(3F) BACKGROUND INFORMATION AND FURTHER PRINT RESOURCES ON FIRST AMENDMENT CONSTITUTIONAL SAFEGUARDS TO **RELIGION** (ADAPTED FROM TDSJ2, APPENDIX 11C, PP. 1–14.)

BACKGROUND TEXT: OVERVIEW

Discussions of freedom of religious expression in the United States necessarily involve an understanding of the two "religious protection" clauses in the 1st Amendment to the U.S. Constitution. This topic is especially important because the 1st Amendment is considered "the guardian of minority religious liberty against burdens imposed knowingly or unknowingly by democratic majorities" (Gilpin, 2004, p. 90). The difficult questions that sometimes crowd out the stark issue of religious liberty, especially for religious minorities confronted with the religious hegemony invested in the state, takes us into complicated legal terrain.

This Appendix presents some but not all of the issues involved in understanding 1st Amendment religious safeguards, and does so by exploring only a few of the issues and cases within 1st Amendment litigation and Supreme Court findings dealing mainly with the "free expression" clause. This Appendix is designed to provide information and resources for the facilitator to prepare a lecture or explanation concerning 1st Amendment Constitutional safeguards for religious freedoms.

Scenarios for participant use, based on actual Supreme and lower court cases brought under the 1st Amendment, are presented in Section 3 of this Chapter 4 Website

Amendment I of the U.S. Constitution reads as follows:

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

Thomas Jefferson's "Act for the Establishment of Religious Freedom" (1777), which was affirmed as the Virginia Statute for Religious Freedom (1786), provided a basis for the principles embodied in the religion clauses of the 1st Amendment to the U.S. Constitution (1791). The 1st Amendment stipulated that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (Amendment 1 to the United States Constitution, 1791). These religion clauses might be thought of as a religious mutual assurance pact among the dominant Protestant sectarian communities in the original 13 states—that is, the amendment has been understood to prohibit any congressionally imposed religion, federal laws showing preference for any religious denomination, and the use of federal taxes to support one denomination over another. Many of the colonists had left European countries where denominational churches had been established, such as the Anglican Church in England, or Roman Catholicism in France and Spain. . Religious rights were "expressed as limitations on the reach of governmental power rather than as affirmative entitlements" (Maddigan, 1993, p. 306) and the prohibition was directed to federal church establishments; state church establishments were not mentioned. The original 13 states agreed that in the United States there would be no single established denominational church, without calling into question the numerous "established" churches at the state level. (Historical background in Levy, 1995; Meacham, 2006; McConnell, 1990.)

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By signing onto the Constitution and the Bill of Rights, the 13 original states agreed on a "disestablishment" plan at the federal level "Religious communities that were in on the original [federal] disestablishment agreement [of the 1st Amendment] implied that it would be better to get along with each other than to divide over competing revelations of God's will" (Mazur, 1999, p. 23). Protestant denominations in the 13 colonies, as well as Catholic and Jewish citizens, were required to defer to the religious pluralism affirmed by the 1st Amendment. Religious freedoms were a right of citizenship—and by the 1790 Naturalization Act, citizenship was available to "white men" whose children then had citizenship as a birthright. Citizenship was not available to peoples of color (that is, not "white") and Native American Indians were considered "domestic dependent nations" in a relation to federal authority of ward to guardians. (Citizenship became available to Native American Indian World War I veterans in 1919, Native Americans born in the U.S. in 1924, with the 1968 Indian Civil Rights act extending rights of citizenship to Native Americans living on reservations, including 1st Amendment right to free exercise of religion. These citizenship dates account for the relatively recent Native American litigation over 1st Amendment free exercise claims.

These 1st Amendment prohibitions were extended from federal to state governments by the 14th Amendment—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States … nor deny to any person within its jurisdiction the equal protection of the laws" (1866/1868).

Article 6 of the Constitution provides that all federal and state legislative, executive and judicial officers "shall be bound by oath or affirmation" to uphold the Constitution, and it is explicit in its prohibition of religious tests for federal office: "no religious test shall ever be required as a qualification to any office or public trust under the United States." These are significant differences from the use of religious oaths and religious tests in countries with religious establishments.

The first clause of the First Amendment, known as the *Establishment Clause* ("Congress shall make no law respecting an establishment of religion"), bans federal legislation from sponsoring or supporting a specific religion as well as religion generally. Legal scholars and court precedent agree "that the establishment clause forbids a state-sponsored religion or church, and prohibits government from preferring one denomination over another" although there is considerable disagreement over where the "line" between government and organized religion should be drawn (Long, 2000, p. 62). Davis argues that this term "describes an *institutional separation* of church and state … the Constitution requires that the *institutions* of church and state in American society not be interconnected, dependent upon, or functionally related to each other" (2004, p. 34). He differentiates this from the integration of religion and politics, meaning "the right of churches and other religious bodies to engage in political advocacy and to make political pronouncement," a right, he argues, that "has never been seriously questioned throughout the United States' history" (Davis, 2004, p. 36). And Davis then introduces a third term, the accommodation he thinks should be accorded civil religion. (See Appendix 11D2 for discussion of civil religion.)

This Constitutional prohibition against a governmentally sponsored religion is popularly (and tellingly) called *separation of church and state*.

The phrase "separation of church and state" comes not from the Constitution but from Thomas Jefferson's 1802 letter to a Danbury (CT) Baptist congregation, to whom Jefferson wrote that the 1st Amendment had built "a wall of separation between Church and State" (see general discussions in Butler, Wacker & Balmer, 2003, pp. 155–160; Fraser, 1999, pp. 18–21; Gaustad & Schmidt, 2002, pp. 123–127). This "wall of separation" between government and religion is still referred to as "the separation of *Church* and State," despite the greater religious pluralism that exists today, compared to in 1802, when the Danbury

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Baptists were concerned primarily about the potential power of Virginia Anglicans or New England Congregationalists. (Historical background in Levy, 1995; McConnell, 1990.) Today's religious pluralism of the 21st century is not only within Christianity but between Christianity and other religions, so that today's debate over the role of political influence on religion is played out in locales that are not limited to "the church" and include the Buddhist ashram, Sikh gurdwara, Moslem mosque, and Jewish synagogue or temple.

The Supreme Court has used two major approaches in cases that invoke the Establishment Clause (see Long, 2000, pp. 61–67; also Beaman, 2002). One interpretation calls for strict separation, a literal "wall of separation" as suggested by Jefferson's 1802 letter to the Danbury Baptists. This places government and religion in distinct and non-interacting separate spheres and prohibits activities such as denominational religious worship in public schools or tax-based vouchers for religious schools. A second interpretation is accommodations or nonpreferential and permits government involvement in religion so long as one religion does not receive advantages over another. By this view, students might be released from classes to receive religious instruction off the school premises. The accommodationist view argues that the 1st Amendment wards off threats to religious freedom either from government action that promotes religious beliefs or practices, or government action that impedes religious beliefs or practices. (See Long, 2000, pp. 62–67 for general discussion of key Supreme Court establishment clause decisions. Feldman, 1997, pp. 175–255, provides detailed analysis of establishment clause litigation and findings.)

Established clause litigation has been evaluated for the past three decades by *Lemon v. Kurtzman* (1971) which invalidated reimbursement of parochial schools for expenses incurred in teaching some secular subjects. The *Lemon* test examines (1) the secular purpose of legislation in question, (2) where its primary effect is to advance or inhibit religion, and (3) the fostering of "excessive government entanglement with religion" (Maddigan, 1993, p. 299; see discussion *passim*). Justice O'Connor suggested an "endorsement test" as a substitute for the second prong of *Lemon,* namely, instead of asking whether legislation "advances" religion, to ask instead whether the practice "endorses" religion (Maddigan, 1993, pp. 300–301). To these tests, Justice Kennedy added the "coercion" text which examined both direct and indirect coercion. For example, indirect coercion might occur in the use of "significant amounts of tax money to serve the cause of one religious faith" or in "efforts[s] to proselytize" religion (from (*County of Allegheny v. ACLU,* 1989, in Maddigan, 1993, p. 302).

The Free Exercise Clause

The second part of this 1st Amendment religious guarantee, known as the *Free Exercise Clause* ("Congress shall make no law … prohibiting the free exercise [of religion]"), has been interpreted by the courts to include freedom of religious practice, behavior, or action as well as belief. Freedom of religious belief has further constitutional support in the "freedom of speech" language of the 1st Amendment: "Congress shall make no law … abridging the freedom of speech, or of the press." Some free exercise cases of linked freedom of belief with freedom of speech.

Unlike freedom of religious belief, which has generally been held to be a constitutional absolute, free exercise cases dealing with religious worship, practice, behavior, or action have been hedged by other considerations, especially when thought to involve compelling state interests. As Mazur explains, "Behavior can be [legally] modified or limited, but belief is beyond monitoring and therefore beyond the state's ability to punish physically" (1999, p. 14). For example, in *Cantwell* (1940), a case that that found on behalf of religious behavior as well as belief, the Supreme Court held that, although religious conduct "remains subject to regulation for the protection of society'," nonetheless "the power [of

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government] to regulate must be so exercised as not … to infringe the protected [religious] freedom" (quoted in Cohen, 1987, p. 773). (For an overview of these two clauses to the 1st Amendment, see Long, 2000, pp. 45–67).

Precedents Establishing Sherbert and Yoder Tests for Free Exercise

This *Cantwell, Sherbert, Yoder* series of free exercise cases were brought by non-mainstream Christian minority groups. The Supreme Court responded favorably to their free exercise claims. These cases are important because of the criteria or "tests" that the Court developed as standards for balancing compelling government interests against free exercise claims. In *Wisconsin v. Yoder* (1972) the Supreme Court found on behalf of Old Order Amish and established the *Yoder* test, which called for strict scrutiny in free exercise cases. The *Yoder* case added three threshold criteria to the two-step "tests" for free exercise claims previously established by *Sherbert*. Using as an example the claim made in *Yoder* by the Amish that compulsory public schooling beyond the eighth grade was a burden on their children's religious practices, the Amish were required, as a first "test," to establish they sincerely followed a recognizable religion. Second, they needed to establish that the protection they claimed was rooted in their religious belief and not in personal, philosophical beliefs—in their case, that Amish religious practices were rooted in Scripture and had been followed by the Amish as an organized religious community for 300 years. The third threshold criterion was where the conflict was rooted in core religious beliefs. In this instance, since the Amish regarded their entire way of life as founded on their religious beliefs, their objection to compulsory public education beyond the eighth grade was accepted by the Court as rooted in core religious concepts.

These three threshold criteria—once their "tests" were met—then led to the two-step test derived from an earlier Supreme Court precedent (in *Sherbert v. Verner,* 1963), namely, (1) that the government action burdened defendant's religious practices, and (2) that compelling state interests did not overcome the free exercise claim. In *Yoder,* the chief goals of the compulsory education system were also found to be served by the Amish mode of education. (See discussion in Cohen, 1987; Long, 2000; Rievman, 1989).

In the earlier *Sherbert* precedent, a Supreme Court ruling on behalf of a Seventh Day Adventist, Justice Brennan had found for the majority that "free exercise rights may only be limited in the protection of some paramount governmental interests" (Rievman, 1989, p. 175). This was reaffirmed a decade later in *Yoder* (1972) in the Court's finding that the several hundred year Amish religious tradition was in danger of being undermined through compulsory school attendance, and that "Amish values outweighed the State's interest." *Yoder* thus articulated a "balancing test" between the burden on free religious exercise versus compelling state interests (Rievman, 1989, p. 167). Ten years after *Yoder,* in the case of a Jehovah's Witness whose work in a weapons foundry conflicted with his religious tenets (*Thomas v. Review Board,* 1981), the Court added a new criterion—not only must the government show a paramount or compelling interest, it also must accommodate this interest by the least restrictive means (Cohen, 1987; Long, 2000; Rievman, 1989).

In Gilpin's summary of the situation in the *Sherbert-Yoder* precedents for free exercise claims, "the Court rigorously evaluated the government's insistence that the demands of civil society necessitated subordinating the individual's religious obligation. To justify the burden on religious exercise, the government had to prove both that it had a compelling, not merely a rational, interest at stake and that the government's compelling interest could not be accomplished by alternate means less restrictive of the individual's religious beliefs" (2004, p. 91).

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In these findings between 1963 and 1982, the Supreme Court developed a line of judicial reasoning that supported the free exercise claims presented by nonmainstream Christian religious minorities. It is startling, therefore, to find that a different set of criteria are used by this court when confronted with Native American Indian free exercise claims from 1980 onward. It is instructive to look closely at the free exercise cases brought by Cherokee, Navaho, and other Native American Indian groups who repeatedly sued in state and federal courts to exercise their religion freely on federal lands and to preserve their traditional sacred sites against the encroachments of federal land management agencies and the Park Service's doctrine of multiple use (Beaman, 2002; Echo-Hawk, 1993; Linge, 2000; see Long, 2000, pp. 129–135, for a discussion of these cases in light of changing high court membership).

The very elements in the *Yoder* precedent that might have seemed auspicious for Native American Indian claims—namely, that they belong to ancient and recognized religions, that they hold their beliefs sincerely, that federal land management policies burden their religious practices and that compelling state interests had not been accomplished by the least restrictive means—these criteria did not carry the day. Extensive legal analyses of the findings in these Native American Indian free exercise cases, argued in detail by legal scholars knowledgeable about Native people's claims as well as Constitutional law, have pointed out inconsistencies and errors in precedent and law, as well as an underlying Christian hegemony, cultural bias in favor of Western modes of practice, and institutional racism (see discussions and critiques in Cohen, 1987; Echo-Hawk, 1993; Feldman, 1997; Ling, 2000; Long, 2000; Mazur, 1999; Rievman, 1989).

The sacred sites cases pit Native American Indian religious practices in sacred locations against policies made by federal agencies charged with the management of those locations. For example, the decisions made by the Tennessee Valley Authority (TVA) to flood the Little Tennessee River at Tellco Reservoir, and by government authorities at Glen Canyon Dam on the Colorado river, drowned the sacred areas and made it impossible for Cherokees or Navaho to continue to worship at their traditional sacred sites (*Sequoyah v. Tennessee Valley Authority*, 1980; *Badoni v. Higginson*, 1980). Similarly, Navaho could not worship at a sacred site that had become overcrowded with tourists (Rainbow Bridge National Monument, also in *Badoni*, 1980), and both Hopi and Navaho opposed Forest Service decision to expand the Snow Bowl ski area in the Arizona San Francisco Peaks (*Wilson v. Block,* 1983). In these cases, and in others not mentioned here, the court found against the free exercise claims of the Native litigants. (See background and analysis in Cohen, 1987; Linge, 2000; Long, 2000; Mazur, 1999; Rievman, 1989.)

Sequoyah, Badoni and *Wilson* establish a line of negative precedents that led to the 1987 Supreme Court reversal (in *Lyng v. Northwest Indian Cemetery Protection Association*) of lower court findings that had supported Native American Indian free religious exercise claims in a case pitting a logging road against sacred worship sites and burial grounds. In this case, the Yoruk, Karok, and Tolowa Indians tried to prevent construction of a logging road in the Chimney Rock section of the Six Rivers national Forest in northern California, and were supported in their efforts by a Forest Service study that acknowledged the logging road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of northwest California Indian peoples" (quoted in Linge, 2000, p. 329). The District and Appeals courts both agreed that the roadway would prevent free exercise of Native religion and was thus unconstitutional, even though it had not been intentionally designed to disrupt (a concern raised in other sacred site precedent-setting cases). These lower court findings thus differed from

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the Supreme Court findings against Native religious claims in the *Sequoyah* and *Badoni* precedents discussed above.

The Supreme Court, however, reversed the lower courts against the Native claims, partly by focusing narrowly on the meaning of "prohibit" in the 1st Amendment Free Exercise clause ("prohibiting the free exercise thereof") as key to the majority finding that "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" (quoted in Linge, 2000, p. 331). The decision also focused on whether or not the plaintiffs were "coerced", reasoning that although the logging road "would interfere significantly" with worship, "the affected individuals would [not] be coerced by the Government's action into violating their religious beliefs" (quoted in Long, 2000, p. 145). Even more telling, Justice O'Connor wrote, "Whatever rights the Indians may have to the use of the area, however, these rights do not divest the Government of *its right to use what is, after all, its land*" (quoted Linge, 2000, p. 332, italics added).

Three Justices wrote a minority opinion in the *Lyng* logging-road case to point out the "cruelly surreal result" of a Supreme Court finding in which the Indian's religious freedom "amounts to nothing more than the right to believe that their religion will be destroyed" and having

> absolutely no constitutional protection against perhaps the gravest threat to their religious practices … Religious freedom is threatened no less by governmental action that makes the practice of one's chosen faith impossible than by government programs that pressure on to engage in conduct which is inconsistent with religious beliefs".
>
> (Justice Brennan's dissent in *Lyng,* quoted in Linge, 2000, pp. 332–334)

Brennan further observed that "Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause" (quoted in Long, 2000, p. 145). (See Rievman, 1989, pp. 184–197 for comparison of *Yoder* with *Lyng,* and the free exercise issues involved in these and related cases.)

The issue of federal land ownership (that is, legal and contractual ownership) appears to be one determinative factor in *Lyng* as well as in the earlier precedent cases, trumping strict scrutiny in constitutional claims based on the free exercise clause. The same can be noted in two Supreme Court findings in two subsequent cases:

> .The fact that a person's ability to practice their religion will be virtually destroyed by a government program does not allow them to impose a religious servitude on *the property of the government*.
>
> (quoted from *Attakai v. United States* [1990] in Lind, 2000, p. 334, italics added)

> Giving the Indians a veto power over activities on federal land would easily require de facto beneficial ownership of some rather spacious tracts of public property.
>
> (quoted from *Havasupal Tribe v. Robertson* [1991] in Lind, 2000, p. 335)

For a reader familiar with the history of Native American Indian forced removals from East to West and their loss of millions of acres following the allocations legalized by the Dawes Act, the highest court's emphasis on public land ownership and property rights is more than accidental (background in Echo-Hawk, 1993; Mazur, 1999, pp. 104–121; Strickland, 1986; Williams, 1986). It is part of the legal apparatus justifying the continued appropriation and management of Indian lands. It suggests that Native American Indian

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free exercise claims to worship on sacred lands forcibly taken for federal or state use re-ignites old conflicts over land use and is not consistent with their historical "domestic dependent nation" status.

As noted by Chief Justice John Marshall (*Cherokee Nation v. Georgia,* 1831), Native Americans constitute "domestic dependent nations" since "they occupy a territory to which we assert a title independent of their will … [in a relationship of] a ward to his guardian" (quoted in Mazur, 1999, p. 102). Later Supreme Courts reinforced the ultimate authority of the federal government, since it was "not a sale but the conquerors' will that deprived [Native American Indians] of their land" (*Tee-Hit-Ton Indians v. United States,* 1955, quoted in Mazur, 1999, p. 106). The authority to make the decision about "compelling state interest" in conflicts over land use (in situations in which lands are not privately owned, nor owned by Native peoples), becomes a key consideration in these conflicts over sacred sites. "In every case, the Indian interest in protecting specific sites imbued with traditional sacred significance ultimately succumbed to the federal government's interest" (Linge, 2000, p. 314).

Core to federal management of lands that were, after all, at one time Native American Indian lands, is the determination of "compelling state interest" versus Native American Indian sacred ceremonies and worship that had occurred at these sites, "sacred" to Native peoples' religions, for hundreds of years. As noted above, the Court took seriously the question of whether they should give the Native Americans Indians "de facto beneficial ownership of some rather spacious tracts of public property" (*Havasupal Tribe v. Robertson,* 1991) and thereby the U.S. government "of its right to use what is, after all, its land" (*Lyng,* 1987). As an example on the other side of the coin, Echo-Hawk (1993) points out that when it suited government policy to violate 1st Amendment Establishment prohibitions by intermingling political interests with religions organizations, the federal government gave land to missionary religious groups for their "religious or educational work among the Indians" and the Supreme Court upheld the use of federal funds to establish a Catholic school on Rosebud Indian Reservation, both in clear violation of 1st Amendment Establishment prohibitions (Echo-Hawk, 1993, pp. 35–36).

One approach to the free exercise issues in these Native American Indian sacred sites cases suggests that "unless the relationship of site, practice, and belief accord with the Judeo-Christian model, Indian plaintiffs will probably be denied free exercise protection" (Cohen, 1987, p. 798). In other words, since specific geographically-identified sites are not generally as important to Western Christian traditions—and those sites that are important are not in the Americas, but primarily in the "Holy Land" of the Middle East—"courts may well view plaintiffs as being required merely to move from one outdoor `church' to another" (Cohen, 1987, p. 798).

It is arguable the degree to which this consistent failure to acknowledge Native American Indian free exercise claims, despite precedents in the Amish, Jehovah's Witnesses, and Seventh Day Adventist cases, derives from hegemonic attachments to Christian theology as religions worthy of free exercise rights, or from the identification of free exercise with access to churches and other religious buildings that are owned by religious organizations as sites of worship, or from "compelling state interests" in land (whether or not "sacred" from an Indian viewpoint) that "is, after all, [government] land" (*Lyng*). *Lyng* also draws upon the Supreme Court decision in a case brought by Abenaki Indians (*Bowen v. Roy,* 1986) that the federal government can determine its needs and interests, but it also draws upon the much earlier *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States* (1890) which disenfranchised the Mormon community and dismantled Mormon church real estate holdings in Utah Territory. Discussing these cases, Mazur notes that they do not so much pit religious exercise against specific government interests

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but instead pits them against the most general of governmental interests, *its own authority* … It is in the government's interest to control its territory, and Native American challenges to that control, in the shape of religious claims, usually are not successful …Not simply a matter of rights or toleration, the real issue is *who has the right to define a particular space and who has the sovereignty over that space at any given time*. (1999, pp. 111–112, 118, emphasis added)

Smith and Other Unsuccessful Free Exercise Claims

There is a second line of cases, other than those concerning sacred sites, involving free exercise claims brought by Native American Indians. (See discussions in Long, 2000.) Most notable of these is *Smith v. Employment Division* (1990), in which the Supreme Court reversed lower court findings on behalf of two drug rehabilitation employees who had used peyote for religious purposes as members of the Native Indian church (Beaman, 2002; Gilpin, 2004; Long, 2000). This case has been seen as a decision that "stripped the federal Constitution of its role as the guardian of nonmainstream faiths against barriers unwittingly erected by secular laws (Gilpin, 2004, p. 91, see discussion pp. 91–93).

The majority decision, written for a severely divided court by Justice Scalia, disregarded earlier precedent in two important ways. First, he noted "that while the free exercise clause absolutely protected freedom of religious beliefs, it did not protect all forms of religious conduct" (Long, 2000, p. 186). Second, he argued that this case did not warrant strict scrutiny because the higher level of scrutiny used in earlier cases "was the exception to the rule that religious challenges to neutral, generally applicable laws do not implicate the free exercise clause" (Long, 2000, p. 188). The result was that the *Smith* decision established the rule "that neutral, generally applicable laws that burdened religious freedom were not protected by the free exercise clause of the First Amendment" (Long, 2000, p. 196).

This ruling removed free exercise protection from members of minority religious groups whose practices collide with those of mainstream groups protected by the state—as in the case of sacramental peyote use or the conviction of Crow Indian Tribe members for using eagle parts in religious ceremonies (*United States v. Hugs*, 1997), or the denial of claims that a state-ordered autopsy hindered the freedom of a Hmong family's son spirit, leading to further family harm (*Yang v. Sturmer,* 1993), or turn aside the jailing for contempt of Amish who would not display the state-mandated yellow-orange reflective triangle on their buggy because of the religious commitment to be "plain" (*Commonwealth v. Jonas Miller et al,* 2002). (For full discussion of *Smith*, see Long, 2000; for other cases, see Gilpin, 2004; Feldman, 1997; Mazur, 1999.) Justice O'Connor's dissent from Justice Scalia's reasoning (although she joined the majority finding against Smith) makes the point sharply: "But a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his [or her] religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion" (quoted in Long, 2000, p. 191).

These cases, along with cases dealing with Native American Indian "sacred sites," suggest that the highest court has been less sensitive and responsive to the claims of non-Christian litigants. Two years before the Court found in *Sherbert v. Verner* (1963) on behalf of the free exercise claim of an Seventh Day Adventist who would not work on Saturdays (her Sabbath), the Court had rejected the free exercise claim of orthodox Jewish merchants who had challenged the Sunday closing law (*Braunfeld v. Brown,* 1961) as an "indirect" burden on religious practice. A quarter-century later, in 1986, in *Goldman v. Weinberger,* the high court rule against an Orthodox Jew's free exercise challenge to Air Force regulations that prevented his wearing any headgear indoors (his yarmulke as required by his religion). The court reasoned that the special needs of the military overcame the strict scrutiny test of free

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exercise claims, and having rejected strict scrutiny, then concluded that military regulations were reasonable and did not violate the free exercise clause. Two elements in the *Goldman* decision are especially telling, as pointed out by Feldman (1997):

> First, the Court's stress upon "standardized uniforms" disregards the fact that the *standard* will almost always mirror the values and practices of the dominant majority—namely Christians. Put bluntly, the U.S. military is unlikely to require everyone to wear a yarmulke as part of the standard uniform. Second, and most clearly opposed to the *Yoder* Court's receptiveness [to the claims of Amish, Jehovah's Witnesses, and Seventh Day Adventists], the *Goldman* Court characterized the wearing of a yarmulke as a matter of mere *personal preference*. Evidently, the majority of the justices (all of the justices at this time were Christian) were unable to comprehend the [religious] significance of the yarmulke.
>
> (p. 247)

Further Legal, Political, and Executive Developments

The complicated and technical histories of litigation and case law surrounding both the Establishment and Free Exercise clauses of the 1st Amendment, as presented in the citations noted below, illustrate the ambiguities and the challenges confronting Jefferson's so-called "wall of separation" for members of non-dominant, non-majority, non-Christian religious groups.

In recent years, there is intense public disagreement over the use of sacred texts to guide political choices and regulate public behavior. A 2006 Pew Forum on Religion and Public Life survey indicates that 60 percent of white evangelical respondents believe that "the Bible should be the guiding principle on making laws [even if] it conflicts with the will of the people" (Pew Forum on Religion and Public Life, August 24, 2006). In the same survey, 78 percent of white mainline Protestant, 72 percent Catholic, and 91 percent secular-identified respondents think that the will of the American people should supersede the Bible as a guiding principle in making laws. This Pew survey does not include members of other religious communities—such as orthodox Jews or Muslims—who may or may not believe that their own religious beliefs or texts (the Torah or the Koran) should guide law and public policy.

The increasing activism of religious groups, on their own or in coalition or through the two-party process, has led to a new development—as put in the title of a front-page story in the *New York Times* (October 8, 2006) "Religion trumps regulation as legal exemptions grow: From day care centers to use of land, rules don't apply to faith groups" (Henriques, p. 1, also online at www.nytimes.com). It reports that faith-based religious groups are exempt from many laws and regulations covering social services, such as addiction treatment and child care. As a result, while ministries run soup kitchens and homeless centers exempt from regulation, secular nonprofits serving the same populations often do not. Regulatory exemptions that support free religious exercise also collide with other Constitutional protections, such as fair employment and non-discrimination laws and policies. In addition to regulatory exemption, faith-based organizations have become "eligible for an increasing stream of federal grants and contracts from state and federal government … Known in the Bush administration as the Faith Based Initiative, it has drawn considerable attention in political, religious and academic circles" (Henriques, 2006, p. 1).

It is difficult if not impossible within a religiously pluralistic nation to apply any one theology to politics or to resolve political questions with reference to a single deity or sacred text, since it is the very plurality of deities and sacred texts in a religiously pluralistic nation that come into conflict and remain irreconcilable. Thus, the 1st Amendment to the

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Constitution, along with Article 6, designed at the end of the 18th century to protect individual religious rights against the kind of Christian sectarian theocracy or political-religious denominational establishment the colonists had rejected in Christian Europe, becomes in the contemporary U.S. an imperfect instrument for negotiating extremely complex questions where the litigation occurs not only among denominations of Christianity, but between members of other religious traditions who come into conflict with a hegemonic Christian state. Mazur makes this observation: "Religious communities that were not instrumental in the drafting of the Constitution or in the debate over disestablishment have agreed [over several centuries] to the supremacy of pluralism" as a process of Americanization presided over by the U.S. Constitution.

> Those communities that have utilized this strategy now live institutionally in the belief system of constitutional authority, which permits them to agree to disagree, and to do so in relative peace. The American Catholic and Jewish communities have gone through this process, as have the Mormons. (1999, p. 23)

Despite the questionable assumption as to the fairness and equity in applications of the 1st Amendment clauses to all religious groups, analyses of litigation concerning free exercise claims provides evidence of the various "faces" of religious oppression experienced by religious minorities in the United States, especially the faces of marginalization, powerlessness, and cultural imperialism. The cases reviewed above suggest that it is not accurate to claim that all religious freedoms (or all practices claimed to be religious) are reliably protected by the 1st Amendment. 1st Amendment court findings in cases brought under the Free Exercise clause sometimes subordinate free religious exercise to counterclaims made on behalf of the state, as in *Reynolds v. United States* (1878—a Mormon polygamy case), *Goldman v. Weinberger* (1986—a religious apparel case), and *Smith v. Oregon* (1990—the Native American Indian peyote case), as well as most of the sacred site cases brought by Native American Indians. In some of these cases, legislative and executive efforts have been made to restore free exercise protection. In some cases those legislative and executive efforts have held the day; in other cases, they were challenged by further court findings. (See examples in Appendix 11E Time Line and in citations listed below.)

The decision to include religious freedom in the Bill of Rights (although couched in the negative, "Congress shall make no law") was a decision to resolve religious disputes primarily through the legal system, as the legal system would determine the standing of constitutional claims (see discussion in Mazur, 1999, pp. 4–27).

> In such circumstances, where an aspect of religion is at issue, be it plural marriage, peyote use, or animal sacrifice, the losing [minority] religious community will have to either reconcile the authority of its theology with the authority of the Court's ruling, or flout it and risk becoming a target of the coercive powers sanctioned by the Constitution.
>
> (Mazur, 1999, p. 5)

An example of the acceptance of the power represented by a Court ruling can be seen in the case of, Nathan Jim, Jr., a Yakima Indian who had been imprisoned for possessing eagle parts in violation of the Eager protection Act and the Endangered Species Act, and who claimed that his actions had religious justification. As part of his settlement, Jim he agreed to stop killing eagles, because, as he told the judge, "I will obey your law" (quoted in Mazur, 1999, p. 96).

A successful political resolution to the Taos Pueblo effort to regain title to their most sacred shrine, Blue Lake, a mountain tarn at 11,000 feet in the Sangre de Cristo Range of

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the Rocky Mountains, is described by Gordon-McCutchan (1991). He describes the Taos Pueblo loss of Blue Lake in 1906, when it became part of Carson National Forest, subject to the "multiple use" policy of the Forest Service, so that the sacred waterhead became a popular camping ground for recreational users. The political and journalistic efforts of Taos Pueblo and their allies, over many decades, led the Indian Claims Commission to rule (1965) that the Indians had enjoyed uninterrupted possession prior to 1906, and subsequent intense political and legal efforts led to congressional and executive decision to return blue Lake to the Taos Pueblo Indians, despite arguments in Congress "that passage of the Blue Lake Bill would set a dangerous precedent and lead to an Indian `raid' on the federal land holdings" (Gordon-McCutchan, 1991, p. 792).

Echo-Hawk (1993), Eck (2001), Feldman (1997), Gordon-McCutchan (1991), Long (2000) and Mazur (1999) provide numerous other instances of conflicts resolved through litigation, or through local or state political action, or through concerted action by coalitions between aggrieved religious minorities and majority religious organizations to seek future resolution. Congressional action in the 1978 American Indian Religious Freedom Act (AIRFA), the 1987 public law permitting military personnel to wear unobtrusive religious headgear, and legislative efforts through the 1990s to find a legislative alternative to the *Smith* decision, are noted in the Appendix 11E historical timeline.

Conflicts continue between local, state, and federal laws, usually reflecting Christian hegemonic religious assumptions and practices, and practices rooted in the religious beliefs of groups that by definition are minority. Examples continue to include plural marriages, Sunday business closings, "sacred sites" on public lands, animal sacrifice, and protection of 1st Amendment free religious exercise for prisoners. Resolution of these conflicts involve the lengthy, complicated and expensive route of Constitutional litigation; or appeal to the political process involving local, state and federal legislatures or executives; or attempting to carry the prohibited religious practice underground. The litigation surveyed above or suggested in Appendix 11D scenarios, 11E Time Line, 11R sample history presentation, illustrates some, but not all of these dilemmas.

At the same time, the Constitutional provision for pluralistic religious coexistence among majority Protestant sects, between Protestant and Catholic denominations, and between Christians and non-Christians in which conflicts would be resolved by "rights" litigation as framed by the Constitution, also suggests less hopeful options. These options lead to the (unconstitutional) enforcement of majority over minority religious exercise, or the (unconstitutional) use of a dominant religion to guide law and public policy, or resistance and violence by aggrieved religious groups, or efforts by them to achieve political autonomy. Examples can be seen in efforts to shape public law and policy to conform to Christian Fundamentalist "values," in the violent confrontations with Christian Identity groups, in the autonomous enclave set up by Branch Dravidians, or historically in the efforts to 19th century Mormons to set up autonomous religious communities in New York state and Utah.

More hopeful is the effort by groups such as the First Amendment Center (2003, 1999, 1995) and the Anti Defamation League (2004) as well as the federal Department of Education (2003) to provide practical tools for teachers and parents to understand the opportunities for teaching about religion in the schools (see also Greenawalt, 2002; Nord, 1995) and handling practical everyday questions relating to religious accommodations, prayer and religious discussion, extracurricular religious clubs and activities, religious holidays, use of school facilities by external religious groups, cooperation between public schools and religious communities, speech codes, free expression rights for students, student dress codes. These works also refer to key legal cases and provide resource information. Greenawalt (2002), First Amendment Center: Haynes, Chaltain, Ferguson, Hudson & Thomas (2003), Herrington (2000), Nash (2001), Nord (1995) and Ryan (2000) identify

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many of the questions summarized under religion and education, and are useful in framing these issues.

For participants in courses dealing with Christian hegemony, free exercise, and religious oppression, there are numerous engaging research and presentation topics—ranging from the complex historical backgrounds of the 1st Amendment, to current day litigation over school prayer, tax-based vouchers for religious schooling, accommodation policies, and the complex practical, regulatory, political and constitutional issues involved in the current Faith Based Initiative program.

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