other faiths. Our respect for the sincerity of their beliefs does not, however, relieve us from the duty to identify the precise character of the two quite different claims that the parents of Little Bird of the Snow have advanced. They claim, first, that they are entitled to an injunction preventing the Government from making any use of a Social Security number assigned to Little Bird of the Snow; and second, that they are entitled to receive a full allowance of food stamps and cash assistance for Little Bird of the Snow without providing a Social Security number for her.
>
> As the Court holds in Part II of its opinion, which I join, the first claim must fail because the Free Exercise Clause does not give an individual the right to dictate the Government's method of record keeping. The second claim, I submit, is either moot or not ripe for decision.
>
> * * *
>
> Once we vacate the injunction preventing the Government from making routine use of the number that has already been assigned to Little Bird of the Snow, there is nothing disclosed by the record to prevent the appellees from receiving the payments that are in dispute.... The only issue that prevented the case from becoming moot was the claim asserted by Roy that he was entitled to an injunction that effectively cancelled the existing number. Since that issue has now been resolved, nothing remains of the case.
>
> * * *
>
> To the extent that other food stamp and welfare applicants are, in fact, offered exceptions and special assistance in response to their inability to "provide required information," it would seem that a religious inability should be given no less deference. For our recent free exercise cases suggest that religious claims should not be disadvantaged in relation to other claims.[278]

Justice O'Connor wrote an opinion that was joined by Justices Brennan and Marshall, giving her the same number of votes on point (2) as the chief justice on the other side.

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278 . *Bowen v. Roy, supra,* Stevens opinion.

I join Parts I and II of the Chief Justice's opinion and I would vacate only a portion of the injunction issued by the District Court.

* * *

The Chief Justice not only believes [with respect to point (2)] appellees themselves must provide a social security number to the Government before receiving benefits, but he also finds it necessary to invoke a new standard to be applied to test the validity of government regulations under the Free Exercise Clause. He would uphold any facially neutral and uniformly applicable governmental requirement if the Government shows its rule to be "a reasonable means of promoting a legitimate public interest." Such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides. I would apply our long line of precedents to hold that the Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.

* * *

Once it has been shown that a governmental regulation burdens the free exercise of religion, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[279] This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest,"[280] or represents "the least restrictive means of achieving some compelling state interest."[281] Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.

Granting an exemption to Little Bird of the Snow, and to the handful of others who can be expected to make a similar objection to providing the social security number in conjunction with the receipt of welfare benefits, will not demonstrably diminish the Government's ability to combat welfare fraud.... The danger that a religious exemption would invite or encourage fraudulent applications seeking to avoid cross-matching performed with the use of social security numbers is remote on the facts as found by the District Court: few would-be lawbreakers would risk arousing suspicion by requesting an exemption granted only to a very few. And the sincerity of the appellees' religious beliefs is here undisputed. There is therefore no reason to believe that our previous standard for determining whether the Government must accommodate a free exercise claim does not apply.

* * *

The Court simply cannot, consistent with its precedents, distinguish this case from the wide variety of factual situations in which the Free Exercise

279 . *Wisconsin v. Yoder*, 406 U.S. 205 (1972), written by Chief Justice Burger.

280 . *U.S. v. Lee*, 455 U.S. 252 (1982), written by Chief Justice Burger.

281 . *Thomas v. Review Board*, 450 U.S. 707 (1981), written by Chief Justice Burger.

> Clause indisputably imposes significant constraints upon government. Indeed, five members of the Court agree that Sherbert and Thomas, in which the Government was required to accommodate sincere religious beliefs, control the outcome of this case to the extent it is not moot [Justices Blackmun, White, O'Connor, Brennan and Marshall].
>
> The Chief Justice's distinction between this case and the Court's previous decisions on free exercise claims...has been directly rejected. The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution.... The rise of the welfare state was not the fall of the Free Exercise Clause.[282]

Justice White, in one sentence, dissented from the entire opinion. "Being of the view that *Thomas*...and *Sherbert*...control this case, I cannot join the Court's opinion and judgment."

Chief Justice Burger's curious retreat from his notable defense of religious liberty in *Yoder*, *Thomas* and other earlier opinions was in sharp contrast to the unwillingness of other members of the court to recede from the standards he had earlier set. Even Justice White, who had dissented in *Sherbert*, was not ready to depart from it, and Justice O'Connor displayed a welcome attachment to the teachings of those cases decided before she came to the court. Altogether, this was a thoroughly rag-taggle performance by the Court, so confusing that it has been misrepresented by many attorneys who ought to know better, including the solicitor general of the United States in a brief *amicus curiae* in *Hobbie v. Florida*, q.v. The next term some of the damage was repaired in a Sabbatarian case, *Hobbie v. Florida*,[283] only to have the whole structure of the "compelling state interest" test of Free Exercise swept away in 1990 in *Oregon v. Smith*.[284]

10. Union Membership

Seventh-Day Adventists, in addition to objecting on religious grounds to working on their Sabbath (Saturday),[285] also have a religious aversion to membership in labor unions. They believe that such membership can, in the event of a strike or other adversary actions by the union against management, place them in a position of enmity to the employer, contrary to the Gospel injunction to "love your neighbor." Labor unions, after decades of struggle, have succeeded in many labor-management contracts in making union membership a condition of employment, and such "union shop" arrangements are recognized in law, as will be noted below. This placed Seventh-Day Adventists in a difficult position under such contracts. They seemed to be wanting to enjoy the benefits of collective bargaining without paying their fair share of the costs thereof. Labor unions have understandably been somewhat inhospitable to that view. Sometimes they have been willing to compromise union "security" to the extent of excusing religious objectors from the requirement of

282 . *Bowen v. Roy, supra*, O'Connor opinion.

283 . 480 U.S. 136 (1987), discussed at § 7i above.

284 . 494 U.S. 872 (1990), discussed at § D2e below.

285 . See § 7c above.

belonging to the union, but have expected persons thus excused still to pay union dues. Adventists have found that arrangement unacceptable, since it required them still to support financially the recurrent labor militancy they eschew.

In return, in order to avoid the onus of seeming to be "free-loaders," they have offered to contribute an amount equal to the union dues to a charity acceptable to, but unconnected with, the union. This compromise has not been acceptable to some unions (though the Executive Council of the AFL-CIO approved it[286]) because they consider that it fails to benefit the union and therefore is not a "compromise" at all. (Some other denominations have views similar to the Adventists' views, as will be seen in the first case below.)

This rather obscure issue of religious conscience has generated a surprising amount of case law and legislation, which will be reported here in rather summary fashion.

a. ***Otten v. B & O Railroad*** **(1953).** One of the early cases was decided by the distinguished jurist Learned Hand and two other judges of the federal Second Circuit Court of Appeals in 1953. The panel was composed of Chief Judge Thomas W. Swan and Judge Augustus N. Hand, in addition to Judge Learned Hand, who wrote the unanimous opinion for the court.

> Otten refused to join the [railroad] union because his religious scruples forbad his becoming a member of any organization, composed in any part of "unbelievers": he is a member of the "Plymouth Brethren IV" who deduce this duty from Chapter 6, verse 14, of the Second Epistle to the Corinthians.[287] The union offered to dispense with Otten's becoming a member formally, if he would pay the same dues, fees and assessments that were required of members; and it offered to deposit his payments in its funds for the support of its retired members. Since, however, this did not obviate the objection of an association with unbelievers, Otten's religion still forbad his acceptance. After protracted negotiations seeking an accommodation the [railroad] discharged him....
>
> * * *
>
> On the merits there can be no doubt. The union has not excluded the plaintiff; on the contrary, it has made substantial concessions to induce him to join.... Otten complains that the other employees deem it in their interest to combine and are not willing to work with anyone who will not combine with them.... This conflict results in making it necessary either for the union to yield what it deems to be one of its important interests—a "union shop" with the control that that gives them in dealing with the railways—or for the plaintiff to yield on a point of conscience. Such conflicts are inevitable; and, when to economic sanctions no political sanction is added, they do not ordinarily raise any constitutional question. The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.... We must accommodate our

286. See *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 452 (1981) at § c below.

287. "Be ye not unequally yoked together with unbelievers...." (II. Cor. 6:14, A.V.).

> idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.[288]

b. Legislative Changes. During the next decade Congress enacted the Civil Rights Act of 1964, which prohibited *private* employers and unions from firing, demoting, or failing to hire any individual because of his or her "race, color, *religion*, sex, or national origin."[289] During the decade after that, Congress adopted the Randolph amendment to the Equal Employment Opportunity Act (in 1972) designed to protect Sabbatarians in private employment:

> The term "religion" [in Title VII of the Civil Rights Act] includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[290]

During the latter 1970s a rash of cases arose testing this new definition of the situation, as applied to the union-membership issue.

• *Cooper v. General Dynamics*, 533 F.2d 397 (CA5 1978) (Adventist objectors are protected by "Randolph amendment" of 1972).

• *McDaniel v. Essex International*, 571 F.2d 338 (CA6 1978), 696 F.2d 34 (CA6 1982) (Adventist objector upheld against claim by employer and union that Randolph amendment of 1972 represented an "establishment of religion").

• *Anderson v. General Dynamics* and *Burns v. Southern Pacific*, 589 F.2d 397, 403 (CA9 1978) (Adventist objectors upheld against "establishment" claim).

c. Another Randolph Amendment. On Christmas Eve of 1980, just a few days before he left office, President Carter signed into law another amendment advanced by Senator Jennings Randolph (D.-W.Va.), the only Christian Sabbatarian in the Senate. It amended Section 19 of the National Labor Relations Act to read as follows:

> 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 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 employees, 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...chosen by such employees from a list of at least three such funds, designated in such contract or if the contract fails to designate such fund, then to any such fund chosen by the employee....[291]

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288 . *Otten v. Baltimore & Ohio Railroad Company*, 205 F.2d 58 (CA2 1953).

289 . 42 U.S.C. § 2000-2(a)(1), emphasis added. For fuller text, see § 7e above.

290 . 42 U.S.C. § 2000e(j). See discussion at § 7e above.

291 . 29 U.S.C. § 169, P.L. 96-593, 94 Stat. 3452.

Further litigation ensued in the circuit courts of appeals, but—as before—none reached the Supreme Court, and all were decided in favor of the objecting employees.

• *Tooley v. Martin-Marietta Corp. and United Steel Workers of America*, 648 F.2d 1239 (CA7 1981) (Adventist employees' claims upheld against "establishment" challenge on basis of Randolph amendment of 1980).

• *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (CA7 1981) (employees' claims upheld against "establishment challenge" on basis of Randolph amendment of 1980).

The prevailing view of courts and Congress seemed to be that the religious objections of a handful of devout and conscientious workers should be honored—even at *de minimis* cost to the unions—and, if the labor force should ever become predominantly peopled with Seventh-Day Adventists, a condition of "undue hardship" might then exist. Although the Seventh-Day Adventist church was one of the most rapidly growing religious bodies in America,[292] it still numbered less than a million members (in the United States in the years in question) and was not apt to swamp the labor market in the near future. With the adoption by Congress of the second Randolph amendment and the working out of litigation already in progress at the time, this subject seems to have fallen into a state of at least temporary quiescence.

11. Landlord's Objection to Renting to Unmarried Couples

A recent development in the exercise of conscience by believers has arisen with the broadening and stricter enforcement of antidiscrimination statutes. Some property owners renting residential space have balked for reasons of conscience at renting to couples who were intending to cohabit without obtaining the blessings of matrimony, contending that to provide housing for such couples would be aiding and abetting fornication. Some couples thus rejected had sued such landlords for violation of state equal-housing statutes that prohibit discrimination on the basis of "marital status." The results of such litigation have been mixed.

a. *Cooper v. French* (1990). The Supreme Court of Minnesota addressed this issue in 1990, when it heard the appeal of a landlord, owner of a two-apartment house, who refused to rent to an unmarried woman because he suspected that she and her fiance would cohabit on the premises, and such conduct was contrary to his faith as a member of the Evangelical Free Church. She filed a complaint with the state human rights agency, which decided in her favor. That holding was affirmed by the court of appeals, and the state supreme court agreed to hear the case. It ruled in an opinion by Justice Lawrence R. Yetka that interpreted the statute's prohibition against discrimination on the basis of "marital status" not to provide protection for unmarried cohabiting couples. The court further noted that the public policy of the state provided criminal penalties for fornication.

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292. See Kelley, *Why Conservative Churches Are Growing*, *supra,* p. 21 and Fig. 8, and "Seventh-day Adventist Church" in Jacquet, Constant H., ed., *Yearbook of American & Canadian Churches (*Nashville: Abingdon Press, 1983), 266. When the manuscript was reviewed posthumously for publication, reviewers were unable to verify the year of the *Yearbook of American & Canadian Churches.*

> It is obvious that the legislature did not intend to extend the protection of the [Minnesota Human Rights Act] to include unmarried, cohabiting couples in housing cases.... *It is simply astonishing to me that the argument is made that the legislature intended to protect fornication and promote a lifestyle which corrodes the institutions which have sustained our civilization, namely, marriage and family life.* If the legislature intended to protect cohabiting couples and other types of domestic partners, it would have said so.... [but] an attempt to do this was defeated by a substantial majority of the Minnesota House of Representatives.[293]

Four of the seven justices agreed with that conclusion. Three went on to consider the constitutional claims of the landlord, but Justice John E. Simonett stated that the statutory holding was dispositive, and he declined to reach the constitutional issue. It is the constitutional claims of religious liberty, however, that are of greatest interest here. The court noted that the state constitution gives to that interest a more salient place than does the federal constitution.

> The Minnesota Constitution, unlike the United States Constitution, treats religious liberty as more important than the formation of government....
>
> The right of every man to worship God according to the dictates of his own conscience shall never be infringed* * * *nor shall any control of or interference with the rights of conscience be permitted*, or any preference be given by law to any religious establishment or mode of worship.... [emphasis in the court's opinion]
>
> The plain language of this section commands this court to weigh the competing interests at stake whenever the rights of conscience are burdened. Under this section, the state may interfere with the rights of conscience only if it can show that the religious practice in question is "licentious" or "inconsistent with the peace or safety of the state." In the present case, the state has simply failed to make such a showing....
>
> It appears that we have now reached the stage in Minnesota constitutional law where the religious views of a probable majority of the Minnesota citizens are being alleged by a state agency to violate state law. Today we have a department of state government proposing that...the state...has an interest in promoting access to housing for cohabiting couples which overrides French's right to exercise his religion.
>
> [The state] characterizes the state's interest as "eliminating *pernicious* discrimination, including marital status discrimination." We are not told what is so pernicious about refusing to treat unmarried, cohabiting couples as if they were legally married.... There are numerous...contexts in which cohabiting couples are not legally entitled to the same treatment as married couples. A prime example is found in the area of employee life and health insurance benefits.... Other examples are found in the laws governing intestate succession and the rules of evidence governing the privilege for marital communications. Is the argument now being made that these too are "*pernicious*" discrimination? If they are, surely it is the

293 . *State ex rel. Cooper v. French*, 460 N.W.2d 2 (1990).

> role of the legislature [not the courts] to make whatever changes are necessary.
>
> How can there be a compelling state interest in promoting fornication when there is a state statute on the books prohibiting it? Moreover, if the state has a duty to enforce a statute in the least restrictive way to accommodate religious beliefs, surely it is less restrictive to require Parsons [the prospective tenant] to abide by the law prohibiting fornication than to compel French to cooperate in breaking it. Rather than grant French an exemption from the MHRA, the state would rather grant everyone an exemption from the fornication statute. Such a result is absurd.[294]

The dissent looked at the matter very differently—as dissents often do. Minnesota Chief Justice Peter S. Popovich concluded that the majority had misconstrued legislative history, public policy and the facts presented to reach a result contrary to the same court's previous interpretation of the human rights law. He insisted that Minnesota had taken the position that "living together" constitutes "marital status," and therefore must not be an object of discriminatory treatment.[295] He made much of the fact that, although the man and woman would be "living together," there was no evidence in the record that they would be engaging in sexual intercourse, and they had refused to tell the landlord whether they would or not. The dissent therefore considered that to be an undocumented conclusion of the landlord, whereas the majority thought the contrary supposition to be unreal.

In a footnote the majority observed, "That Parsons would insist on renting only if she could reside there with her fiance and suggest that no sexual intercourse would take place is difficult to believe to say the least. Even if we accept that fairy tale, it misses the point: French's religious beliefs prohibit the living together of an unmarried man and woman regardless of whether sexual intercourse takes place."

The basic position of the dissent was that the defendant had entered the commercial field and was bound by the rules set by the state for that arena. "The distinction between public and private activities underlies freedom of religion cases." The legislature had drawn the line between the two, and the court was not in a position to redraw it.

> [B]y entering the public marketplace one is subjecting oneself to laws concerning public behavior, including anti-discrimination laws, that must be balanced against first amendment interests. There is no first amendment right to yell "fire" in a crowded theater. Upon entering the public marketplace [French] could no longer consider just his own rights and beliefs, but became subject to certain state laws and the rights of potential tenants.... [He] is free, in his private life, to not associate with anyone whom he feels has the "appearance of evil," but when someone voluntarily enters the public marketplace he may encounter laws that are

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294 . Ibid.

295 . Citing *McClure v. Sports & Health Club*, 370 N.W.2d 844 (1985), which dealt with discrimination against unmarried persons cohabiting with a person of the opposite sex in *employment*, which the majority had considered different from discrimination in *housing*.

> inconsistent with his religious beliefs....
>
> If the state shows it has a compelling or overriding interest for the burdensome regulation[,] it can prevent a religious-based exemption from that regulation.... Providing equal access to housing in Minnesota by eliminating pernicious discrimination, including marital status discrimination, is an overriding compelling state interest....
>
> Religious and moral values include not discriminating against others solely because of their color, sex, or whom they live with, avoiding unnecessary emotional suffering, showing tolerance for nontraditional lifestyles, and treating others as one would wish to be treated.... The majority, in effect, would have us return to the day of "separate but equal" where individuals such as French would be permitted to keep their neighborhoods free of "undesirables" and "nonbelievers."
>
> * * *
>
> The appearance of evil argument is without merit. The Act prohibits marital *status* discrimination, here French concludes living together status assumes certain *conduct*, which he can then use to discriminate. There is nothing, however, in the fornication statute outlawing unmarried couples from living together....
>
> The last requirement is that the state regulation use the least restrictive means of achieving the state's goals.... French contends a less restrictive means is for the state simply to not enforce the Act's prohibition of marital status discrimination. That is not a less restrictive means; it would be a complete abrogation of the state's goal of preventing invidious discrimination.... The only possible less restrictive means is to grant those individuals with sincerely held religious beliefs an exemption from the Human Rights Act.... The legislature has already drawn a line that grants an exemption...to small-scale landlords renting out a room in the house in which they live.... The majority's argument properly should be left to the legislature. If [it] wishes to redraw this line so as to exclude individuals like French..., it is perfectly free to do so. But until the legislature changes the statute it should be enforced as written, since it is within the permissible parameters of constitutional principles.[296]

This dissent was joined by Justices Rosalie Wahl and A.M. Keith, making three justices who saw the matter as one of opposing invidious discrimination (including chiding French for not living up to the supposed "religious and moral values" of fairness and nondiscrimination), whereas three other justices saw the same matter as one of upholding the state's public policy of favoring marriage over "fornication." The swing justice agreed with the latter only to the extent of statutory construction: that "marital status" refers only to "whether *a person* is single, married, remarried, divorced, separated, or a surviving spouse," and by implication *not* to the renting individual's relationship to others.

This diametric opposition of views about the same fact-situation and legal analysis will be seen running through subsequent wrestlings by other courts with the same issue.

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296 . *Cooper v. French, supra*, dissent.

• *Donahue v. Fair Employment & Housing Commission*, 2 Cal. Rptr.2d 32 (1991) (state rule against marital status discrimination in housing outweighed by landlord's right to free exercise of religion under compelling state interest test of *People v. Woody*[297]). Notable quote:

> Religion may properly be viewed as not merely the performance of rituals and ceremonies, limited to one's home and place of worship, but also as a system of moral beliefs and ethical guideposts which regulate one's daily life. Religion thus does not necessarily end where society begins.... People do not lose their freedom of religion and "liberty of conscience" [Calif. Const. Art. I, § 4] when they engage in worldly activities.

(The California Supreme Court granted a petition to review this decision, but later dismissed the review as improvidently granted and rejected a request for an order directing publication of the lower court's opinion, so it has no precedential weight—beyond the probative force of its reasoning.)

b. *Attorney General v. Desilets* (1994). A similar quandary appeared on the East Coast when the Supreme Judicial Court of the Commonwealth of Massachusetts addressed an appeal of a housing discrimination complaint brought by the attorney general on behalf of an unmarried couple who had been refused the rental of housing by two brothers, Roman Catholics, who had refused for religious reasons to rent to some ten or more applicants over a decade. They defended on the basis of their religious belief that they should not facilitate sinful conduct. Both sides moved for summary judgment, and the motion of the brothers was granted by the Superior Court. The attorney general appealed to the Supreme Judicial Court, which divided on this issue—like the Minnesota Supreme Court in *Cooper v. French, supra*—into three segments.

Three justices joined an opinion by Justice Herbert P. Wilkins (for himself and Justices Ruth Abrams and John Greaney) that concluded neither party was entitled to summary judgment and remanded the case for trial of issues of fact. Chief Justice Paul J. Liacos agreed in that result but for different reasons, making it the judgment of the court. The other three justices, Francis P. O'Connor, Neil Lynch and Joseph Nolan, would have decided in the landlords' favor without a remand. The Wilkins opinion rejected the Supreme Court's abandonment of the compelling state interest test in *Oregon v. Smith*[298] in preference for retaining that test on state grounds, noting that such a stance was consonant with the newly enacted Religious Freedom Restoration Act.

> Because it is unchallenged on the summary judgment record, we must accept that the defendants sincerely believe that their behavior must in all respects conform to their religious beliefs and that, in their view, the operation of rental housing is not independent of those beliefs. Conduct motivated by sincerely held religious convictions will be recognized as the exercise of religion.... Here,... the government has placed a burden on the

297 . 394 P.2d 813 (1964), discussed at § D2a below.

298 . 494 U.S. 872 (1990), discussed at § D2e below.

> defendants that makes their exercise of religion more difficult and more costly. The statute affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation....
>
> The fact that the defendants' free exercise of religion claim arises in a commercial context, although relevant when engaging in a balancing of interests, does not mean that their constitutional rights are not substantially burdened. This is not a case in which a claimant is seeking a financial advantage by asserting religious beliefs....
>
> We must, therefore, consider whether the record establishes that the Commonwealth has or does not have an important governmental interest that is sufficiently compelling that the granting of an exemption to people in the position of the defendants would unduly hinder that goal. The general objective of eliminating discrimination of all kinds...cannot alone provide a compelling State interest that justifies the application of [the law] in disregard of the defendants' right to free exercise of their religion. The analysis must be more focused.... [M]arital status discrimination is not as intense a State concern as is discrimination based on certain other classifications.... Because there is no constitutionally based prohibition against discrimination on the basis of marital status, [that] discrimination is of a lower order than those discriminations [mentioned in the State Constitution]. Moreover, in various ways, by statute and judicial decision, the law has not promoted cohabitation and has granted a married spouse rights not granted to a man or woman cohabiting with a member of the opposite sex.[299]

The opinion noted the sweeping language of Article 2 of the Commonwealth's Constitution, "unaltered since the people adopted it in 1780 [and] has no precise parallel in the Constitution of the United States":

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

Justice Wilkins and two colleagues concluded that Article 2 was not involved in this case "because we are not dealing with any restraint on the defendants' religious professions or sentiments"—a conclusion with which Chief Justice Liacos differed. The three justices thought that the Commonwealth should have an opportunity to substantiate whether its interest in enforcing the nondiscriminatory rule against the defendants was sufficient to justify burdening their rights to free exercise of religion.

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299 . *Atty. Gen. v. Desilets*, 636 N.E.2d 233 (1994). A number of provisions are listed, many similar to those in a case discussed above, but adding a few unique to Massachusetts, such as the declaration that "Massachusetts does not recognize common-law marriage." *Davis v. Misano*, 366 N.E.2d 752 (1977).

The chief justice agreed with that disposition, but added some thoughts about the bearing of Article 2 on that question.

> Our Constitution precedes and was, in large measure, the model for the Federal Constitution.... The language of art. 2 does not limit the mode or manner of worship to commonly recognized forms of worship. On the contrary, the language, "in the manner and season most agreeable to the dictates of [an individual's] conscience" unambiguously indicates that a citizen is free to decide for himself or herself the method by which he or she will worship....
>
> The decision by an individual as to what form of religious worship constitutes an appropriate vehicle by which to pay homage to a chosen object of that worship can hardly be characterized as anything but a religious belief or sentiment, for it is religious belief which informs, and serves as the foundation for, that choice....
>
> The court states that this case does not involve "any restraint on the defendants' religious profession or sentiments" and therefore...art. 2's protection of "religious profession or sentiments" is not implicated in this case. The court gives no reason for this conclusion.... I cannot agree.... I believe...the protection in art. 2 for "religious profession or sentiments" is relevant here.... [T]he event immediately precipitating this action was one telephone call made by [Cynthia] Tarail. The content of the conversation which took place was disputed, but the judge found that Paul Desilets imparted to Tarail that he would not rent to unmarried cohabiters because to do so would violate his religion. The conversation then ended....
>
> As I see it, then, the action of the defendants on which this suit was founded was his profession of his religious belief that cohabitation of unmarried persons is a sin. Therefore, the facts of this case also implicate the protection afforded to the defendants' "religious profession or sentiments."...
>
> In my opinion art. 2 covers the actions of the defendants. As a result, their conduct is deserving of art. 2 protection unless it disturbs the peace.... I would remand this case for further proceedings and a determination whether the defendants' actions disturbed the public peace.... If the judge determines that the defendants' conduct did disturb the public peace, the judge should then balance the State's interest in maintaining the public peace against the defendants' rights under art. 2.[300]

Justice Francis O'Connor wrote a vigorous dissent that was joined by Justices Nolan and Lynch. It summed up what religious liberty guaranteed by the Massachusetts Constitution should require.

> In keeping with their sincerely held religious beliefs, the defendants consider an unmarried couple's living together in a sexual relationship to be an offense against God...and enabling or assisting another in the commission of an offense against God to be itself an offense against Him.... The court now concludes that an evidentiary hearing—a trial—is required

300. *Atty. Gen. v. Desilets, supra*, Chief Judge Liacos, concurring.

> before a determination can be made concerning whether the defendants may lawfully be forced to choose between violating their religiously informed consciences or withdrawing from their commercial endeavors. I disagree. No combination of facts that might be found after trial would legally justify the imposition of such a choice....
>
> [T]he Commonwealth can have no reasonable expectation of sustaining its burden of proving at trial an essential element of its case, which is that the Commonwealth has an interest in ensuring the availability of rental housing for unmarried couples with a sexual relationship...that outweighs the defendants' interest in conforming their conduct to the will of God without State-imposed penalty.... [N]either the court nor the Legislature can constitutionally give preference or priority to a so-called "right" of cohabitation over the moral and other fundamental values recognized in, and promoted by, the Massachusetts Constitution's clearly articulated guarantees of the free exercise of religion.
>
> The court gives no hint of what circumstances could be shown that would permit a reasonable inference that the Commonwealth's interest in eliminating discrimination in housing based on marital status can only be served by punishing landlords for holding fast to the commitments dictated by their religious beliefs. I can envision no such circumstances....
>
> If the Massachusetts Constitution is to be effectively amended by giving rights to cohabitation preferred status over an individual's right to live according to his or her religiously-informed conscience, a result I do not recommend, that amendment should be achieved by lawful procedures for constitutional amendment, not by judicial fiat.[301]

In the sharply contrasting judicial analyses of the Landlord's Conscience cases, this was one of the most forthright expositions of the case for respect for the rights of conscience. (On remand, the case was settled out of court.)

c. *Swanner v. Anchorage Equal Rights Commission* (1994). From the Supreme Court of Alaska came a decision on this type of case that reached the opposite result from *French* and that urged by the dissent in *Desilets*, though it evoked its own vigorous dissent from Chief Justice Daniel A. Moore, Jr. The decision was issued *per curiam* by Justices Jay Rabinowitz, Warren Matthews and Allen Compton. The fact-pattern was similar to the cases described above. The Supreme Court chose to analyze the case on the basis of its own state constitution rather than the federal First Amendment and to retain the compelling-state-interest test of infringement of the free exercise of religion as the applicable standard in Alaska. It noted in the margin that the Religious Freedom Restoration Act reinstating the compelling-state-interest test had been signed into law shortly before publication of its opinion, but that enactment did not change the outcome of the case, since the court was already using that test.

> No one disputes that a religion is involved here (Christianity), or that Swanner is sincere in his religious belief that cohabitation is a sin and by renting to cohabitors, he is facilitating the sin. However, the superior court held that he did not meet the... requirement that his conduct was

301 . Ibid., O'Connor dissent.

religiously based because "[n]othing in the record permits a finding that refusing to rent to cohabiting unmarried couples is a religious ritual, ceremony or practice deeply rooted in religious belief."... In Frank [v. Alaska],[302] we determined that the action at issue was a practice deeply rooted in religion. However, we did not intend to limit free exercise rights only to actions rooted in religious rituals, ceremonies, or practices.... [T]his determination is not limited to actions resulting from religious rituals. Swanner's refusal to rent to unmarried couples is not without an arguable basis in some tenets of the diverse Christian faith, and therefore, his conduct is sufficiently religiously based to meet our constitutional test....

The question [remains] whether Swanner's conduct poses a threat to public safety, peace or order, or whether the governmental interest in abolishing improper discrimination in housing outweighs Swanner's interest in acting based on his religious beliefs.

[W]e must determine whether "a competing state interest of the highest order exists."... The government possesses two interests here: a "derivative" interest in ensuring access to housing for everyone, and a "transactional" interest in preventing individual acts of discrimination based on irrelevant characteristics.... In the instant case, the government's derivative interest is in providing access to housing for all. One could argue that if a prospective tenant finds alternative housing after being initially denied because of a landlord's religious beliefs, the government's derivative interest is satisfied. However, the government also possesses a transactional interest in preventing acts of discrimination based on irrelevant characteristics regardless of whether the prospective tenants ultimately find alternative housing.... The existence of this transactional interest distinguishes this case from...most other free exercise cases where courts have granted exemptions. The government's transactional interest in preventing discrimination based on irrelevant characteristics directly conflicts with Swanner's refusal to rent to unmarried couples. The government views acts of discrimination as independent social evils even if the prospective tennants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination. [emphasis added]

The dissent attempts to prove that the state does not view marital status discrimination in housing as a pressing problem by pointing to other areas in which the state itself discriminates based on marital status. However, those areas are readily distinguished. The government's interest here is in specifically eliminating marital status discrimination in housing, rather than eliminating marital status discrimination in general. Therefore, the other policies which allow marital status discrimination are irrelevant in determining whether the government's interest in eliminating marital status discrimination in housing is compelling.

In the examples the dissent cites, treating married couples differently from unmarried couples is arguably necessary to avoid fraudulent

302 . 604 P.2d 1068 (1979), discussed at § E1c.

availment of benefits available only to spouses. The difficulty of discerning whose bonds are genuine and whose are not may justify requiring official certification of the bonds via a marriage document. That problem is not present in housing cases: as this case demonstrates, if anything, an unmarried couple who wish to live together are at a disadvantage if they claim to be romantically involved....

Swanner complains that applying the anti-discrimination laws to his business activities presents him with a "Hobson's choice"—to give up his economic livelihood or act in contradiction to his religious beliefs.... Swanner has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or "Hobson's choice," of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. Swanner is voluntarily engaging in property management. The law and ordinance regulate unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. Voluntary commercial activity does not receive the same status accorded to directly religious activity....

"As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace."[303] Because Swanner's religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws.[304]

The chief justice of the Alaska Supreme Court entered a significant dissent.

The majority acknowledges that Swanner's actions fall within the ambit of the free exercise clause.... No one questions the sincerity of his religious belief that he facilitates a sin by renting to unmarried individuals such as the complainants in this case. For this reason, Swanner's religiously impelled conduct must be protected under Alaska law unless the [State] can show that the conduct poses "some substantial threat to public safety, peace or order," or that there exist competing governmental interests "of the highest order" which are not otherwise served without limiting Swanner's conduct. I do not believe the [State] has met its burden in this case. I would therefore grant Swanner an exemption to accommodate his religious beliefs....

[T]he majority...defines [the state's] interest as that in "preventing acts of discrimination based on irrelevant characteristics." Such an articulation of the state's interest poses myriad questions. Who is to determine what is an "irrelevant" characteristic? Obviously, marital status is not "irrelevant" to Swanner. It is central to the question whether he will be committing a sin under the dictates of his religion. Is the legislature the final arbiter of

303 . McConnell, Michael W., "Free Exercise Revisionism and the *Smith* Decision," 57 *Chi.L.Rev.* 1109, 1145 (1990).

304 . *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (1994).

relevancy or irrelevancy? Further, the discrimination at issue here is not based on innate "characteristics" but rather on the conduct of potential tenants. While this conduct is worthy of some protection, it does not warrant the same constitutional protection given to religiously compelled conduct. I am not willing to place the right to cohabit on the same constitutional level as the right to freedom from discrimination based on either innate characteristics—such as race or gender—or constitutionally protected belief, such as freedom of religion....

* * *

Based on my analysis of free exercise jurisprudence and the issues surrounding marital status discrimination, I cannot conclude that eradication of [such] discrimination in the rental housing industry constitutes a governmental interest of such high order as to justify burdening Swanner's fundamental constitutional rights.

There can be no question that the state has a compelling interest in eradicating discrimination against certain historically disadvantaged groups. This compelling interest has been found to exist based on a determination that the discrimination at issue is so invidious to personal dignity and to our concept of fair treatment as to warrant strict protection. There is no question that Swanner's right to freely exercise his religion could and should be burdened if he engaged in such discrimination as a result of his religious beliefs.

This fact does not mean, however, that every form of discrimination is equally invidious or that the state's interest in preventing it necessarily outweighs fundamental constitutional rights.... The majority cites no evidence that marital status classifications have been associated with a history of unfair treatment that would warrant heightened governmental protection. To the contrary, I believe the law is clear that marital status classifications have been accorded relatively low import on the scale of interests deserving government protection. For instance, the government itself discriminates based on marital status in numerous regards, and there is no suggestion that this practice should be reexamined. Alaska law explicitly sanctions such discrimination.[305]..

My research has not revealed a single instance in which the government's interest in eliminating marital status discrimination has been accorded substantial weight when balanced against other state interests, let alone fundamental constitutional rights....

The majority comments that its result today is justified because Swanner's right to the free exercise of his religious beliefs must be accorded less weight since he has entered the commercial arena.... However, neither [U.S. v.] Lee nor any other case of which I am aware stands for the proposition that individuals like Swanner altogether waive their constitutional right to the free exercise of religion simply because a conflict between their religious faith and some legislation occurs in a

305 . Citing specific statutes providing that intestate succession does not benefit unmarried partner of decedent; workers' compensation death benefits only for surviving spouse, child, parent, grandchild or sibling; no marital communication privilege [of confidentiality] between unmarried couples; no insurance coverage for unmarried partner under family accident insurance policy.

> commercial context. To the contrary, the Lee Court recognized that, even in a commercial setting, the state must justify its limitation on religious liberty by showing the limitation is "essential to accomplish an overrriding governmental interest."...
>
> The majority suggests that Swanner's constitutional rights must be accorded lesser weight because he voluntarily engages in the property management industry, and his right to engage in that business is not entitled to judicial protection. However, this court has stated that "the right to engage in an economic endeavor within a particular industry is an `important' right for state equal protection purposes." The ability to participate in a particular industry, such as rental property management, is therefore entitled to more protection under our state constitution than the majority acknowledges....
>
> I see no evidence whatsoever in the record to suggest that Swanner's conduct poses a substantial threat to public safety, peace or order such that the burden on Swanner's rights is justified. For this reason, I fail to see why an exemption to accommodate Swanner's religious beliefs is not warranted.[306]

The dissent could have scrutinized more penetratingly the majority's glib reference to "irrelevant characteristics." Is absence of the marriage relationship "irrelevant" to landlords' considering prospective tenants? The majority seemed to think it pertinent in "discerning whose [marital] bonds are genuine and whose are not" in avoiding "fraudulent availment of benefits available only to spouses." Why are some benefits available only to spouses? Presumably because they are in a relationship that differentiates them from nonspouses. Is such a relationship not legitimately of interest to prospective landlords? Before they rent, landlords not unreasonably want to know who is going to pay the rent. If two persons currently in liaison enter into a joint contract for rental, the landlord understandably has a prudential interest in the stability of that arrangement. While the marriage relationship is none too stable these days, it still offers some vestiges of legal recourse to landlords trying to collect back-rent after one of the spouses flits that may not be available in a relationship that—for all the landlord knows—may be evanescent. A marriage license evidences some slightly greater commitment to jointly and durably bearing mutual obligations that a landlord should be entitled to take into consideration in evaluating prospective tenants. It is not, then, just an "irrelevant characteristic," the consideration of which "degrades individuals, affronts human dignity, and limits... opportunities."

For the landlord to take such bona fide rental qualifications into consideration does not displace religious and moral factors or render them less deserving of accommodation. There are people—some of them landlords—who feel an almost visceral repugnance for a couple proposing to live together as man and wife who are not man and wife. That is, they have not made the enduring commitment to each other that lends stability to the founding of a family unit. For persons who believe marriage should have that kind of basis and show that sort of commitment to continuance, its absence gives rise to both religious and prudential reservations, and it

306 . *Swanner v. Anchorage Equal Rights Commission, supra*, Moore dissent.

is not a gratuitous "affront" to "human dignity," etc., to entertain them. In fact, one could argue that it is an all too rare and all too valuable selectivity that honors the qualities of family stability that are the foundation of any stable civilization. This type of preference for stable family units should be encouraged rather than penalized by state laws and "Equal Rights" agencies.

This case was appealed to the Supreme Court of the United States, which declined to hear it. But Justice Clarence Thomas entered a dissent to that outcome that is notable for its view of the Religious Freedom Restoration Act (RFRA).

> I am quite skeptical that Alaska's asserted interest in preventing discrimination on the basis of marital status is "compelling" enough to satisfy [the] stringent standards [of RFRA].... [T]here is surely no "firm national policy" against marital status discrimination in housing decisions.... The decision of the Alaska Supreme Court drains the word *compelling* of any meaning and seriously undermines the protection for exercise of religion that Congress so emphatically mandated in RFRA.[307]

d. *Smith v. Fair Employment & Housing Commission* (1994). Once more in California the issue of the Landlord's Conscience arose. Evelyn Smith, a widow in Chico belonging to the Bidwell Presbyterian Church there, rented out two duplexes from which she derived her primary source of income. She informed all couples interested in renting that she preferred to rent to married couples. One couple expressed interest in renting a vacant apartment and (falsely) told her they were married. Before moving in, they informed the landlady that they were not married. She cancelled the agreement and returned their deposit. The couple subsequently complained to the Fair Employment and Housing Commission (FEHC), which found in their favor and awarded damages of $954 against the landlady, including $300 to the woman complainant and $200 to the man for "emotional distress" (which the Commission conceded on appeal it did not have authority to award). The landlady appealed to the courts for relief, and in due course the Court of Appeal for the 3d Appellate District ruled on the case in an opinion by Presiding Justice Robert K. Puglia for himself and Justices Arthur G. Scotland and Vance W. Raye.

> Religious freedom is among the highest values of our society. However, even the highest values must sometimes give way to the greater public good. The question here presented is whether plaintiff is constitutionally entitled to exemption from the operation of a statute designed to eliminate housing discrimination against unmarried couples where the enforcement of the statute would interfere with [her] free exercise of religion.

The court rehearsed at some length the then-new standard for weighing claims of free exercise of religion announced by the Supreme Court of the United States in *Oregon v. Smith*[308] and concluded that the instant case came under the rubric of "hybrid" constitutional claims.

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307. *Swanner v. Anchorage Equal Rights Comm'n,* 513 U.S. 979, 981 (1994) (Thomas dissenting).
308. 494 U.S. 872 (1990), discussed at § D2e below.

> [Plaintiff] contends her First Amendment right to freedom of speech is abridged by [the State's] forcing her to post notices on her property proclaiming concepts and rules which are antithetical to her religious beliefs and signing them as if to make them her own. We have no doubt the coerced posting of these notices implicates plaintiff's First Amendment right to freedom of speech. [Footnote 7: Totalitarian governments also attempt to enforce conformity by forcing apostates to become instruments of their own abasement. For example, during the so-called "Cultural Revolution" in Communist China, non-conformists who did not subscribe to the orthodoxy of the ruling elite were subjected to obloquy and humiliation by being forced to parade on public streets while wearing ludicrous dunce caps.]

The court relied on the holding of *Wooley v. Maynard*[309] that a religious objector could not be required by law to bear on an automobile license plate the state motto of New Hampshire "Live Free or Die" because to compel an expression contrary to a person's own beliefs was as much a violation of freedom of speech as censoring speech.

> It is no less tyrannical to require plaintiff to post on her property notices which proclaim notions and ideas which are offensive to her moral and religious beliefs....
>
> The instant case is a paradigm of the "hybrid" genus described in Smith. Accordingly, the state may deny plaintiff her First Amendment rights only upon showing it has an interest in protecting unmarried couples from discrimination in housing that is so compelling as to outweigh plaintiff's right, unburdened, to free exercise and free speech.
>
> For the state to prevail it must show the exercise by plaintiff of her First Amendment rights constitutes a grave and immediate danger to the state or to a compelling interest the state seeks to promote.
>
> * * *
>
> The inquiry narrows to whether California's interest in eradicating discrimination in housing against unmarried couples reaches the level of an overriding governmental interest....
>
> [I]t cannot be said the goal of eliminating discrimination on the basis of unmarried status enjoys equal priority with the state public policy of eliminating racial discrimination. Racial classifications leading to different treatment always demand strict scrutiny. No similar level of scrutiny is demanded where discrimination is on the basis of marital status and certainly not for discrimination against unmarried couples.
>
> Second, the Legislature has not extended to unmarried couples numerous rights which married couples enjoy. Citing typically the lack of legislative approval, the courts have consistently refused to treat unmarried couples as the legal equivalent of married couples.[310] If the

309. 430 U.S. 705 (1977), discussed at § A6c above.

310. Citing decisions holding that an unmarried person does not have cause of action either for negligent infliction of emotional distress or for loss of consortium; prison regulations may properly

need to eradicate discrimination against unmarried couples is so compelling as complainants and the Commission contend, the Legislature would have responded to these judicial decisions to extend equal rights to all cohabiting Californians.

We deem the Legislatures lack of response to reflect the state's strong interest in the marriage relationship. "[T]he state's interest in promoting the marriage relationship is not based on anachronistic notions of morality. The policy favoring marriage is `rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.'"[311]...

Finally, we note that simultaneously with the addition of "sex" and "marital status" as proscribed grounds of discrimination, the Legislature added provisions which allow public and private postsecondary educational institutions to provide accommodations limited on the basis of sex or marital status but not on the basis of race, religion, or national origin. The Legislature has reiterated that discrimination on the basis of race or creed is intolerable, but has recognized that in certain instances discrimination on the basis, for example, of marital status is permissible given what it perceives to be the greater public benefit. Plaintiff's constitutional claims are entitled to no less deference and respect.

We hold the state's proscription against discrimination in housing on the basis of a couple's unmarried status does not rank as a state interest "of the highest order." Given this conclusion, the state's interest must give way to plaintiff's free exercise and free speech rights as protected by the federal Constitution.

[Footnote 12: The exemption...for postsecondary educational institutions, if applied to these complainants, would render an anomalous result. [One c]omplainant...was at the time of this action a student at California State University at Chico. University officials could legally have denied complainants accommodations to live together in married student housing because of their unmarried status. Yet, plaintiff's refusal to rent to complainants because of her religious beliefs has brought down on her the wrath of the state for doing the very thing the state, as landlord, could do with impunity. Thus the state is, hypocritically, coercing plaintiff to "do as it says, not as it does."][312]

The court added that the California Constitution provided an additional basis for its decision, since it afforded broader protection for religious liberty than did the federal First Amendment as interpreted in *Oregon v. Smith, supra*. The court also

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allow conjugal visitation rights to married couples but deny them to unmarried couples; unmarried couples do not have a right to spousal support absent a written agreement; insurer's refusal to issue joint umbrella policy, reserved for married couples, to unmarried couple is not unlawfully discriminatory; unmarried cohabitant is not entitled to dental benefits available to family members of state employees; unmarried person cannot bring wrongful death action on behalf of cohabiting partner; unmarried couples do not have marital communication privilege of confidentiality under rules of evidence, etc.

311 . *Elden v. Sheldon*, 250 Cal.Rptr. 254, 758 P.2d 582 (1988).

312 . *Smith v. Fair Emp. & Housing Com'n*, 30 Cal.Rptr.2d 395 (1994).

referred to the Religious Freedom Restoration Act, newly adopted by Congress, that restored the compelling-state-interest test of free exercise of religion, but said it need not be considered because it "affords plaintiff no greater protection than that to which she is already entitled" under the California Constitution and the "hybrid" protection of *Oregon v. Smith*. Justice Scotland concurred. Justice Raye wrote a brief concurring opinion saying he thought the effort to craft a "hybrid" situation by conjoining free speech to free exercise of religion was unnecessary, as the court could simply have vacated that portion of the FEHC order, and he would have rested the holding entirely on the California Constitution.

e. *Smith v. Fair Employment & Housing Commission* (1996). In due course, the Supreme Court of California agreed to hear this case and split three ways on it. Three justices joined in an opinion by Justice Kathryn Mickle Werdegar (her colleagues were Justice Ronald M. George and Justice Armand Arabian, retired, sitting by assignment). They reversed the Court of Appeals, *supra*, on the ground that Mrs. Smith's free exercise of religion had not been "substantially" burdened by the state's prohibition of discrimination on marital status. Three justices took the opposite position. Justice Joyce Kennard wrote an opinion concluding that the Religious Freedom Restoration Act required the state to exempt Mrs. Smith from its nondiscrimination requirement. Justice Marvin R. Baxter wrote an opinion, in which he was joined by Chief Justice Malcolm M. Lucas, that would remand the case for further proceedings before the Commission and the courts below to bring it into conformity with RFRA. The seventh vote, by Justice Stanley Mosk, concurred in the Werdegar opinion but concluded that RFRA was unconstitutional and therefore did not control the case. His disposition tipped the scales against Mrs. Smith and gave to Justice Werdegar and her two colleagues the "majority" position.

The prevailing opinion, then, turned on whether Mrs. Smith had suffered a "substantial" burden on her free exercise of religion. Justice Werdegar struggled vigorously but ultimately unpersuasively to make that argument.

> [O]ne observes the obvious conflict between [the Fair Housing Act] and the landlord's religious beliefs. This case, however, differs from the unemployment-compensation cases[313] in two significant respects. First, the degree of compulsion involved is markedly greater in the unemployment-compensation cases than in the case before us. In the former instance, one can avoid the conflict between the law and one's beliefs about the Sabbath only by quitting work and foregoing compensation. To do so, however, is not a realistic solution for someone who lives on the wages earned through personal labor. In contrast, one who earns a living through the return on capital invested in rental properties can, if she does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments.
>
> Second, the landlord's request for an accommodation in the case before us has a serious impact on the rights and interests of third parties. This factor was not present in the unemployment-compensation cases. Because

313 . *Sherbert v. Verner, supra, et seq.*

> Smith is involved in a commercial enterprise, the state cannot exempt her from the antidiscrimination provisions of [the law] without affecting members of the public she encounters in the course of her business. More specifically, to permit Smith to discriminate would sacrifice the rights of her prospective tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics.[314]

Justice Kennard disagreed with the central argument of the "majority."

> Indeed, here Smith is subject to substantially more government coercion than the employees who were denied unemployment benefits...; they lost only the opportunity for a state-conferred monetary benefit by conforming to their beliefs, while in this case the state has imposed on Smith civil penalties and a cease-and-desist order dictating her future conduct. In addition, the cease-and-desist order may be entered as a judgment...which would thereby make Smith liable for additional fines and imprisonment should she follow her religious beliefs and refuse to obey the...order....
>
> Changing jobs and changing investments both entail transaction costs. There is no basis for the plurality opinion's assumption that transaction costs of changing capital investments cannot amount to "substantial pressure...to modify...behavior and to violate...beliefs," as do the transaction costs of changing jobs. In this case, Smith is a widow, and the two duplexes are her major source of income. The costs to Smith of switching to an alternative investment may be substantial, for in addition to the expenses of selling her property and locating an alternative investment, she may have to pay large capital gains taxes on the transaction, given that she has owned the duplexes for over 20 years. These expenses and taxes could significantly reduce the amount of capital she has to reinvest, and thereby permanently reduce her income and standard of living, even assuming she could find an investment with a comparable rate of return at an equivalent risk....
>
> The purpose of the substantial burden inquiry is to determine whether further judicial inquiry is warranted into the state's justifications for the burden it has imposed on an individual's exercise of religious beliefs. To consider at the substantial burden stage, as the plurality opinion does, the third party impact of a hypothetical accommodation for the religious adherent subverts this purpose. The FEHA [Fair Employment and Housing Act] rights of Phillips and Randall [the rejected tenants] are creations of state statute, not fundamental constitutional rights. They are of recent vintage and limited scope. Using them to negate the substantial burden on Smith and thereby avoid reaching the compelling interest test results in a blind deference to state policy judgments infringing religious freedom. Under the plurality opinion's reasoning, state-created statutory rights of third parties automatically trump the federally created right of religious freedom under RFRA without judicial inquiry into the importance of those third party rights and the degree to which they would

314 . *Smith v. Fair Employment & Hous. Comm'n,* 913 P.2d 909, 925 (Cal. 1996).

> be impacted by an accommodation....
>
> One scholarly commentary has criticized the assertion made in this very case that eliminating housing discrimination against unmarried heterosexual couples is a compelling governmental interest: "California authorities are arguing...that states have a compelling interest in forcing conscientiously objecting landlords to rent apartments to unmarried couples. [They do not] mention[] any evidence that unmarried couples were actually having difficulty finding housing; without such evidence, this claim of compelling interest is utterly frivolous. The stakes are entirely symbolic: sex outside of marriage has gone from misdemeanor to compelling interest in one generation, and religious believers who resist the change must be crushed.... [¶] If any such deferential view of compelling interest is read into RFRA, the congressional goal of protecting religious practice will be wholly defeated."[315]

Justice Baxter (joined by Chief Justice Lucas) had doubts about the validity of the plurality opinion under RFRA and its authority, given the divergences of Justice Mosk's views.

> In reviewing the rationale of the lead opinion, it strikes me that the justices subscribing to it are seemingly choosing to focus, not on [Mrs. Smith's] sincere affirmation that compliance with the provision of [the statute] in question will burden her firmly held religious beliefs, but instead *solely* on the manner in which her compliance with the statutory provision will impact her *economic* "way of life." Although the extent of the "economic" burden a challenged statute imposes on the believer is clearly a factor that can be weighed in evaluating the sincerity of the claimed need for a religious exemption, it is not determinative of the question of "substantial burden" where, as here, it can be shown that compliance with the law *conflicts* with the believer's fundamental religious beliefs. Indeed, this case well illustrates the point, for...[her] economic interest in securing tenants for her vacant units is in actuality at odds with her religious beliefs, which serve to limit her pool of prospective lessees. In this sense too then, I believe the subscribers to the lead opinion lose sight of the full mandate of RFRA to apply a true *balancing test* to free exercise claims....
>
> In 1993, a nearly unanimous Congress, with overwhelming public support, passed federal legislation in an to attempt to reestablish the traditional protections which religious liberty has long enjoyed in this country. In my view, the justices subscribing to the lead plurality opinion have misconstrued both the letter and the spirit of that important remedial legislation as it applies to this case.
>
> It must of course be noted that there is no "majority" support in this case for the interpretation of RFRA suggested in Justice Werdegar's lead opinion. This becomes clear when one considers the basis on which Justice Mosk has provided the essential concurring fourth vote for *the result*

315. Ibid., Kennard opinion, quoting Laycock, D. and Thomas, O., "Interpreting the Religious Freedom Restoration Act," 73 *Tex.L.Rev.* 209, 223-224.

> reached by the plurality in this case.... Justice Mosk would find RFRA unconstitutional....
>
> In short, there is no majority support for the construction of the provisions of RFRA, or the suggested limited scope of its protection of religious liberties in California, set forth in the lead opinion. "And it is important. The lead opinion's reasoning does not express the views of a majority of this court. As a result, its analysis 'lacks authority as a precedent'...and hence cannot bind. Therefore, its mischief is limited to this case and to this case alone." (*Alfredo A. v. Superior Court* (1994), dis. opn. of Mosk, J.)....
>
> The lead opinion's rationale is precisely the type of abbreviated analysis embraced in [*Oregon v.*] *Smith*, which the federal legislation [RFRA] was designed to redress.[316]

Thus did the highest court of the most populous state struggle through some 150 pages of creative writing with the conundrum of the Landlord's Conscience and reached an outcome that can hardly be considered conclusive. The case was appealed to the U.S. Supreme Court with numerous briefs *amicus curiae* on both sides urging that Court to hear it. Several states had wrestled with the issue and reached diverse conclusions. If the states represent independent laboratories for the exploration of and experimentation with a variety of social policies, such heteropraxy was certainly taking place on this issue, with the rights of conscience of landlords subjected to varying degrees of protection or constraint depending upon whether they were located in Massachusetts, Minnesota, Alaska or California. Perhaps that was as it should be in a federal system until such time as a consensus of judicial and/or legislative opinion was attained in the nation as a whole as a result of the experience of the several states and a consolidation of policy achieved so that citizens' rights were not dependent upon where they happened to reside.

f. Two Rival Concepts of Justice. In these four cases, thirty-one judges considered the issue of the Landlord's Conscience and arrived at two very dissimilar conclusions. Sixteen judges announced that an exception should be made for landlords who were conscientiously opposed to renting to unmarried cohabiting couples, while fifteen insisted that the law against discrimination on the basis of marital status in housing represented a compelling interest of the state that could not be attained by making exceptions for nonconforming landlords, even those religiously motivated (though six of those judges sought further data to substantiate that possibility).

The two views were expressed in some instances quite vehemently. Justice Yetka of Minnesota expostulated, "It is simply astonishing to me that the argument is made that the legislature intended to protect fornication and promote a lifestyle which corrodes the institutions which have sustained our civilization, namely, marriage and family life." Chief Justice Popovich responded, "Religious and moral values include not discriminating against others solely because of their color, sex, or whom they live with, avoiding unnecessary emotional suffering, showing tolerance for nontraditional lifestyles, and treating others as one would wish to be treated. The majority... would

316 . *Smith v. FEHC*, *supra*, Baxter dissent.

have us return to the day of `separate but equal' where individuals such as [this landlord] would be permitted to keep their neighborhoods free of `undesirables' and `nonbelievers.'"

Justice Roger W. Boren of California concluded, "The [state] has... failed to explain what exactly is so invidious or unfairly offensive in not treating unmarried cohabiting couples as if they were married." The Supreme Court of Alaska, *per curiam*, stated that the government had a compelling interest in preventing "housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities." Presiding Justice Puglia of California observed, "[P]laintiff's refusal to rent to complainants because of her religious beliefs has brought down on her the wrath of the state for doing the very thing the state, as landlord, could do with impunity."

What accounts for this sharp division within four state courts over the same fact-situations and the same statutory and constitutional grounds? The answer may be that the judges seem to be actuated by two different, divergent and even contradictory visions of "justice." Everyone is in favor of justice, but not everyone has the same understanding of what justice in actuality is. One definition is "Exercise of authority or power in maintenance of right: vindication of right by assignment of reward or punishment; requital of desert (Old English)."[317] A more recent definition is, "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[318] Around these two poles have formed supporters who press for social ends that can seem at times antithetical.

> For one group, "justice" means the punishment of malefactors, requital according to their just deserts, retribution for immoral or anti-social conduct. For the other, "justice" means the rectifying of injustice, the correction of arbitrary and unfair discrimination, the leveling of invidious inequalities, the alleviation of oppression, etc. The ideal of the latter is a world in which all people are treated equally, regardless of their individual disadvantages, deficits or shortcomings. A British scholar observes:
>
> > Indeed, within the framework of an ideology of distributive justice, individuals rapidly cease to have deserts or personal responsibility at all.... Ultimately, not merely are the rich and the poor, the lucky and the unlucky, the intelligent and the stupid to be made equal, but also the virtuous and the wicked.[319]
>
> This can produce a certain disagreement at the end of the day, when the idle grasshopper gets as much provender as the diligent ant, or the laborers who have delved in the vineyard all day receive the denarius they were promised, but so do those who have worked but one hour (Matt. 20:1-6). Those for whom "justice" means reward or punishment according to each person's deservingness will look upon the outcome of such equalization as the opposite of justice, and conversely.... It is not helpful to

317 . *Oxford Universal Dictionary.*

318 . Rawls, John, *A Theory of Justice* (Cambridge, Mass.: Harvard Univ. Press, 1971), p. 60.

319 . Davies, Christie, "Crime, Bureaucracy and Equality," *Policy Review*, Winter 1983, p. 104.

> contend that we all are in favor of "justice" when it can mean two such very divergent things.[320]

These two moieties could be described as *egalitarian* v. *elitist*, as "liberal" v. "conservative," but those terms are heavily freighted with positive or negative affect, which tends to obscure the recognition that there is some merit in each. They reflect a continuing struggle between those who see the good society as one in which effort and achievement are rewarded, sloth and irresponsibility punished, and those who see the good society as one in which the hapless, the underachiever and even the errant are not discarded—or even made to feel inferior. The former strive for a social situation in which the standards of correct conduct are clear and effectual, such as "the man who will not work shall not eat" (II Thess. 3:10, NEB). The latter are solicitous for the plight of the widow, the orphan and the stranger and seek a "safety net" that will encompass all.

Perhaps more neutral labels would be *preceptorial* and *latitudinarian* approaches to justice. The former would advocate strong moral precepts as the organizing principles of society, with departures therefrom subject to appropriate sanctions. The latter would allow wide latitude for individual differences and "lifestyles" under the sovereign aegis of equality, which would permit no forms of "discrimination" among them in access to public (or even private?) goods and services.

In some ways these terms correspond to the categories of "substantive" and "formal" neutrality of government toward religion. In "formal" neutrality, religion is to be treated *equally* with other categories—no better, no worse, whereas in "substantive" neutrality, religion is subject to considerations unique to it that may in some instances be more lenient and in others less so than those applying to other activities or organizations.[321]

One of the higher achievements of humankind and one essential to adaptive behavior is the ability to *discriminate* between similar but significantly disparate cases, as between Virginia creeper and poison ivy. That same sort of discernment is important in making other life decisions about whom to trust and whom to avoid. Too often such discernment has relied on superficial indicators such as race or gender or surname that short-circuited the recognition of individual attributes and thus could work injustice on particular persons who did not fit the stereotypes that substituted for real discernment.

In an effort to prevent such injustice, society has decreed that individuals should not be disqualified from benefits or opportunities on the basis of innate characteristics such as race or gender or national origin. (Religion has been classified with these innate characteristics in order to render it free of disadvantage.) To those impermissible categorizations others have been added that are not altogether innate but to some degree acquired or retained, such as class, "sexual orientation" and—marital status. The understandable though somewhat rigid prohibition of "discrimination" on such grounds has tended to displace the exercise of genuine

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320. Kelley, D.M., "Religion and Justice: The Volcano and the Terrace," The 1983 H. Paul Douglass Memorial Lecture, 26 *Review of Religious Research* (Sept. 1984), pp. 6-7.

321. See Laycock, "Formal, Substantive, and Disaggregated Neutrality Toward Religion," *supra.*

discernment of qualities relevant to the proposed acceptance or relationship, as in the question (addressed earlier) whether "marital status" is indeed "irrelevant" to the admission to tenancy.

The rivalry between these two visions of justice continues, with their partisans often talking past each other, one side contending that the glass is half full and the other insisting that it is half empty. It may be helpful in understanding the issue of the Landlord's Conscience and many other legal riddles of our time to recognize that these two conflicting dynamics are at work, not only in the courts but in the public at large.

12. Tithing and Bankruptcy: *Christians v. Crystal Evangelical Free Church* (1993)

Another situation of conflict between law and conscience arose to national visibility in the mid-1990s when a church was ordered by a court to turn over to a trustee in bankruptcy some $13,000 that had been donated to it by a couple during the year prior to their declaring bankruptcy. It was not the first case of its kind, but it was the first to reach an appellate court and to gain the attention of the president of the United States. It posed in stark contrast the rights of conscience against the wooden requirements of the bankruptcy statutes and their wooden interpretation by the courts.

In some Christian and Jewish groups, tithing is a voluntary act of devotion to God in which one-tenth (or similar proportion) of one's income is given to God via church or synagogue. In some evangelical churches tithing is an essential part of the discipline of commitment, and the devoted tenth is to be set aside "off the top" of one's income each payday before taxes or any other obligations are paid. It takes priority over them in the same way that commitment of one's life to God takes priority over all other commitments. For persons who pursue this mode of devotion, to fail to pay the tithe would be an affront to God and a failure to carry out their sacred duty.

The unusual style of this case seems to suggest that a church is at war with members of the faith, but that impression is merely an artifact of the customary nomenclature, the trustee in bankruptcy being named Julia Christians. The parties at interest were Bruce and Nancy Young, who had tithed of their income to their church for several years preceding their seeking protection under Chapter 7 of the Bankruptcy Code, and following their sense of religious duty they had contributed $13,450 during the year immediately prior. The trustee in bankruptcy brought an action against the Crystal Evangelical Free Church to recover the amount in question for the benefit of the Youngs' creditors on the ground that it was a transfer for which the Youngs had not received value and was thus "fraudulent" for purposes for the bankruptcy law. The church defended against having to return donations it had received in good faith and expended for the carrying on of its mission.

The bankruptcy court granted summary judgment to the trustee and against the church, which appealed to the federal district court for the District of Minnesota. Judge Harry H. McLaughlin made a thorough review of the case, granting several concessions in favor of the church. The church wished to raise certain constitutional

issues that had not been raised in the bankruptcy court, and the trustee opposed their being considered on appeal. There was also the question whether the church had standing to raise the claim of free exercise of religion or whether only the Youngs could do so. The judge made an unusual discretionary ruling that the church could raise the constitutional issues on appeal. He also recognized the church's standing to raise the free exercise claims because the debtors were not parties to the instant case nor could they raise those claims in another forum.

The crux of the case was whether contributions to the church were "fraudulent transfers" under the terms of § 548 of the Bankruptcy Code, meaning transfers for which the debtor "received less than a *reasonably equivalent value in exchange for* such transfer" (emphasis added by the district court). Therefore, several pages of the court's opinion were devoted to wrestling with whether the Youngs had received "reasonably equivalent value" from the church for their substantial "transfer." The bankruptcy court had maintained that "value" was defined in the statute as *property*, and that the debtors had received no "property" in return for their transfer. The church contended that the donors had received religious services, theological programs and access to the premises, but the bankruptcy court noted that they would have received those even if they made no contribution, since "the church welcomes all members to worship regardless of the size of contributions." Thus the services offered by the church were in no way linked to the debtors' contributions. Furthermore, the bankruptcy court noted that the Internal Revenue Code denies deductions for donations made to a religious organization for which the donor receives *quid pro quo* considerations, so contributions for which donors receive deductibility cannot also be transfers "in exchange for" "value."[322]

On appeal the church argued that Congress did not intend § 548 to regulate religious conduct, and that the statute should not be interpreted to do so without the clearest expression by Congress of an affirmative intention to that effect. The very title of the section—"Fraudulent Transfers"—indicated that Congress was concerned with unscrupulous creditors and not bona fide charities, and in this instance neither the donor nor the church intended to defraud creditors. The church also argued that the Internal Revenue Code and the Bankruptcy Code serve different governmental purposes, so that what is "value" for one is not necessarily a "*quid pro quo* consideration" for the other. Beyond that, the church and the trustee mainly rephrased and reasserted their arguments before the bankruptcy court.

The district court on appeal agreed with the bankruptcy court that the debtors did not receive "reasonably equivalent value" from the church in exchange for their transfers, and even if they had received such value, it was not "in exchange for" their contributions, since they were entitled to the benefits the church afforded whether or not they contributed.

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322 . The bankruptcy court sharply criticized two earlier bankruptcy court decisions that reached an opposite conclusion—*Ellenberg v. Chapel Hill Harvester Church*, 59 B.R. 815 (N.D.Ga. 1986), and *Wilson v. Upreach Ministries*, 24 B.R. 973 (N.D.Tex. 1982)—for having failed to respect the language of the statute.

> [D]ebtors made the contributions out of a "sense of religious obligation." A debtor cannot receive reasonably equivalent value for payments that are made out of a sense of moral obligation rather than legal obligation. Moreover, emotional support received in exchange for a transfer, without more, cannot satisfy the requirement for reasonably equivalent value. "The object of section 548 is to prevent the debtor from depleting the resources available to creditors through gratuitous transfers of the debtor's property."[323] Charitable contributions are clearly gratuitous transfers, despite the fact that debtors feel morally obligated to tithe. Strictly as a matter of statutory interpretation, there are no justifiable grounds to differentiate between religious donations and other gratuitous transfers, such as gifts to family members, which are clearly avoidable.

The Court turned to the constitutional issues raised by the church.

> The church argues that the bankruptcy court's order violates the debtors' free exercise rights in several respects. First, [it]...results in discrimination against religion. The Code...allows a debtor to exempt from property of the [bankrupt] estate a residence, a motor vehicle, and a limited amount of household goods and furnishings, among other things. The church argues that it is unconstitutional to not include religious expenditures in the list of items accorded favorable treatment under the Code. The church emphasizes the strength of the debtors' religious beliefs and argues that the principle of tithing is as much a matter of necessity as expenditures for food or clothing [permitted by the Code].... In support of this argument, the church cites several cases which have held that confirmation of a Chapter 13 plan which provides for regular religious donations does not violate the Constitution.[324]...
>
> The Court concludes that section 548 is a neutral statute of general applicability. There is no evidence...that [it] was designed to regulate religious beliefs or conduct.... The issue is whether [it] has more than an "incidental effect" on religion. The Court finds that it does not. The purpose of the statute is to enlarge the pool of funds for creditors by recovering gratuitous transfers made on the eve of bankruptcy by insolvent debtors....
>
> [T]he Court is satisfied that the Bankruptcy Code is designed to advance a compelling government interest.... The government's policy of allowing debtors to get a fresh start while at the same time treating creditors as fairly as possible qualifies as a compelling interest....
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> In short, the Court holds that an order for the church to turn over

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323 . *Walker v. Treadwell*, 699 F.2d 1050 (CA11 1983).

324 . Citing *In re McDaniel*, 126 B.R. 782 (1991) (*per se* prohibition on religious contributions as reasonably necessary expense would violate free exercise rights, but prohibition on excessive donations does not); *In re Bien*, 95 B.R. 281 (1989) (nondiscretionary tithing constituted reasonable necessary expenditure and included in plan); *In re Navarro*, 83 B.R. 348 (1988) (confirmation of plan which included tithing would not force creditor to support religious views in violation of Establishment Clause); *In re Green*, 73 B.R. 893 (1987), aff'd, 103 B.R. 852 (1988) (plan which provides for tithing does not violate the Establishment Clause; in fact, denial of confirmation solely because it included tithing would violate Free Exercise Clause).

> debtors' contributions, which were made while the debtors were insolvent, does not violate debtors' free exercise...rights.[325]

The court also rejected the church's contention that the bankruptcy court's order violated the Establishment Clause, suggesting that a ruling in favor of the church might do so because it would involve the courts in evaluating the services of the church to determine if they were "reasonably equivalent" to the amount contributed—a process that would surely be "fraught with the sort of entanglement that the Constitution forbids."

This decision was appealed by the church to the U.S. Court of Appeals for the Eighth Circuit, which heard oral argument in late 1993, shortly after the Religious Freedom Restoration Act was signed into law. A brief *amicus curiae* was filed by a number of national religious bodies in support of the church's position. These *amici* were alarmed at the prospect of trustees in bankruptcy being able "literally to reach into the offering plates and baskets of churches and synagogues" to grasp contributions made in good faith by devout members in fulfillment of their religious obligations.

> The result is that an intimate relationship of profound significance to both the believer and his church—the religious commitment of the tithe and a religious body's ability to depend on such commitments for the operation of its religious ministry—is torn apart by the coercive action of the state.... This case concerns not only the Youngs and Crystal Church. It threatens the liberty of *every* church and synagogue....
>
> It is difficult to think of a more serious infringement on collective free exercise of religion, or a greater entanglement of church and state, than to hold that a church's offerings are subject to after-the-fact seizure by government officials.... Under the district court's ruling, a church must constantly fear that a court will order the return of contributions made by a church member...as much as a year earlier—and thereby interfere with the ongoing financial support of its ministry.... The alternative—that churches must scrutinize the personal financial status of its members when receiving tithes and offerings—is a grotesque interference with the relationship between a church and its members.[326]

The U.S. Justice Department entered a brief *amicus curiae* on the other side maintaining that the recently enacted Religious Freedom Restoration Act did not apply to bankruptcy cases. On the day before oral argument, President William Clinton personally directed the Justice Department to retract that brief.[327]

The treatment of this case by statute, bankruptcy and district courts seemed

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325 . *Christians v. Crystal Evangelical Free Church,* 82 F.3d 1407, 1418 (CA8 1996).

326 . *Christians v. Crystal Evangelical Free Church*, Brief *Amicus Curiae* of the Christian Legal Society, The National Association of Evangelicals, Americans United for Separation of Church and State, Concerned Women for America, Baptist Joint Committee on Public Affairs, Southern Baptist Convention, General Conference of Seventh-day Adventists, and the Evangelical Lutheran Church in America, July 9, 1993, pp. 1, 2, 18, 19.

327 . Baptist Joint Committee, *Report from the Capital*, Vol. 49, No. 18, Sept. 20, 1994, p. 1.

singularly obtuse. Preexisting practice of tithing by the Youngs long prior to their insolvency should have been presumptive evidence of sincerity and good faith. Considering their obligation as morally but not *legally* binding was a particularly perverse misunderstanding of the free exercise of religion, similar to the notion that tithing was only recommended but not "required" by the church. Some churches and synagogues do "require" tithing, but that is a stricture imposed in the absence of self-actuating commitment on the part of some adherents. The ideal and the norm in evangelical circles is that the believer returns to God a faithful portion of the abundance received from the Divine beneficence, not because failure to do so will result in penalty in this life or punishment in the next, but because the believer feels a much more binding sense of gratitude, voluntarily assumed and conscientiously fulfilled, not out of fear but out of fidelity. In the view of the believer, God is not an optional recipient. God is not only the primary and preeminent "innocent creditor" but the source of *all* income and the giver of life itself. It is ironic—and tragic—that this obligation might have been more readily respected by the court if it were a "mandate" of religion rather than a free exercise of discipleship, if it had been a kind of master-slave relationship rather than one of grateful service by a willing devotee to a generous deity.

In due course, the Eighth Circuit Court of Appeals rendered its decision on May 6, 1996, in an opinion written by Judge Theodore McMillian for himself and Judge Frank J. Magill. The circuit court agreed with the lower courts that the bankrupt couple had received nothing "in return for" their tithes because, by their own admission, they would have been able to enjoy whatever religious benefits they gained from their church whether they tithed or not. But the circuit court went on to consider whether the church and its bankrupt tithers had a valid claim for relief under the Religious Freedom Restoration Act, adopted after the district court's decision but retroactively applicable "to all Federal and State law, and the implementation of that law, whether statutory of otherwise, and whether adopted before or after November 16, 1993." The bankruptcy code clearly fell within that scope, said the court, and so RFRA would govern the case.

The court noted that RFRA had been deemed unconstitutional in several jurisdictions,[328] but added that the parties had not raised that issue, and the court would not address it. That was ironic in view of the fact that the author of the decision, Judge McMillian, had written a dissent in an earlier case arguing that RFRA was unconstitutional,[329] a fact the dissent in this case sought to exploit. The threshold under RFRA, said the court, was whether the government's action (in this case, the effort to recover tithes from the church) "substantially burdened" the tithers' religious practice.

> In order to be considered a "substantial" burden, the governmental action must "significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his

328 . E.g., *In re Tessier*, 190 B.R. 396, 405-7 (Bankr. D. Mont. 1995).

329 . *Hamilton v. Schriro*, 74 F.3d 1545, 1557 (CA8 1996) (McMillian, J., dissenting).

or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion."[330] Assuming for purposes of analysis that courts can constitutionally determine the parameters of religious belief, what beliefs are important or fundamental, and whether a particular practice is of only minimal religious significance, defining substantial burden broadly to include religiously motivated as well as religiously compelled conduct is consistent with RFRA's purpose to restore pre-Smith free exercise case law.

For purposes of analysis, we can assume that the recovery of these contributions would substantially burden the debtors' free exercise of religion. Even though the church encourages but does not compel tithing, the debtors consider tithing to be an important expression of their sincerely held religious beliefs. In other words, in the present case, tithing is religiously motivated, but not religiously compelled, practice. Permitting the government to recover these contributions would effectively prevent the debtors from tithing, at least for the year preceding the filing of bankruptcy petitions. We do not think it is relevant that the debtors can continue to tithe or that there are other ways in which the debtors can express their religious beliefs that are not affected by the governmental action. It is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice of more than minimal significance in a way that is not merely incidental....

The next question is whether there is a compelling governmental interest. Once the individual has shown that the governmental action substantially burdens his or her free exercise right, the government must demonstrate that the substantial burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest....

In the present case the question is whether the bankruptcy code in general and § 548(a)(2)(A) in particular constitute a compelling governmental interest.... We [conclude]...that the interests advanced by the bankruptcy system are not compelling under the RFRA. Although we would not necessarily interpret compelling governmental interests as narrowly as the Tessier court did, we agree that bankruptcy is not comparable to national security or public safety [the criteria in Tessier]. We also agree that allowing debtors to get a fresh start or protecting the interests of creditors is not comparable to the collection of revenues through the tax system or the fiscal integrity of the social security system, which have been recognized as compelling governmental interests in the face of a religious exercise claim.[331] Moreover, we cannot see how the recognition of what is in effect a free exercise exception to the avoidance of fraudulent transfers can undermine the integrity of the bankruptcy system as a whole; its effect will necessarily be limited to the debtors' creditors, who will as a result have fewer assets available to apply to the outstanding

330 . *Christians v. Crystal Evangelical Free Church*, *supra*, quoting *Werner v. McCotter*, 49 F. 3d 1476, 1480 (CA10 1995).

331 . Citing *Droz v. Commissioner*, 48 F. 3d 1120, 1122-24 (CA9 1995).

> liabilities, and not all creditors or even all debtors. This is not to say that the recognition of a free exercise exception under these circumstances may not have adverse economic consequences for both creditors and debtors; for example, creditors may be more cautious in doing business with those who tithe or make contributions to religious organizations.[332]

Because the governmental interest had not been found compelling, the court did not reach the question whether the governmental action was the least restrictive means of furthering that interest. The order of the lower court was reversed, and the trustee was not entitled to recover $13,450 (plus interest and costs) from the church.

That outcome did not please the third member of the panel, District Judge Andrew Bogue of the District of South Dakota, sitting by designation. He agreed with the majority that RFRA was not limited to religious practices "required" by the church but applied as well to conduct motivated by religious belief, provided that the court scrutinized whether the claimed burden was really "substantial," and on that note Judge Bogue parted company with the majority.

> Although it is undisputed that the debtors sincerely believe in tithing and that tithing is central to the religion they practice, I would conclude that the trustee's action in recovering monies tithed during the year the debtors were insolvent does not substantially burden the free exercise of their religion.
>
> In coming to this conclusion, I note that the act of tithing by the debtors in the year preceding their filing for [bankruptcy] protection was in fact executed, i.e., regardless of the eventual outcome, they were given the opportunity to practice their religion as they chose during the year they were insolvent....
>
> The trustee's act of recovering the tithes from the church...does not change the fact that the debtors did all they could in the way of expressing and practicing their religious beliefs. [Fn 3: The debtors should be commended for their commitment to contributing to the church. There is no dishonor in the fact that the tithes they offered during insolvency ought to be recovered by the trustee. The reality is that the tithed money should be part of the estate available to creditors, who in good faith advanced money, goods or services to the debtors upon the condition of repayment.]...
>
> Even if [the bankruptcy code] worked a substantial burden on the debtors' religious practice, I would conclude that the statute serves a compelling governmental interest and is the least restrictive means of achieving said interest....
>
> It can fairly be said that our nation's economy depends extensively on the availability of credit to individuals and businesses. Bankruptcy is an extraordinary remedy for insolvent debtors and oftentimes harsh on creditors. One of the creditor's few protections are recovery statutes like section 548, which as of today includes a free exercise exception for religious giving in the year preceding filing for bankruptcy.... Given

332 . Ibid., Bogue dissent.

> today's holding, are cautious potential creditors (including government or government-sponsored creditors) now expected to question applicants in depth regarding the highly personal activity of religious giving? And what if said application is denied on the grounds that the applicant's religious giving makes extending credit an unwarranted risk? Pragmatic issues aside, it is enough that all of society has a compelling interest in maintaining the balance between debtors and creditors in its current state.[333]

It is interesting that none of the five judges considering this case—including particularly the three who would have upheld the trustee in bankruptcy—observed that if the debtors were actually insolvent during the year prior to declaring bankruptcy (as no one disputed), then they did not have any actual income during that year and therefore did not *owe* a tithe to the church. Of course, that is a sophistical construct formed in retrospect. Neither the tithers nor their church enjoyed the luxury of a year's hindsight in making their day-to-day decisions. The Youngs tithed as they thought their current condition required, and the church expended their contributions for the current needs of its mission. To expect the church to cough up $13,450 it had spent in good faith would be not only to nullify the tithers' sincere giving but to deeply impair the church's ability to operate, perhaps even to survive. A church's only recourse from such a possibility would be to place all contributed income in escrow for a year—an even more calamitous prospect!

333 . *Christians, supra*, Bogue dissent.