E. SPECIAL POPULATIONS AND ENVIRONMENTS

There are several situations in which the free exercise of religion presents unique claims or operates under unusual restrictions. Among these are the provisions for the religious practices of aboriginal populations and the difficulties of making provisions for various claims of free exercise in prisons and in military service. (This problem is compounded when Native Americans find themselves in prison or in military service.) Already discussed were the special recognition in the law of several states for the peyote practices of American Indians.[1] But there is a range of other claims by American Indians for recognition of their religious practices, which differ in various ways from the "European" patterns of the Christian and Jewish majority and which are therefore often difficult for the majority to conceptualize, let alone accommodate. On the other hand, there is also a paternalistic tendency in some quarters to romanticize "The Noble Savage" in an equally unrealistic way.

1. American Indian Religious Practices

The encounter between indigenous peoples of the North American continent and the incursions of European peoples over several centuries has produced the dislocations, subjugations and culture conflicts characteristic of major human migrations, of which the rivalry between aboriginal animistic religions and the various versions of Christianity of the conquerors forms but one (occasionally ameliorative) strand. The curious church-state complications of this encounter have been identified as departures from the (supposed) norm of American nonestablishment, in that church-sponsored mission boards were subsidized by the U.S. government from the time of Grant's Peace Policy (1869) until the end of the century to assume responsibility for educating and "civilizing" the Indians.[2]

The tragic disarray and deculturation of American Indians is being resisted and possibly overcome in some quarters, particularly with the efforts by some Indians to reassert "traditional" religion as a core part of their tribal identity. This trend has included efforts to recover and repristinate venerable religious practices and to protect them from trampling by non-Indians.

a. Taos Pueblo and the Blue Lake Lands. One of the paradigmatic struggles between Indian religion and the secular society and government of the United States occurred in the late 1960s. Taos Pueblo is situated at the foot of the Sangre de Cristo mountains in New Mexico adjacent to the much more recent town of Taos. It has been inhabited by the Taos people at least since the fourteenth century. During that

---

1. See *People v. Woody, Whitehorn v. Oklahoma,* and *Oregon v. Smith* at §§ D2a, d and e above and in the final portion of the preceding section.

2. See Bowden, Henry Warner, *American Indians and Christian Missions* (Chicago: Univ. of Chicago Press, 1981), pp. 192-194; and Beaver, R. Pierce, *Church, State and the American Indians*, (St.Louis: Concordia Press, 1966), pp. 167-168.

time they have drawn spiritual sustenance from the mountains above them, particularly from the Blue Lake, out of which flows the rushing stream on which the pueblo is located. Then came the white man, who in his wisdom created the Kit Carson National Forest to "protect" the wooded slopes of the mountains, and to obtain from them a "sustained yield" of timber.

In the 1960s the Indians became aware of plans by the U.S. Forest Service—a branch of the Department of Agriculture—to permit lumbering in the vicinity. They protested that this would desecrate their sacred Blue Lake lands and destroy their ancestral religion. Therefore, they sought "trust title" to the Blue Lake watershed so that it would be "theirs" rather than the Forest Service's. Legislation to this effect was introduced in Congress but was resisted in the Senate Indian Affairs subcommittee by New Mexico's senior senator, Clinton P. Anderson, who also happened to be a former secretary of Agriculture and the most senior member of the Senate Interior and Insular Affairs Committee and its subcommittee on Indian Affairs. He dominated the series of hearings on this issue and sided with the Forest Service in its professed anxiety that the Indians would not be able to take adequate care of the forest (though somehow it had survived for a number of centuries under their tutelage before the Forest Service came along), perhaps permitting it to succumb to the ravages of the then-prevalent spruce budworm.

This author recalls the senator assuring the Taos Pueblo leaders that the Blue Lake and its immediate vicinity would be protected from any lumbering operations. The Indians replied that the Blue Lake was like their "church," and they did not want it desecrated any more than Europeans would want a factory set up in the interior of a cathedral. Their people made periodic pilgrimages, not only to the Blue Lake near timberline, but to other places on the slopes. Senator Anderson then invited the tribal spokesman to point out on a large Forest Service map the location of any other "shrines," and they too would be protected. The tribal representatives seemed to be nonplussed by this offer and reiterated that the Blue Lake was their church, etc.

The author later met with the tribal council at Taos Pueblo and inquired further as to the nature of their religious use of the area. Eventually it became apparent that their veneration was not localized to particular sacred spots or "shrines" in the European sense, but was extended equally to the entire watershed from which they drew not only the stream that supplied the pueblo with water but their spiritual resources as well. In testimony the next year the author explained this concept to the Indian Affairs subcommittee—with no visible effect on the outcome. Senator Anderson remained adamant, influenced—some said—less by any testimony than by the views of the Forest Service and the interests of a large lumber company that was one of his main campaign contributors and had recently clear-cut the timber up to the ridge bordering the Blue Lake watershed. Be that as it may, the matter languished for several frustrating years until in 1970 President Richard Milhouse Nixon resolved it in the Pueblo's favor![3]

3. See account in Gordon-McCutchan, R.C., *Taos Indians and the Battle for Blue Lake* (Santa Fe, N.M.: Red Crane Books, © 1991).

b. The American Indian Religious Freedom Act (1978). In order to minimize such conflicts (and to mollify a small but persistent body of Indian sympathizers of the kind that had prevented logging in the Blue Lake watershed and persuaded President Nixon to give the Taos Pueblo trust title to it), Congress in 1978 enacted P.L. 95-341, entitled "Protection and preservation of traditional religions of Native Americans," known as the American Indian Religious Freedom Act (or AIRFA), which read in its entirety as follows:

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indians, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[4]

Anyone familiar with the legislative process will understand what strenuous lobbying efforts were necessary to get such an enactment on the books. The effect of this law upon the litigation over such issues and usages will be seen in what follows.

c. *Sequoyah v. TVA* (1980). Two bands of Cherokee Indians and three individual Cherokees brought action for an injunction to prevent completion and flooding of the Tellico Dam on the Little Tennessee River. The dam was said to threaten irreparable injury by submerging the "sacred homeland" of the plaintiffs, containing "sacred sites, medicine gathering sites, holy places and cemeteries" in an area along the river known as Chota, the ancestral dwelling-place of the Cherokees.

The Tellico Dam had its own unique history in law, reaching a high level of visibility in the historic "snail darter" case,[5] when construction was halted to preserve the habitat of an obscure small fish. Other obstacles had hindered its completion until Congress adopted a directive in the Energy and Water Development Appropriation Bill in 1979 providing that "Notwithstanding provisions of [the Endangered Species Act] *or any other law*, the Corporation [Tennessee Valley Authority, TVA] is authorized and directed to complete construction, operate and maintain the Tellico Dam...."[6] Invocations of the American Indian Religious Freedom Act or the National Historic Preservation Act were met with this citation by the Sixth Circuit Court of Appeals, which added:

> No clearer congressional command is imaginable. No law is to stand in the way of the completion and operation of the dam. The only basis upon which...this court would be empowered to enter an order contrary to the express will of Congress is that a violation of the Constitution will result from carrying out the congressional mandate.[7]

The court added, with a possible intimation of skepticism:

---

4. 42 U.S.C. §1996.

5. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

6. *Ammoneta Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (1980), quoting P.L. 96-69, italics supplied by the court.

7. Ibid., at 1161.

> The record in the present case discloses that some of the plaintiffs objected to the dam and sought to prevent its construction as early as 1965. However, the documents in the record indicate that the Cherokee objections to the Tellico Dam were based primarily on a fear that their cultural heritage, rather than their religious rights, would be affected by flooding the Little Tennessee Valley. Only with the filing of the complaint in this action... less than a month before impoundment was scheduled to begin—did any Cherokee make an explicit claim based on the Free Exercise Clause.

Of course, the distinction between "cultural heritage" and "religious rights" was a somewhat artificial one that would not occur to an American Indian unless his mind had been clouded by "Anglo" legal education.

The contentions of the plaintiffs were related at some length by the appellate court, among which were the following:

> (1) The plaintiff Ammoneta Sequoyah is a medicine man and a direct descendant of Sequoyah, the inventor of the Cherokee writing system. This affiant stated that he had gone to the Valley all his life and had lived in an abandoned cabin at Chota [one of the nine sites of 18th century Cherokee villages located in the Valley... both the capital of the Cherokee Nation and a "peace town" or sanctuary] for six years.... The affiant stated that he goes to the Valley three or four times a year to get medicine which must be gathered by a medicine man "to work a cure." The Cherokees believe that all a person knows is placed in the ground with that person when he is buried. Flooding the Valley or digging up the bodies of Indians buried there will destroy "the knowledge and beliefs of [the] people who are in the ground" and destroy what they have taught. Mr. Sequoyah believes that he will lose his knowledge of medicine if the Valley is flooded.
>
> (2) Richard Crowe has been going to the lands at Tellico for more than 30 years and learned from his people that "this is where WE begun." [*sic*] Over the years Mr. Crowe has visited the area more than 20 times and he took his children there when they were young. Chota is one of the sacred Cherokee places, spoken of by his family as the birthplace of the Cherokee. It was understood by the Cherokees that "this location was our connection with the Great Spirit."

Because of their close symbiosis with the land, Indians tend to have more place-specific linkages in their religious awareness than do some other traditions. The court was fairly perceptive of that quality.

> The Cherokees who are plaintiffs in this action obviously have great reverence for their ancestors and believe that the places where their ancestors lived, gathered medicine, died and were buried have cultural and religious significance. Similar feelings are shared by most people to a greater or lesser extent. However, because of their beliefs respecting the transmission of knowledge and spiritual powers to succeeding

> generations, particular geographic locations figure more prominently in Indian religion and culture than in those of most other people.
>
> There is no requirement that a religion meet any organizational or doctrinal test in order to qualify for First Amendment protection. Orthodoxy is not an issue. The fact that Cherokees have no written creeds and no man-made houses of worship is of no importance. The Cherokees have a religion within the meaning of the Constitution and the sincerity of the adherence of individual plaintiffs to that religion is not questioned. However, in bringing this action, the plaintiffs are asserting that otherwise lawful and wholly secular activity of the government should be prohibited. Accepting every statement of fact as true, the question is whether the plaintiffs have shown a constitutionally cognizable infringement of a First Amendment right.
>
> It is the flooding of a particular place which is claimed to deny the right freely to exercise the plaintiffs' religion. It is clear, even from the plaintiffs' affidavits, that the exact location of Chota and the other village sites was unknown to the Cherokees until TVA undertook archeological explorations with the assistance of the University of Tennessee. It appears that the plaintiffs are now claiming that the entire valley is sacred.... For more than 100 years prior to its acquisition by TVA the land in the Valley was owned by persons other than plaintiffs or members of the class. There is no showing that any Cherokees other than Ammoneta Sequoyah and Richard Crowe ever went to the area for religious purposes during that time. At most, plaintiffs showed that a few Cherokees had made expeditions to the area, prompted for the most part by an understandable desire to learn more about their cultural heritage.

The court glided smoothly over the question where the Cherokees had been in the interim, and why they left their ancestral home to "others" and revisited it so rarely. There was no recognition by the court that the Cherokees had left it unwillingly—at bayonet point—in forced dispossession and relocation by the United States along the tragic "Trail of Tears" of 1838-1839, from Georgia and Tennessees to Oklahoma and environs, from whence it was no easy task to make "expeditions" back to their "real" home, especially since their ancestral domains had been usurped (without compensation to them) by land-greedy "others." And now the prospect loomed that even that tenuous linkage of vagrant visitors to property now "owned" by "others" was to be drowned in many feet of water.

The court did give a passing glance to history at a later point in the opinion.

> The district court in the present case based its holding on the plaintiffs' lack of any property interest in the Tellico area.... While this is a factor to be considered, we feel it should not be conclusive in view of the Cherokee expulsion from Southern Appalachia followed by the "Trail of Tears" to Oklahoma and the unique nature of the plaintiffs' religion. Nevertheless, there are criteria by which the constitutional validity of a claim based on the Free Exercise Clause must be tested.

In between references to *Wisconsin v. Yoder*[8] and *People v. Woody*,[9] the court also adverted to *Frank v. Alaska*, in which the Supreme Court of Alaska had reversed the conviction of an Athabascan Indian who had broken the game laws by killing a moose for a funeral feast or potlatch.

> The court found that "[t]he funeral potlatch is the most important institution in Athabascan life" and that "[f]ood is the cornerstone of that ritual...." "While moose itself is not sacred, it is needed for proper observance of a sacred ritual which must take place soon after death occurs. Moose is the centerpiece of the most important ritual in Athabascan life and is the equivalent of sacred symbols in other religions."[10]

From these three cases the court drew the theme that the religious practices challenged there were at the very heart of the religion. It concluded:

> Examination of the plaintiffs' affidavits discloses no such claim of centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances. Granting as we do that the individual plaintiffs sincerely adhere to a religion which honors ancestors and draws its spiritual strength from feelings of kinship with nature, they have fallen short of demonstrating that worship at the particular geographic location in question is inseparable from the way of life (*Yoder*), the cornerstone of their religious observance (*Frank*), or plays the central role in their religious ceremonies and practices (*Woody*). Rather, the affidavits disclose that medicines are obtainable there which may be found at higher elevations in other locations, that it is believed by some that the knowledge of previous generations will be lost if graves are disturbed or flooded and that the locations of Chota and other village sites are sacred places. These affidavits appear to demonstrate "personal preference" rather than convictions "shared by an organized group." (*Yoder*, supra).... The claim of centrality of the Valley to the practice of the traditional Cherokee religion, as required by *Yoder*, *Woody* and *Frank*, is missing from this case. The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake.... Though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment.... [P]laintiffs have not alleged infringement of a constitutionally cognizable First Amendment right. In the absence of such an infringement, there is no need to balance the opposing interest of the

8. 406 U.S. 205 (1972), discussed at IIIB2.

9. Discussed at § D2a above.

10. *Frank v. Alaska*, 604 P.2d 1068 (Alaska 1979).

> parties, or to determine whether the government's interest in proceeding with its plans for the Tellico Dam is "compelling."[11]

One judge dissented. Judge Gilbert S. Merritt took minor issue with Judge Pierce Lively, who wrote the majority opinion, and Judge Dumont Keith, who concurred.

> I agree with the centrality standard and the general reasoning of the Court's opinion, but I believe the case should be remanded to the District Court to permit plaintiffs to offer proof concerning the centrality of their ancestral grounds to their religion.
>
> This is a confusing and essentially uncharted area of law under the free exercise clause. At the time the complaint and various affidavits were filed, the centrality standard had not been clearly articulated. It may have been unclear to the Cherokees precisely what they had to allege and prove in order to make a constitutional claim. Indeed, the District Court simply held that the Indians have no free exercise claim because the Government now owns the land on which the burial sites are located. The District Court therefore did not explore, develop or find any facts concerning the role that this particular location plays in the Cherokee religion. In view of the liberal rules of pleading and protective attitude that Federal courts should follow in considering Indian claims, we should reverse and remand the case to the District Court in order to give the Cherokees an opportunity to offer proof concerning the significance and centrality of their ancestral burying grounds in light of the standard we have adopted.

But the other two judges, sensing the impatient shadows of TVA and Congress looming behind them, probably thought it best not to delay matters any longer, and let the Cherokee claims go the way of the snail-darters, dispossessing them for the second time in 150 years. (The Supreme Court denied *certiorari*.[12])

d. *Badoni v. Higginson* (1980). At the same time that *Sequoyah* was wending its way through the Sixth Circuit, another Indian religious freedom case was percolating up through the Tenth. The former was precipitated by the prospective flooding of the Little Tennessee River, the latter by the rising of the Colorado River behind the Glen Canyon Dam to form Lake Powell in southern Utah. As the level of water in Lake Powell rose, it entered Rainbow Bridge National Monument in 1970, by 1977 had reached a level of twenty feet under the bridge itself, and at its fullest extent would be forty-six feet deep under the bridge. With the arrival of the lake, the natural bridge site was flooded with tourists, who previously had been few because of the inaccessibility of the site. The National Park Service had begun to operate a floating marina near the bridge to accommodate tourists, but after the suit was filed moved it to a different canyon.

Plaintiffs were individual Indians residing in the vicinity, including three Navajo medicine men, and three chapters of the Navajo Nation. Their complaint included the claim that the government's operations violated their rights to the free exercise of religion in two respects:

---

11. *Sequoyah, supra.*
12. 449 U.S. 953 (1980).

> (1) by impounding water to form Lake Powell, the government has drowned some of plaintiffs' gods and denied plaintiffs access to a prayer spot sacred to them;
> (2) by allowing tourists to visit Rainbow Bridge, the government has permitted desecration of the sacred nature of the site and has denied plaintiffs' right to conduct religious ceremonies at the prayer spot.[13]

The trial court granted summary judgment against the Indians because they had "no property interest in the Monument," and in addition the government's interest in the water and power resources of the area outweighed the plaintiffs' religious interest. The appellate court affirmed, but on the basis of somewhat different reasoning.

> At the outset, we reject the conclusion that plaintiffs' lack of property rights in the Monument is determinative. The government must manage its property in a manner that does not offend the Constitution. See *Sequoyah v. TVA*...(lack of property interest not conclusive, but is a factor in weighing free exercise and competing interests). We must look to the nature of the government's action and the quality of plaintiffs' positions to determine whether they have stated a free exercise claim....
> The pertinent facts in this case are as follows. Rainbow Bridge and a nearby spring, prayer spot and cave have held positions of central importance in the religion of some Navajo people living in that area for at least 100 years. These shrines are regarded as the incarnate forms of Navajo gods, which provide protection and rain-giving functions. For generations, Navajo singers have performed ceremonies near the Bridge[,] and water from the spring has been used for other ceremonies. Plaintiffs believe that if humans alter the earth in the area of the Bridge, plaintiffs' prayers will not be heard by the gods[,] and their ceremonies will be ineffective to prevent evil and disease. Because of the operation of the Dam and Lake Powell, the springs and prayer spot are under water. Tourists visiting the sacred area have desecrated it by noise, litter and defacement of the Bridge itself. Because of the flooding and the presence of tourists, plaintiffs no longer hold ceremonies in the area of the Bridge....
> We agree with the trial court that the government's interest in maintaining the capacity of Lake Powell at a level that intrudes into the Monument outweighs plaintiffs' religious interest.... In the instant case unrebutted evidence...shows that the storage capacity of the lake would be cut in half if the surface level were dropped to an elevation necessary to alleviate the complained of infringements. The required reduction would significantly reduce the water available to the Upper Basin States of Colorado, New Mexico, Utah and Wyoming from the Colorado River....
> Moreover, it is reasonable to conclude that no action other than reducing the water level would avoid the alleged infringement of plaintiffs' beliefs and practices. In these circumstances we believe the government has

13. *Lamarr Badoni v. Keith Higginson, Commissioner, Bureau of Reclamation*, 638 F.2d 172 (1980).

shown an interest of a magnitude sufficient to justify the alleged infringements.

The second basis for plaintiffs' free exercise claims concerns management of the Monument by the National Park Service. Specifically, plaintiffs assert that tourists visiting the Monument desecrate the area by noisy conduct, littering and defacement of the Bridge and that the presence of tourists prevents plaintiffs from holding ceremonies near the Bridge.... In their complaint plaintiffs seek an order requiring the government officials "to take appropriate steps to operate Glen Canyon Dam and Reservoir in such a manner that the important religious and cultural interests of Plaintiffs will not be harmed or degraded...." They suggest some specific types of relief, such as prohibiting consumption of beer at the Monument and closing the Monument on reasonable notice when religious ceremonies are to be held there.

* * *

The government here has not prohibited plaintiffs' religious exercises in the area of Rainbow Bridge; plaintiffs may enter the Monument on the same basis as other people. It is the presence of tourists at the Monument and their actions while there that give rise to plaintiffs' complaint of interference with the exercise of their religion. We are mindful of the difficulties facing plaintiffs in performing solemn religious ceremonies in an area frequented by tourists. But what plaintiffs seek in the name of the Free Exercise Clause is affirmative action by the government which implicates the Establishment Clause of the First Amendment. They seek government action to exclude others from the Monument, at least for short periods, and to control tourist behavior.

Unquestionably the government has a strong interest in assuring public access to this natural wonder.... Issuance of regulations to exclude tourists completely from the Monument for the avowed purpose of aiding plaintiffs' conduct of religious ceremonies would seem a clear violation of the Establishment Clause.... Exercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area.... We find no basis in law for ordering the government to exclude the public from public areas to insure privacy during the exercise of First Amendment rights.

We must also deny relief insofar as plaintiffs seek to have the government police the actions of tourists lawfully visiting the Monument. Although Congress has authorized the Park Service to regulate the conduct of tourists in order to promote and preserve the Monument..., we do not believe plaintiffs have a constitutional right to have tourists visiting the Bridge act "in a respectful and appreciative manner...."

> The First Amendment protects one against actions by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities.... We must accommodate

> our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life.[14]

Were it otherwise, the Monument would become a government-managed religious shrine.

> The Park Service already has issued regulations applicable to the Monument prohibiting disorderly conduct, intoxication and possession of alcoholic beverages by minors, defacement, littering, and tampering with personal property [citations omitted]. These regulations no doubt would be justified as authorized under its charge to conserve and protect the scenery, natural and historic objects for the enjoyment of the public.... These regulations also provide the relief plaintiffs request as to control of tourist behavior except perhaps for a total ban on beer drinking.
>
> What of the request stated in the appellant's reply brief for access "on infrequent occasion" to conduct religious ceremonies in private? The government asserts that plaintiffs, in common with other members of the public, may apply for a public assembly permit to hold religious ceremonies at the Bridge. No one suggests such a permit could not be used to permit access after normal visiting hours when privacy might be assured.... Our problem is that there is no allegation that any such permit was requested and denied...
>
> Plaintiffs cite the Park Service's proposed guidelines for use of Grand Canyon National Park, which prohibit entry on certain sacred Indian religious sites. They also cite the American Indian Religious Freedom Act, which states a public policy to permit Indian access to sacred sites for worship, and perhaps to protect them from intrusion.... But we do not have before us the constitutionality of those laws or regulations or of any action by defendants in alleged violation of them. The pleadings, even as supplemented by the expanded requests in the brief and supported by the proffered evidence, afford no basis for relief.[15]

Thus the American Indian Religious Freedom Act, brushed aside in *Sequoyah*, was again of no avail in the kind of situation it was supposedly designed to provide relief. The Supreme Court denied *certiorari*.[16]

e. *Wilson v. Block* (1983). A somewhat more direct reference to the American Indian Religious Freedom Act occurred in a later decision that also involved the Navajo's religious interests, along with the Hopis, whose reservations are located in northeastern Arizona. The dominant feature of the skyline from the reservations is the San Francisco Peaks, which rise to an altitude of 12,633 feet.

> The Navajos believe that the Peaks are one of the four sacred mountains which mark the boundaries of their homeland. They believe the Peaks to be the home of specific deities and consider the Peaks to be the body of a spiritual being or god, with various peaks forming the head, shoulders,

14. Ibid., quoting *Otten v. Baltimore & Ohio R. Co.* (Learned Hand, J.) 205 F.2d 58, 61 (CA2 1953), discussed at § A10 above.

15. *Badoni, supra.*

16. 452 U.S. 954 (1981).

> and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin. The Navajos pray directly to the Peaks and regard them as a living deity. The Peaks are invoked in religious ceremonies to heal the Navajo people. [The people] collect herbs from the Peaks for use in religious ceremonies, and perform ceremonies upon the Peaks. They believe that artificial development of the Peaks would impair the Peaks' healing power.
>
> The Hopis believe that the Creator uses emissaries to assist in communicating with mankind. The emissaries are spiritual beings and are generally referred to by the Hopis as "Kachinas." The Hopis believe that for about six months of the year..., extending through mid-winter, the Kachinas reside at the Peaks. During the remaining six months of the year the Kachinas travel to the Hopi villages and participate in various religious ceremonies and practices. The Hopis believe that the Kachinas' activities on the Peaks create the rain and snow storms that sustain the villages. The Hopis have many shrines on the Peaks and collect herbs, plants and animals from the Peaks for use in religious ceremonies. The Hopis believe that use of the Peaks for commercial purposes would constitute a direct affront to the Kachinas and to the Creator.[17]

Into this peaceful setting came the white man, his government and his commercial interests. The government of the United States created the Coconino National Forest and entrusted its management to the Forest Service. An area of 777 acres, known as the "Snow Bowl," was made available in 1937 when the Forest Service built a road to it and a ski lodge for the convenience of skiers. Ski lifts were added in 1958 and 1962. The Snow Bowl skiing facilities were operated by a private business, Northland Recreation Company, under franchise by the Forest Service. In 1977, Northland proposed an ambitious plan of development to include additional ski slopes, parking areas, lodge facilities and ski lifts. The Forest Service conducted extensive hearings and considered Northland's proposal and five alternative plans, including one for the elimination of all artificial structures and skiing activities. Special efforts were made to solicit the views of the Hopis and Navajos. In 1979, the Forest Supervisor of the Coconino Forest issued a decision permitting moderate development, which was not identical to any of the six plans under consideration. It would involve clearing 50 acres of forest rather then the 120 requested by Northland, as well as construction of a new day lodge, reconstruction of existing chair lifts and the paving and widening of the access road. In 1981, the Navaho Medicinemen's Association filed suit in the District of Columbia seeking to halt the development and to require the removal of existing ski facilities. The federal district court, per Judge Charles R. Richey, ruled against the Indians on all issues, and the plaintiffs appealed to the U.S. Court of Appeals for the District of Columbia Circuit, which considered the free exercise claim as follows:

> The Navajo and Hopi plaintiffs contend that development of the Snow Bowl is inconsistent with their First Amendment right freely to hold and

17. *Richard F. Wilson v. John R. Block, Secy. of Agriculture*, 708 F.2d 735 (1983).

practice their religious beliefs....

* * *

The Free Exercise Clause proscribes government action that burdens religious beliefs or practices, unless the challenged action serves a compelling governmental interest that cannot be achieved in a less restrictive manner....

The First Amendment right to hold religious beliefs is absolute. Cantwell v. Connecticut...[18] The Free Exercise Clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." McDaniel v. Paty...[19] Notwithstanding the plaintiffs' concerns, it is clear that the government has not regulated, prohibited, or rewarded their religious beliefs as such, nor has it in any manner directly burdened the plaintiffs in their beliefs. The Free Exercise Clause, however, also proscribes certain indirect burdens on belief.

* * *

Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion. The Secretary of Agriculture has a statutory duty...to manage the National Forests in the public interest, and he has determined that the public interest would best be served by expansion of the Snow Bowl ski area. In making that determination, the Secretary has not directly or indirectly penalized the plaintiffs for their beliefs. The construction approved by the Secretary is, indeed, inconsistent with the plaintiffs' beliefs, and will cause the plaintiffs spiritual disquiet, but such consequences do not state a free exercise claim under Sherbert, Thomas, or any other authority. In sum, the plaintiffs have not shown that expansion of the Snow Bowl will burden their freedom to believe. A separate question, to which we now turn, is whether expansion will burden the plaintiffs in the practice of their religions.

The plaintiffs must have access to the San Francisco Peaks to practice their religions. Certain of the plaintiffs' ceremonies must be performed upon the Peaks and religious objects must be collected there. Because the plaintiffs' religions are, in this sense, site specific, development of the Peaks would severely impair the practice of the religions if it destroyed the natural conditions necessary for the performance of ceremonies and the collection of religious objects. The plaintiffs claim that the Preferred Alternative will impair their religious practices in precisely that manner. Few courts have considered whether the Free Exercise Clause prohibits the government from permitting land uses that impair specific religious practices.

The court then reviewed *Sequoyah v. TVA*,[20] *Badoni v. Higginson*,[21] *Fools Crow v. Gullet*,[22] *Inupiat Community v. U.S.*,[23] and *Northwest Indian Cemetery Protective*

18. 310 U.S. 296 (1940), discussed at IIA2c.
19. 435 U.S. 618 (1978), discussed at IIE4k.
20. 620 F.2d 1159 (CA6 1980), discussed at § c above.
21. 638 F.2d 172 (CA10 1980), discussed at § d above.
22. 541 F.Supp. 785 (D.S.D. 1982), discussed at § g below.

Assn. v. Peterson,[24] finding *Sequoyah* particularly pertinent.

> Judge Richey relied upon the Sequoyah analysis in the present case, and held that plaintiffs had failed to show the indispensability of the Snow Bowl to the practice of their religions. The plaintiffs challenge Judge Richey's reliance upon Sequoyah on two grounds. They argue first that Sherbert and Thomas, and not Sequoyah, establish the standard applicable to their claim. They contend that governmental action which indirectly imposes a burden upon religious practices greater than the burdens involved in Sherbert and Thomas necessarily violates the First Amendment. Contending that the Snow Bowl ski area effectively prohibits the practice of their religions, the plaintiffs claim that their burden is greater than that of the practitioners in Sherbert and Thomas, who, the plaintiffs say, could have continued to practice their beliefs simply by choosing to forego government benefits. However, as we previously stated, Sherbert and Thomas considered only whether the government may legally condition benefits on a decision to forego or to adhere to religious belief or practice. Those cases did not purport to create a benchmark against which to test all indirect burden claims. Second, the plaintiffs argue that Sequoyah incorrectly interpreted the First Amendment. They argue that the First Amendment protects all religious practices, whether or not "central," and that courts are not competent to rule upon the centrality of religious belief or practice. We agree that the First Amendment protection of religion "does not turn on the theological importance of the disputed activity,"[25] and that courts may not "dictate which practices are or are not required in a particular religion."[26] These principles, however, are not contrary to Sequoyah's analysis. Far from requiring judicial evaluation of religious doctrine, Sequoyah focuses inquiry solely upon the importance of the geographic site in question to the practice of the plaintiffs' religion. If the plaintiffs cannot demonstrate that the government land at issue is indispensable to some religious practice, they have not justified a First Amendment claim. We agree with Sequoyah's resolution of the conflict between the government's property rights and duties of public management, and a plaintiff's constitutional right freely to practice his religion. We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site.
>
> The plaintiffs argue that their proof establishes a denial of First Amendment rights even under the above standard. They rely principally upon the affidavits submitted by Hopi and Navajo religious practitioners, which establish that ceremonies conducted upon the Peaks are indispensable to the plaintiffs' religions; that ceremonial objects must be collected from the Peaks to be effective; that some ceremonial objects and

---

23. 548 F.Supp. 182 (D.Alaska 1982), discussed at § f below.
24. 552 F.Supp. 951 (N.D.Cal. 1982), discussed at § h below.
25. *Unitarian Church West v. McConnell*, 337 F.Supp. 1252 (1972), discussed at IIIB5.
26. *Geller v. Secy. of Defense*, 423 F.Supp. 16 (1976), discussed at § 2a below.

> medicinal herbs are collected from the Snow Bowl, and that expansion of the ski area could make those objects and herbs more difficult to find; that ceremonies and prayers have occasionally been conducted in the Snow Bowl, but that expansion of the ski area will destroy the natural conditions necessary for prayers and ceremonies to be effective; and that the mountain as a whole, and not just parts thereof, is considered sacred.
>
> The plaintiffs' affidavits, together with other evidence in the record, establish the indispensability of the Peaks to the practice of the plaintiffs' religions. The Forest Service, however, has not denied the plaintiffs access to the Peaks, but instead permits them free entry onto the Peaks and does not interfere with their ceremonies or the collection of ceremonial objects. At the same time, the evidence does not show the indispensability of that small portion of the Peaks encompassed by the Snow Bowl permit area. The plaintiffs have not proven that expansion of the ski area will prevent them from performing ceremonies or collecting objects that can be performed or collected in the Snow Bowl but nowhere else. The record evidence is, in fact, to the contrary. The Forest Service's Final Environmental Statement found, on the basis of comments submitted by Hopi and Navajo practitioners, that "religious practices, including collecting plant materials, may occur in many locations on the sacred mountain...." It must be remembered that the Snow Bowl permit area comprises only 777 of the 75,000 acres of the Peaks, and that prior construction on the Peaks has not prevented the plaintiffs from practicing their religions....
>
> As the plaintiffs have not shown that development will burden them in their religious beliefs or practices, we need not decide whether the ski area expansion is a compelling governmental interest, or whether the Preferred Alternative is the least restrictive means of achieving that interest.[27]

The court devoted two full pages to the American Indian Religious Freedom Act.[28]

> The plaintiffs contend that AIRFA proscribes all federal land uses that conflict or interfere with traditional Indian religious beliefs or practices, unless such uses are justified by compelling governmental interests. They argue that the Snow Bowl ski resort expansion is not a compelling governmental interest, and is accordingly proscribed by AIRFA....
>
> AIRFA affirms the protection and preservation of traditional Indian religions as a policy of the United States.... [Legislative] reports reveal that in AIRFA Congress addressed the unwarranted and often unintended intrusions upon Indian religious practices resulting from federal officials' ignorance and the inflexible enforcement of laws and regulations which, though intended to achieve valid secular goals, had directly affected Indian religious practices.... The federal government, the reports note, had sometimes denied Indians access to religious sites on federal land; had failed to accommodate such federal statutes as the drug and endangered

27. *Wilson v. Block, supra.*

28. See § b above.

> species laws to the Indians' religious needs, and had itself interfered, or permitted others to interfere, with religious observances....
>
> It is clear from the reports, and from the statutory preamble, that AIRFA requires federal agencies to learn about, and to avoid unnecessary interferences with, traditional religious practices. Agencies must evaluate their policies and procedures in light of the Act's purpose, and ordinarily should consult Indian leaders before approving a project likely to affect religious practices. AIRFA does not, however, declare the protection of Indian religions to be an overriding Federal policy, or grant Indian religious practitioners a veto on agency action. "The clear intent of [AIRFA]," the Senate report states, "is to insure for traditional native religions the same rights of free exercise enjoyed by more powerful religions. However, it is in no way intended to provide Indian religions with a more favorable status than other religions, only to insure that the U.S. government treats them equally."

The court quoted comments made during floor debate by Representative Morris Udall of Arizona, chairman of the House Committee on Interior and Insular Affairs and sponsor of the House bill.

> "Mr. Speaker, it is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on Indians.... [I]t is the [Justice] Department's understanding that this resolution, in and of itself, does not change any existing State or Federal law. That, of course, is the committee's understanding and intent.
>
> "All this simple little resolution says to the Forest Service, to the Park Service, to the managers of public lands is that if there is a place where Indians traditionally congregate to hold one of their rites and ceremonies, let them come on unless there is some overriding reason why they should not.
>
> "(The resolution) simply says to our managers of public lands that they ought to be encouraged to use these places. It has no teeth in it. It is the sense of Congress."[29]
>
> The AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values. It does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices. Instead, an agency undertaking a land use project will be in compliance with AIRFA if, in the decision-making process, it obtains and considers the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices....[30]
>
> Finally, we find that the Forest Service complied with AIRFA in the present case. Before approving the Preferred Alternative the Forest Service held many meetings with Indian religious practitioners and conducted public hearings on the Hopi and Navajo reservations at which

29. Quoting 124 Cong. Rec. 21, 444-5 (1978).

30. The court noted that it had recently ruled, in *New Mexico Ranchers Assn. v. ICC*, 702 F.2d 227 (1983), that the Interstate Commerce Commission must make sure that the builders of a rail line would protect Navajo sacred sites along the right-of-way.

> practitioners testified. The views there expressed were discussed at length in the Final Environmental Statement and were given due consideration in the evaluation of the alternative development schemes proposed for the Snow Bowl. Development of the Snow Bowl under the Preferred Alternative will not deny the plaintiffs access to the Peaks, nor will it prevent them from collecting religious objects. The Forest Service has not burdened the plaintiffs' religious practices in any manner prohibited by AIRFA.

The court similarly disposed of challenges under the Endangered Species Act, the Wilderness Act, and the National Historic Preservation Act, in all respects upholding Judge Richey's decision clearing the way for greater access to the Peaks for seasonal throngs of "snow bunnies."

f. *Inupiat Community v. U.S.* (1982). Another indigenous population was the Inupiat Eskimo of Alaska, which made its impress on the case law in this and other areas by suing the United States, the secretary of the Interior, the State of Alaska and numerous oil companies for violating their rights over the Arctic Slope and adjacent seas by drilling for oil therein. The case of significance to this work is *Inupiat Community of the Arctic Slope v. U.S.*, which—as the trial judge acidly observed—was "not the first time these parties have met in a courtroom." (It was the first case, however, to raise a claim of violation of religious rights.)

> This suit is but the latest in a line of legal actions through which the Inupiat Eskimo have sought control over the region in which they have long resided.
>
> * * *
>
> Much of the Inupiat's claim to the Beaufort and Chukchi Seas off-shore areas is based on notions of tribal sovereignty. The Inupiat constantly reiterate that they have never been conquered, have never voluntarily submitted to the jurisdiction of the United States, and have at every opportunity resisted federal and state regulation of their hunting, fishing, whaling and sealing rights. In effect, the Inupiat claim that they have all the rights of self-determination and sovereignty of an independent nation. These assertions sweep far too broadly.
>
> Tribes of American natives, especially those living on reservations, do possess some powers of self-determination and sovereignty over their territory.... These powers are especially strong when they relate to the internal sovereignty of the tribe and its rights to [control the] affairs of its members.... The external sovereignty of the tribes, however, is sharply limited by their dependent status.... In areas where the security of the United States as a nation and its dealings with foreign countries are a major concern, the intrinsic authority of the tribes is revoked by implication. Any exercise of external sovereignty by the Inupiat in the area of the outer continental shelf would be inconsistent with their status as members of the United States and hostile to the interests of the nation as a whole....[31]

31. *Inupiat Community of the Arctic Slope v. U.S.*, 541 F.Supp. 785 (1982), Fitzgerald, J.

The court dealt with several other grounds for the Inupiat claims, rejecting them all, and came at last—almost as an afterthought (as perhaps it was also to the Inupiat?)—to the religious claim.

> Finally, I conclude that the Inupiat's religious claim is also without foundation. It meets neither of the two elements of the test set by *Wisconsin v. Yoder*….[32] First, the action of the federal government in initially leasing in the Beaufort and Chukchi Seas beyond the three mile limit does not create a serious obstacle to the exercise of the plaintiff's religion. While the Inupiat allege that the government's actions threaten to deny them access to sacred sites, those they identify are located on land, well outside the area at issue in this suit. They offer no explanation of the religious significance of even those sites..., and they offer no explanation of how the [government's] activities may interfere with their free exercise of religion.... They also allege possible disruption of appeasement ceremonies, again without definition.
>
> In essence the Inupiats claim that their [religion is inter-]twined with their hunting and gathering life-style, and since all exploratory activities negatively affect some portion of their subsistence area, all such activity should be interdicted on free exercise grounds. Carried to its ultimate, their contention would result in the creation of a vast religious sanctuary over the Arctic seas beyond the state's territorial waters. A claim to such a large area based on such non-specific grounds cannot provide the sort of "serious obstacle" contemplated by Yoder.
>
> The Inupiat's claim also fails to meet the second requirement of Yoder. The government's interest in pursuing the development of the area outweighs the alleged interference with the plaintiffs' religious beliefs. The federal government has a significant economic stake in the development of energy resources within its borders.... Perhaps more importantly, the United States has treaty obligations to keep the high seas freely available for international passage and fishing....[33] Against these specific needs and obligations, I find that the generalized claims of the Inupiat are not adequate to strike a balance in their favor....
>
> Finally, I observe that the relief sought by the Inupiat creates serious Establishment Clause problems. The Supreme Court has held repeatedly that the First Amendment may not be asserted to deprive the public of its normal use of an area....[34] I deal in this suit with the high seas, an area which is public to the world under American law.... I therefore hold with other courts that a free-exercise claim cannot be pushed to the point of awarding exclusive rights to a public area.[35]

---

32. 406 U.S. 205 (1972), discussed at IIIB2.

33. Citing Convention on the Continental Shelf (1958) and Convention on the High Seas (1958).

34. Citing two free-speech cases and *Cox v. Louisiana*, 379 U.S. 536 (1965) and *Niemotko v. Maryland*, 340 U.S. 268 (1951), discussed at IIA2q.

35. *Inupiat Community, supra*. Citing *Hopi Indian Tribe v. Block*, *supra, sub nom. Wilson v. Block.*

Once again the Free Exercise claims (as well as other claims) of an aboriginal people were doomed to disappointment. In this instance, the Inupiat seem to have introduced the Free Exercise claim as a kind of make-weight to add to territorial claims on other grounds asserted previously and unsuccessfully. In competing with the possibilities of exploitation of vast oil reserves on the Arctic Slope, the Eskimos experienced the same sort of casual displacement that their American Indian cousins had already experienced.

g. *Fools Crow v. Gullet* (1983). In 1983 the Eighth Circuit Court of Appeals delivered its opinion in a case arising from the Black Hills of South Dakota, where a prominent geological feature called Bear Butte was the center of religious practices of the Lakota and Tsistsistas Indian people. That area had been purchased by the State of South Dakota in 1962 and made into a State Park. When the State Department of Game, Fish and Parks began constructing various improvement at the Park, representative members of the two tribes sought declaratory and injunctive relief in the federal district court. Chief Judge Andrew Bogue consolidated an evidentiary hearing on a motion for preliminary injunction with a trial on the merits and ruled on the parties' cross-motions for summary judgment.

The plaintiffs' witnesses included two Lakota medicine men, who explained the religious significance of Bear Butte.

> They stated that Bear Butte was the site where the Lakota originally met with the Great Spirit. It was the place of instruction and remains today the most significant of Lakota religious ceremonies. To the Tsistsistas, Bear Butte likewise is the site of pilgrimages, where worshippers go to receive the powers and benefits of the Great Spirit. Additionally, Lakota worshipers conduct the Vision Quest at Bear Butte. The Quest is one of the seven sacred ceremonies of the Lakota people. During the Quest, the vision seeker and all his family and companions must be purified by means of the "sweat lodge" ceremony. The worshipers fast during this time. The vision seeker climbs to a solitary place on the Butte where he prays aloud and sings. The vision seeker may leave sacred gifts on the Butte for the Great Spirit. During the Vision Quest, which may last up to four days, the companions wait below the Butte and sing honorary songs and pray.
>
> In this action, plaintiffs contend that the conduct of [the Parks Department] and the general public at Bear Butte destroys the sanctity and power of the religious ceremonies and violates their right to exercise freely their religious beliefs. Specifically, defendants have allegedly desecrated the ceremonial area at the foot of the Butte through the construction of access roads and parking lots. Defendants also constructed wooden viewing platforms on the Butte. It is also alleged that defendants disrupt ceremonies and interfere with the worshipers by permitting tourists to camp at the Butte and hike to the top of the mountain. Plaintiffs' witnesses stated that tourists violate the sanctity of the ceremonies by taking photographs, carrying food and water on the Butte, taking the worshiper's offerings from the Butte, and bothering prayers and singers. Plaintiffs

> alleged that defendants violate their constitutional rights by *allowing* tourists to behave as set forth above. Finally, plaintiffs allege that defendants denied the worshipers access to roots and plants necessary for Vision Quest ceremonies at the Butte.

(One can imagine a bunch of brash little non-Indian boys clambering over the rocks and making typical nuisances of themselves, distracting and irritating enough at best, but thoroughly disruptive to any efforts at spiritual devotion and concentration focused upon the Quest. Perhaps adults could be even more of a problem.) But the defendants had their side of the situation to explain.

> The [government] agreed that Bear Butte is a traditional, significant religious site for the Lakota and Tsistsistas people. In fact, [the government] maintain[s] the park, in part, to serve and assist Indian worshipers. The State also manages Bear Butte State Park for the benefit of the general public.
>
> This most recent dispute apparently arose when the [government] began several construction projects at the park.... Most important of these projects was an access road and parking lot adjacent to the area...traditionally used by Indians as a ceremonial ground and campsite. The State maintains this campsite for the exclusive use of ceremonial campers. The general public is not authorized to drive to or camp in this area. [The government] found, however, that the vehicles of the ceremonial campers became mired in the mud near the campsite; the makeshift road also provided poor access to the campsite. As a result of vehicle traffic through the open fields, vegetation was destroyed and erosion occurred. For this reason [the Park Manager] sought and received authorization to build the road and parking lot at the ceremonial grounds. Although plaintiffs' witnesses abhorred the desecration represented by the construction, defendants contend many worshipers in the past urged the State to provide better and safer access to the site. The parking lot does not occupy the area utilized for ceremonies. It would occupy the same area used by worshipers to park their automobiles in the past. At this ceremonial area the defendants also provide services such as outdoor bathroom facilities, garbage disposal, and free firewood. The plaintiffs apparently do not object to these activities of defendants....
>
> Additionally, [Tony] Gullet [Park Manager] testified that park employees are instructed to urge tourists and hikers not to interfere with the Indian worshipers at the Butte. [(Always a sure stimulus to little boys.)] Although plaintiffs object to the construction of platforms on the Butte, Gullet testified that the platforms were built as a means of minimizing the contacts of tourists with worshipers. Tourists are told by defendants not to stray from established hiking trails or from the viewing platforms. Violators are arrested and issued citations. Gullet testified that there are places on the Butte to which worshipers may go out of the sight of the general public. Although worshipers may still hear other hikers and campers, Gullet testified that many of the sources of noise at the Butte are outside defendants' control. Gullet also testified that defendants permit hiking on the Butte by the general public only between the hours of eight

> o'clock, a.m., to eight o'clock, p.m. Indian religious campers are free to stay on the Butte overnight and may freely hike and camp without regard to the time regulation.
>
> * * *
>
> The record does not disclose a single instance in which defendants denied any plaintiff access to Bear Butte for the purpose of conducting ceremonies of worship.
>
> * * *
>
> Defendants' witnesses testified that it is the policy of the Department to accommodate and not to infringe upon the traditional uses of Bear Butte. Defendants assert that they have never in the past, nor will they in the future, deny Indian worshipers access to the Butte. Instead, defendants contend that they have sought to minimize the conflict of competing recreational and religious uses of the Butte through the creation of distinct "activity sites."[36]

The court reviewed the then-current two-part constitutional test for the free exercise of religion,[37] noting that the Free Exercise Clause applied to the states through the Fourteenth Amendment.

> In this case, there is no dispute that plaintiffs' practices at Bear Butte are based upon a system of belief that is religious and is sincerely held by plaintiffs.... This Court, therefore, must determine whether the conduct of defendants violates the right of plaintiffs to the free exercise of their religion.
>
> * * *
>
> It is clear to this Court that plaintiffs have no property interest in Bear Butte or in the State Park. For many years the State has administered this area as a state park. During this time it appears that plaintiffs' religious practices managed to coexist with the diverse developments that occurred there.

The court quoted the decision in *Hopi Indian Tribe v. Block*[38] with approval:

> [Plaintiffs] are essentially claiming that anyone asserting a religious interest in government property...has a constitutional right to demand that the government grant them access to it, yet restrict the rights of the public to, and any development of, this property in order to facilitate the exercise of religious beliefs. This Court will not extend the First Amendment to such limits....
>
> This Court likewise concludes that plaintiffs failed to show that the construction projects now in progress, as well as the past development in the park, have burdened any rights protected by the free exercise clause. Plaintiffs failed to establish that particular religious practices were damaged by the construction or that the free exercise clause obligated

36. *Fools Crow v. Gullet* (indexed under *Crow*), 541 F.Supp. 785 (1982).
37. Derived from *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at § A7c above.
38. 708 F. 2d (1983), discussed at § e above *sub nom. Wilson v. Block.*

> defendants to waive their statutory power to manage and develop the state park in the public interest. Instead, we conclude that the free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out....
>
> This Court also rejects plaintiffs' claim that the free exercise clause obligates defendants to control the actions of the general public at the Butte which may interfere with plaintiffs' religious practices. Specifically, plaintiffs contend that defendants should not permit tourists to photograph vision seekers, ceremonies, or religious objects; bring water and food on the Butte during a vision quest; operate car horns, motorcycles, radios, etc., during a vision quest; take religious offerings off the Butte; permit non-Indian women having their menstrual period to go on the Butte during a vision quest. The first amendment does not require defendants to police the actions of tourists, even though defendants voluntarily urge tourists to respect the religious practices of plaintiffs at the Butte.
>
> * * *
>
> In this context, it is significant that plaintiff Grover Horned Antelope testified that he successfully completed his Vision Quest last year, in spite of distractions by tourists. This Court concludes, therefore, that defendants have not burdened the exercise of plaintiffs' religion by "allowing" tourists to act on occasion in a manner which does not conform to the dictates of plaintiffs' religion.
>
> * * *
>
> Finally, this Court further concludes that plaintiffs' right of free exercise of religion is not infringed when they are required to register at the Park Visitor Center and acquire camping permits. The courts hold permit requirements unconstitutional only when they have been used to restrain first amendment rights without narrow, objective standards.... Plaintiffs did not allege that the permit requirements restricted [their] access to the Butte or to ceremonial sites.... The requirements do not require plaintiffs to violate any tenet of their religion, but serve valid state interests in controlling traffic at the state park and in providing the means to contact visitors in case of an emergency.

The court turned its attention to the American Indian Religious Freedom Act and observed that "it is not clear that the Act governs the conduct of state governments or agencies. It applies expressly only to the federal government." But that wasn't all.

> Second the Act does not create a cause of action in federal courts for violation of rights of religious freedom. The Act is merely a statement of the policy of the federal government with respect to traditional Indian religious practices.

Appeals to the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights fared no better. The court professed itself unable to find "any authority that indicates a legally cognizable right or cause of action is created" by either of them.

> In summary, this Court concludes that plaintiffs failed to establish any infringement of a constitutionally cognizable first amendment right. To the extent their right of access was temporarily restricted at the ceremonial grounds, this Court concludes that the plaintiffs' interests are outweighed by compelling state interests in preserving the environment and the resource from further decay and erosion, in protecting the health, safety, and welfare of park visitors, and in improving public access to this unique geological and historical landmark.

The court might well have left it there, but went on to suggest with more than a hint of asperity that if plaintiffs pressed their case much further they risked running afoul of the Establishment Clause.

> It is worth noting, finally, that some courts have expressed great concern that special treatment such as that afforded religious users of the park may constitute a violation of the Establishment Clause. At Bear Butte State Park, religious campers have a special camping area, from which the general public is excluded. Religious campers may acquire a permit to stay in the park up to ten days. The general public is limited to five days. Religious campers were permitted to camp free of charge at Bear Butte Lake. The general public must pay a fee to camp there. At the Butte itself, the Department has limited public access to established trails and platforms. Indian religious users may freely roam the Butte. Finally, the general public can hike the Butte only during a twelve-hour period of the day. Religious campers can stay on the Butte without regard to these time restrictions. Thus, defendants have gone far to afford special treatment and special privileges to American Indian religious practices at the Butte. Defendants justify their policies because the Indian religious tradition helps define the value and importance of Bear Butte to this region. In so doing, however, the government risks being haled into court by others who claim that the same rights of the general public are being unduly burdened, or that state government has become "excessively entangled" with religion, in violation of the Establishment Clause.[39]

The case was appealed to the Eighth Circuit, which in a *per curiam* decision affirmed the district court's opinion.[40] On petition for *certiorari* to the U.S. Supreme Court a brief *amicus curiae* was filed by the Christic Institute in support of petitioners, written by Richard Hughes, an American Indian and attorney of Albuquerque, New Mexico, which provided a cogent critique of Judge Bogue's rather facile approach to the case.

> I. Bear Butte Is Central and Indispensable to Petitioners' Religions
>
> The Importance of Bear Butte to the Lakota and Tsistsistas religions is well documented.... Both religions hold that Bear Butte is the center of the world and the indispensable altar for lonely communion with the

39. *Fools Crow v. Gullet, supra*. citing at the end *Widmar v. Vincent*, 450 U.S. 909 (1981), discussed at IIIE3b, which is curious, since *Widmar* expressly rejected such an establishment claim.

40. *Crow v. Gullet*, 706 F.2d 856 (1983).

Supreme Being.... The Tsistsistas prophets received the covenant at Bear Butte from the Creator who dwells within the sacred mountain; and according to the Lakota, the Great Spirit issues his commandments there.

The high dieties of the Tsistsistas religion, the Creator and Mother Earth, join at Bear Butte to form the world's axis where the sacred Four Directions meet. Sacred Mountain is the pillar that supports the firmament above and forms the highest point on earth. This mountain connects the spirits above the earth to those below....

* * *

In the core religious experience of the vision quest, the mountain itself becomes the altar upon which the seeker stands alone. To experience a vision he must pray and fast in solitude at a questing place.... He sets out tobacco and flag offerings at his prayer spot.... If the seeker is worthy, a spirit breaks his solitude, offering special power that can be summoned for protection and curing....

* * *

The Locus of the Creation, Bear Butte has power only to the extent that it is preserved in its natural topography. Freedom from intrusive distraction is required to protect the delicate sacred communications there. Without Bear Butte, both religions' bonds to the Supreme Being would be broken.

II. Petitioners' Free Exercise of Religion Has Been Substantially Burdened

* * *

In this case, the state's activities preclude Petitioners' exercise of their religion in accordance with their beliefs by denying the ritual integrity and religious efficacy of the practices that are central to Petitioners' religions. The court took notice that Bear Butte is central and indispensable, and that "silence and solitude are essential in their mind to accomplish what they wish to accomplish." If South Dakota develops Bear Butte as a tourist attraction it can no longer be effectively used for the religious practices to which it has been dedicated from time immemorial.

Although the court below found "centrality" in this case, it cited as precedent for its ruling such cases as Hopi and Sequoyah in which centrality was not found. Because [those] cases also involved denial of physical access to sites, the court simply applied their rules as an applicable standard for this case. But here the state's construction and tourism activities interfere with "an essential part of [petitioners') religious belief and practice."[41] This centrality of Bear Butte to Petitioners' religions, for the very reasons stated by the Sixth Circuit in Sequoyah, demand the different result here of protection against the burdens imposed by South Dakota.

Any construction at Bear Butte burdens Petitioners' religious expressions because it violates the natural topography, diminishes the power of Sacred Mountain and causes ritual failures.... Such desecration precludes use of the land for its traditional spiritual purposes. "Any

41. *Wisconsin v. Yoder, supra*, at 210.

obstruction or building of that sort in sight...is a distraction and it just pulls our meditation and concentration away from prayer."

Tourist noises, traffic and other interruptions "interferes with the Vision Quest, because it interferes with communication with the spirit world; and destroys the strength of the ceremony itself." Affidavit of Larry Red Shirt. "[I]t is of the utmost importance that Bear Butte may not be contaminated in any way."

When we go on a fast, we wish to be excluded from the world, the noise even, and that's why we fast and that's why we go there without food, without water. We want to put away those things that make our life a pressure. We want to fast; we want to suffer; we want to give back to God, the Great Spirit, something that he made of me here in this world. Affidavit of Pete Catches....

But with tourist development reaching 100,000 visitors a year at the Butte, it is now impossible to fast according to the ceremonial rules that require seclusion from the world....

* * *

III. The State Has No Compelling Reason for Restricting Petitioners' Religions

A burden on the free exercise of religion is constitutionally tolerable only if outweighed by state interests that are "compelling...."

* * *

Even a superficial consideration of the state interest involved here, that of promoting recreational opportunity, would reveal less restrictive alternatives. That the State controls 200,000 acres of parkland indicates that recreational interests can be "otherwise served" by the State of South Dakota away from Bear Butte.

The court below went astray by failing to adequately weigh the burden on Petitioners' religions against alleged compelling interests of the state. In fact, it may well be questioned whether the court below ever did enter upon this crucial step of First Amendment analysis. Where, as here, only commercial and recreational interests in tourism are counter-poised to religious freedoms, a careful and detailed analysis is required to adequately weigh the interests at stake. This the court below failed to do....

* * *

The court below reasoned that to halt construction at Bear Butte would force Respondents to "waive statutory power to manage and develop the state park in the public interest." But park officials do not jeopardize their authority by adopting tourism development programs that do not infringe upon important First Amendment freedoms.

The court found a compelling interest in "preserving the environment and the resource from further erosion and protecting the health, safety and welfare of park visitors and in improving public access." There was no evidence that access by Petitioners to Bear Butte to practice their religious ceremonies had a significant adverse environmental effect. There was no evidence of serious erosion endangering park visitors. Increased public access, although a more specific value, is surely not compelling nor of the "highest order." Further recreational development of a few hundred acres,

to which the public already had ample access, and which will only further [erode] Petitioners' religious freedoms, cannot justify Respondents' restrictions.

Precedent for the state interest asserted to support tourist desecration of the site was found by the court in the Tenth Circuit's Badoni case. There it was said that the First Amendment gives one "no right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities...."

But the court missed the point. Petitioners did not claim that environmental protection interfered with religious exercise but that the continued development of a tourist industry is not sufficiently compelling to allow government interference with religious ceremony.

In 1982 the park established permit registration so that visitors could be notified of emergencies arising outside the park. This service to visitors plays no role integral to park management, but the court refused to compromise even the minimal state interest involved in this service....

IV. Petitioners' Requested Relief Would Not Violate the Establishment Clause

The district court below suggested...that it might violate the Establishment Clause to grant Petitioners' request for relief. To restrict construction and tourism at the sacred mountain would not, contrary to the District Court's suggestion, provide the "means and environment" for Petitioners' religious practices.... The state does not provision the rituals at Bear Butte. The mere absence of construction and tourists [would] not make the mountain and its ceremonies sacred. Petitioners do not ask the state to exclude tourists from Bear Butte; they only ask that South Dakota stop construction which desecrates the mountain and promotes additional tourism, and restore the Sacred Mountain to its former virtually pure condition. For the park authorities to weigh competing interests according to First Amendment standards is not an impermissible entanglement with religion....

The district court raised the specter of a "government-managed religious shrine" to refuse Petitioners relief from tourist interferences.... Certain active assistance, such as all-weather roads and running water, the court permitted. But mere limitation of tourist activity, which entails no active involvement in the religion, the court found to be an entanglement. The court overlooked that it is not a religious preference to provide worshipers the same facilities for exercising freedom of speech and assembly that other groups enjoy.... To reserve sacred sites for religious use, as tennis courts are reserved for tennis and classrooms for discourse, cannot violate the Establishment Clause. The Court has allowed mere instrumental concerns to outweigh even First Amendment interests in order to exclude the public and press from prisons, military bases and libraries, and undoubtedly public exclusion from numerous other kinds of government property would be upheld....

Bear Butte has been dedicated to religious worship since before the Constitution was written. When, as here, the First Amendment weighs on

> the side of excluding the public, certainly the State has the power, if not the obligation, to preserve that use of the property just as it would any mere instrumental use of the property against demands of access by the public.... Extending the state's general protection for purposes of preserving Bear Butte's pre-existing sacred character would not amount to "establishing" Petitioners' religions there. Such protection would only avoid "disestablishing" the historical sacred nature of Bear Butte and thereby avoid burdening Petitioners' free exercise of religion.... The court saw the burdens on Petitioners' free exercise as assistance and their removal of these burdens as excessive entanglement. But removal of burdens on free exercise is not an establishment issue where less entanglement would result.[42]

The "vision quest" is a kind of spiritual athleticism to which even the most pyknic Indian youth can aspire. The ascetic rigor described by Peter Catches is a religious self-discipline that requires the degree of intense, protracted concentration attained by a concert pianist, a singer recording a difficult aria, a gymnast performing a dangerous feat, where a sudden loud noise or interruption can break the spell and waste the energy of preparation and execution. It is curious that people who can understand that one should not move around or even cough when a tennis star is preparing to serve seem not to comprehend that the same courtesy is needed in the presence of one trying to address an even more significant Audience. An Indian seeking a vision through fasting and prayer needs all the help he can get in the way of insulation from distraction. What a burden upon the spiritual aspirant it is to have to labor along the mystic path against the barrage of visual and aural "static" from gaggles of uncomprehending tourists! Even *attempted* discipline of the spirit is so rare that society should celebrate it by staying as far out of its way as possible, which is what the Free Exercise Clause of the First Amendment seems designed to promote.

One yearns for a world in which the spirit of the Free Exercise Clause could be honored by a universal willingness to set aside the Sacred Mountain for the exclusive use of Indians who go there for their crucial spiritual journeys. They do not require any special provision by the state other than to be *left alone*—a luxury of increasing rarity—to pursue their ancient path. With 200,000 acres of state parkland in a rather sparsely populated state, South Dakota ought to be able to devote a few hundred acres to preserve and protect the immemorial religious usage of its first inhabitants, who in so many other tragic ways have already been progressively dispossessed.

But, said the judge, they have no Property Interest in the place—meaning that they do not "own" the premises of their religious practices, in the imported European sense of property ownership. In that sense, the aboriginal peoples once "owned" it all, and the Europeans are the interlopers. But Indians have difficulty conceiving of anyone's "owning" the earth, or even portions of it. Grandmother Earth is there for all, belonging no more to one than another; though some may occupy portions of it temporarily, it is not their perpetual *possession*. The tribes in this case did not seek *exclusive* use of the Sacred Mountain, just decent respect for their

42. *Fools Crow v. Gullet,* brief *amicus curiae* of Christic Institute.

primordial rites of veneration that could be performed nowhere else. That seems very little to ask, but apparently it was more than the bustling, crowded, heedless "Anglo" society was willing to grant.

In November 1983 the U.S. Supreme Court denied the petition for writ of *certiorari* in *Fools Crow v. Gullet*, leaving standing the ruling of the courts below.

h. ***Northwest Indian Cemetery Protective Assn. v. Peterson*** **(1982, 1983).** Marvelous to relate, a somewhat different result for the Indians came forth—at least temporarily—from California. In the northwest corner of that state the U.S. Forest Service, after five years of planning and of fending off environmentalists' objections, was prepared to construct a paved road through a previously roadless area of the Blue Creek Unit of the Six Rivers National Forest and open it up to timber "harvesting." The Chimney Rock Section would connect already paved sections of a road between Gasquet and Orleans, California, and would traverse an area considered sacred by three tribes of American Indians. These tribes, in company with the Wilderness Society, the Sierra Club, four other environmentalist groups and the State of California (through its Native American Heritage Commission), brought suit in federal district court for a preliminary injuction, which was denied "based upon defendants' assurance that no construction would occur prior to the Court's ruling on the merits." Judge Stanley Weigel had based the earlier ruling largely upon his estimate that the plaintiffs were unlikely to prevail on the merits. Nevertheless, he set it for early trial and in his subsequent opinion considered the Indians' Free Exercise claims.

> In reviewing the nature of the religious beliefs involved in this case, it must be remembered that their unorthodox character is no basis for denial of the protection of rights guaranteed by the Free Exercise Clause.... Thus, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[43]
>
> The northeastern corner of the Blue Creek Unit is considered sacred by members of the Yurok, Karok, and Tolowa Indian tribes. [Footnote 3: Secrecy surrounding religious use of the high country makes estimation of the number of users difficult.... Nevertheless, it appears that between 110 and 140 members of these tribes make current use of the high country for religious purposes, although the nature and frequency of such use varies widely among these individuals.... This number does not include the much larger group of tribal members who participate in religious ceremonies involving use of the high country.] Although the high country includes the highest mountain peaks in this corner of the Blue Creek Unit, such as Chimney Rock, Doctor Rock, and Peak 8, the area considered sacred encompasses an entire region rather than simply a group of individual sites....[44] The Indian plaintiffs and the State of California assert that [construction of the road or harvesting of timber] would desecrate the high country in violation of the Indian plaintiffs' rights under the Free Exercise Clause of the First Amendment.

43. Quoting *Thomas v. Review Board*, 450 U.S. 707 (1981), discussed at § A5l above.

44. See similar claim of Taos Pueblo Indians at § a above.

The Indian plaintiffs' use of the high country for religious purposes is not in dispute. Ceremonial use...dates back to the early nineteenth century...and probably much earlier.... Members of these tribes currently make regular use of the high country for several religious purposes. Individuals hike into the high country and use "prayer seats" located at Doctor Rock, Chimney Rock, and Peak 8 to seek religious guidance or personal "power" through "engaging in emotional [and] spiritual exchange with the creator." Such exchange is made possible by the solitude, quietness, and pristine environment found in the high country....

For a number of reasons, the Indian plaintiffs contend that construction of the Chimney Rock Section [of paved road] would violate the sacred qualities of the high country and impair its successful use for religious purposes. First, they claim, visibility of the road from religious sites would damage the pristine visual conditions found in the high country that are essential to its religious use.... (The Chimney Rock Section [of road] would dissect the high country, and separate Chimney Rock to the north from Peak 8 and Doctor Rock to the south.) Second, increased aural disturbances from construction and use of the road would similarly impair the success of religious and medicinal quests into the high country. [Footnote: The Forest Service estimates that an average of 76 logging and 92 other vehicles would traverse the (road] every day.] Third, environmental degradation of the high country resulting from construction of the road would erode the religious significance of the areas.... Finally, religious use of the area would be impaired by increased recreational use resulting from construction of the [road].

The [Forest Service's] Management Plan calls for the harvesting of timber and the construction of approximately 200 miles of logging roads in areas immediately adjacent to Chimney Rock, Doctor Rock, Peak 8, and to other religious sites within the high country. The Forest Service has proposed "protective zones" around Chimney Rock, Doctor Rock, Peak 8, and a few other sites, which would forbid timber harvesting or the construction of logging roads within one-half mile of these locations.... Even so, plaintiffs urge that these protective zones would fail significantly to mitigate the adverse visual, aural and environmental impacts of logging activities on the high country's salient religious characteristics. [Footnote: The religious integrity of the high country rests on the pristine qualities of the entire area rather than on just a few individual sites.... Because many of the important sites are located at the highest elevations, the visual impact of logging the valleys between these peaks could not be mitigated....]

* * *

Relatively few courts have faced claims similar to those advanced by the Indian plaintiffs in this case. A majority of those courts concluded that the challenged government activity did not burden the free exercise of Indian religious practices.[45]

* * *

45. Citing *Sequoyah v. TVA, Hopi Indian Tribe v. Block, Crow v. Gullet,* and *Badoni v. Higginson* (district court decision), discussed earlier in this title, in all of which cases the Indian plaintiffs lost.

In the present case, [the government] concede[s] that the Indian plaintiffs' use of the high country for religious practices is entitled to First Amendment protection. The Indian plaintiffs' claim that the high country is sacred is both sincerely held and "rooted in religious belief...." Similarly, [the Indians'] lack of a property interest in the high country does not release defendants from the constitutional responsibilities the First Amendment imposes on them.

The first step in evaluating plaintiffs' claim based upon their constitutional right to the free exercise of religion is to determine whether the challenged actions do burden that right. The evidence establishes that construction of the [road] and/or implementation of the [harvesting of timber] would seriously impair the Indian plaintiffs' use of the high country for religious practices.

For generations, individual members, spiritual leaders, and medicine persons of the [three] tribes have travelled to the high country to communicate with the "great creator," to perform rituals, and to prepare for specific religious and medicinal ceremonies. Such use of the high country is "central and indispensable" to the Indian plaintiffs' religion.... For [them], the high country constitutes the center of the spiritual world. No other geographic areas or sites hold equivalent religious significance for these tribes. Further, use of the high country is essential to performing the "World Renewal" ceremonies, such as the White Deerskin and Jump dances, which constitute the heart of the Northwest Indian religious belief system. Finally, use of the high country in training young persons in the tribes in traditional religious beliefs and ceremonies is necessary to preserve such practices and to convey them to future generations. Degradation of the high country and impairment of such training would carry "a very real threat of undermining the [tribal] communi[ties] and religious practice[s] as they exist today."[46]

Communication with the "great creator" is possible in the high country because of the pristine environment and opportunity for solitude found there. Construction of the [road] and/or the harvesting of timber in the high country, including "clear-cutting," would seriously damage the salient visual, aural, and environmental qualities of the high country. The Forest Service's own study concludes that "[i]ntrusions on the sanctity of the Blue Creek high country are * * * potentially destructive of the very core of Northwest [Indian] religious beliefs and practices."

* * *

Once a burden on the free exercise of religion is established, "only those interests of the highest order" can uphold the challenged government action. Defendants assert that construction of the [road] would (1) increase the quantity of timber accessible to harvesting in the Blue Creek Unit; (2) stimulate employment in the regional timber industry; (3) provide recreational access to the Blue Creek Unit as well as permit through recreational traffic...; (4) further the efficient administration of Six Rivers National Forest by the Forest Service; and (5) increase the price of bids on

46. Quoting *Wisconsin v. Yoder, supra,* modified by the *Peterson* court.

future timber sales in the Orleans area...by decreasing the cost of hauling such timber to [lumber] mills located in Del Norte County. Defendants also contend that implementation of the Management Plan would increase timber production in the Blue Creek Unit, thereby stimulating the regional timber industry and increasing Forest Service revenues, a fixed proportion of which is returned to the four counties partly located in Six Rivers National Forest.

Construction of the [road] would not materially serve several of the claimed governmental interests. First, the Forest Service concedes that construction...would not improve access to timber resources in the Blue Creek Unit. That timber could be harvested without building the Chimney Rock Section [of road]. Second, completion of [that section] would result in no net increase in the number of jobs in the regional timber industry. The most it would accomplish would be the transfer of a certain number of jobs from Humboldt County to Del Norte County. Third, increased recreational access to the area...cannot support infringement of plaintiffs' First Amendment rights. Recreational access to the area currently exists, and the Forest Service projects that an average of only eight vehicles per day would use the road for recreational purposes. Moreover, although recreational access to the area by means of motor vehicles would be somewhat improved, resulting environmental degradation would decrease the area's suitability for primitive recreational use.

The remaining interests defendants offer in support of construction of the [road] fall far short of constituting the "paramount interests" necessary to justify infringment of plaintiffs' freedom of religion. Construction of the road would not greatly improve the efficient administration of Six Rivers National Forest. The Forest Service is currently able efficiently to provide all needed administrative services to the Chimney Rock-Doctor Rock area.... The Forest Service's interest in more efficiently providing road maintenance and fire protection cannot justify infringment of the free exercise of plaintiffs' religion. Both services are efficiently provided at present.

Defendants claim that construction of the [road] would increase competition for timber in the Orleans area...and thus increase Forest Service revenues.... Defendants failed to introduce any evidence whatever establishing the likely effect of the road construction on regional timber markets.... Such speculative and diffuse goals as these cannot provide the basis for denying plaintiffs' free exercise claim.

* * *

Harvesting of timber from the Blue Creek Unit pursuant to the Management Plan would not serve any compelling public interest. That timber is a small fraction of the timber resources found in the entire Six Rivers National Forest. Its harvesting would not significantly affect timber supplies. Moreover, the regional timber industry will not suffer greatly without access to timber in the Unit. Finally, even if defendants could demonstrate a compelling need for additional timber harvesting in the Blue Creek unit[,] means less restrictive of plaintiffs' First Amendment rights...exist that would satisfy that need. The Management Plan could

> easily be more narrowly tailored to accommodate Indian religious use of the high country and at the same time exploit most of the timber resources present in the Blue Creek Unit....
>
> Defendants assert that the grant of an injunction preventing construction of the Chimney Rock Section or implementation of the Management Plan based upon the Indian plaintiffs' free exercise claim would create a government-managed "religious shrine" in violation of the Establishment Clause of the First Amendment. This assertion is without merit. Actions compelled by the Free Exercise Clause do not violate the Establishment Clause. In the present case, the Forest Service failed to accommodate the Indian plaintiffs' religious practices to the extent required by the Free Exercise Clause. Government actions having the goal and effect of such accommodation and which do not result in excessive government entanglement with religion are consistent with the Establishment Clause.... Otherwise, courts could not, based upon the need to accommodate legitimate religious practices, grant exemptions to laws requiring compulsory school attendance,[47] punishing use of peyote,[48] or fixing eligibility standards for unemployment compensation.[49]
>
> The nature of the relief the Indian plaintiffs seek supports the conclusion that accommodation of the Indian plaintiffs' free exercise rights does not entail excessive government entanglement with religion. Plaintiffs do not request that the Forest Service exclude recreational users from the Blue Creek Unit or regulate the behavior of those users in any way.... Rather, plaintiffs contend that in reaching its decisions the Forest Service failed to weigh competing public interests, both secular and religious, in the manner prescribed by the First Amendment. Since plaintiffs prevailed on that claim, the offending decisions of the Forest Service cannot stand.[50]

This was a classic confrontation between the Forest Service and its primary clientele, the timber industry, on the one hand, and the environmentalist interests on the other, among which was the Indian interest in undisturbed use of the sacred heights in their pristine state. In this instance a perspicacious judge pressed the asserted interests of the government far enough to ascertain that they were not nearly as compelling as they were claimed to be. Not all judges are disposed to push matters that far. Perhaps the intervention of the State of California may have lent a degree of extra weight to the interests of the Indians and the environmentalists. In any event, this case was almost unique (along with *Woody*) in upholding an Indian religious claim. And Judge Weigel decided for the Indians without help from the American Indian Religious Freedom Act, which he ruled the Forest Service had obeyed.

> Although defendants' proposed actions violate the Indian plaintiffs' First Amendment rights, defendants did make sufficient efforts to protect those rights to satisfy the requirements of the AIRFA. Defendants commissioned

47. Citing *Yoder, supra.*
48. Citing *People v. Woody, supra,* obviously prior to *Oregon v. Smith, supra.*
49. Citing *Sherbert v. Verner, supra.*
50. *Northwest Indian Cemetery Protective Assn. v. Peterson,* 565 F.Supp. 587 (1983).

> studies on Indian beliefs and practices...and held hearings at which Indian representatives testified. In addition, defendants selected the D-4 route for the Chimney Rock Section in part in order to lessen the road's adverse impact on Chimney Rock.

In other words, the Forest Service could completely comply with AIRFA and still proceed to "violate the Indian plaintiffs' First Amendment rights"! The conclusion is inescapable that AIRFA was at best indeed only a "paper tiger," since "it has no teeth," as its sponsor rightly observed.[51] One may wonder what sort of deity can be communicated with only in the untouched solitude of the virgin forest, but if one has seen the devastation wrought by "clear-cut" timber "harvesting," the difficulty of communicating with any deity in that setting is more comprehensible. Indian life and religion are attuned to a kind of affinity for untouched nature that is very vulnerable to the actions of those who see the forest as a mere "crop" to be "harvested" by the most practical means, which is the view embraced by the Forest Service, perhaps necessarily, since it is a branch of the Department of Agriculture. But Judge Weigel ruled that the Forest Service's view did not need to apply to every square foot of National Forest. "You've got lots of timber to cut elsewhere," he said in effect, "so run along and leave this sector alone."

Sometimes the objection is raised—as it was in the Taos Pueblo situation—that "not many Indians use the sacred places anyway." That is probably true. Not all Indians are devout followers of the traditional religion (or any other), partly because destruction of the natural habitat has made it an increasingly uphill path. But not all non-Indians are devout either, and that is not thought to be a justification to bulldoze the churches into rubble to make way for more cinderblock shopping centers. The whole point of the Free Exercise Clause (and—one would have thought—of AIRFA) was to insure that the path is not made any more uphill than necessary for those who do want to follow it.

i. *Lyng v. Northwest Indian Cemetery Protective Association* (1988). While the decision discussed immediately above was awaiting review in the Ninth Circuit Court of Appeals, Congress enacted the California Wilderness Act,[52] which designated much of the area under litigation as wilderness, prohibiting commercial activities such as timber harvesting, but exempting a narrow strip of land where the Forestry Service planned to connect the disputed G-O road pending completion of the appeals process, "to enable the completion of the Gasquet-Orleans Road project if the responsible authorities so decide."[53]

In due course a panel of the Ninth Circuit affirmed the district court's decision to the extent that it found that the government had failed to demonstrate a compelling interest in the completion of the road, especially since the possibility of timber harvesting had been largely precluded by the Wilderness Act. It also rejected the idea

51. See quotation from Rep. Morris Udall, quoted in *Wilson v. Block* at end of § e above.
52. California Wilderness Act of 1984, P.L. 98-425, 98 Stat. 1619.
53. Sen. Rep. No. 98-582, p. 29 (1984).

that abandoning the road would have created "a religious preserve for a single group in violation of the establishment clause."[54]

The U.S. Supreme Court agreed to hear the case at the behest of Richard E. Lyng, Secretary of Agriculture, and decided it in an opinion delivered by Justice O'Connor for a majority of five, including Chief Justice Rehnquist and Associate Justices White, Stevens and Scalia. The majority chided the courts below for reaching constitutional questions when the issue could be decided on statutory grounds and for failing to "articulate the bases of their decisions with perfect clarity." But since the courts below appeared to have relied upon constitutional considerations in prohibiting completion of the road, and because the government was appealing only the constitutional issue, claiming that it could cure any statutory shortcomings, the court proceeded to deal with the constitutional merits.

> It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion. Respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in timber harvesting in the Chimney Rock area. We disagree.[55]

The court recalled that a similar claim had been dealt with in *Bowen v. Roy*,[56] in which applicants for public welfare had refused to use a Social Security number for their daughter, Little Bird of the Snow, because it would "rob her spirit." The court had rejected that claim (at least insofar as it would prevent the government from assigning and using such a case number itself; the court did not enlist a majority in support of the government's power to require the *plaintiffs* to *use* or *supply* that number in violation of their religious beliefs—only three justices subscribed to that view, a fact often overlooked by those who cite *Bowen v. Roy* as though the entire opinion written by Chief Justice Burger were the opinion of the court, which it is not). Justice O'Connor quoted from the portion of *Bowen v. Roy* that did command a majority:

> "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 [the Roys] engage in any set form of religious observance, so [they] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter....
>
> "...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."

---

54. *NWICPA v. Peterson*, 795 F.2d 688, 694 (1986).

55. *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S.439 (1988).

56. 476 U.S. 693 (1986), discussed at § A9g above.

> The building of a road or the harvesting of timber cannot meaningfully be distinguished from the use of a Social Security number in *Roy*. In both cases, the challenged government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by other citizens.

Both the Indian respondents and the state of California had attempted to distinguish the *Roy* case from the one at bar, the state pointing out that the Social Security number used by the government to designate Little Bird of the Snow in its own internal recordkeeping would be known to the Roys only "second-hand" and would not directly interfere with their ability to practice their religion (if *they* were not required to use it), whereas the proposed road would "physically destro[y] the environmental conditions and the privacy without which the [religious] practices cannot be conducted."[57] But the court was not persuaded.

> These efforts to distinguish *Roy* are unavailing. This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy*..., and accordingly cannot weigh the adverse effects on the Roys and compare them with the adverse effects on respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other.

This argument seemed disingenuous. It was not the difference in the beliefs of the complainants that was the primary concern but the gross difference in the government's actions bearing on their religious beliefs and practices. For the government to designate its file for Little Bird of the Snow by a Social Security number it had assigned her without her parents' knowledge or consent, and without requiring *them* to use it, was utterly different from the government's permitting commercial lumbering concerns to rip up and ravage vast tracts of the landscape around the Indians' sacred sites or building a road through them. There was no way in which the Indians in the latter case could remain unaffected by the government's actions, whereas in the former case they might.

The [Indians] cited earlier Free Exercise decisions of the court they thought required similar relief in the instant case—*Wisconsin v. Yoder*,[58] *Sherbert v. Verner*,[59] *Thomas v. Review Board*[60] and *Hobbie v. Florida*[61]—but without avail. Justice O'Connor sought to distinguish them, not altogether convincingly.

---

57. *Lyng, supra,* Brief for Respondent State of California; brackets are the Supreme Court's revisions.
58. 406 U.S. 205 (1972), discussed at IIIB2.
59. 374 U.S. 398 (1963), discussed at § A7c above.
60. 450 U.S. 707 (1981), discussed at § A5l above.
61. 480 U.S.136 (1987), discussed at § A7i above.

It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship. This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit": "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."[62]

Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices. Those practices are intimately and inextricably bound up with the unique features of the Chimney Rock area, which is known to the Indians as the "high country." Individual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the tribe, and indeed, of mankind itself. The Indians use this area, as they have used it for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals. According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible. To be sure, the Indians themselves were far from unanimous in opposing the G-O road..., and it seems less than certain that construction of the road will be so disruptive that it will doom their religion. Nevertheless, we can assume that the threat to the efficacy of at least some religious practices is extremely grave.

Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will "virtually destroy the Indians' ability to practice their religion," the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects— will always be considered essential to the spiritual well-being of some citizens, often on

62. *Sherbert v. Verner, supra*, at 412, Douglas concurring.

the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.[63]

One need not look far beyond the present case to see why the analysis in *Roy*, but not respondents' proposed extension of *Sherbert* and its progeny, offers a sound reading of the Constitution. Respondents attempt to stress the limits of the religious servitude that they are now seeking to impose on the Chimney Rock area of the Six Rivers National Forest. While defending an injunction against logging operations and the construction of a road, they apparently do not *at present* object to the area's being used by recreational visitors, other Indians, or forest rangers. Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands.... No disrespect for [their] practices is implied when one notes that [their] beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial: the District Court's order permanently forbade commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (i.e., more than 17,000 acres) of public land.

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law forbidding Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.[64]

Nothing in our opinion should be read to encourage governmental insensitivity to the religious need of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents. It is worth emphasizing, therefore, that the Government has taken numerous steps in this very case to minimize the

63. Cf. The Federalist No. 10 (suggesting that the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects).

64. Cf. *Bowen v. Roy*, at 724-727 (O'Connor concurring in part and dissenting in part) (distinguishing between the Government's use of information in its possession and the Government's requiring an individual to provide such information).

> impact that construction of the G-O road will have on Indians' religious activities. [enumerating them]
>
> * * *
>
> Except for abandoning its project entirely, and thereby leaving the two existing segments of road to deadend in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous. Such solicitude accords with "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian...including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." American Indian Religious Freedom Act (AIRFA).
>
> Respondents, however, suggest that AIRFA goes further and in effect enacts their interpretation of the First Amendment into statutory law.... This argument is without merit.... Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.
>
> What is obvious from the face of the statute is confirmed by numerous indications in the legislative history. The sponsor of the bill that became AIRFA, Representative Udall,... emphasized that the bill would not "confer special religious rights on Indians," would "not change any existing State or Federal law," and in fact "has no teeth in it."[65]

And so the one claim of Indian religious freedom that had survived the circuit courts to reach the Supreme Court was turned back with a finality that seemed to doom all similar claims in the future to similar defeat. One of the more regressive holdings of this series of cases— that Indians could not claim Free Exercise rights on land they didn't own[66]—although deprecated by subsequent opinions in other circuits, was in effect approved by the Supreme Court when it announced that Indians could not prevail against the "Government's rights to the use of *its own land*," as though the government were an adverse private property owner in its own right rather than the caretaker of the *public* lands that belong to all the people. To be sure, the Indians were generously conceded the right to come on to the public lands like any other "recreational visitors"—as long as they didn't get in the way of the bulldozers—and to watch the timber being hacked and slashed and dragged from their ancestral sacred sites. And this rejection of their claims was crowned by the reminder—adding insult to injury—that the American Indian Religious Freedom Act did not prevent this outcome: it "has no teeth in it"!

Justice Brennan did not let this pass without protest. He wrote a lengthy and eloquent dissent, in which he was joined by Justices Marshall and Blackmun. (Justice Kennedy had just come on to the court and, having been on the Ninth Circuit Court of Appeals when it dealt with this issue, took no part in the consideration or decision of this case.)

---

65. *Lyng, supra*, quoting 124 Cong.Rec. 21444-21445 (1978).

66. *Sequoyah v. TVA,* 620 F.2d 1159 (1980), discussed at § c above.

> "`[T]he Free Exercise Clause,'" the Court explains today, "`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.'" Pledging fidelity to this unremarkable constitutional principle, the Court nevertheless concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not "doing" anything to the practitioners of that faith. Instead, the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government *de facto* beneficial ownership of federal property. These two astonishing conclusions follow naturally from the Court's determination that federal land-use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause, because such decisions neither coerce conduct inconsistent with religious belief nor penalize religious activity. The constitutional guarantee we interpret today, however, draws no such fine distinctions between types of restraints on religious exercise, but rather is directed against any form of governmental action that frustrates or inhibits religious practice. Because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices, I dissent.

Justice Brennan reviewed the nature of Indian religion, with its site-specific devotion to certain points of access to spiritual resources, such as can be seen in the cases discussed earlier in this section. He reviewed the course of this case in greater detail than the majority had, pointing out the dearth of compelling state interest in completing the G-O road.

> The Court does not for a moment suggest that the interests served by the G-O road are in any way compelling, or that they outweigh the destructive effect construction of the road will have on respondents' religious practices. Instead, the Court embraces the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices. Attempting to justify this rule, the Court argues that the First Amendment bars only outright prohibitions, indirect coercion, and penalties on the free exercise of religion. All other "incidental effects of government programs," it concludes, even those "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," simply do not give rise to constitutional concerns. Since our recognition nearly half a century ago that restraints on religious conduct implicate the concerns of the Free Exercise Clause..., we have never suggested that the protections of the guarantee are limited to so narrow a range of governmental burdens. The land-use decision challenged here will restrain respondents from practicing their religion as surely and completely as any of the

governmental actions we have struck down in the past, and the Court's efforts simply to define away respondents' injury as non-constitutional is both unjustified and ultimately unpersuasive.

A

The Court ostensibly finds support for its narrow formulations of religious burdens in our decisions in *Hobbie*..., *Thomas*..., and *Sherbert*…. In those cases, the laws at issue forced individuals to choose between adhering to specific religious tenets and forfeiting unemployment benefits on the one hand, and accepting work repugnant to their religious beliefs on the other. The religions involved, therefore, lent themselves to the coercion analysis the Court espouses today, for they proscribed certain conduct...that the unemployment benefits laws effectively compelled. In sustaining the challenges to these laws, however, we nowhere suggested that such coercive compulsion exhausted the range of religious burdens recognized under the Free Exercise Clause.

Indeed, in *Wisconsin v. Yoder*, we struck down a state compulsory school attendance law on free exercise grounds not so much because of the affirmative coercion the law exerted on individual religious practitioners, but because of "the *impact* that compulsory high school attendance could have on the continued survival of Amish communities." (emphasis added [by Justice Brennan]). Like respondents here, the Amish view life as pervasively religious and their faith accordingly dictates their entire lifestyle.... By exposing Amish children "to a `wordly' influence in conflict with their beliefs"...the compulsory school law posed "a very real threat of undermining the Amish community and religious practice." Admittedly, this threat arose from the compulsory nature of the law at issue, but it was the "impact" on religious practice itself, not the source of that impact, that led us to invalidate the law.

I thus cannot accept the Court's premise that the form of the Government's restraint on religious practice, rather than its effect, controls our constitutional analysis. Respondents here have demonstrated that construction of the G-O road will completely frustrate the practice of their religion.... Indeed, the Government's proposed activities will restrain religious practice to a far greater degree here than in any of the cases cited by the Court today. None of the religious adherents in *Hobbie, Thomas*, and *Sherbert*, for example, claimed or could have claimed that the denial of unemployment benefits rendered the practice of their religion impossible; at most, the challenged laws made those practices more expensive. Here, in stark contrast, respondents have claimed—and proved—that the desecration of the high country will prevent religious leaders from attaining the religious power or medicine indispensable to the success of virtually all their rituals and ceremonies.... Here the threat posed by the desecration of sacred lands that are indisputably essential to respondents' religious practices is both more direct and more substantial than that raised by a compulsory school law that simply exposed Amish children to an alien value system. And of course respondents here do not even have the option, however unattractive it might be, of migrating to more

hospitable locales; the site-specific nature of their belief system renders it non-transportable.

* * *

B

Today the Court professes an inability to differentiate [*Bowen v.*] *Roy* from the present case, suggesting that "[t]he building of a road or the harvesting of timber on publicly owned land cannot be meaningfully distinguished from the use of a Social Security number." I find this inability altogether remarkable. In *Roy*, we repeatedly stressed the "internal" nature of the Government practice at issue:...we likened the use of such recordkeeping numbers to decisions concerning the purchase of office equipment. When the Government processes information, of course, it acts in a purely internal manner, and any free exercise challenge to such internal recordkeeping in effect seeks to dictate how the Government conducts its own affairs.

Federal land-use decisions, by contrast, are likely to have substantial external effects that government decisions concerning office furniture and information storage obviously will not, and they are correspondingly subject to public scrutiny and public challenge in a host of ways that office equipment purchases are not. Indeed, in the American Indian Religious Freedom Act, Congress expressly recognized the adverse impact land-use decisions and other governmental actions frequently have on the site-specific religious practices of Native Americans.... Although I agree that the Act does not create any judicially enforceable rights, the absence of any private right of action in no way undermines the statute's significance as an express congressional determination that federal land management decisions are not "internal" government "procedures," but are instead governmental actions that can and indeed are likely to burden Native American religious practices. That such decisions should be subject to constitutional challenge, and potential constitutional limitations, should hardly come as a surprise.

The Court today, however, ignores *Roy*'s emphasis on the internal nature of the government practice at issue there, and instead construes that case as further support for the proposition that governmental action that does not coerce conduct inconsistent with religious faith simply does not implicate the concerns of the Free Exercise Clause. That such a reading is wholly untenable, however, is demonstrated by the cruelly surreal result it produces here: governmental action that will virtually destroy a religion is nevertheless deemed not to "burden" that religion.

* * *

C

In the final analysis, the Court's refusal to recognize the constitutional dimension of respondents' injuries stems from its concern that acceptance of respondents' claim would potentially strip the Government of its ability to manage and use vast tracts of federal property. In addition, the nature of respondents' site-specific religious practices raises the specter of future suits in which Native Americans seek to exclude all human activity from such areas. These concededly legitimate concerns lie at the very heart of

> this case, which represents yet another stress point in the longstanding conflict between two disparate cultures—the dominant western culture, which views land in terms of ownership and use, and that of the Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred. Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the federal legislature. Such an abdication is more than merely indefensible as an institutional matter: by defining respondents' injury as "non-constitutional," the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be "sensitive" to affected religions. In my view, however, Native Americans deserve—and the Constitution demands—more than this.

Justice Brennan proceeded to suggest one possible way of avoiding the feared scenario in which "the Government will find itself ensnared in a host of lilliputian lawsuits" (his phrase), though he recognized its limitations.

> I believe it appropriate...to require some showing of "centrality" before the Government can be required either to come forward with a compelling justification for its proposed use of federal land or to forego that use altogether. "Centrality," however, should not be equated with the survival or extinction of the religion itself.... Because of their perceptions of and relationship with the natural world, Native Americans consider all land sacred. Nevertheless, the Theodoratus Report [to the Forest Service by an independent anthropologist] reveals that respondents here deemed certain lands more powerful and more directly related to their religious practices than others. Thus in my view, while Native Americans need not demonstrate, as respondents did here, that the Government's land-use decision will assuredly eradicate their faith, I do not think it is enough to allege simply that the land in question is held sacred. Rather, adherents challenging a proposed use of federal land should be required to show that the decision poses a substantial and realistic threat of frustrating their religious practices. Once such a showing is made, the burden should shift to the Government to come forward with a compelling state interest sufficient to justify the infringement of those practices.[67]

The majority devoted some space to answering this proposal. Justice O'Connor wrote:

> The dissent proposes an approach to the First Amendment that is fundamentally inconsistent with the principles on which our decision rests. Notwithstanding the sympathy that we all must feel for the plight of the Indian respondents, it is plain that the approach taken by the dissent cannot withstand analysis. On the contrary, the path toward which it

67. *Lyng, supra*, Brennan dissent.

> points us is incompatible with the text of the Constitution, with the precedents of this Court, and with a responsible sense of our own institutional role.
>
> * * *
>
> Perceiving a "stress point in the long-standing conflict between two disparate cultures," the dissent attacks us for declining to "balance these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the federal legislature." Seeing the Court as the arbiter, the dissent proposes a legal test under which it would decide which public lands are "central" or "indispensable" to which religions, and by implication which are "dispensable" or "peripheral," and would then decide which government programs are "compelling" enough to justify "infringement of those practices." We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program. Unless a "showing of centrality" is nothing but an assertion of centrality, the dissent thus offers us the prospect of this Court holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think that such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the judiciary in a role that we were never intended to play.[68]

Justice Brennan rejoined in his dissent:

> The Court today suggests that such an approach would place courts in the untenable position of deciding which practices and beliefs are "central" to a given faith and which are not, and invites the prospect of judges advising some religious adherents that they "misunderstand their own religious beliefs." In fact, however, courts need not undertake any such inquiries: like all other religious adherents, Native Americans would be the arbiters of which practices are central to their faith, subject only to the normal requirement that their claims be genuine and sincere. The question for the courts, then, is not whether the Native American claimants understand their own religion, but rather, whether they have discharged their burden of demonstrating, as the Amish did with respect to the compulsory school law in *Yoder*, that the land-use decision poses a substantial and realistic threat to undermining or frustrating their religious practices. Ironically, the Court's apparent solicitude for the integrity of religious belief and its desire to forestall the possibility that courts might second-guess the claims of religious adherents leads us to far greater inequities than those the Court postulates: today's ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service

68. *Lyng, supra,* majority opinion. This passage foreshadowed the demise of the then-existing test of Free Exercise that soon thereafter occurred in *Smith* (1990).

> can build a six-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivable use it.
>
> Similarly, the Court's concern that the claims of Native Americans will place "religious servitudes" upon vast tracts of federal property cannot justify its refusal to recognize the constitutional injury respondents will suffer here. It is true, as the Court notes, that respondents' religious use of the high country requires privacy and solitude. The fact remains, however, that respondents have never asked the Forest Service to exclude others from the area. Should respondents or any other group seek to force the Government to protect their religious practices from the interference of private parties, such a demand would implicate not only the concerns of the Free Exercise Clause, but those of the Establishment Clause as well. That case, however, is most assuredly not before us today, and in any event cannot justify the Court's refusal to acknowledge that the injuries respondents will suffer as a result of the Government' proposed activities are sufficient to state a constitutional cause of action.[69]

This decision seemed to represent a distressing regression in the Supreme Court's understanding of the scope of the Free Exercise Clause—a retreat from the territory staked out in *Sherbert, Yoder, Thomas* and *Hobbie*. The government was not even required to advance a compelling interest to justify a serious interference with the free exercise of religion if that interference occurred on "its own land" and thus was an "internal" activity of the government! Even more troubling was Justice O'Connor's reference to the use of the word "prohibiting" in the Free Exercise Clause as posing a key to the meaning of the clause. Although she did not compare it with the participle "abridging" in the Free Speech and Free Press Clauses following, her suggestion that the government had not *prohibited* the Indians' free exercise of religion in a way cognizable under the First Amendment invited the further inference urged by the solicitor general in *Hobbie* (q.v.)—i.e., that the Free Exercise Clause is more "narrowly focused" than the Free Speech and Press Clauses, and forbids only governmental action that *prohibits* the protected activity, not merely "abridges" it.

Lyng, then, was a prelude to the soon-to-be-seen evisceration of the Free Exercise Clause in *Oregon v. Smith* (1990),[70] which Justice O'Connor criticized in her separate opinion in that case, but which merely followed the road she had cut in *Lyng*. (Fortunately, Congress denied the appropriation for construction of the G-O road.[71])

2. Religious Practices in Military Life

One of the special environments in which religious practices pose problems somewhat different from the general society is that of the armed services. Having its own unique function, tradition and ethos, the military institution is sometimes resistant to intrusions by "outside" considerations such as constitutional

69. *Lyng, supra,* Brennan dissent.

70. 494 U.S. 872 (1990), discussed at § D2e above.

71. Pub. Law No. 100-446, Sept. 27, 1988, 102 Stat. 1774, 1809.

requirements. The Department of Defense and the Joint Chiefs of Staff struggled to prevent any change in the tradition of compulsory chapel at the armed services' academies,[72] and the military has in other ways "internalized" the institutionalization of religion in its chaplaincy arrangements.[73] This section touches on a few cases in which members of the armed forces have tried to pursue certain practices of their religious faith that came into conflict with military regulations. One of these cases reached the Supreme Court, which resulted in a ruling that will govern most such situations in the immediate future.

a. *Geller v. Secretary of Defense* (1976). Rabbi Michell Geller served as a chaplain in the U.S. Air Force from 1950 to 1974. In 1966 he began wearing a beard. Not until 1973 did the Air Force inform him that a beard was not permitted under Air Force regulations. When he refused to shave off his beard, he was reassigned to inactive reserve status. He took the matter to court, seeking a declaratory judgment that the regulation prohibiting facial hair was a violation of his Free Exercise of Religion. The case came on to be heard by Aubrey E. Robinson, judge of the federal district court for the District of Columbia in 1976 on cross-motions for summary judgment.

The government insisted that the First Amendment could not be invoked because Rabbi Geller had admitted that wearing a beard was not required by his religion and that he did so for personal rather than religious reasons. Rabbi Geller responded that he had made no such admission and asked the court to review his answers to the interrogatories in context. The court did so and concluded that the Rabbi's contention was correct.

> There is no requirement that the religious practice be absolutely mandated in order to elevate plaintiff's claim to a level of constitutional significance. It is not the province of the courts to dictate which practices are or are not required in a particular religion.... The Court is persuaded by the record as presently constituted that the wearing of beards, although not required, is a well established religious tradition among members of the Jewish faith and that plaintiff wore his beard in furtherance of that religious practice. This being the case, a question of constitutional significance has been raised..., and the only remaining issue for resolution is whether there is sufficient justification for this infringement of Rabbi Geller's right to free exercise of his religion which has occurred by the application of this regulation to him.
>
> * * *
>
> The defendants have cited the preamble to the regulation as illustrative of its purpose. This preamble speaks of "a desire to create a uniform appearance for members of the Air Force" and to "instill public confidence and leave no doubt that the serviceman lives by a common standard and is responsible to military order and discipline." The defendants have also suggested that the Air Force has a general interest in a "military image" or [of?] "neatness, cleanliness and safety." These reasons, the Court feels, are not sufficient in this case where plaintiff, a Jewish Rabbi, was employed

72. *Anderson v. Laird*, 466 F.2d 283 (1971), discussed at VD1d.

73. See *Katcoff v. Marsh*, 755 F.2d 22 (1985), discussed at VD1a.

> specifically by the military to serve in a religious capacity as a Jewish chaplain and where, in such service, he was permitted to wear a beard without criticism, adverse action or ill effects for seven years.[74]

The court ordered that Rabbi Geller be reinstated as an active chaplain with back pay and all promotions, points and salary increments he would have accrued in the interim.

b. *Sherwood v. Brown* (1980). A similar case arose in the Navy when a man with four years' service became a Sikh in 1973 and thereupon insisted upon wearing a turban in conformity with his religious vows, which require that "a Sikh will not alter his human form from the way the Creator has created it, thereby not removing or permitting to be removed, any hair from the body, and protecting his human form by wearing the unshorn hair on top of the head in a Rishi knot and covered with a cotton cloth known as a turban."[75] He was court-martialed and discharged from the Navy for failure to adhere to uniform regulations. In 1977 he brought suit against the secretary of Defense, seeking a declaration that the regulations were unconstitutional as applied to him, reinstatement in the Navy and monetary damages. The district court dismissed the suit and the Ninth Circuit issued a *per curiam* opinion, which said in part:

> Government regulations which infringe protected religious practice are proscribed by the free exercise clause of the First Amendment unless the Government can demonstrate that the regulation is the least restrictive alternative to meet a compelling state need....
>
> The District Court concluded that the Navy's interest in safety was sufficient to meet the compelling need requirement, and that because *all* naval personnel are subject to military duties which implicate the safety rationale, no less restrictive alternative exists. Based on the affidavit of a senior naval officer, the District Court found that:
>
> > Whether aboard a ship or aircraft extreme conditions of confinement make safety the touchstone of combat readiness and efficiency... [V]irtually all naval activities are conducted in close proximity to complex machinery of an often hazardous nature. Dangerous operating conditions cannot be tolerated. The accomplishment of an entire naval mission may be impaired by the failure of a single individual to perform his assigned task.
> >
> > A Sikh cannot, for religious reasons, wear a helmet.... Absence of a helmet poses serious safety problems both for the unprotected sailor and for the crew that depends on him. Pilots and air crewmen are required to wear specially protective helmets. Sailors working on an aircraft carrier flight deck or around operating aircraft must be similarly protected. All personnel at battle stations wear helmets to protect themselves from missiles such as shrapnel and to cushion their impact

74. *Geller v. Secretary of Defense*, 423 F.Supp. 16 (1976); compare *Goldman v. Weinberger* (1986), at § c below.

75. *Ronald B. Sherwood v. Harold Brown, Secretary of Defense*, 619 F.2d 47 (1980), the court's characterization of Sherwood's religious views.

> with bulkheads and overheads caused by a lurching vessel. A turban does not meet these safety requirements necessitated by both the ordinary and extraordinary activities of the modern, mechanized Navy.
>
> The judgment of the District Court is AFFIRMED.

This appeared to be one of the more justifiable denials of relief sought for religious practices in military life.

c. *Goldman v. Weinberger* (1986). The Supreme Court agreed to hear a case of this genre involving an Orthodox Jew and ordained rabbi named Simcha Goldman, who was employed as a clinical psychologist by the Air Force, serving in a mental health clinic at March Air Force Base in California. Although a commissioned officer wearing the appropriate Air Force uniform, Goldman also wore a yarmulke or small skullcap indoors as required by his religious faith. For several years no issue was made of this practice, but in 1981 he testified as a defense witness in a court-martial wearing his yarmulke but not a service cap. The prosecutor filed a complaint with the commandant of the hospital that Capt. Goldman was out of uniform. Air Force Regulation AFR 35-10 requires that "headgear will not be worn indoors except by armed security police in the performance of their duties." The commandant ordered Goldman not to wear his yarmulke indoors while on duty. Goldman refused for religious reasons. He was given a letter of reprimand and threatened with court-martial if he continued to disobey orders.

Goldman took the matter to federal court. The district court for the District of Columbia enjoined the Air Force from prohibiting Goldman from wearing a yarmulke while in uniform. The Court of Appeals for the District of Columbia reversed.[76] The Supreme Court granted *certiorari* "because of the importance of the question"—an evaluation of the issue that some might dispute in view of some other cases the court has declined to hear, such as *Fools Crow v. Gullet*.[77] The majority opinion was written by Justice Rehnquist.

> Petitioner argues that [Air Force Regulation] 35-10, as applied to him, prohibits religiously motivated conduct and should therefore be analyzed under the standard enunciated in Sherbert v. Verner.... But we have repeatedly held that "the military is, by necessity, a specialized society separate from civilian society...."[78] "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life...." in order to prepare for and perform its vital role....
>
> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment,

76. 734 F.2d 1531 (1984).

77. See § E1g above.

78. Citing *Parker v. Levy*, 417 U.S. 733 (1974); *Chappell v. Wallace*, 462 U.S. 296 (19830; *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Orloff v. Willoughby*, 345 U.S. 83 (1953); none of which were religion cases.

and esprit de corps.... The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service...."

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment.... But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.... Not only are courts "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have...," but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "Judicial deference...is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[79]

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble....

* * *

Petitioner Goldman contends that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accoutrements create a "clear danger" of undermining discipline and esprit de corps. He asserts that in general, visible but "unobtrusive" apparel will not create such a danger and must therefore be accommodated. He argues that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline. He contends that the Air Force's assertion to the contrary is mere ipse dixit, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony that religious exceptions...are in fact desirable and will increase morale by making the Air Force a more humane place.

But whether or not expert witnesses may feel that religious exceptions to [the uniform code] are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to

79. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

> prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel which is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.[80]

This resolution of the matter commended itself to Chief Justice Burger and Associate Justices White, Powell and Stevens in addition to Rehnquist. Justice Stevens wrote a clarifying concurrence, in which Justices White and Powell joined, saying some nice things about Jews and yarmulkes, and finding virtue in uniformity of treatment among faiths.

> Captain Goldman presents an especially attractive case for an exception from the uniform regulations that are applicable to all other Air Force personnel. His devotion to his faith is readily apparent. The yarmulke is a familiar and accepted sight. In addition to its religious significance for the wearer, the yarmulke may evoke the deepest respect and admiration—the symbol of a distinguished tradition and an eloquent rebuke to the ugliness of anti-Semitism. Captain Goldman's military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission. Moreover,... there is reason to believe that the policy of strict enforcement against Captain Goldman had a retaliatory motive. He had worn his yarmulke while testifying on behalf of a defendant in a court-martial proceeding. Nevertheless, as the case has been argued, I believe we must test the validity of the Air Force's rule not merely as it applies to Captain Goldman but also as it applies to all service personnel who have sincere religious beliefs that may conflict with one or more military commands.[81]

Justice Stevens disagreed with the dissenters who would pose only a utilitarian test for dress regulations.

> [That] approach attaches no weight to the separate interest in uniformity itself. Because professionals in the military service attach great importance to that plausible interest, it is one that we must recognize as legitimate and rational even though personal experience or admiration for the performance of the "rag-tag band of soldiers" that won us our freedom in the revolutionary war might persuade us that the Government has exaggerated the importance of that interest.
>
> The interest in uniformity, however, has a dimension that is of still

80. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

81. Ibid., Stevens concurrence.

> greater importance for me. It is the interest in uniform treatment for the members of all religious faiths. The very strength of Captain Goldman's claim creates the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as "so extreme, so unusual, so faddish an image that public confidence in his ability to perform his duties will be destroyed..." If exceptions from dress code regulations are to be granted on the basis of a multifactored test such as that proposed by Justice Brennan, inevitably the decision maker's evaluation of the character and the sincerity of the requester's faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision. For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in "appearance"—it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other. The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application.
>
> As the Court demonstrates, the rule that is challenged in this case is based on a neutral, completely objective standard—visibility. It was not motivated by hostility against, or any special respect for, any religious faith. An exception for yarmulkes would represent a fundamental departure from the true principle of uniformity that supports that rule. For that reason, I join the Court's opinion and its judgment.

The dissenters filed three opinions. Justice Brennan, the senior associate justice, wrote one, which was joined by Justice Marshall.

> Simcha Goldman invokes this Court's protection of his First Amendment right to fulfill one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God. The Court's response to Goldman's request is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity. I dissent.
>
> In ruling that the paramount interests of the Air Force override Dr. Goldman's free exercise claim, the Court overlooks the sincere and serious nature of his constitutional claim. It suggests that the desirability of certain dress regulations, rather than a First Amendment right, is at issue. The Court declares that in selecting dress regulations, "military officials are under no constitutional mandate to abandon their considered professional judgment." If Dr. Goldman wanted to wear a hat to keep his head warm or to cover a bald spot I would join the majority. Mere personal preferences in dress are not constitutionally protected. The First Amendment, however, restrains the Government's ability to prevent an Orthodox Jewish serviceman from, or punish him for, wearing a yarmulke.
>
> The Court also attempts, unsuccessfully, to minimize the burden that was placed on Dr. Goldman's rights. The fact that "the regulations don't permit the wearing of...a yarmulke," does not simply render military life for observant Orthodox Jews "objectionable." It sets up an almost absolute

> bar to the fulfillment of a religious duty. Dr. Goldman spent most of his time in uniform indoors, where the dress code forbade him even from covering his head with his service cap. Consequently, he was asked to violate the tenets of his faith virtually every minute of every working day.
>
> * * *
>
> Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a subrational-basis standard—absolute, uncritical "deference to the professional judgment of military authorities...."
>
> A deferential standard of review, however, need not, and should not, mean that the Court must credit arguments that defy common sense. When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proffered military interest. Unabashed *ipse dixit* cannot outweigh a constitutional right.
>
> In the present case, the Air Force asserts that its interests in discipline and uniformity would be undermined by an exception to the dress code permitting observant male orthodox Jews to wear yarmulkes. The Court simply restates these assertions without offering any explanation how the exception Dr. Goldman requests reasonably could interfere with the Air Force's interests. Had the Court given actual consideration to Goldman's claim, it would have been compelled to decide in his favor.
>
> The Government maintains in its brief that discipline is jeopardized whenever exceptions to military regulations are granted. Service personnel must be trained to obey even the most arbitrary command reflexively. Non-Jewish personnel will perceive the wearing of a yarmulke by an Orthodox Jew as an unauthorized departure from the rules and will begin to question the principle of unswerving obedience. Thus shall our fighting forces slip down the treacherous slope toward unkempt appearance, anarchy, and, ultimately, defeat at the hands of our enemies.
>
> The contention that the discipline of the armed forces will be subverted if Orthodox Jews are allowed to wear yarmulkes with their uniforms surpasses belief. It lacks support in the record of this case and the Air Force offers no basis for it as a general proposition. While the perilous slope permits the services arbitrarily to refuse exceptions requested to satisfy mere personal preferences, before the Air Force may burden free exercise rights it must advance, at the *very least*, a rational reason for doing so.[82]

Justice Brennan noted that the Air Force regulation itself "expressly abjures the need for total uniformity" when it conceded, "Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a

82. Ibid., Brennan dissent.

disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad."[83]

> It cannot be seriously contended that a serviceman in a yarmulke presents so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed. Under the Air Force's own standards, then, Dr. Goldman should have and could have been granted an exception to wear his yarmulke.
>
> The dress code also allows men to wear up to three rings and one identification bracelet of "neat and conservative," but non-uniform design.... This jewelry is apparently permitted even if, as is often the case with rings, it associates the wearer with a denominational school or a religious or secular fraternal organization. If these emblems of religious, social, and ethnic identity are not deemed to be unacceptably divisive, the Air Force cannot rationally justify its bar to yarmulkes on that basis....
>
> I find totally implausible the suggestion that the overarching group identity of the Air Force would be threatened if Orthodox Jews were allowed to wear yarmulkes with their uniforms. To the contrary, a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States serviceman embraces and unites religious and ethnic pluralism.
>
> Finally, the Air Force argues that while Dr. Goldman describes his yarmulke as an "unobtrusive" addition to his uniform, obtrusiveness is a purely relative, standardless judgment. The Government notes that while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor do dreadlocks to a Rastafarian. If the Court were to require the Air Force to permit yarmulkes, the service must also allow all of these other forms of dress and grooming.
>
> The Government dangles before the Court a classic parade of horribles, the specter of a brightly-colored, "rag-tag band of soldiers...." Although turbans, saffron robes, and dreadlocks are not before us in this case and must each be evaluated against the reasons a service branch offers for prohibiting personnel from wearing them while in uniform, a reviewing court could legitimately give deference to dress and grooming rules that have a reasoned basis in, for example, functional utility, health and safety considerations, and the goal of a polished, professional appearance.... It is the lack of any reasoned basis for prohibiting yarmulkes that is so striking here.
>
> Furthermore, contrary to its intimations, the Air Force has available to it a familiar standard for determining whether a particular style of yarmulke is consistent with a polished, professional military appearance—the "neat and conservative" standard by which the service judges jewelry. No rational reason exists why yarmulkes cannot be judged by the same criterion. Indeed, at argument Dr. Goldman declared himself willing to

83. AFR 35-10.

wear whatever style and color yarmulke the Air Force believes best comports with its uniform.

Department of Defense Directive 1300.17 (June 18, 1985) grants commanding officers the discretion to permit service personnel to wear religious items and apparel that are not visible with the uniform, such as crosses, temple garments and scapulars. Justice Stevens favors this "visibility test" because he believes that it does not involve the Air Force in drawing distinctions among faiths.... He rejects functional utility, health and safety considerations, and similar grounds as criteria for religious exceptions to the dress code, because he fears that these standards will allow some service persons to satisfy their religious dress and grooming obligations, while preventing others from fulfilling theirs. But the visible/not visible standard has that same effect. Furthermore, it restricts the free exercise rights of a larger number of service persons. The visibility test permits only individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties. In my view, the Constitution requires the selection of criteria that permit the greatest possible number of persons to practice their faith freely.

Implicit in Justice Stevens' concurrence, and in the Government's arguments, is what might be characterized as a fairness concern. It would be unfair to allow Orthodox Jews to wear yarmulkes, while prohibiting members of other minority faiths with visible dress and grooming requirements from wearing their saffron robes, dreadlocks, turbans and so forth. While I appreciate and share this concern for the feelings and the free exercise rights of members of these other faiths, I am baffled by this formulation of the problem. What puzzles me is the implication that a neutral standard that could result in the disparate treatment of Orthodox Jews and, for example, Sikhs, is more troublesome or unfair than the existing neutral standard that does result in the different treatment of Christians, on the one hand, and Orthodox Jews and Sikhs on the other. Both standards are constitutionally suspect; before either can be sustained, it must be shown to be a narrowly tailored means of promoting important military interests.

I am also perplexed by the related notion that for purposes of constitutional analysis religious faiths may be divided into two categories—those with visible dress and grooming requirements and those without. This dual category approach seems to incorporate an assumption that fairness, the First Amendment, and, perhaps, Equal Protection, require all faiths belonging to the same category to be treated alike, but permit a faith in one category to be treated differently from a faith belonging to the other category. The practical effect of this categorization is that, under the guise of neutrality and even handedness, majority religions are favored over distinctive minority faiths. This dual category analysis is fundamentally flawed and leads to a result that the First Amendment was intended to prevent. Under the Constitution there is only one relevant category—all faiths. Burdens placed on the free exercise rights of members of one faith must be justified independently of burdens

placed on the rights of members of another religion. It is not enough to say that Jews cannot wear yarmulkes simply because Rastafarians might not be able to wear dreadlocks.

* * *

Through our Bill of Rights, we pledged ourselves to attain a level of human freedom and dignity that had no parallel in history. Our constitutional commitment to religious freedom and acceptance of religious pluralism is one of our greatest achievements in that noble endeavor. Almost 200 years after the First Amendment was drafted, tolerance and respect for all religions still set us apart from most other countries and draws to our shores refugees from religious persecution from around the world.

Guardianship of this precious liberty is not the exclusive domain of federal courts. It is the responsibility as well of the States and of the other branches of the Federal Government. Our military services have a distinguished record of providing for many of the religious needs of their personnel. But that they have satisfied much of their constitutional obligation does not remove their actions from judicial scrutiny. Our Nation has preserved freedom of religion, not through trusting to the good faith of individual agencies of government alone, but through the constitutionally mandated vigilant oversight and checking authority of the judiciary.

It is not the province of the federal courts to second guess the professional judgments of the military services, but we are bound by the Constitution to assure ourselves that there exists a rational foundation for assertions of military necessity when they interfere with the free exercise of religion. "The concept of military necessity is seductively broad,"[84] and military decisionmakers themselves are as likely to succumb to its allure as are the courts and the general public. Definitions of necessity are influenced by decisionmakers' experiences and values. As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority. The military, with its strong ethic of conformity and unquestioning obedience, may be particularly impervious to minority needs and values. A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar. It is the constitutional role of this Court to ensure that this purpose of the First Amendment be realized.

The Court and the military services have presented patriotic Orthodox Jews with a painful dilemma—the choice between fulfilling a religious obligation and serving their country. Should the draft be reinstated, compulsion will replace choice. Although the pain the services inflict on Orthodox Jewish servicemen is clearly the result of insensitivity rather than design, it is unworthy of our military because it is unnecessary. The

84. *Brown v. Glines*, 444 U.S. 348 (1980), Brennan, J., dissenting.

> Court and the military have refused these servicemen their constitutional rights; we must hope that Congress will correct this wrong.[85]

Justice Blackmun wrote a separate dissent because his reasons for voting to reverse the lower court differed somewhat from those of Justice Brennan and of Justice O'Connor, whose opinion is discussed below.

> If the Free Exercise Clause of the First Amendment means anything, it means that an individual's desire to follow his or her faith is not simply another personal preference, to be accommodated by government when convenience allows.... "Rules are rules" is not by itself a sufficient justification for infringing religious liberty.
>
> Nor may free exercise rights be compromised simply because the military says they must be. To be sure, application of the First Amendment to members of the armed services must take into account "the different character of the military community and the military mission." As Justice Brennan and Justice O'Connor point out, however, military personnel do not forfeit their constitutional rights as a price of enlistment. Except as otherwise required by "interests of the highest order," soldiers as well as civilians are entitled to follow the dictates of their faiths.
>
> In my view, this case does not require us to determine the extent to which the ordinary test for inroads on religious freedom must be modified in the military context, because the Air Force has failed to produce even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors.... [His] modest supplement to the Air Force uniform clearly poses by itself no threat to the Nation's military readiness....
>
> The Air Force argues that it has no way of distinguishing fairly between Goldman's request for an exemption and the potential requests of others whose religious practices may conflict with the appearance code, perhaps in more conspicuous ways. In theory, this argument makes some sense. Like any other rules prescribing a uniform the Air Force dress code is by nature arbitrary; few of its requirements could be defended on purely functional grounds. Particularly for personnel such as Goldman who serve in noncombat roles, variations from the prescribed attire frequently will interfere with no military goals other than those served by uniformity itself. There thus may be no basis on which to distinguish some variations from others, aside from the degree to which they detract from the overall image of the service, a criterion that raises special constitutional problems when applied to religious practices. To allow noncombatant personnel to wear yarmulkes but not turbans or dreadlocks because the latter seem more obtrusive.... would be to discriminate in favor of this country's more established, mainstream religions, the practices of which are more familiar to the average observer. Not only would conventional faiths receive special treatment under such an approach; they would receive special treatment precisely *because* they are conventional. In general, I see no

85. *Goldman v. Weinberger, supra,* Brennan dissent. See end of this section for report of action by Congress.

constitutional difficulty in distinguishing between religious practices based on how difficult it would be to accommodate them, but favoritism based on how unobtrusive a practice appears to the majority could create serious problems of equal protection and religious establishment, problems the Air Force clearly has a strong interest in avoiding by drawing an objective line at visibility.

The problem with this argument, it seems to me, is not doctrinal but empirical. The Air Force simply has not shown any reason to fear that a significant number of enlisted personnel and officers would request religious exemptions that could not be denied on neutral grounds such as safety, let alone that granting these requests would noticeably impair the overall image of the service....

In these circumstances, deference seems unwarranted. Reasoned military judgments, of course, are entitled to respect, but the military has failed to show that this particular judgment with respect to Captain Goldman is a reasoned one. If, in the future, the Air Force is besieged with requests for religious exemptions from the dress code, and those requests cannot be distinguished on functional grounds from Goldman's, the service may be able to argue credibly that circumstances warrant a flat rule against any visible religious apparel. That, however, would be a case different from the one at hand.[86]

Justice O'Connor wrote a separate dissent in which Justice Marshall joined.

The Court rejects Captain Goldman's claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital. No test for Free Exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives a need for uniformity.

* * *

I believe that the Court should attempt to articulate and apply an appropriate standard for a free exercise claim in the military context, and should examine Captain Goldman's claim in light of that standard.

* * *

One can...glean at least two consistent themes from this Court's precedents. First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served." These two requirements are entirely sensible in the context of the assertion of a free exercise claim. First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of special importance before there is any

86. *Goldman v. Weinberger, supra,* Blackmun dissent.

chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.

There is no reason why these general principles should not apply in the military, as well as the civilian, context... [They are] sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending.

The first question that the Court should face here, therefore, is whether the interest that the Government asserts against the religiously based claim of the individual is of unusual importance. It is perfectly appropriate at this step of the analysis to take account of the special role of the military. The mission of our armed services is to protect our Nation from those who would destroy all our freedoms. I agree that, in order to fulfill that mission, the military is entitled to take some freedoms from its members.... The need for military discipline and esprit de corps is unquestionably an especially important governmental interest.

But the mere presence of such an interest cannot, as the majority implicitly believes, end the analysis of whether a refusal by the Government to honor the free exercise of an individual's religion is constitutionally acceptable. A citizen pursuing even the most noble cause must remain within the bounds of the law. So, too, the Government may, even in pursuing its most compelling interests, be subject to specific restraints in doing so. The second question in the analysis of a Free Exercise claim under this Court's precedents must also be reached here: will granting an exemption of the type requested by the individual do substantial harm to the especially important governmental interest?

I have no doubt that there are many instances in which the unique fragility of military discipline and esprit de corps necessitates rigidity by the Government when similar rigidity to preserve an assertedly analogous interest would not pass constitutional muster in the civilian sphere.... Nonetheless, as Justice Brennan persuasively argues, the Government can present no sufficiently convincing proofs in *this* case to support and ascertain that granting an exemption of the type requested here would do substantial harm to military discipline and esprit de corps.

First, the Government's asserted need for absolute uniformity is contradicted by the Government's own exceptions to its rule.... Furthermore, the Government does not assert, and could not plausibly argue, that petitioner's decision to wear his yarmulke while indoors at the hospital presents a threat to health or safety. And finally, the District Court found as fact that in this particular case, far from creating discontent or indiscipline in the hospital where Captain Goldman worked, "[f]rom September 1977 to May 7, 1981, *no objection* was raised to Goldman's wearing his yarmulke while in uniform...."

In the rare instances where the military has not consistently or plausibly justified its asserted need for rigidity of enforcement, and where the individual seeking the exemption establishes that the assertion by the

> military of a threat to discipline or esprit de corps is in his or her case completely unfounded, I would hold that the Government's policy of uniformity must yield to the individual's assertion of the right to free exercise of religion. On the facts of this case, therefore, I would require the Government to accommodate the sincere religious belief of Captain Goldman. Napoleon may have been correct to assert that, in the military sphere, morale is to all other factors as three is to one, but contradicted assertions of necessity by the military do not on the scales of justice bear a similar disproportionate weight to sincere religious beliefs of the individual.[87]

Thus did the Case of the Banned Yarmulke evoke a great deal of high-priced creative writing, with the outcome representing a distinct defeat for religious liberty. It also represented a setback on a broader front: the effort to apply the Bill of Rights to persons in military service, particularly in court-martial procedures.[88] The slim five-justice majority embraced a policy of judicial deference to the military that does not enhance the vital principle of civilian control of the armed forces. It seemed to echo the subservience of Judge Howard F. Corcoran in the presence of the be-medaled Admiral Moorer in *Anderson v. Laird*, q.v.[89]

The final word on this subject, however, was not spoken by the court. Following Justice Brennan's advice, various Jewish groups (and others) persuaded Congress to instruct the armed services in a fuller accommodation of religious apparel. On December 4, 1987, President Reagan signed into law P.L. 100-180, which required that henceforth the Department of Defense should allow members of the armed services to wear "neat and conservative religious apparel which is part of the observance of the religious faith practiced by the members while in uniform" if it would not interfere with their military duties.

3. Religious Practices in Prison

Another special environment in which the practice of religion is subject to restrictions not encountered or constitutionally permissible in the society at large is that of prisons and jails. A considerable flow of case law has emerged testing the limits of those restrictions and the discretion allowable to those who set them. Since the prison population consists of unwilling captives, it is not surprising that they seek in many ways to protest their captivity and to enlarge the area of their confinement. Many prisoners devote their enforced leisure to legal complaints and appeals, and one of the more fruitful avenues of litigation is the free exercise of religion.[90] That does not mean, of course, that all complaints of this kind are without merit, but it does suggest that courts are justified in examining them with extra care. Only a scattering of such cases can be dealt with here.

---

87. *Goldman v. Weinberger,* O'Connor dissent.

88. See Douglas, William O., *Almanac of Liberty* (New York: Doubleday & Co., 1954).

89. 466 F.2d 283 (1971), discussed at VD1d.

90. See the observations by Justice Rehnquist on this propensity of jailhouse lawyers in his dissent in *Cruz v. Beto*, discussed at § E3b(1) below.

a. Black Muslim Cases. A source of particular stress in prisons beginning in the 1960s was the appearance among black inmates of adherence to the unique variant of Islam proclaimed by one Elijah Muhammad (*ne* Robert Poole, 1897), who himself spent some time in prison during World War II for refusal to kill on any orders but Allah's. At the end of the war, in 1946, he became prominent as the leader of a movement he denominated the "Nation of Islam." It was a product of the confluence of two black nationalist movements, that of Marcus Garvey (1887-1940) and the Temple of Islam in Detroit led by Wallace D. Fard. Elijah Muhammad claimed to be the Messenger of Allah, and he taught that all nonwhite peoples are members of the ancient tribe of Shabazz, descended from Abraham. Preeminent among these are the Black Nation, composed of the black people of North America, which will be led by the Nation of Islam. Caucasian people are an inferior, latter-day offshoot of the original black strain, and their demonic usurpation will end about A.D. 2000 with the resurgence of the Black Nation, putting an end to the white "spook" civilization.

At its height in the early 1960s, the Nation of Islam may have numbered as many as 100,000 adherents, mostly young men, many recruited in prisons. While denouncing the rule of the "white devils," it demanded disciplined obedience to the Messenger of Allah and conformity to his canons of self-respect and self-reliance, including prohibitions against alcohol, narcotics, sexual promiscuity and crime, and emphasis on the ideal of respect for womanhood, a strong patriarchal family, occupational reliability, honesty and quiet, decorous behavior. Thus, while mouthing rabid antiwhite polemics, it called the poorest and most disorganized ghetto blacks to the traits of the traditional Puritan-American mainstream—an irony that was not apparent to most whites, who reacted mainly to the racist rhetoric.[91]

Black men in prison may at first have been drawn to this "gospel" for the same reason that whites were repelled by it: its articulation of black resentments within a cosmic and apocalyptic framework. It provided a coherent and potentially privileged vehicle of protest and self-affirmation within the prison setting. But many of its prison converts were led through it to lives of self-respect and self-discipline, and some became leaders in the Black Muslim movement, such as Malcolm Little, who was converted while serving time on a burglary charge (1946-1952), and emerged as a charismatic apostle styling himself "Malcolm X" (he broke with Elijah Muhammad in 1964 and founded his own organization in New York, where he was assassinated in 1965).[92]

The abrasive qualities of this movement did not commend it to the authorities of American prison management, who tended to see it as a "political" rather than a religious phenomenon. It certainly had its political aspects and implications, but by the 1960s it should have been apparent that it was incontrovertibly religious and indeed a more effective instrument of rehabilitation than all of the conventional mainstream prison chaplaincies put together. But it had to fight its way uphill for

91. See Ahlstrom, Sydney E., *A Religious History of the American People* (New Haven: Yale Univ. Press, 1972), pp. 1066-1069.

92. Ibid.

acceptance, and the story of that struggle is reflected in dozens of lawsuits, of which a few are reported here.

(1) *Fulwood v. Clemmer* (1962). One of the earlier cases originated in Lorton Reformatory in Virginia, operated by the District of Columbia and housing many black prisoners from Washington, D.C. William T.X. Fulwood, an inmate at Lorton, complained that his religious beliefs as a Muslim had been interfered with, that he had been denied religious practices and contacts granted other prisoners, and that he was punished on several occasions solely for his religious views. His plea was considered by Judge Burnita S. Matthews of the U.S. District Court for the District of Columbia.

> While petitioner was in Korea in the United States Army in 1954 or 1955, he learned of the Islamic religion of the Moslems. He first heard of the Muslim faith while in jail awaiting trial in early 1959, became a convert to that faith late in the same year, and has so remained. Whether the Muslim faith is an authentic offshoot of the Islamic religion of the Moslems is not shown in the record.
>
> The Muslims believe in Allah as their God. They regard their religion as the religion of Islam which teaches submission to the will of Allah. According to their religion Muslims must pray at least five times per day. They must give charity to support the cause of Islam. They must believe in the scriptures, including the Koran, and in the prophets, including the prophet Mohammed. They must believe in the resurrection and in the hereafter.
>
> Prison authorities have acknowledged that petitioner seems very devoted to his faith, and that it "is in some way related to increasing his stature as a negro." To him the main attraction of the Muslim faith is that it gave him something to associate himself with, something to uplift him from the degradation to which he had fallen.[93]

In 1959 a group of Muslim inmates had requested permission to hold religious services in the prison. At that time there were between 30 and 50 Muslim inmates at Lorton. Early in 1960, Donald Clemmer, director of the Department of Correction for the District of Columbia, denied their request on the basis that "the Muslims teach racial hatred, that such teaching is inflammatory and likely to create a disturbance or disorder."[94] Even an expert witness called by Fulwood, Father Charles M. Whelan, S.J., testified to that effect.

> "I don't know any other religion that teaches racial hatred as an essential part of the faith of the religion. There are many religions which have practiced racial hatred at various times, but this movement is the only movement that I know of which makes it a tenet of the faith that all white people should be hated."[95]

---

93. *Fulwood v. Clemmer*, 206 F.Supp. 370 (1962).

94. Ibid., the court's characterization of Clemmer's rationale.

95. Ibid., Father Whelan is white, a professor of law at Fordham University and was codirector with the present author of a project on "Church, State and Taxation," 1981-1984.

The court continued:

> The spiritual leader of the Muslims is Elijah Muhammad. He describes himself as the messenger of Allah and such description is accepted by his followers. In his writings he portrays the white race as a race of total evil—a race of devils, murderers, thieves, robbers, scientists at tricks, world snoopers, meddlers and liars. He declares that to survive, negroes and whites must be separated. He advocates the establishment of a separate Black State. Despite the admixture of political aspirations, economic goals, and racial prejudice in Muslim doctrine, substantial emphasis is placed by the Muslims upon religious faith and observances.
>
> Under freedom of religion in this country a person has an absolute right to embrace the religious belief of his choice.... Nor is it the function of the court to consider the merits or fallacies of a religion or to praise or condemn it, however excellent or fanatical or preposterous it may be. Whether one is right about his religion is not a subject of knowledge but only a matter of opinion.
>
> It is sufficient here to say that one concept of religion calls for a belief in the existence of a supreme being controlling the destiny of man. That concept of religion is met by the Muslims in that they believe in Allah, as a supreme being and as the one true god. It follows, therefore, that the Muslim faith is a religion.
>
> * * *
>
> The prison management sponsors and encourages religion as a prison program. But participation is not compulsory. The position of prison management...is...to permit every inmate to participate as he sees fit according to his own beliefs....
>
> Religious services are held by a large number of denominations at Lorton.... With public funds the District of Columbia promotes and underwrites the religious services and activities of Catholics, Protestants and Jews at Lorton.... For example, several full time Catholic and Protestant chaplains are employed to carry on a wide variety of religious duties....
>
> A chapel large enough to hold three services simultaneously has been built at Lorton with public funds by the Department of Corrections....
>
> It does not appear from the record that any Muslim Minister has ever held religious services at Lorton....
>
> By allowing some religious groups to hold religious services at Lorton..., and by conducting such services at public expense, while denying that right to petitioner and other Muslims, respondents have discriminated...against petitioner in violation of the Order of the Commissioners of the District of Columbia...which requires prison officials to make facilities available without regard to race or religion.[96]

The court ruled against the inmate on his complaints about restrictions on his mail and newspaper subscription privileges that prevented him from corresponding with

96. *Fulwood v. Clemmer, supra.*

Elijah Muhammad or receiving a newspaper containing his writings, but held that the inmate was entitled to receive Muslim religious medals [whatever those may be] at public expense since Catholic, Protestant and Jewish inmates received religious medals [whatever—in the case of Protestants and Jews—those may be] at public expense. Because the inmate had preached the doctrines of Elijah Muhammad to an assemblage of a dozen Muslim inmates in the spectators' stands at the prison recreation field while a ball game was in progress on another part of the field, and the sentiments expressed had stirred antipathies in white and black inmates who overheard him, he was held in solitary confinement or other restricted conditions and not allowed to return to the general prison population for two years "primarily because [he] was considered one of several Muslim leaders, and his [restriction] would prevent other Muslims from rallying around him." The court held that this punishment was unreasonable, and he should be returned to the general prison population.

• *Childs v. Pegelow*, 321 F.2d 487 (1963) (prison authorities were under no obligation to accommodate hours of serving meals to Muslim inmates' desire to observe the month of Ramadan by fasting between sunrise and sundown).

• *Desmond v. Blackwell*, 235 F.Supp. 246 (1964) (plaintiff was accorded every right to which he was entitled consistent with proper administration of the prison).

(2) *Cooper v. Pate* (1967). This case arose in the Illinois State Penitentiary where Thomas Cooper, a member of the Black Muslim movement, complained that he was denied access to religious publications and scriptures of his faith, was refused opportunities to meet with other prisoners of his faith for religious services, and was placed in solitary confinement because of his efforts to observe his faith. The federal district court to which he took his complaint dismissed it, and the Seventh Circuit Court of Appeals affirmed the dismissal,[97] but the U.S. Supreme Court granted *certiorari* and in a *per curiam* opinion held that the complaint stated a cause of action and remanded it for trial.[98] The district court, in an opinion by Judge Richard B. Austin, found in favor of Cooper on some counts and against him on others. The defendants appealed from the former parts of the judgment and Cooper appealed from the others. The case thus came to the Seventh Circuit for the second time and was heard by a panel consisting of Judges Elmer J. Schnackenberg, Luther M. Swygert and Thomas E. Fairchild, who rendered a unanimous judgment in an opinion written by Judge Fairchild.

> Defendants, as administrators responsible for the safety of inmates, as well as the success of rehabilitative efforts, and the like, are apprehensive about the presence and effect of the racial doctrines of the Elijah Muhammad Muslims. Stateville, the Illinois penitentiary involved, has 4,700 inmates, negro and white. It is a maximum security prison where the highest degree of immaturity, resentment, irresponsibility, despair, and lack of self-control are virtually entrance requirements.

97. *Cooper v. Pate*, 324 F.2d 165 (1963).
98. 378 U.S. 546 (1964).

(At this juncture the court added in a footnote that "Cooper himself, though his testimony reflects considerable mental agility, is serving two consecutive 100-year terms for murder, and the record contains much evidence of his acts of dangerous violence."[99])

> Defendants would justify their prohibition of religiously-motivated activities of Elijah Muhammad Muslims as efforts, in the interests of safety, to prevent the nurture and spread of such beliefs within the prison, and to avoid explosive impact of these beliefs on those who find them abhorrent. Defendants' concern is understandable. Racism in any form would be dangerous in a crowded, racially-mixed prison. When racism is an article of religious faith, the danger is undoubtedly greater.
>
> *The legal principles*. Defendants have not argued that the beliefs of Elijah Muhammad Muslims do not constitute a religion. A determination that they do not would be indistinguishable from a comparative evaluation of religions, and that process is beyond the power of a court.
>
> * * *
>
> It is clear that prison authorities must not punish a prisoner nor discriminate against him on account of his religious faith. But although a prisoner retains his complete freedom of religious belief, his conviction and sentence have subjected him to some curtailment of his freedom to exercise his beliefs.
>
> Courts will closely scrutinize the reasonableness of any restriction imposed on a prisoner's activity in the exercise of his religion, and specially so where the adherents of one faith are more heavily restricted than the adherents of another.
>
> With the foregoing general principles in mind, we proceed to consider the several parts of the judgment.
>
> 1. *The Koran* (Qur'an). Defendants were enjoined from refusing to plaintiff and other followers of Elijah Muhammad permission to purchase English-language translation of the Holy Qur'an, including the "Mulana Muhammad Ali Edition." Defendants have not appealed from this decree.
>
> 2. *Communication and visiting with ministers*. Defendants were "enjoined from refusing to plaintiff and other followers of Elijah Muhammad permission to communicate by mail and visit with ministers of their faith, subject to prison rules and the conditions specified in the Memorandum Opinion...." [which were] that inmates are usually allowed to write to and be visited by their minister at home or a personally-known minister, and that communication between Elijah Muhammad Muslim inmates and ministers of that faith "should be allowed within allowable limitations and in conformity with prison practices including usual and generally applicable censorship."
>
> The court found that defendants had not shown that such communication "presents a clear and present danger to prison security." If the clear and present danger standard is the correct test, the district court was clearly correct in finding that communication and visiting had not

99. *Cooper v. Pate*, 382 F.2d 518 (1967), n. 6.

> been shown to pose such danger. Moreover, the denial of the privilege of such communication to adherents of one faith while granting it to others is discrimination on account of religion.
>
> 3. *Religious services*. Defendants were "enjoined from refusing to plaintiff and other followers of Elijah Muhammad permission to attend religious services conducted by a recognized Muslim or Islamic minister, subject to prison rules and the conditions specified in the Memorandum Opinion."
>
> In the memorandum opinion, the court noted that any right to attend a service must not interfere with regular prison routine and that it is not administratively feasible to provide regular services for each and every religion. "Should a recognized Muslim or Islamic minister make his services available to the prison, however, and space and normal prison routine permit, those who sincerely believe in these faiths should be allowed to attend any service he shall conduct."
>
> * * *
>
> The court considered that categorical denial to Elijah Muhammad Muslims of the right to attend organized religious services conducted by a recognized minister of their faith while granting this right to other religions would be religious discrimination. We agree.
>
> * * *
>
> The district court found that there are less drastic and less sweeping means of achieving necessary control of such group services than categorically banning them. In part that is a finding of fact, and in part a recognition that discrimination in treatment of adherents of different faiths could be justified, if at all, only by the clearest and most palpable proof that the discriminatory practice is a necessity. Proof which would be more than adequate support for administrative decision in most fields does not necessarily suffice when we are dealing with the constitutional guaranty of freedom of religion, and with an exercise of religion so widely considered essential as worship services.[100]

The plaintiff had also complained that he was not permitted to purchase and read newspapers and other publications of his choice or to obtain Arabic and Swahili grammars in order to study Islamic works. The district court did not consider that the plaintiff had shown that these materials were necessary to his practice of religion and so upheld the prison administration's decision not to provide them.

Lastly, the court dealt with the complaint that Cooper had been sequestered apart from other inmates because of his insistence on his rights to practice his religion.

> 6. *Segregation*. Plaintiff has been separated for many years from the general prison population. He is held in the segregation unit, where he cannot mingle with other prisoners and enjoys fewer privileges....
>
> Cooper's stay in segregation is almost of record length. He arrived there in 1957 after a term in isolation for attacking prison guards. He was out briefly in 1959, but was returned after a similar outbreak, and has remained.

---

100 . Ibid.

> The complaint states that the defendants hold him in segregation because of their hostility to his religion. The district court found that his confinement "is for normal disciplinary reasons and not because of any religious beliefs he may hold...." The finding of the district court on this point is not clearly erroneous.* * * The judgment is affirmed.[101]

• *Tate v. Cubbage*, 210 A.2d 555 (1965) (plaintiffs should not be denied exercise of their religious rights on an equal basis with other prisoners solely because of speculative harms that can be dealt with if they actually occur).

• *Barnett v. Rodgers*, 410 F.2d 995 (1969) (case remanded to give prison authorities opportunity to develop a plan for supplying Muslim prisoners with pork-free diet).[102]

Two other Black Muslim cases will be discussed below, *St. Claire v. Cuyler* (CA3, 1980) and *Shabazz v. O'Lone* (CA3, 1986). The last-named was decided by the Supreme Court of the United States in a manner that probably brings to rest for a while this entire category of cases.

b. Other Kinds of Cases. Black Muslims were not the only complainants to bring Free Exercise cases from the prison environment, nor were the lower courts the only ones to wrestle with them. The Supreme Court had remanded *Cooper v. Pate* in 1967 and *Long v. Parker* in 1968 by *per curiam* opinions, and in 1972 it remanded another *per curiam*, with an articulate dissent by Justice Rehnquist.

(1) *Cruz v. Beto* (1972). An inmate in the care of the Texas Department of Corrections complained that other prisoners were allowed to use the prison chapel for their religious observances, but he was not. They received points of good merit enhancing their eligibility for desirable job assignments and early parole as a reward for attending orthodox religious services, while he did not. He was a member of the Buddhist Churches of America. When he shared his religious writings with other prisoners, he was punished by being placed in solitary confinement on bread and water for two weeks. He was also prohibited from corresponding with his religious adviser in the Buddhist sect outside the prison. The federal district court denied relief without a hearing or any findings, saying the matter was one in which the "sound discretion" of prison administrators should not be questioned by courts. The Court of Appeals affirmed. The Supreme Court accepted the case and remanded it for hearing on the merits.

> Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners. We are not

---

101 . Ibid.

102 . Additional cases of this ilk may be of interest to the researcher: *Brown v. McGinnis*, 10 N.Y.2d 531 (1962); *Pierce v. LaVallee*, 319 F.2d 844 (CA2, 1963); *Sostre v. McGinnis*, 334 F.2d 906 (CA2, 1964); *Banks v. Havener*, 234 F. Supp. 27 (1964); *Horn v. California*, 321 F.Supp. 961 (1968); *Long v. Parker*, 390 F.2d 816 (CA3, 1968); *Bethea v. Daggett*, 329 F.Supp. 246 (1970); *Hoggro v. Pontesso*, 456 F.2d 917 (CA10, 1972); *Clark v. Wolff*, 347 F. Supp. 887 (1972); *Burgin v. Henderson*, 536 F.2d 501 (CA2, 1976); *Mawhinney v. Henderson*, 542 F.2d 1 (CA2, 1976); *Kahey v. Jones*, 836 F.2d 948 (CA5, 1988); *Hunafa v. Murphy*, 907 F.2d 46 (CA7 1990), and many more.

> unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes "access of prisoners to the courts for the purpose of presenting their complaints...." [I]n Cooper v. Pate...[103] we reversed a dismissal of a complaint [in which] [t]he allegation made by that petitioner was that solely because of his religious beliefs he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners.
>
> * * *
>
> If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion, established 600 B.C., long before the Christian era.... If the allegations of this complaint are assumed to be true, as they must be on the motion to dismiss, Texas has violated the First and Fourteenth Amendments.[104]

Justice Blackmun concurred only in the result. Chief Justice Burger concurred in the result with a brief separate comment:

> I concur in the result reached even though the allegations of the complaint are on the borderline necessary to compel an evidentiary hearing. Some of the claims alleged are frivolous; other do not present justiciable issues. There cannot possibly be any constitutional or legal requirement that the government provide materials for every religion and sect practiced in this diverse country. At most, Buddhist materials cannot be denied to prisoners if someone offers to supply them.[105]

Justice Rehnquist did not concur. His dissent pointed out some of the pitfalls in entertaining claims of religious liberty, especially in the prison setting, and is what makes this case noteworthy.

> Unlike the Court, I am not persuaded that petitioner's complaint states a claim under the First Amendment, or that if the opinion of the Court of Appeals is vacated the trial court must necessarily conduct a trial upon the complaint.
>
> Under the First Amendment, of course, Texas may neither "establish a religion" nor may it "impair the free exercise" thereof. Petitioner alleges that voluntary services are made available at prison facilities so that Protestants, Catholics, and Jews may attend church services of their choice. None of our prior holdings indicates that such a program on the part of prison officials amounts to the establishment of a religion.
>
> Petitioner is a prisoner serving 15 years for robbery in a Texas

103 . 378 U.S. 546 (1964), discussed at § 3a(2) above.

104 . *Cruz v. Beto*, 405 U.S. 319 (1972), *per curiam*.

105 . Ibid., Burger concurrence.

penitentiary. He is understandably not as free to practice his religion as if he were outside the prison walls. But there is no intimation in his pleadings that he is being punished for his religious views, as was the case in Cooper v. Pate..., where a prisoner was denied the receipt of mail about his religion. Cooper presented no question of interference with prison administration of the type that would be involved here in retaining chaplains, scheduling the use of prison facilities, and timing the activities of various prisoners.

None of our holdings under the First Amendment requires that, in addition to being allowed freedom of religious belief, prisoners be allowed freely to evangelize their views among other prisoners. There is no indication in petitioner's complaint that the prison officials have dealt more strictly with his efforts to convert other convicts to Buddhism than with efforts of communicants of other faiths to make similar conversions.

By reason of his status, petitioner is obviously limited in the extent to which he may practice his religion. He is assuredly not free to attend the church of his choice outside the prison walls. But the fact that the Texas prison system offers no Buddhist services at this particular prison does not, under the circumstances pleaded in his complaint, demonstrate that his religious freedom is impaired. Presumably prison officials are not obligated to provide facilities for any particular denominational services within a prison, although once they undertake to provide them for some they must make only such reasonable distinctions as may survive analysis under the Equal Protection clause.

What petitioner's basic claim amounts to is that because prison facilities are provided for denominational services for religions with more numerous followers, the failure to provide prison facilities for Buddhist services amounts to a denial of the equal protection of the laws. There is no indication from petitioner's complaint how many practicing Buddhists there are in the particular prison facility in which he is incarcerated, nor is there any indication of the demand upon available facilities for other prisoner activities. Neither the decisions of this Court after full argument, nor those summarily reversing the dismissal of a prisoner's civil rights complaint have ever given full consideration to the proper balance to be struck between prisoners' rights and the extensive administrative discretion that must rest with correction officials. I would apply the rule of deference to administrative discretion that has been overwhelmingly accepted in the courts of appeals. Failing that, I would at least hear argument as to what rule should govern.

A long line of decisions by this Court has recognized that the "equal protection of the laws" guaranteed by the Fourteenth Amendment is not to be applied in a precisely equivalent way in the multitudinous fact situations that may confront the courts. On the one hand, we have held that racial classifications are "invidious" and "suspect." I think it is quite consistent with the intent of the framers of the Fourteenth Amendment, many of whom would doubtless be surprised to know that convicts came within its ambit, to treat prisoner claims at the other end of the spectrum from claims of racial discrimination. Absent a complaint alleging facts

> showing that the difference in treatment between petitioner and his fellow Buddhists and practitioners of denominations with more numerous adherents could not reasonably be justified under any rational hypothesis, I would leave the matter in the hands of prison officials.
>
> ...I would not require the district court to inflexibly apply [the general standard for dismissal] to the complaint of every inmate, who is in many respects in a different litigating posture than persons who are unconfined. The inmate stands to gain something and lose nothing from a complaint stating facts that he is ultimately unable to prove. Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse. To expand the availability of such courtroom appearances by requiring the district court to construe every inmate's complaint under the liberal [general] rule...deprives those courts of the latitude necessary to process this ever-increasing species of complaint.
>
> Finally, a factual hearing should not be imperative on remand if dismissal is appropriate on grounds other than failure to state a claim for relief. It is evident from the record before us that the in forma pauperis complaint might well have been dismissed as "frivolous or malicious" under the discretion vested in the trial court....
>
> The State's answer to the complaint showed that the identical issues of religious freedom were litigated by another prisoner from the same institution, claiming the same impairment of the practice of the Buddhist religion, which was brought by the attorney employed at the prison to provide legal services for the inmates. It is not clear whether petitioner here was a party to that suit, as he was to many suits filed by his fellow prisoners. If he was, the instant claim may be barred under the doctrine of res judicata.[106] In any event, a prior adjudication of the same claim by another prisoner under identical circumstances would be a substantial factor in a decision to dismiss this claim as frivolous.
>
> In addition, the trial court had before it the dismissal of another of petitioner's cases filed shortly before the instant action, where the trial judge had been exposed to myriad previous actions, and found them to be "voluminous, repetitious, duplicitous and in many instances deceitful." Whether petitioner might have raised his claim in these or several other actions in which he joined other prisoner plaintiffs is also proper foundation for a finding that this complaint is "frivolous or malicious." Whatever might be the posture of this constitutional claim if petitioner had never flooded the courts with repetitive and duplicitous claims, and if it had not recently been adjudicated in an identical proceeding, I believe it could be dismissed as frivolous in the case before us.[107]

If what Justice Rehnquist pointed out was correct, it seemed remarkable that no one had ascertained specifically whether Cruz's complaint was *res judicata* under

---

106 . "A matter already decided," the judicial doctrine that a final judgment by a court of competent jurisdiction is binding on the parties in any subsequent litigation involving the same cause of action and may not be relitigated.

107 . *Cruz v. Beto, supra,* Rehnquist dissent.

actions in which he was a party or which disposed of identical contentions before the Supreme Court of the United States spent valuable time and energy on it. The recreational aspect of "jailhouse lawyering" was further explicated by a footnote to Justice Rehnquist's opinion, quoting a law review article.

> "The last type of writ-writer to be discussed writes writs for economic gain. This group is comprised of a few unscrupulous manipulators who are interested only in acquiring from other prisoners money, cigarettes, or merchandise purchased in the inmate canteen. Once they have a `client's' interest aroused and determine his ability to pay, they must keep him on the `hook.' This is commonly done by deliberately misstating the facts of his case so that it appears, at least on the surface, that the inmate is entitled to relief. The documents drafted for the client cast the writ-writer in the role of a sympathetic protagonist. After reading them, the inmate is elated that he has found someone able to present his case favorably. He is willing to pay to maintain the lie that has been created for him."
>
> "When decisions do not help a writ-writer, he may employ a handful of tricks which damage his image in the state courts. Some of the not too subtle subterfuges used by a small minority of writ-writers would tax the credulity of any lawyer. One writ-writer simply made up his own legal citations when he ran short of actual ones. In one action against the California Adult Authority involving the application of administrative law, one writ-writer used the following citations: *Aesop v. Fables*, *First Baptist Church v. Sally Stanford*, *Doda v. One Forty-four Inch Chest*, and *Dogood v. The Planet Earth*. The references to the volumes and page numbers of the nonexistent publications were equally fantastic, such as 901 *Penal Review*, page 17,240. To accompany each case, he composed an eloquent decision which, if good law, would make selected acts of the Adult Authority unconstitutional. In time the `decision' freely circulated among other writ-writers, and several gullible ones began citing them also."[108]

Another footnote quoted a Ninth Circuit opinion: "[T]emporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls."[109] While not implying that *all* prisoners' complaints were specious, Justice Rehnquist's dissent did suggest the need for an extra measure of judicial perspicacity in dealing with them, and the same may be said (to a lesser degree) about many other religious liberty pleas.

(2) *Theriault v. Carlson* (1972), "Church of the New Song." The confinement of prison provides a fertile field for the imagination. Several new religions have been spawned within its precincts, one of the more luxuriant of which was the Church of the New Song (acronym CONS?), emanating from the federal penitentiary in Atlanta, where it was promulgated in 1970 by one Harry William Theriault (incarcerated for robbery) and a colleague, Jerry M. Dorrough.

---

108. Ibid., quoting Larsen, Charles, "A Prisoner Looks at Writ-Writing," 56 *Calif. L. Rev.* 343, 348-349 (1968).

109. Ibid., Rehnquist dissent, n. 8, quoting *Price v. Johnston*, 159 F.2d 234, 237 (CA9 1947).

> They had obtained "doctor of divinity" certificates from a mail-order organization and, as a "game," they decided to challenge the chaplaincy program in the federal prisons and, at the same time, to develop a new religion of their own.[110]

When the prison authorities in Atlanta showed no willingness to "play along," Theriault filed suit in federal district court, whereupon he was transferred to the federal facility in Marion, Illinois, "which houses the most severe security risks in the federal system."

> Theriault now began to take his own religious claims seriously and attempted to explain them to the prisoners and staff at Marion. The Chief of Classification and Parole at Marion testified in this court that, at this point, Theriault's activities were truly religious in nature.

As a result of Theriault's increased activity at Marion, he became a source of concern to the staff. One staff member wrote a memorandum characterizing his activities as follows: "He has constantly kept occupied, writing writs and other legal papers for the inmate population. This seems to be a very big business, that occupies most of his time." On one occasion when he tried to send some papers out of the prison—whether legal or religious is not clear— permission was denied.

> Mr. Edmonds would not give Theriault permission to send the papers out. Theriault became very upset and proceeded to say this was a conspiracy to prevent him from mailing this material. He proceeded to use several colorful adjectives to describe Mr. Edmond [*sic*].... I advised him to be careful in using these terms in relation to staff members. His comment was `Freedom of speech, man.'[111]

Three days later Theriault was placed in punitive detention for failing to obey the order of a security officer. Later he was released into the regular prison population, but shortly thereafter he approached a correctional supervisor and demanded a place to hold religious services, but his request was denied. The supervisor recorded the event in his report.

> He would not accept this as an answer to his question or demand. At this time he appeared to be getting emotional, so I asked him to step into the office and we would discuss the matter.
>
> To take away the opportunity of Theriault creating an incident, if he so desired, I kept him in the office until the evening yard was closed and we had began to count.
>
> During our talk in the office, Theriault still demanded to be permitted to worship his lord in a place where other inmates could come if they so desired.
>
> He stated he would hold his services and if I attempted to break it up,

110 . *Theriault v. Carlson*, 339 F.Supp. 375 (1972).

111 . Ibid., n. 5.

> I would have to resort to violence because no one would leave if I instructed them to leave....
>
> As a preventive measure toward any type of incident taking place as he indicated, I placed him in [segregation] immediately after count before the general population was released for evening activities.[112]

And in punitive segregation "Bishop" Theriault remained until transferred back to Atlanta for hearings in court on his lawsuit, and he was kept in segregation in Atlanta when not in court.

Judge Newell Edenfield of the U.S. District Court for the Northern District of Georgia observed, "The court finds as fact that the sole basis for the punitive segregation of Theriault was his demand to hold religious services."[113]

In his lawsuit Theriault claimed that the existing arrangement in federal prisons constituted an "establishment of religion" because it provided accommodations for religious services for the major faiths but not for minority faiths like the Church of the New Song. The court disposed of that claim as follows:

> The "establishment" claim raised by petitioners is, for the most part, without merit.... The Bureau [of Prisons] cannot maintain a full complement of...religious professionals on the prison staffs, and a representative selection must suffice. The ordained clergymen on the federal payroll who serve as chaplains in the federal prison system are hired to provide for the spiritual needs of all prisoners, whatever their religious denomination, and they are not merely the emissaries of their respective churches. As Mr. Justice Brennan has written:
>
> > "There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be...."[114]
>
> The court concludes that the maintenance by the Bureau of Prisons of chaplains at the Atlanta federal penitentiary is not unconstitutional.
>
> Notwithstanding this conclusion, the court does find merit in

112 . Ibid., n. 6.

113 . Ibid., at 380.

114 . *Abington v. Schempp*, 374 U.S. 203 (1963), Brennan concurrence, at 296-299. See discussion of chaplaincies at VD.

> petitioners' claims about the filing of religious reports [by chaplains]. The testimony before this court established that Rev. Hansberry and Fr. Beane regularly submit reports to the caseworkers at the Atlanta penitentiary in which they comment on the inmates' participation or lack of participation in their respective religious activities. These reports, together with reports from other staff members, are culled by the caseworkers and form part of the inmates' profiles which are presented to the Board of Parole when the inmates are being considered for release on parole. It is not inconceivable that the grant or denial of parole is based, to some degree, on the religious reports submitted by the chaplains.
>
> In the court's view, the submission of religious reports by [the chaplains] involves the Government in a violation of the neutrality it must maintain with respect to religion.... Indeed, it is likely that the inmates' very knowledge of the existence of these religious reports may compel some to participate in religious activities....
>
> The court will accordingly enjoin the submission of these religious reports....

The court was more favorably impressed by Theriault's claim that the free exercise of religion was being denied the practitioners of the "Eclatarian" faith of the Church of the New Song.

> The chaplains...denied Theriault's request to hold religious services because they felt the Church of the New Song and the Eclatarian faith were not "recognized." The insistence by these federal employees that Theriault and his followers meet this "recognition" standard before they might freely exercise their religious beliefs runs squarely afoul of the First Amendment. One of the purposes of the First Amendment was to prohibit the imposition of any standard as a prerequisite to the free exercise of religion....
>
> * * *
>
> But respondents [the government] go further. They argue that Theriault's "religion" is not a religion at all but merely a random amalgamation of pseudo-political notions; that this "church" is nothing but a collection of some of the worst prisoners in the federal system. Similar arguments were offered by prison officials when so-called Black Muslim prisoners began suing in federal court for religious freedom.
>
> * * *
>
> The record in this case amply reflects the tenets, such as they are, of the Church of the New Song and the Eclatarian faith. The Eclatarian faithful worship a divine and universal spirit which they identify as "Eclat" and which they believe manifests itself in all animate and inanimate objects. Since each person is thought to possess some of this universal spirit, the Eclatarians believe that loneliness may be overcome and true brotherhood achieved if people become more conscious of Eclat.... A number of inmates testified before this court that Theriault and his teachings have had a positive, rehabilitative effect upon their lives and have inspired them religiously. This court is not unmindful of the very real possibility that petitioners are still engaging in a "game" and attempting to perpetrate a

> colossal fraud upon both this court and the federal prison system. Nevertheless, with all due respect to respondents, the court cannot declare petitioners' religion illegitimate.
>
> Respondents contend, however, that even if the Eclatarian faith is not illegitimate, they need not permit its free exercise in prison because Theriault and his followers are violent and threaten the security of the prison.
>
> * * *
>
> However, in view of the Black Muslim cases,[115] this court cannot say on the basis of this evidence that Theriault or his group are so menacing that they should not be allowed to freely exercise their religion.... Accordingly, it must grant petitioners appropriate relief so they may freely exercise their rights within the context of a prison community.[116]

The court ordered that the Bureau of Prisons' regulations pertaining to accommodations of prisoners' religious activities be applied equally to the Church of the New Song, no more, no less. It ordered Theriault released from punitive segregation and returned to the general prison population, adding that if he engaged in any disruptive, violent or inciting behavior thereafter, he was to be treated exactly as any other inmate.

Subsequently, the Church of the New Song (acronym CONS) appeared in another court, this time in Iowa.

(3) *Remmers v. Brewer* (1973), "Church of the New Song." Two inmates of the Iowa State Penitentiary, after less inventive excursions of their own, came upon Theriault's creation in 1972 and decided to adopt it. Their efforts to pursue this new faith, however, were not encouraged by the prison authorities, and so inmates Remmers and Loney complained to the courts that their freedom of religion was being stultified and sought relief in the form of an injunction requiring the warden and other prison personnel to grant the Church of the New Song the same privileges as other religious faiths. Their complaint was dealt with by Chief Judge William Cook Hanson of the federal district court for the Southern District of Iowa.

> In late 1971...plaintiff Remmers was involved in the founding of a group known as T.R.U.T.H., an acronym for To Religious Understanding Through Hope. This organization, in which plaintiff Loney was also involved, apparently functioned as an informal discussion group with religious overtones. Shortly, after the founding of T.R.U.T.H., Remmers approached Reverend Ray [prison chaplain] on behalf of the group and requested permission to hold formal meetings and use prison facilities. This request was denied by Reverend Ray because he felt that T.R.U.T.H. was not a "recognized" religion and had no established counterpart or sponsor outside the prison.
>
> Sometime after this encounter, Remmers and other T.R.U.T.H. members became acquainted with an order known as the Church of the New

115 . The court discussed and quoted from *Cooper v. Pate*, 382 F.2d 518 (1967) and *Long v. Parker*, 390 F.2d 816 (1968).

116 . *Theriault v. Carlson*, *supra*.

Song.... Following this acquaintanceship, Remmers, Loney, and a number of other inmates became members of the Church of the New Song and carried on correspondence with Bishop Harry Theriault [its founder] and other Church of the New Song functionairies. Remmers and Loney then again approached Reverend Ray and Father Hoenig. They expressed their belief in the Church of the New Song and indicated to both chaplains that a sizeable number of inmates were interested in the new faith. Their request for meeting facilities and formal scheduling of Church of the New Song activities was denied by the chaplains with the explanation that the church was not a recognized religion.

* * *

The threshold determination to be made in this case concerns whether or not the Church of the New Song is a religion so as to come under the protection of the First Amendment. This question has previously been considered by a federal court in Theriault v. Carlson.... The court there concluded that the Church of the New Song was a religion and as such was entitled to the full protection of the First Amendment.... [T]his Court agrees with the conclusion of Judge Edenfield in Theriault v. Carlson.

In the first instance, the Court notes that the preferred position of religious freedoms in our constitutional plan demands that a federal court view religious claims with great solicitude lest these vital freedoms be extinguished....

* * *

The primary bond between Church of the New Song members appears to be their belief in inanimate and supreme force or spirit called Eclat, which they believe pervades all things. The Eclatarians apparently believe that Eclat is a unifying and harmonizing spirit which unites all men in brotherhood. Eclatarians view Jesus and other Christian figures as great teachers and spiritual leaders who are nonetheless subordinate to Eclat. Thus plaintiffs do not feel that they are a Christian sect or that their religious needs can be fulfilled under the existing opportunities for Protestant or Catholic services. Important writings in the Eclatarian faith include the Bible and a series of "Demandates" and "Exegetic Missives" issued by the spiritual leader of the faith, Bishop Harry Theriault....

The testimony of Richard Tanner and Becky Hensley showed that the Eclatarian movement is no longer confined only to the inmates of two federal penitentiaries, as was the case when the *Theriault* opinion was written. Rather, the Church of the New Song appears to have spread both within and without penal institutions across the country.... Dr. Stephen Fox, a member of the church and a professor of psychology, testified as to the rehabilitative effects of Eclatarianism on prison inmates in particular and on people in general....

Although much of the precise meaning of Eclatarianism may escape the Court, and no matter how strange or bizarre its origins and fundamentals may appear to some, it is beyond serious doubt that it possesses many of the characteristics associated with traditional "recognized" religions. The state has not shown the insincerity or fraudulant nature of the petitioners' professed beliefs....

The state does not appear to deny this conclusion directly, but argues that in a prison context some initial showing of legitimacy is required for administrative purposes before a group alleging to be a religion is entitled to the protection of the Free Exercise Clause.... [T]he state's argument suggests that prison administrators have the power to decide which religions are "recognized" and legitimate and which are not. Such a notion strikes directly at the freedom from governmental approval of secular [*sic*] religion which is at the core of the First Amendment's Establishment Clause. Apart from the fact that the petitioners here have plainly made a *prima facie* showing of legitimacy, the requirement proposed by the state is patently unsound and cannot stand. The Court is not insensitive to the problems of a prison administrator faced with a profusion of religious claims by those whose faith may appear both strange and incomprehensible, if not downright false and insincere, but that concern cannot justify a voyage into the uncharted hazards of religious censorship. It is neither for a court nor a governmental official to rule on the truth or falsity of a religious faith. Such questions are clearly placed beyond the pale of governmental decision-making by the First Amendment. The only appropriate and relevant inquiry is whether or not the Church of the New Song is a religion and whether the plaintiffs possess a sincere and good faith belief in that creed.

* * *

Given these findings, the plaintiffs' remedy at law is clear. When the state seeks to justify the granting or withholding of benefits and privileges based on religious classifications, the Equal Protection Clause of the Fourteenth Amendment demands that the state present a compelling interest which is served by the discrimination. The principle is equally applicable in a prison setting. The state has not suggested nor does the Court perceive any compelling state concern which is forwarded by denying to Church of the New Song members the same rights of assembly, discussion, correspondence, ministerial visits, devotional facilities, etc. which are enjoyed by Protestant and Catholic inmates....

The Court is well aware of the possibility that the Church of the New Song may be only a sham religion created to serve as a convenient vehicle for the presentation of political claims. But the as yet unsubstantiated anxieties of this Court cannot justify the possible suffocation of religious freedoms. If the Church of the New Song should prove to be a hoax and front that the state claims it is, that eventuality can be dealt with by both the prison authorities and this Court. Nor should it be thought that by granting the Eclatarians religious rights the prison administration is laying itself open to uncontrollable hazards. The prison administration has a strong interest in seeing that the facilities and benefits enjoyed by the Church of the New Song are not abused or used for other than religious purposes. Meetings can be observed or mail monitored to see that this is the case. Given the power vested in prison authorities to take reasonable

> precautions to prevent potential abuses, any phoney believers should find their jest most unrewarding.[117]

The plaintiffs also complained that the chaplains of the prison participated in the decision-making process of the Classification and Review Committee, which determined each inmate's placement and assignments in the prison and their work-release or parole from it, and consequently could prejudice an inmate's status or release because of participation or nonparticipation in religious activities carried on by the chaplains for adherents of conventional faiths. The court found that the chaplains' role in the Committee's work was not substantial and did not pertain solely or primarily to inmates' religious activity or lack thereof, and so the Court dismissed that complaint.

The state appealed the ruling that the Church of the New Song must be given treatment comparable to other faith groups (of similar size) in the prison; the plaintiffs appealed the adverse ruling on the role of chaplains. The Eighth Circuit Court of Appeals affirmed both holdings in a brief *per curiam* opinion.[118]

(4) The Further Adventures of "Bishop" Theriault. Some eight years after the Church of the New Song made its appearance in the Federal Reports, it reached a conclusion of sorts in a 1980 decision of the Seventh Circuit Court of Appeals, which noted that the first decision, *Theriault v. Carlson* (1972), *supra*, had found the Church of the New Song to be a religion, but that that conclusion had been reversed by the Fifth Circuit on appeal.[119] Theriault had been transferred to the federal penitentiary at Marion, Illinois, where he filed another suit,
and later he was transferred to the federal prison in LaTuna, Texas, where he instituted another action in federal court claiming violation of his First Amendment rights, which was dismissed on the day it was filed. Another lawsuit instituted by Theriault in Georgia claiming that prison authorities had violated the orders of court in the first case resulted in a civil contempt order against them. But that case, along with its Georgia precursor, the Illinois case, and the Texas case were consolidated by the Fifth Circuit and remanded (twice) for further fact-finding, which ultimately resulted in a decision that "the Church of the New Song was not a legitimate religion entitled to First Amendment protection."[120] Theriault appealed this decision, but because of "vile and insulting references to the trial court," the Fifth Circuit dismissed the appeal with prejudice.

A new lawsuit was instituted in East Texas under the curious style *Church of the New Song v. Establishment of Religion on Taxpayers' Money in the Federal Bureau of Prisons*, and it eventually was taken on appeal to the Fifth Circuit, which ruled that the prior (West) Texas decision was *res judicata*—that it had settled the matter once and for all when it ruled (after considering in great detail the writings of Theriault, the record in the prior cases and the conduct of Theriault and his followers) that "[t]he Church of the New Song appears not to be a religion, but rather as a masquerade

---

117 . *Remmers v. Brewer*, 361 F.Supp. 537 (1973).
118 . *Remmers v. Brewer*, 494 F.2d 1277 (1974).
119 . 495 F.2d 390 (1974).
120 . *Theriault v. Silber*, 453 F.Supp. 254 (W.D.Tex. 1978).

designed to obtain First Amendment protecton for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities."[121] Theriault contested all of the elements of *res judicata* (unsuccessfully) and then insisted that, even if those elements were lacking, he should still prevail "because of the important public policies and liberty interests at stake." The Fifth Circuit demurred and commented mildly, "We believe...that Theriault has more than had his day in court. *Res judicata* itself is based on public policy favoring an end to litigation, and we hold that it was appropriately applied in this case." In a footnote to the statement about "his day in court," *sixty-one* court actions were listed involving Theriault since 1968, including a number of appeals to the Supreme Court and motions for rehearing denial of *certiorari*. (Curiously, the Fifth Circuit distinguished the Iowa case involving the same Church of the New Song, which had recognized it as a legitimate religion in *Remmers v. Brewer, supra.*)

• *O'Malley v. Brierley*, 477 F.2d 785 (CA3 1973) (clergy from outside prison have no constitutional right to claim admission to counsel inmates; accord *Bridges v. Davis*, discussed at § B2a above).

(5) *Teterud v. Burns* (1975), Long Hair. Jerry Teterud, an inmate of the Iowa State Penitentiary, challenged in federal court a prison regulation prohibiting him from wearing long braided hair. A federal district court found the wearing of long braided hair to be a tenet of the Indian religion sincerely held by Teterud and directed the prison authorities to pursue the interests of penal administration by less restrictive means than requiring Teterud to cut his hair. The state appealed, and the Eighth Circuit affirmed in an opinion by Judge Gerald W. Heaney for himself and Judges Martin D. Van Oosterhout and Donald P. Lay.

The state asserted that wearing long braided hair is not a tenet of the Indian religion but is reflective of purely secular considerations of racial pride and personal preference.

> The appellants' argument appears to be premised on the theory that Teterud was required to prove that wearing long braided hair was an absolute tenet of the Indian religion practiced by all Indians. This is not the law. Proof that the practice is deeply rooted in religious belief is sufficient. It is not the province of government officials or court to determine religious orthodoxy.
>
> * * *
>
> While also a matter of tradition, the wearing of long hair for religious reasons is a practice protected from government regulation by the Free Exercise Clause.... We will not, at the insistence of the appellants, judge the orthodoxy of Teterud's beliefs.
>
> They next assert that...Teterud was [not] sincere in his religious beliefs. Again we disagree. First, the sincerity of Teterud's beliefs was, on questioning from [his] counsel, admitted by Warden Brewer. Second, when asked what it would mean to cut his hair, Teterud stated:
>
> I would feel spiritually dead. I would feel empty. Mentally, it would

121 . Ibid.

> be a tremendous strain. I would have to feel...my being was going to die.
>
> Third, the fact that Teterud was, prior to trial, an active leader in the Church of the New Song is not inconsistent with a sincere belief in the Indian religion, for the record shows that the former does not require conformity to certain beliefs. The Indian religion, unlike Christian religions, is not exclusive. Its followers can, without contradiction, participate in different religions simultaneously.
>
> Finally, the appellants assert that the encroachment on Teterud's right to exercise his religious beliefs is not greater than necessary to serve the interests of penal administration.... They argued below that the absolute prohibition against wearing long hair was necessary for: (1) sanitary food preparation; (2) safe operation of machinery; (3) easy identification of inmates; (4) security against contraband; and (5) the personal cleanliness of inmates. The District Court held these justifications to be either without substance of overly broad in their sweep. It found that: (1) the interests in sanitation and safety could be adequately served by requiring those with long hair to wear hair nets; (2) those inmates whose appearance changes by growing long hair could be rephotographed for easy identification; (3) any contraband secreted in the longer hair would be found by the normal body searches; and (4) there was no reason to believe an inmate could not keep long hair clean.
>
> * * *
>
> Moreover, Warden Brewer testified by post-trial deposition, when an estimated twenty percent of the inmate population was in noncompliance with the regulation, that after five months of nonenforcement under the restraining order, no inmate problems had resulted from the wearing of long hair. Justifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment.
>
> * * *
>
> The proof at trial established that the legitimate institutional needs of the penitentiary can be served by viable, less restrictive means which will not unduly burden the administrator's task. The challenged regulation, thus, impermissibly infringed on Teterud's right under the First Amendment to the free exercise of his religion.[122]

This decision was subsequently rendered obsolete by the Eighth Circuit in *Iron Eyes v. Henry*[123] as a result of the Supreme Court's decision in *Turner v. Safley*,[124] which determined that accommodation of prisoners' constitutional rights should be judged on the basis of "reasonableness" rather than strict scrutiny, that is, whether the regulation in question is "reasonably related to legitimate penological interests."

(6) *Kahane v. Carlson* (1975), Kosher Diet. Meir Kahane, an orthodox Jewish rabbi, had attained some small notoriety as the leader of the Jewish Defense League when in 1971 he was sentenced in the Eastern District of New York for conspiracy

122 . *Teterud v. Burns*, 352 F.2d 357 (1975).

123 . 907 F.2d 810 (1990), discussed below at § d1.

124 . 482 U.S. 78 (1987).

to violate the federal Firearms Act. Kahane sought court orders requiring prison administrators to conform the conditions of his incarceration to his religious beliefs concerning diet and prayer. Judge Jack B. Weinstein granted a writ of mandamus affording relief. The Second Circuit, in an opinion by Judge Joseph Smith for himself and Chief Judge Irving Kaufman, modified the order and affirmed it. (Judge Henry J. Friendly concurred in a separate opinion that did not pertain to the merits of the dietary issue.)

> The evidence in this case justifies the court's finding of the deep religious significance to a practising orthodox Jew (which this prisoner concededly is) of the laws of Kashruth. The dietary laws are an important, integral part of the covenant between the Jewish people and the God of Israel.... We agree with the court below that the prison authorities are proscribed by the constitutional status of religious freedom from managing the institution in a manner which unnecessarily prevents Kahane's observance of his dietary obligations. The difficulties for the prisons inherent in this rule would seem surmountable in view of the small number of practising orthodox Jews in federal prisons (which the evidence indicated would not exceed approximately twelve), and in view of the fact that state and city prisons provide kosher food, that federal institutions do so on high holidays and that medical diets are not unknown in the federal system.
>
> The order under review indicates that there are several means within the reach of the [administration] by which Kahane's rights may be respected. Some of these means, such as methods for self-preparation of vegetables and fruits, are suggested by [the administration] themselves. Provision of tinned fish, boiled eggs and cheese may be made from regular institutional supplies. The language of the opinion incorporated in the order may be interpreted to require hot kosher TV dinners. If these are merely suggested methods, we find no fault with them.... Such details are best left to the prison's management which can provide from the food supplies available within budgetary limitations. Prison authorities have reasonable discretion in selecting the means by which prisoners' rights are effectuated.
>
> The use of frozen, prepared foods, while perhaps helpful, is not constitutionally required if another acceptable means of keeping kosher is provided.... As modified, the order is affirmed.[125]

(7) *Kennedy v. Meacham* (1976), Satanism. A federal district court in Wyoming encountered a singular complaint from three inmates of that state's penitentiary to the effect that they had been hindered in the free exercise of their religion and subjected to penalties and discrimination because of it. The motion was dismissed by the district judge, Ewing T. Kerr, and two of the inmates appealed to the Tenth Circuit. The inmates claimed to be followers of Anton LaVey's Church of Satan. The state contended on appeal that (1) the facts pleaded do not establish that Satanism is a religion, and (2) in any event the inmates' belief in Satanism was not

125 . *Kahane v. Carlson*, 527 F.2d 492 (1975).

restricted, only their practice, and that only reasonably to comport with prison discipline. The appellate court dealt with the matter of dismissal as follows:

> First, we must reject the contention that dismissal was proper because no "religion" was involved. The trial court...expressed no such view and instead analyzed the complaint as showing that only reasonable limitations on the exercise of the belief were imposed, apparently either accepting the allegations that for constitutional purposes a religion was involved, or reasoning that even assuming that a religion was involved the restrictions were permissible.
>
> We cannot agree with the defendants that, on the basis of this complaint, a court may declare as a matter of law that no religious belief is involved. We are admonished that a complaint should not be dismissed for failure to state a claim unless it appears without doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,...and less stringent standards apply when the pleading is by a layman....
>
> We cannot dismiss the allegations claiming that a "religion" is involved here in the absence of any responsive pleading, affidavits or the like, and no proof or findings thereon, and say that no belief entitled to First Amendment protection is involved.... For the Amendment is part of "...a charter of government which envisaged the widest possible toleration of conflicting views."[126]
>
> * * *
>
> Second, we are not persuaded that a court may hold that the complaint shows that defendants' actions were only lawful limitations on the practice of religious belief, and that no infringements of rights under the Free Exercise Clause occurred.
>
> It is true that overt acts prompted by religious beliefs or principles are subject to some regulation..., and the circumstance of imprisonment is, of course, a factor that bears on the lawfulness of limitations....[127] While in custody inmates have only such rights as can be exercised without impairing requirements of prison discipline.... Again, however, the dismissal was made before there was any assertion by defendants that their actions were taken as necessary security or control measures in the prison, and without any pleading or proof of the surrounding circumstances.
>
> We are persuaded that the asserted justification of such restrictions on religious practices based on the State's interest in maintaining order and discipline must be shown to outweigh the inmates' First Amendment rights.... Hence, we conclude we must vacate the judgment of dismissal and remand for further proceedings. If it is determined that the practice of a religious belief is involved, and that there are restrictions imposed on its exercise, then the court should further determine whether any incidental burden on fundamental First Amendment rights is justified by a

126 . Citing *U.S. v. Ballard*, 322 U.S. 78 at 87 (1944), discussed at IIB6a.

127 . Citing *Barnett v. Rodgers*, 410 F.2d 995 (1969), discussed at § a(7) above.

> compelling state interest in the regulation of prison affairs, within the State's constitutional power.... For "...only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[128]

This opinion was rendered by Judge William J. Holloway for himself and the other two members of the panel, Judges Robert H. McWilliams and William E. Doyle. What happened further may have been affected by one plaintiff's having "graduated" from prison and another's having asked to be dismissed from the appeal. They had argued that the warden had denied them "necessary ritual items including candles, robes, a holy water sprinkler, parchment, a gong, a chalice, incense and a bell." Perhaps the warden had felt that supplying such equipment for the practice of "Satanism" did not seem altogether consonant with the objectives of rehabilitation. This poses the interesting question whether there *are* religions that are genuinely incompatible with the common good and should be suppressed, and who should make that judgment, and on what basis. The First Amendment does not seem to contemplate that very real possibility.[129]

(8) *Moskowitz v. Wilkinson* (1977), Orthodox Jew's Beard. A somewhat more conventional question was presented by Philip Moskowitz, an Orthodox Jewish prisoner at the Federal penitentiary in Danbury, Connecticut, who refused for religious reasons to remove his beard. He had been penalized four times for violating the prison's no-beard policy, each time losing seven days' statutory "good time" toward release, and the last time being placed in disciplinary segregation, whereupon he petitioned the court for a writ of habeas corpus and asked for a temporary restraining order, which was granted pending action on the petition. A full evidentiary hearing was held, and Judge Jon O. Newman of the Connecticut District Court issued a decision.

> Petitioner is an orthodox Jew. He asserts that his religious belief forbids any cutting or shaving of his beard. It is undisputed that there is substantial support in Jewish law and doctrine for the view that any cutting or shaving of the beard is impermissible. The belief derives from several Biblical verses[130] and has the support of commentators on Jewish law.
>
> The Government concedes the existence of this authority but disputes its significance in the present case. It cites other Jewish authorities who express the view that removal of facial hair is permissible, at least if it is

---

128. *Kennedy v. Meacham*, 540 F.2d 1057 (1976), quoting *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discussed at IIIB2.

129. Another case involving Satanism, *McCorkle v. Johnson*, 881 F.2d 993 (CA11 1989), was decided following the Supreme Court's decisions in *Turner* and *O'Lone, infra*, and reached an opposite conclusion from *Kennedy v. Meacham*.

130. Citing Leviticus 21:5: "They shall not make tonsures upon their heads, nor shave off the edges of their beards, nor make any cuttings on their flesh," and Deuteronomy 22:5: "A woman shall not wear anything that pertains to a man, nor shall a man put on a woman's garment; for whoever does these things is an abomination to the Lord your God" (RSV). (The first was addressed to *priests only* and refers to ritual mourning customs only.)

> done with instruments that cut or clip the beard rather than shave or scrape the face. The argument is that "the Jewish religion" does not mandate the level of observance claimed on behalf of petitioner but rather recognizes varying levels of observance. The Government further contends that petitioner's claim to a sincere belief that he may never shave is undermined by his position up until the onset of this litigation that when forced to do so he would acquiesce in the trimming of his beard.
>
> It cannot be denied that different levels of observance exist among the world's Jews. But the fact that some Jews do not object to shaving, or that others accept the distinction between shaving and cutting, does not defeat the plaintiff's claim. It is his own religious belief that is asserted, not anyone else's. [Emphasis added.] The Court need not and should not attempt to determine whether a religious tribunal would hold that the tenets of the Jewish religion do not require petitioner to adhere to his preferred level of observance. He need not show that his religious practice is absolutely mandated in order to receive constitutional protection.... The showing of a belief or practice deeply rooted in religious doctrine is sufficient to trigger the Government's obligation under the Constitution to justify its restriction as reasonably necessary in support of an important or substantial interest. The Government does not avoid this obligation by pointing to other believers who accept less rigorous views and practices.
>
> Furthermore, although the Government argues that the petitioner has changed his religious beliefs upon filing this suit, the petitioner's showing, even if some change has occurred, is clearly sufficient to confer on him standing to challenge the Bureau's regulation on religious grounds. He asserts that he has never voluntarily cut his beard in his adult life. He has sought guidance from Orthodox rabbis on how to adhere to his religious obligation while in prison. On four separate occasions he suffered disciplinary proceedings and the imposition of sanctions including the forfeiture of good time rather than cut his beard in violation of his religious beliefs. Although a prisoner with no religious beliefs at all, or a demonstrably insincere religious belief adopted only for the purpose of obtaining a benefit, might not have standing to raise the religious claim and trigger the Government's obligation to justify its regulation, petitioner has more than met the standing requirement to assert his constitutional claim.[131]

The court here seemed to be saying that sincerity was the test of standing and that sincerity was evidenced by willingness to endure punishment rather than abandon disfavored religious practices. A possible implication would be that the government should not accommodate religious claims until it had applied some pressure against them to determine their sincerity; if they withstand such testing, then the government should relent and accommodate them. But how much "testing" would be enough? And if, at some point, the claimant acceded to the government's demands, as Moskowitz was represented as having done prior to this litigation, does that mean that the government's rigidity was justified, and the claimant was not really

131 . *Philip N. Moskowitz v. George C. Wilkinson, Warden*, 432 F.Supp. 947 (1977).

"sincere"? Are only the religious obligations one is willing to die for "sincere" or worthy of respect?

> The governmental interest at stake in the promulgation and enforcement of the no-beard rule is asserted to be the need for effective identification of inmates to insure prison security and to facilitate apprehension of inmate escapees. This is an "important and substantial interest" within the meaning of [prior cases]. The critical issue is whether this governmental interest reasonably justifies the impairment of petitioner's ability to observe his religious beliefs.
>
> The Government's evidence established that the wearing of a beard poses some risk to identification of inmates, both in prison and in the event of escape, because, according to the testimony of experienced investigators, removal of a beard or even changes in its length and shape can significantly alter a person's appearance and diminish prospects of recognition. But obviously the Government cannot require whatever would promote easier identification of inmates regardless of the impact on constitutionally protected liberties. The constitutional reasonableness of this prohibition remains to be determined.
>
> The Government's contention that a no-beard rule is reasonably justified is significantly undermined by the experience of other prison systems. A survey of nearly all the state prison systems conducted at the Court's request by the National Institute of Corrections and made part of the record in this case shows that approximately half of the states allow beards.... [T]he policies at other well-run institutions are relevant to a determination of the necessity for the restriction, and the fact that half the states operate their prisons without a no-beard rule certainly casts doubt on the Government's claim.
>
> The need for a no-beard rule to facilitate inmate identification is also undermined by the Bureau's present policy of allowing hair styles of any length as well as mustaches and sideburns. Although the Government's witnesses testified that identification problems are somewhat greater where a suspect removes or changes his beard than where he merely changes his hair style or his mustache, the incremental difficulties are not shown to pose a sufficiently serious risk as to outweigh the inmate's religious interest in wearing a beard. Special identification problems for bearded inmates can be dealt with in far less restrictive ways such as by rephotographing the inmate if his appearance changes.
>
> Further, during the period of approximately one year when the Bureau allowed beards for inmates with a religious claim, it experienced no serious problems with identification, security or escapes. According to...testimony,...during this period approximately 1% of the federal prisoners asserted a religious interest in wearing a beard. [The witness] could cite no instance of an escape involving a bearded inmate nor any disruption of greater significance than the minor dissatisfactions of inmates who wanted to wear beards for personal rather than religious reasons and were refused permission. The determination of a prisoner's *bona fide* religious interest can be done on a case-by-case basis as is now

> done to accommodate other religious practices such as observing kosher food requirements. The absence of any serious problems beyond minor administrative inconvenience or inmate frictions in the running of the kosher food program shows the feasibility of accommodating prison interests and religious practices.
>
> The portion of Bureau of Prisons Policy...prohibiting all beards is hereby declared unconstitutional as applied to prisoners who decline to remove their beards on the basis of sincerely held religious beliefs. Since no determination has ever been made that the petitioner's professed belief is or was insincere, the imposition of disciplinary sanctions on the basis of his violation of the unconstitutional policy violated the Constitution.
>
> Judgment will enter directing the [warden] to restore to petitioner all good time credits and any other privileges or benefits forfeited because of his violation of [the no-beard] policy...and to expunge from [his] records all references to the disciplinary proceedings held because of the violation.[132]

An illuminating insight into Moskowitz's effort to practice his faith in prison was afforded by the court's account in a footnote.

> The evidence showed that petitioner has never allowed his beard to be trimmed in all of his adult life except for medical reasons or under threat of physical force or disciplinary sanctions. Because of a skin condition he has had to have his beard trimmed in the past, but has done it under rabbinical supervision. Then, when he began his term of imprisonment and ran afoul of the Bureau's no-beard rule, he consulted a rabbi at the federal prison at Atlanta where he was first incarcerated to determine what he should do when forced to shave. That rabbi advised him that one interpretation of Jewish law is that if a man is under physical threat unless he shaves, he may allow the person threatening him to shave him. The pattern petitioner followed between his arrival at Danbury and the commencement of this lawsuit was to wait until the threat of sanctions became real and then to allow someone at the institution to trim his beard with clippers. On four separate occasions he suffered disciplinary proceedings and the imposition of sanctions including the forfeiture of good time rather than prematurely cut his beard before the threat ripened into coercion. Never has he cut his beard voluntarily, and even when under threat, he has never cut his beard himself; and he has insisted that the third person use clippers rather than a razor in order to maintain the highest possible level of observance even while under compulsion.
>
> Recently, upon consultation with another orthodox rabbi after having been subject to several disciplinary hearings for his refusal to shave except under threat, petitioner adopted that rabbi's view that shaving in prison even under compulsion violates Jewish law. He found support for his more rigorous belief in a separate canon of the Jewish faith, which he describes as *requiring him to choose the more pious course when interpretations conflict*. He now believes he was wrong to submit to trimming his beard

132 . Ibid.

> even under threat. The fact that this view was recently acquired does not defeat the claim of sincerity...especially since it is only a refinement of a principle he has long observed.[133]

This district court decision is reported at some length because of its insightful treatment of the Free Exercise claim involved and its recognition that a devout believer may choose the more arduous course as more pleasing to God.

(9) *St. Claire v. Cuyler* (1980), Black Muslim. As noted earlier, the appearance of professions of Muslim faith in prisons produced resistances and perplexities that were eventually reflected in case law. This case resumes the saga of Muslim claims from prison with which this section began. One Frank St. Claire, disowning his "white" name and taking the cognomen "X" (as in "Malcolm X," the assassinated leader of a Black Muslim faction in New York), sought other ways as well to manifest his faith in the not-entirely-hospitable setting of the Pennsylvania State Correctional Institution at Graterford. Eventually a federal district judge, Joseph S. Lord III, chief judge of the Eastern District of Pennsylvania, granted injunctive and declaratory relief but denied compensatory damages, and both sides took appeals to the Third Circuit Court of Appeals, which reached a unanimous opinion written by Judge Ruggero J. Aldisert for himself and the other two members of the panel, Judges Leonard Garth and Max Rosenn.

> This litigation arises out of three discrete incidents at the Graterford prison. In the first incident, prison officials punished Frank "X" St. Claire, an inmate, for failing to obey an order not to enter the prison dining room wearing a kufi, a religious head covering. In another, they refused to permit him to pass through the main corridor security gate wearing a turban made from a bed sheet. In the third incident, they refused to provide a guard to escort him from a segregated housing unit to religious services attended by inmates in the prison's general population.
>
> * * *
>
> In 1968 St. Claire joined the religious group known as the Nation of Islam, and in 1973 he changed his affiliation to the Ahmidiyya branch of Islam.... He...believes that he should, whenever and wherever possible, and especially while praying, wear a kufi, which is a small round hat and which to St. Claire indicates piety, humility, neatness, and devotion. Wearing the kufi is not mandatory, but it is traditional, and he believes it brings him closer to his God. It is also an insignia of the Ahmadiyya movement. In addition, his religion mandates attendance as often as possible but at least once a month at the Friday congregational prayer service known as Jumu'ah....
>
> * * *
>
> On December 10, 1976, [St. Claire] entered the B Gallery dining room at mealtime wearing his kufi, in violation of a prison rule prohibiting hats in the dining areas. Officer Walker ordered [him] to remove the kufi, and St. Claire protested that it had religious significance for him and that he wished to continue to wear it. The events that followed are disputed. [St.

133 . Ibid., n. 13 (emphasis added).

Claire] testified that although he was distressed and angered, since he believed his religious rights to have been infringed, he removed the kufi and replaced it when he was leaving the area. Officer Burroughs testified that St. Claire went through the "chow line," got his food, and returned to his seat, all without removing his hat, and that after he was seated St. Claire again disobeyed an order to remove his hat. Both parties agree that Burroughs told St. Claire that he was guilty of "misconduct" for wearing the kufi and refusing to obey an order. As a result of the misconduct, [St. Claire] was returned to the [Behavioral Adjustment Unit] to serve the remainder of a term there for a previous infraction...for which he had been released early....

The second incident occurred on September 14, 1977, when [St. Claire] had an appointment to meet with the Parole Board. Attending the Parole Board hearing required St. Claire to proceed beyond the security gate in the main corridor, where, according to Superintendent Cuyler, prisoners are not allowed to wear "civilian clothes." In proceeding to the meeting, St. Claire wore a turban made from a bedsheet wrapped around his head. A turban is another form of religious head covering similar in purpose to the kufi, and for St. Claire and other Muslims it has religious significance. Officer Wampole refused to permit appellee to proceed beyond the security gate to the treatment area in order to attend the Parole Board hearing unless he removed his turban. For religious reasons St. Claire refused, and he did not meet with the Board.

The third incident occurred on July 20, 1977, when appellee was confined to B Gallery. On that date appellee made a formal written request for permission to attend Jumu'ah services. Superintendent Cuyler denied the request and advised St. Claire that he would be allowed to attend religious services only after his release from segregation. As a matter of policy, allegedly never varied, inmates confined to B gallery or [the Behavior Adjustment Unit] are not permitted to attend religious services. There is no evidence on the record to show that Muslim prisoners are treated any differently from members of other religious faiths.

* * *

The Supreme Court has...specifically addressed [the tension between the first amendment and internal prison security] in a number of decisions. In Pell v. Procunier,[134] the Court held that "challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system...." It identified four important functions of the corrections system, three of which relate to society's basic justification for establishing prisons: deterrence of crime, protecting the public by "quarantining" offenders, and rehabilitation.... "Finally," it noted, "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves...." The Court also indicated that considerations of rehabilitation and institutional security "are peculiarly within the province and professional expertise of corrections officials,"

134 . 417 U.S. 817 (1974)—not a religious liberty case.

and held that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."

* * *

We are persuaded that these Supreme Court decisions indicate that the district court's interpretation of "reasonableness" [of prison regulations] imposed too rigid a burden on prison authorities. Such a strict standard does violence to the wide-ranging deference that must be accorded prison officials and the determination that first amendment values must give way to the reasonable considerations of prison management. First amendment freedoms may be curtailed whenever the officials, in the exercise of their informed discretion, reasonably conclude that the first amendment exercise possesses "the likelihood of disruption to prison order or stability, or otherwise interfere[s] with the legitimate penological objectives of the prison environment..."[135] The deferential review required by the Supreme Court's decisions leaves no room for a requirement that prison officials choose the least restrictive regulation consistent with prison discipline.... We therefore conclude that the state needs only to produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security.

* * *

We now turn to the record to determine whether the Commonwealth...met [its] burden of production, and if so whether St. Claire carried his burden of proving the [prison officials'] concerns unreasonable or their response exaggerated. Superintendent Cuyler...testified that Graterford's policy against headgear in dining areas is "a matter of decorum, and it's a matter of security, and some other things.... [F]irst, hats could be used to conceal contraband, such as small weapons, small tools, such as a hacksaw or other cutting device, or drugs.... [O]ur experience has been over the years that certain inmates would wear certain types of head covering for identification. This within itself could trigger off some kind of problem in an area where you are feeding [300 to] 400 men together." When asked by the trial judge whether these concerns would not apply elsewhere in the prison, Cuyler replied:

> That is correct, but the reality of the situation is that the dining rooms in a prison are hot spots and at Graterford Prison we [have] five dining rooms...and we only have approximately 40 officers inside the main prison controlling approximately 1800 inmates....

Deputy Superintendent Mauger [added] that approximately 370 inmates are in a dining hall at a time, and that no more than five guards are available to supervise each dining area.... Forty-five minutes are allotted for each meal, and in Mauger's view it would be impossible to

135. Quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977)—not a religious liberty case.

> search each inmate for contraband both entering and leaving the dining area, at least if numerous inmates wore headgear.[136]

This was an instance of the prison administrator's propensity to generalize to the whole: if we let one do it, they'd *all* do it, and we couldn't search every inmate coming to and going from every meal! It is possible that no more than the 1% who wore beards for religious reasons in the federal prison system[137] would want to wear kufis or turbans for religious reasons, and it would not be unduly onerous to search the headgear of 1% of the prison population, coming and going. It is also possible that wearing kufis and turbans might offer an outlet for permissible assertion of solidarity against the "screws," and the prison population would suddenly blossom with headgear of all kinds, ostensibly motivated by a sudden surge of irresistible piety. Then would be time enough for the prison administration to determine that the religious headgear arrangement was unmanageable and would have to be rescinded. The point is that neither outcome can be infallibly predicted in advance. While it is true that any individual exceptions offer the possibility of risks to security, like one car stopping on a busy freeway, it is also true that prison administrators, if left to their own devices, would be inclined to permit *no* exceptions for *anything*, even the most innocuous or potentially rehabilitative, not to mention those in furtherance of the free exercise of religion guaranteed by the First Amendment.

> Superintendent Cuyler also testified that a prison rule prohibits inmates from wearing civilian clothes past the security gate that leads to the administration building.... [He] explained that the security gate separates the cell blocks from the administrative offices, treatment area, hospital area, and the front control gates. He stated that civilian personnel are employed in the areas outside the security gate where the parole hearings are held, and that these civilians are not readily identifiable by any dress code.... [I]t was necessary from a security standpoint, to make certain that inmates who entered that particular area could be readily identified and not confused with staff members.

One wonders whether many of the civilian employees went about with a bedsheet wrapped around their heads or whether guards might be likely to open a control gate inadvertently for someone so attired, especially as the turban would not cover the prison uniform unless unwound and redeployed as a toga in a fashion even more noteworthy. Forbidding the wearing of bedsheet turban under the rubric of "civilian clothes" is strained, to say the least. But so is the contention by St. Claire that when the rare and crucial opportunity arrived to meet with the Parole Board, his piety attained such a pitch that no mere kufi would suffice, and he had to don a bedsheet turban to signalize it. Some might suppose that he was signalizing something else, either defiance or ostentation or the kind of "flakiness" made familiar by "Max Klinger" in the TV serial *M.A.S.H.* Since there was probably no regulation against that, Officer Wampole resorted to the rule on "civilian clothes" to keep St. Clair from

136 . *St. Claire v. Cuyler*, 634 F.2d 109 (1980).

137 . See *Moskowitz v. Wilkinson, supra.*

making a bigger fool of himself (and the institution) before the Parole Board.

> With regard to St. Claire's third complaint, Superintendent Cuyler testified that it would be necessary to provide two officers to escort a prisoner from the B gallery to religious services, and that escorting inmates to religious services would not be feasible because of the shortage of officers.... Cuyler testified that assigning a guard to escort duty lessens the security in the area where his normal post is located, and therefore that it is not feasible to pull officers from their normal security assignments to provide special escort service.
>
> We hold as a matter of law that this evidence satisfied appellants' burden of production.... Once appellants satisfied their burden of going forward with the evidence, the burden shifted to St. Claire to provide by substantial evidence that the security concerns were unreasonable or the responses exaggerated. We have examined the entire record, and it is clear that he has not carried that burden. Indeed, he made no effort to prove the policies unreasonable or exaggerated.
>
> * * *
>
> Accordingly, for the above reasons, we...reverse the judgment [of the district court] and remand these proceedings with a direction to enter judgment in favor of the defendants.[138]

Whether an omniscient finder of fact and Solomonic determiner of law would have found otherwise in this particular case, it is apparent that the court unanimously and unequivocally joined what it saw as the Supreme Court's move toward greater deference to the judgment of prison administrators, similar to the deference to military officers that seen in *Goldman v. Weinberger,*[139] and which was to culminate in *Shabazz v. O'Lone*, discussed below.

Prison is an arena in which the balancing of religious claims against state interest, never easy at best, is complicated by the interplay of accumulated suspicions, aggressions, manipulations and resentments on both sides to a degree that tends to overshadow and distort the purported controversy. It is doubtless true that experienced prison administrators know a lot is going on behind the surface pleadings that they cannot prove and that a civil court can scarcely sense, but it is equally true that prison administrators are loath to change the patterns of prison operation that have been worn smooth and familiar by long usage for the sake of anything as "abstract" and quixotic as religious beliefs and yearnings, and a court can seek to inject an element of objectivity into such disputes.

(10) *Wiggins v. Sargent* (1985), Church of Jesus Christ Christian. With this case, the movement known as "Identity Christians" came into visibility in the case law. It was a movement that began in the British Isles with the publication of *Our Israelitish Origin* by John Wilson in the 1840s. Subsequently it reached Canada and then the United States. The crux of British or American Israelism is that the white race, particularly Anglo-Saxons, are the descendants of the "ten lost tribes" of Israel

138 . *St. Claire v. Cuyler*, *supra.*

139 . Discussed at § E2c above.

and thus the true Chosen People. Various strands of this quasitheological, pseudobiblical tradition have developed in the United States, where they have formed linkages with neo-Nazi, Ku Klux Klan, Christian Patriot and "Constitutionalist" interests.[140]

The instant case arose from the Cummins Unit of the Arkansas prison system, when Johnny Clint Wiggins and other inmates brought a civil rights action against the state for violation of their rights to free exercise of religion, specifically, denial of access to literature of their faith and correspondence with its leaders. The state defended on the ground that the inmates' beliefs were not really religious and thus not entitled to protection of the First Amendment. A federal magistrate agreed with the state's position, and the district court affirmed. The Eighth Circuit reviewed the case on appeal and issued a decision announced by Senior Circuit Judge J. Smith Henley, joined by Circuit Judges Richard S. Arnold and John R. Gibson.

> The Church of Jesus Christ Christian has some affiliation or connection with an organization known as Aryan Nations...founded by Richard Butler...[who] succeeded Wesley Swift as pastor.... Although both the church and Aryan Nations share similar beliefs in the superiority of the white race, it also appears that Aryan Nations is primarily a loosely organized political entity while the Church of Jesus Christ Christian is the religious body.... [B]oth are headquartered in Hayden Lake, Idaho....
>
> The district court...did not "doubt the religious sincerity of the individual plaintiffs or that they truly believe in the philosophy of the Aryan Nation," [but] it nevertheless held that the beliefs were "more a rejection of the traditional secular viewpoint of western civilization than a deeply rooted religious belief...." It therefore found that the notion of white supremacy was secular and that "[m]aking such a notion more palatable by cloaking it in the garb of fundamentalist Christianity may result in attracting followers and creating the appearance of spiritual credibility, but it does not warrant the protection of the free exercise clause of the First Amendment."
>
> * * *
>
> From a review of the limited evidence presented at the hearing, we believe that the district court may have erred in its conclusion that the inmates' beliefs are purely secular. Followers of the churches involved here base their beliefs directly on literal interpretations of fundamentalist Christian theology. They believe that the Bible teaches that race mixing is a sin. However "unpalatable" such ideas are, it is not a court's prerogative to determine the validity of such beliefs. The belief system here has its own orders of worship and Articles of Faith.... It has its own religious dogma, hierarchy, and mandated lifestyle. It also appears that the inmates' religion may be comprehensive and that it may address fundamental and ultimate questions.[141]

---

140. See the informative sociological study of this movement in Aho, James A., *The Politics of Righteousness* (Seattle: Univ. of Wash. Press, 1990).

141. *Wiggins v. Sargent*, 753 F.2d 663 (CA8 1985), citing *Africa v. Pennsylvania*, 662 F.2d 1025 (CA3 1982), discussed at VF2.

> Moreover, the district court seemed to be under the mistaken impression that an idea or belief cannot be both secular and religious. It apparently grounded its conclusion on the rationale that since the notion of white supremacy was secular, it could not also be religiously based. "But a coincidence of religious and secular claims in no way extinguishes the weight appropriately accorded the religious one."[142] In other words, a belief can be both secular and religious.... We believe that in this case the fact that the notion of white supremacy may be, and perhaps usually is, secular, in the sense that it is a racist idea, does not necessarily preclude it from also being religious in nature....
>
> There is an equally fundamental error in holding that the inmates had no first amendment interests which were implicated by the administrators' actions here. Even apart from any religious significance the censored materials may have, they may have independent first amendment protection through the guarantee of free speech....
>
> Here the prison officials contend that the censorship is necessary since the materials and correspondence contain "overtones of racial hatred" which could cause violence within the institution.... [T]he district court ruled that the officials' actions were reasonable. Apart from this one conclusory statement, however, the court made absolutely no findings on the issue. The district court made no findings that release of the materials would create any kind of clear and present danger to security at the prison or that the censorship otherwise furthered a substantial government interest. Moreover, the record evidence is unclear whether the materials which were withheld actually advocate violence and therefore constitute a threat to security or whether they merely stress racial purity.... The inmates assert that the administration has imposed a total and complete ban on all mail from church leaders. Clearly a total ban on all literature concerning the churches would be overbroad. On the other hand, materials which advocate violence may properly be excluded....
>
> In sum, on the present record the district court erred in holding that the inmates are entitled to no first amendment protection. Accordingly, we reverse and remand for further proceedings consistent with this opinion.[143]

The same issue was addressed somewhat less amiably a year later by a federal district court in Idaho, which reached an the conclusion that the prisoners' claims were unfounded.[144]

(11) *Dettmer v. Landon* (1985), Church of Wicca. Another new arrival in the kaleidoscope of prison case law was the ancient "Wiccan Craeft"—the pursuit of witchcraft. This subject was brought before the bar by one Herbert Daniel Dettmer, an inmate at the Powhatan Correctional Center in Virginia, who claimed that he had been denied by prison officials the few simple worship materials needed for his devotions—candles, a statue, a white robe, incense, sulfur, and sea salt or uniodized

142 . Ibid., citing *Callahan v. Woods*, 658 F.2d 679, 684 (CA9 1981), discussed at § A9d above.

143 . *Wiggins v. Sargent, supra.*

144 . *McCabe v. Arave*, 626 F.Supp. 1199 (1986).

salt. (No eye of newt or toe of frog requested, evidently.) Decision was rendered by federal district judge Richard L. Williams.

> [Wicca] is an ancient faith which enjoyed a fairly substantial following in Northern Europe around the 10th and 11th centuries. Although the Craft declined in popularity and became much less visible with the growth of Christianity and various "witch hunts," the Church of Wicca has survived in isolated locations and has enjoyed a modest revival in popularity during the last few decades. There are currently an estimated 10,000-50,000 followers of the Church of Wicca in the United States.
>
> Wiccans generally meet for worship in autonomous groups known as covens.... Wiccan followers are generally guided by a belief structure which appears to relate to "ultimate" concerns in a manner similar to the belief structures of more conventional religions. Other features of the group—its ceremonial use of meditation, prayer, incense, robes and candles, its worship of "gods," its emphasis on the spiritual development of its members, and its extensive literature and folklore— are not unlike features of other religious groups.
>
> * * *
>
> Recognizing that the prison officials had legitimate security concerns with several of the items [he wanted], Dettmer consulted with his religious leaders and offered to substitute sea salt or uniodized salt for the sulfur, to remove the hood from the robe, and to use a plastic statue rather than a wooden or ceramic one.... However, despite Dettmer's efforts to provide a workable solution, and even though officials never questioned the sincerity of [his] religious beliefs, the prison still denied [him] access to the items. At the same time, prisoners worshipping more conventional religions such as Catholicism and Hinduism were given access to candles, incense, and crosses, and all prisoners were routinely given access to bathrobes and boxing robes.
>
> Initially, the Court must determine whether the Church of Wicca is a "religion" for purposes of the first amendment. [Prison officials contend that it is not.] Each individual has a different, and often highly personal conception of a "religion," and the various religions of the world have their own unique, frequently complex system of beliefs and practices. Because religion is so highly personal and private, dealing with spiritual rather than temporal matters, courts have traditionally been reluctant to examine and pass judgment upon these beliefs. However, when confronted with a dispute between religious conviction and the needs of the state, courts have a duty to make at least some inquiry into the nature of the faith to ensure that purely secular beliefs and practices are not accorded the special protection afforded by the first amendment....
>
> Because the concept of a "religious belief" cannot be defined (and thereby limited) with any real precision, courts must accept a belief as "religious" so long as it is sincere, it occupies a meaningful position in the individual's life, and it relates to the individual's "ultimate concerns." An individual's concerns may be described as "ultimate" when they go beyond purely

> intellectual matters of self interest to touch concerns that are in some sense "spiritual."...
>
> With the above principles in mind, the Court thinks that the Church of Wicca is clearly a religion for first amendment purposes.... [T]he items sought by the plaintiff are an essential and central part of Wiccan worship.... Defendant attempts to justify this prohibition by claiming that the items pose a threat to prison security. The Court finds that the asserted justifications for denying Dettmer these items are either overly broad or totally lacking in substance. While it is conceivable that a few of the items sought could be used for some nefarious purpose, the Court find that the items pose no more of a hazard to prison security and discipline than other items already available to prisoners, either for their own personal use or for worship purposes.
>
> To the extent that any of the prison's asserted justifications are legitimate, they are not warranted in this instance because less restrictive alternatives are available to the state. Prison authorities may simply keep the controversial items in a safe location, and make them available to the plaintiff at reasonable intervals as plaintiff may require them, and under such supervision as the defendant believes is necessary to promote prison security.[145]

The court ordered the prison authorities to supply the plaintiff with sulfur, sea or uniodized salt; a quartz clock with alarm (in lieu of a kitchen timer, which prison officials said could be used as a detonator); candles; incense; and a white robe without a hood.

c. The Supreme Court Speaks

(1) *Shabazz and Mateen v. O'Lone* (1986). This case is of more than usual interest since it involved an *en banc* hearing and decision by the entire Third Circuit, because it overturned that circuit's approach to pleas of religious liberty in prison expressed in *St. Claire v. Cuyler* (1980),[146] and because it was accepted for review by the Supreme Court. The complaint was brought by two inmates of the New Jersey State Prison at Leesburg who were adherents of the Islamic faith and complained that they were prohibited by prison regulations from attending weekly Islamic religious services called Jumu'ah and thus were deprived of the free exercise of religion. The trial court dismissed their complaint and a panel of the Third Circuit affirmed the dismissal on the basis of *St. Claire v. Cuyler, supra*. Rehearing *en banc* was granted for the purpose of reconsidering the *St. Claire* standard, and it was "modified" in an opinion written by Acting Chief Judge Arlin Adams, author of several important decisions in the church-state field.[147]

Jumu'ah services had been held at the Leesburg prison since 1979, and all Muslim inmates who wished to attend were allowed to do so. The service was held every

145 . *Dettmer v. Landon*, 617 F.Supp. 592 (1985).

146 . 634 F.2d 109 (1980), *supra*.

147 . E.g., *Malnak v. Yogi*, 592 F.2d 197 (1979), concurring; *Bender v. Williamsport*, 741 F.2d 538 (1984), dissenting. (A slip opinion of *Shabazz* was sent to this author by Judge Adams in 1985.)

Friday between noon and the mid-afternoon prayer. Its observance was commanded by the Qur'an and could not be performed at any other time. It was a central practice of the Muslim faith, and the plaintiffs were conceded to be sincere adherents of that faith.

In March 1984, the regulations were changed in such a way as inadvertently to impede attendance by many Muslim inmates at the weekly Jumu'ah services. Inmates were reclassified in three custody categories: maximum security, gang minimum and full minimum. Maximum security prisoners were kept in the main building (where Jumu'ah services were held). Gang minimum inmates worked at job sites outside the main buildings but under supervision of corrections officers at all times. Full minimum prisoners lived and worked at a minimum-security facility called the Farm. Shabazz was classified in gang minimum and Mateen in full minimum. The new regulations required that gang minimum prisoners work outside the main buildings at all times (to reduce overcrowding in the main buildings). Muslim inmates in that group could no longer be assigned to alternate work details in the buildings on Fridays in order to attend services. A second regulation barred returns to the main facility during the day by inmates working outside (to reduce security and discipline problems involved in accounting for and supervising the going and coming of inmates). These changes prevented Mateen and Shabazz, along with other Muslim prisoners in the two lower-security classifications, from attending their Friday religious services.

The district court and the Third Circuit panel had accepted the teaching of *St. Claire* that "a mere declaration by prison officials that certain religious practices raise potential security concerns is sufficient to override a prisoner's first amendment right to attend the central religious service of his faith."[148] It was that standard that the full bench of the Third Circuit undertook to re-examine. Under that standard,

> [t]he prison officials are not required to produce convincing evidence that they are unable to satisfy their institutional goals in any way that does not infringe the inmates' free exercise rights. Nor do they carry a burden of showing that bona fide security problems occurred or are likely to arise because of the religious practice at issue.
>
> The flaw in the *St. Claire* standard is well illustrated by the facts presented in this case. The prison officials here do not claim that attendance at Jumu'ah is an inherently dangerous practice. Indeed, they could not, as attendance was permitted for all Muslim prisoners until the March 1984 implementation of the new regulations and there is no suggestion that such attendance resulted in any harm. Rather, defendants merely assert that security problems caused by overcrowding and understaffing necessitated the policy changes that outlawed attendance at Jumu'ah for nearly all but the maximum security prisoners. Although appellants suggested alternative methods of allocating work assignments that would both satisfy defendants' security concerns and honor the prisoners' wish to participate in Jumu'ah services, the prison administrators rejected these suggested solutions. They assert that any

148 . *Shabazz and Mateen v. O'Lone*, 782 F.2d 416 (1985).

> such accommodations would raise new security problems. Yet, under *St. Claire*, the state was under no burden to establish that such security concerns were genuine and were based upon more than speculations....
>
> We conclude...that the *St. Claire* standard, which did not require any inquiry into the feasibility of accommodating prisoners' religious practices, provides inadequate protection for their free exercise rights and therefore must be modified. Accordingly, we hold that upon remand, the state must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable methods exists by which appellants' religious rights can be accommodated without creating bona fide security problems.

Two of the eleven judges of the Third Circuit bench dissented. Judge James Hunter III wrote a lengthy opinion that was joined by Judge Leonard I. Garth resisting the modification of *St. Claire*.

> I cannot accept the majority's treatment of the institutional considerations prompting Leesburg's policies.... Moreover, I have strong reservations about the role of "mutual accommodation" in the new legal standard governing prisoners' first amendment free exercise claims. The standard announced today is neither necessitated by the facts of the case before us nor supported by Supreme Court precedent. I must dissent.
>
> * * *
>
> Although the free exercise clause of the first amendment protects religious activity from governmental interference, this protection, like other constitutional guarantees, is adjusted when it conflicts with the legitimate goals and policies of correctional institutions. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[149] The fact of conviction and internment necessarily implies that inmates' rights and privileges are not coextensive with those of the free citizens....
>
> Although the majority opinion recognizes and reiterates the deference [to correctional authorities] principle, the standard announced today displays a lack of appreciation for the considerations supporting this principle.
>
> * * *
>
> After acknowledging that federal courts are limited in their ability to review prison administrators' decisions, the majority then asserts that the ultimate goal of judicial review in free exercise cases "must be a `mutual accommodation' between the important institutional objective of security and the constitutionally protected rights of prisoners." While I agree that federal courts must police the unlawful abridgment of constitutional rights, we, by necessity, must support a higher degree of restrictions on constitutional guarantees in a prison setting. However, under the majority's mutual accommodation standard, federal courts are no longer guardians of fundamental constitutional rights but arbitrators in disputes

149 . *Price v. Johnston,* 334 U.S. 266-285 (1948).

> between prison officials and inmates. To facilitate this dubious new calling, the majority asks federal judges to second guess the administrators' judgment by finding "a reasonable method" to accommodate inmates. Contrary to the applicable precedent, the majority today opens the door to judicial review of those "discretionary actions that traditionally have been the business of prison administrators rather than the federal courts."[150]
>
> * * *
>
> There is an important clue in the majority opinion, however, that reveals the authority on which the majority rests its investiture of the term "mutual accommodation" with new meaning. The majority states that "there has been an increasing concern that the *St. Claire* test...provides inadequate protection for the rights of prisoners freely to exercise their religion." This concern is founded upon a perception, unsupported by reference to empirical data or legal authority, of *St. Claire*'s inadequacy. Proceeding from that unsubstantiated "concern," the majority then announces a new standard which not only shifts the burden of proof to the state but also replaces the Supreme Court's established doctrine of deference with what amounts to a "least restrictive alternative" analysis. This new standard opens the floodgate of future litigation to determine what "reasonable" accommodation must be permitted to override security or other penological objectives.
>
> * * *
>
> I do not share this perception, and consequently I cannot agree that it is necessary to create a new test *ex nihilo* to address it....[151]

Judge Hunter contended that the record in this case already showed that the accommodation desired by the plaintiffs (that they be allowed to return to the main building for their mid-day Friday religious service) was impracticable.

> Returning gang minimum inmates pose at least three distinct security risks to Leesburg, all of which relate to the problem of arranging for Jumu'ah in a productive, overcrowded and understaffed prison facility. The first logistical problem concerns the distance of the outside work details from the main building. Many of the details work as far away as 45 minutes from the main building. Because gang minimum inmates must be constantly under the supervision of a corrections official, the return of one inmate requires the return of the entire detail to the main building's receiving gate, and consequently disrupts the work of the entire detail. Second, the process of physically moving the inmate through the receiving gate poses a serious security risk. Because Leesburg is a productive facility, the truck traffic through the receiving gate during the day is heavy. Both trucks and inmates must enter Leesburg through the same gate, a situation that disrupts truck traffic and increases the possibility of escapes through the gate. [Third,] the timing of the return raises security problems because the services take place at about the same time as the

150 . Quoting *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

151 . *Shabazz and Mateen v. O'Lone, supra*, Hunter dissent.

noon meal. During this meal, most of the corrections officials are stationed as a security precaution around or in the dining hall. The increased risk of escapes during this mass movement of inmates requires Leesburg to keep its receiving gates shut. Consequently, those returning for Jumu'ah would be required to return well before the noon meal.

* * *

These problems shed light on the associated concerns that permitting returns would cause for Leesburg's correctional goals. Returns effectively waste the whole productive day, not just for the practicing Muslim, but for the entire work detail that must accompany the practitioner back to the gate.

* * *

A quick review of the record reveals concrete reasons for judicial deference [to correctional authorities].... Leesburg initially attempted to accommodate gang minimum inmates who wished to attend Jumu'ah by creating an alternate work detail. This attempt at "mutual accommodation" collapsed in light of a number of problems.... Leesburg found that a number of inmates would use any excuse to avoid outside work details. As Leesurg gradually removed the inmates' opportunity to use these fictitious excuses, by, for example, scheduling sick call well before the details were scheduled to leave for outside work, the inmates would move to the next excuse, trying to find the point of least resistance. As it stood, nearly half of those who asked to return for Jumu'ah received reprimands for failing to attend [the service after they returned for it]. Thus, on the facts of this case, creating a special exception for Jumu'ah presents the nearly impossible task of separating the conscientious from the nonconscientious.

* * *

Under the standard adopted by this Circuit in *St. Claire v. Cuyler*, the foregoing reasons would be more than enough to justify Leesburg's policies. Yet, because the *St. Claire* standard fails to place a burden on the state "to establish that such security concerns were genuine and were based on more than mere speculation," the majority remands the case for another hearing.

The majority opinion offered a rebuttal to Judges Hunter and Garth:

The dissent complains that the test articulated here fails to give adequate weight to the principle of deference stated by the Supreme Court in its cases addressing prisoners' constitutional rights. We disagree. Federal courts must afford deference to decisions by prison officials in areas concerning security, but where first amendment values are implicated such deference must be tempered by an effort to accommodate free exercise values.

Further, none of the Supreme Court cases cited by the dissent as requiring deference to the arguably correct opinions of prison officials involved a practice that lies at the core of an explicit constitutional guarantee, such as the right to attend religious services central to the prisoners' faith. Cases concerning rights of association or privacy provide

> uncertain guidance in resolving the clash of interests presented here. Thus, while we are not unaware of the role that the deference principle has played in the Supreme Court's opinions regarding prisoners' rights, and indeed subscribe to that principle, we seek only to ensure that it does not deprive prisoners' free exercise rights of all content.[152]

The dissent came back with a surrebuttal.

> The majority maintains that...Supreme Court cases involving inmates' rights are inapplicable to cases involving the first amendment's free exercise guarantee.... [T]he Supreme Court has used essentially the same analytic framework whether the claimed right has been based upon the first amendment's free speech and association guarantees, the fourth amendment's guarantee of privacy, or the fifth and fourteenth amendments' due process guarantees.... These cases are still good law and clearly control this appeal. However, because the Supreme Court has yet to address specifically the scope of review over prison regulations limiting religious activity, the majority believes it is free to adopt a standard that is inconsistent with the precedent controlling analogous cases. I cannot disagree more strongly; free exercise does not require its own, nondeferential standard of review.[153]

In these two opinions were clearly expressed the two poles of principle between which church-state struggles are played out: the asserted claims of faith and the asserted necessities of government in conflict with them. In the prison context, they were surrounded by contextual pressures that overlay the legal principles and arguments. Behind and around the religious needs and interests of the inmates were the understandable, but not particularly religious, strivings to gain and defend an area of autonomy or prerogative, however small, within the crushing regimen of the penitentiary. The claim to the right of free exercise of religion offered a tempting beachhead for such limited but defiant assertions of selfhood. On the other side, the prison authorities, wary of all such chinks in the machinery of control and skeptical of the bona fides of all such protestations of religious fervor that provided occasion for departures from the rigor of routine, resolutely resisted making changes sought by inmates for fear of what they might lead to. On each side pressure mounted in proportion to like pressure on the other side.

The fact that half of the petitioners for excusal from work duty to attend Jumu'ah didn't actually get to the services seemed to confirm the suspicions of the correctional system, whereas it should cause little surprise that there are malingerers or free-loaders in any group, especially among convicted criminals scrabbling desperately for advantage in a total custodial institution. That problem was simple and easy to deal with: those who are excused to attend Jumu'ah but do not attend will not be excused again. What should cause surprise and justify encouragement is that half of those excused *did* attend, and among them perhaps there were even a few who

152 . Ibid., majority opinion.
153 . Ibid.

were sincerely religious. It is for them that the free exercise guarantee exists and is worth effectuating.

It was clear to Judge Hunter that returning a few inmates to the main building at mid-day for Jumu'ah just wasn't feasible. What that meant was that the entire system had (understandably) been arranged around other priorities and necessities, such as having in intermediate security grade (gang minimum) as a transition between maximum and minimum, having the gang minimum details at work a mile or more away, and requiring that each detail move as a body. The circumstance that all traffic in and out, trucks and inmates, had to go through the receiving gate seemed to be another immutable feature of the universe, but then it appeared in the record that there was another gate, called "the personnel gate:"

> The witness: [T]here was just too much traffic going through that gate.... It either meant backing trucks up four, five and six or it meant... holding up the inmates.... And it was just too much for that traffic gate. And we don't have officers to man the other [personnel] gate.[154]

So the elimination of return by gang minimum Muslims for Jumu'ah turned out to have been in large part a traffic problem created not by a shortage of gates but by a shortage of officers to man them. Behind the traffic problem was a problem of personnel and budget and appropriations and overcrowding, etc., etc. So when the pinch of economic strictures began to be felt, what suffered? Accommodation of minority religious practices was the most expendable arrangement. If the Muslims could just see their way clear to become Baptists and worship with the majority at the regularly scheduled services on Sunday, all would be well. But it was not necessarily the Baptist services that were having the most redemptive effect on the most intractable inmates. Being an obstinate Muslim in a "honky" prison may have its own uniquely redemptive (or at least preservative) qualities, and even if it doesn't, it still may be close to the heart of what the Free Exercise Clause is all about.

The majority of the Third Circuit was trying to find a way to get past the stolid assertions of the status quo to ask whether the work of the prison could not be rearranged a little to put the free exercise of religion a bit higher up in the scale of priorities than it seemed to be at Leesburg. Whether that is something federal courts can accomplish is a central riddle of our time. They have reshaped social priorities in other areas—desegregation, reapportionment, environmental protection (not always or incontrovertibly for the better)—why not in corrections? Unfortunately, the correctional system is one of the most refractory to rearranging from outside (or even from inside), and the Third Circuit may have been unrealistic in hoping it could improve the situation.

It remanded the case for further proceedings, but the state appealed to the Supreme Court, and the Supreme Court agreed to hear the case.

(2) *O'Lone v. Estate of Shabazz* (1987). Between the time the Third Circuit issued its decision and the Supreme Court spoke on *Shabazz*, another prison case

154 . Ibid., App. at 86-87, quoted in Hunter dissent, n. 3.

was decided by the Supreme Court which may have changed the state of the law; at least the Supreme Court cited it as doing so. That was *Turner v. Safley* (decided June 1, 1987), written by Justice O'Connor for a majority of five (joined by Chief Justice Rehnquist and Associate Justices White, Powell and Scalia), assessing the constitutionality of two regulations of the Missouri Division of Corrections, one restricting inmates' correspondence with other inmates, the other permitting inmates to marry only with permission of the prison superintendent. Both regulations had been held unconstitutional by the courts below. The Supreme Court considered the restriction on correspondence constitutional, the restriction on marriage unconstitutional. Justice Stevens dissented on the first holding, joined by Justices Brennan, Marshall and Blackmun.

The main bone of contention was the *test* to be applied to constitutional claims arising in prisons. The lower courts had imposed a standard of "strict scrutiny"—that the state must show a compelling interest that can be served in no other way to justify infringing inmates' constitutional rights. The majority of the Supreme Court held that a lesser level of scrutiny was all the state needed to meet in prison cases: *whether the challenged regulation was "reasonably related" to legitimate penological interests*. The correspondence ban met this test; the marriage ban did not. The minority contended that the majority's test was much too permissive and would permit prison authorities to justify almost any policies. "Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners...."[155] The "reasonable-relation-to-legitimate-penological-interests" test posed a grim augury for the *Shabazz* case, announced eight days later by a court divided along the same 5-4 lines. The majority opinion was written by Chief Justice Rehnquist.

> This case requires us to consider once again the standard of review for prison regulations claimed to inhibit the exercise of constitutional rights.
>
> * * *
>
> Several general principles guide our consideration of the issues presented here. First, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[156]... Inmates clearly retain protections afforded by the First Amendment,[157] including its directive that no law shall prohibit the free exercise of religion.... Second, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[158] The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security.
>
> In considering the appropriate balance of these factors, we have often said that evaluation of penological objectives is committed to the considered judgment of prison administrators, "who are actually charged

155 . *Turner v. Safley*, 107 S.Ct. 2254 (1987), Stevens dissent.
156 . *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).
157 . *Pell v. Procunier*, 417 U.S. 817, 822 (1974).
158 . *Price v. Johnston*, 334 U.S. 266, 285 (1948).

with and trained in the running of the particular institution under examination."[159] To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a "reasonableness" test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.[160] We recently restated the proper standard: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[161]

We think the Court of Appeals decision in this case was wrong when it established a separate burden on prison officials to prove "that no reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems...." Though the availability of accommodations is relevant to the reasonableness inquiry, we have rejected the notion that "prison officials...have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaints."[162] By placing the burden on prison officials to disprove the availability of alternatives, the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators.

Turning to consideration of the policies challenged in this case, we think the findings of the District Court establish clearly that prison officials have acted in a reasonable manner.... First, a regulation must have a logical connection to legitimate governmental interests invoked to justify it. The policies at issue here clearly meet that standard. The requirement that full minimum and gang minimum prisoners work outside the main facility was justified by concerns of institutional order and security, for the District Court found that it was "at least in part a response to a critical overcrowding in the state's prisons, and... at least in part designed to ease tension and drain on the facilities during that part of the day when the inmates were outside the confines of the main buildings."...

The subsequent policy prohibiting returns to the institution during the day also passes muster under this standard. Prison officials testified that the returns from outside work details generated congestion and delays at the main gate, a high risk area in any event.... Rehabilitative concerns further supported the policy; corrections officials sought a simulation of working conditions and responsibilities in society.... These legitimate goals were advanced by the prohibition on returns; it cannot seriously be maintained that "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."[163]

Our decision in Turner also found it relevant that "alternative means of

159 . *Bell v. Wolfish, supra.*

160 . Citing *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119 (1977).

161 . *Turner v. Safley, supra.*

162 . Ibid.

163 . Ibid.

exercising the right...remain open to prison inmates." There are, of course, no alternative means of attending Jumu'ah; respondents' religious beliefs insist that it occur at a particular time. But the very stringent requirements as to the time at which Jumu'ah may be held may make it extraordinarily difficult for prison officials to assure that every Muslim prisoner is able to attend that service. While we in no way minimize the central importance of Jumu'ah to respondents, we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penalogical [sic] objectives to that end.... Here, similarly, we think it appropriate to see whether under these regulations respondents retain the ability to participate in other Muslim religious ceremonies. The record establishes that respondents are not deprived of all forms of religious exercise, but instead freely observe a number of their religious obligations. The right to congregate for prayer or discussion is "virtually unlimited except during working hours," and the state-provided imam has free access to the prison. Muslim prisoners are given different meals whenever pork is served in the prison cafeteria. Special arrangements are also made during the month-long observance of Ramadan, a period of fasting and prayer. During Ramadan, Muslim prisoners are awakened at 4:00 a.m. for an early breakfast, and receive dinner at 8:30 p.m. each evening. We think this ability on the part of respondents to participate in other religious observances of their faith supports the conclusion that the restrictions at issue here were reasonable.

Finally, the case for the validity of these regulations is strengthened by examination of the impact that accommodation of respondents' asserted right would have on other inmates, on prison personnel, and on allocation of prison resources generally. Respondents suggest several accommodations of their practices, including placing all Muslim inmates in one or two inside work details or providing weekend labor for Muslim inmates. As noted by the District Court, however, each of respondents' suggested accommodations would, in the judgment of prison officials, have adverse effects on the institution. Inside work details for gang minimum inmates would be inconsistent with the legitimate concerns underlying [the regulation], and the District Court found that the extra supervision necessary to establish weekend details for Muslim prisoners "would be a drain of scarce human resources" at the prison. Prison officials determined that the alternatives would also threaten prison security by allowing "affinity groups" in the prison to flourish. Administrator O'Lone testified that "we have found out and think almost every prison administrator knows that any time you put a group of individuals together with one particular affinity interest...you wind up with...a leadership role and an organizational structure that will almost invariably challenge the institutional authority." Finally, the officials determined that special arrangements for one group would create problems as "other inmates [see] that a certain segment is escaping a rigorous work detail" and perceive favoritism. These concerns of prison administrators provide adequate support for the conclusion that accommodations of respondents' request to attend Jumu'ah would have

> undesirable results in the institution. These difficulties also make clear that there are not "obvious, easy alternatives to the policy adopted by petitioners."
>
> We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to "substitute our judgment on...difficult and sensitive matters of institutional administration,"[164] for the determinations of those charged with the formidable task of running a prison. Here the District Court decided that the regulations alleged to infringe constitutional rights were reasonably related to legitimate penalogical [sic] objectives. We agree with the District Court, and it necessarily follows that the regulations in question do not offend the Free Exercise Clause of the First Amendment of the United States Constitution. The judgment of the Court of Appeals is therefore Reversed.[165]

So much for the effort by Judge Adams and his colleagues to require prison officials to justify policies infringing on Free Exercise rights of inmates by something more than simple assertion! The views of Judges Hunter and Garth prevailed in the end after all, but only by one vote. And the minority subscribed to a ringing dissent by Justice Brennan that one day may be seen to be more cogent and more consistent with the spirit of the Bill of Rights than the narrow majority's rather uncritical deference to the administrative concerns of prison officials, reminiscent of a similar deference to military officials that found expression in *Goldman v. Weinberger* the previous year (also by five votes to four).[166]

> The religious ceremony that these respondents seek to attend is not presumptively dangerous, and the prison has completely foreclosed respondents' participation in it. I therefore would require prison officials to demonstrate that the restrictions they have imposed are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives....
>
> Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness. They are members of a "total institution" that controls their daily existence in a way that few of us can imagine....
>
> It is thus easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity. Nothing can change the fact, however, that the society that these prisoners inhabit is our own. Prisons may exist on the margins of that society, but no act of will can sever them from the body politic. When prisoners emerge from the shadow to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable.

---

164 . *Block v. Rutherford,* 468 U.S. 576, 588 (1984).

165 . *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

166 . Discussed at § E2c above.

They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.

In reviewing a prisoner's claim of the infringement of a constitutional right, we must therefore begin from the premise that, as members of this society, prisoners retain rights that limit the exercise of official authority against them. At the same time, we must acknowledge that incarceration by its nature changes an individual's status in society. Prison officials have the difficult and often thankless job of preserving security in a potentially explosive setting, as well as of attempting to provide rehabilitation that prepares some inmates for re-entry into the social mainstream. Both these demands require the curtailment and elimination of certain rights.

The challenge for this Court is to determine how best to protect those prisoners' rights that remain. Our objective in selecting a standard of review is therefore not, as the Court declares, "[t]o ensure that courts afford appropriate deference to prison officials." The Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs, nor as a blueprint for ensuring sufficient reliance on administrative expertise. Rather, it was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing. The practice of Europe, wrote James Madison, was "charters of liberty...granted by power"; of America, "charters of power granted by liberty." While we must give due consideration to the needs of those in power, this Court's role is to ensure that fundamental restraints on that power are enforced.

In my view, adoption of "reasonableness" as a standard of review for all constitutional challenges by inmates is inadequate to this task. Such a standard is categorically deferential, and it does not discriminate among degrees of deprivation. From this perspective, restricting use of the prison library to certain hours warrants the same level of scrutiny as preventing inmates from reading at all. If a directive that officials act "reasonably" were deemed sufficient to check all exercises of power, the Constitution would hardly be necessary. Yet the Court deems this single standard adequate to restrain any type of conduct in which prison officials might engage.

* * *

Mere assertions of exigency have a way of providing a colorable defense for governmental deprivation, and we should be especially wary of expansive delegations of power to those who wield it on the margins of society. Prisoners are too often shielded from public view; there is no need to make them virtually invisible.

An approach better suited to the sensitive task of protecting the constitutional rights of inmates is laid out by Judge Kaufman in Abdul Wali v. Coughlin.[167] That approach maintains that the degree of scrutiny of prison regulations should depend on "the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as

167 . 754 F.2d 1015 (CA2 1985).

opposed to a mere limitation) on the exercise of that right." Essentially, if the activity in which inmates seek to engage is presumptively dangerous, or if a regulation merely restricts the time, place, or manner in which prisoners may exercise a right, a prison regulation will be invalidated only if there is no reasonable justification for official action. Where exercise of the asserted right is not presumptively dangerous, however, and where the prison has completely deprived an inmate of that right, then prison officials must show that "a particular restrictions is necessary to further an important government interest, and that the limitation on freedoms occasioned by the restrictions are no greater than necessary to effectuate the governmental objective involved."

* * *

The prison in this case has completely prevented respondent inmates from attending the central religious service of their Muslim faith. I would therefore hold prison officials to the standard articulated in Abdul Wali, and would find their proffered justifications wanting. The State has neither demonstrated that the restriction is necessary to further an important objective nor proved that less extreme measures may not serve its purpose. Even if I accepted the Court's standard of review, however, I could not conclude on this record that prison officials have proved that it is reasonable to preclude respondents from attending Jumu'ah. Petitioners have provided mere unsubstantiated assertions that the plausible alternatives proposed by respondents are infeasible....

The Court in this case acknowledges that ""respondents' sincerely held religious beliefs compe[l] attendance at Jumu'ah," and concedes that there are "no alternative means of attending Jumu'ah." Nonetheless, the Court finds that prison policy does not work a complete deprivation of respondents' asserted religious right, because respondents have the opportunity to participate in other religious activities. This analysis ignores the fact that, as the District Court found, Jumu'ah is the central religious ceremony of Muslims, "comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects." As with other faiths, this ceremony provides a special time in which Muslims "assert their identity as a community covenanted to God." Brief for Imam Jamil Abdullah Al-Amin et al. as Amici Curiae. As a result:

> "unlike other Muslim prayers which are performed individually and can be made up if missed, the Jumu'ah is obligatory, cannot be made up, and must be performed in congregation. The Jumu'ah is therefore regarded as the central service of the Muslim religion, and the obligation to attend is commanded by the Qur'an, the central book of the Muslim religion."[168]

Jumu'ah therefore cannot be regarded as one of several essentially fungible religious practices. The ability to engage in other religious activities cannot obscure the fact that the denial at issue in this case is absolute: respondents are completely foreclosed from participating in the core ceremony that reflects their membership in a particular religious

168 . Quoting from the district court in *Shabazz*, 595 F.Supp. 928, 930 (1984).

community. If a Catholic prisoner were prevented from attending Mass on Sunday, few would regard that deprivation as anything but absolute, even if the prisoner were afforded other opportunities to pray, to discuss the Catholic faith with others, and even to avoid eating meat on Friday if that were a preference. Prison officials in this case therefore cannot show that "`other avenues' remain available for the exercise of the asserted right."[169]

* * *

In the present case, it is...worth noting that Federal Bureau of Prisons regulations require the adjustment of work assignments to permit inmate participation in religious ceremonies, absent a threat to "security, safety, and good order...." Furthermore, the Chaplain Director of the Bureau has spoken directly to the issue of participation of Muslim inmates in Jumu'ah:

> "Provision is made, by policy, in all Bureau facilities for the observance of Jumu'ah by all inmates in general population who wish to keep this faith practice. The service is held each Friday afternoon in the general time frame that corresponds to the requirements of Islamic jurisprudence....
>
> "Subject only to restraints of security and good order in the institution all routine and normal work assignments are suspended for the Islamic inmates to ensure freedom to attend such services....
>
> "In those institutions where the outside work details contain Islamic inmates, they are permitted access to the inside of the institution to attend the Jumu'ah."

That Muslim inmates are able to participate in Jumu'ah throughout the entire federal prison system suggests that the practice is, under normal circumstances, compatible with the demands of prison administration. Indeed, the Leesburg State Prison permitted participation in this ceremony for five years, and experienced no threats to security or safety as a result. In light of both standard federal prison practice and Leesburg's own past practice, a reasonableness test in this case demands at least minimal substantiation by prison officials that alternatives that would permit participation in Jumu'ah are infeasible.... [T]his does not mean that petitioners are responsible for identifying and discrediting these alternatives; "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint" [Turner]. When prisoners themselves present alternatives, however, and when they fairly call into question official claims that these alternatives are infeasible, we must demand at least some evidence beyond mere assertion that the religious practice at issue cannot be accommodated. Examination of the alternatives proposed in this case indicates that prison officials have not provided such substantiation.

Respondents' first proposal is that gang minimum prisoners be assigned to an alternate inside work detail on Friday, as they had been before the recent change in policy. Prison officials explained that the alternative work detail is now restricted to maximum security prisoners, and that they did not wish maximum and minimum security prisoners to mingle. Even the

169 . *Turner v. Safley, supra,* quoting *Jones v. North Carolina Prisoners' Union, supra.*

District Court had difficulty with this assertion, as it commented that "[t]he defendants did not explain why inmates of different security levels are not mixed on work assignments when otherwise they are mixed." The court found, nonetheless, that this alternative would be inconsistent with [the state's] mandate to move gang minimum inmates to outside work details. This conclusion, however, neglects the fact that the very issue is whether the prison's policy, of which [that rule] is a part, should be administered so as to accommodate Muslim inmates. The policy itself cannot serve as a justification for its failure to provide reasonable accommodation. The record as it now stands thus does not establish that the Friday alternate work detail would create a problem for the institution.

Respondents' second proposal is that gang minimum inmates be assigned to work details inside the main building on a regular basis. While admitting that the prison used inside details in the kitchen, bakery, and tailor shop, officials stated that these jobs are reserved for the riskiest gang minimum inmates, for whom an outside job might be unwise. Thus, concluded officials, it would be a bad idea to move these inmates outside to make room for Muslim gang minimum inmates. Respondents contend, however, that the prison's own records indicate that there are a significant number of jobs inside the institution that could be performed by inmates posing a lesser security risk. This suggests that it might not be necessary for the riskier gang minimum inmates to be moved outside to make room for the less risky inmates. Officials provided no data on the number of high-risk gang minimum inmates performing them, the number of Muslim inmates that might seek inside positions, or the number of staff that would be necessary to monitor such an arrangement. Given the plausibility of respondents' claim, prison officials should present at least this information in substantiating their contention that inside assignments are infeasible.

Third, respondents suggested that gang minimum inmates be assigned to Saturday or Sunday work details, which would allow them to make up any time lost by attending Jumu'ah on Friday. While prison officials admitted the existence of weekend work details, they stated that "[s]ince prison personnel are needed for other programs on weekends, the creation of additional weekend details would be a drain on scarce human resources." The record provides no indication, however, of the number of Muslims that would seek such a work detail, the current number of weekend details, or why it would be infeasible simply to reassign current Saturday or Sunday workers to Friday, rather than create additional details. The prison is able to arrange work schedules so that Jewish inmates may attend services on Saturday and Christian inmates may attend services on Sunday. Despite the fact that virtually all inmates are housed in the main building over the weekend, so that the demand on the facility is greater than at any other time, the prison is able to provide sufficient staff coverage to permit Jewish and Christian inmates to participate in their central religious ceremonies. Given the prison's duty to provide Muslims a "reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to

> conventional religious precepts," Cruz v. Beto,[170] prison officials should be required to provide more than mere assertions of the infeasibility of weekend details for Muslim inmates....
>
> [P]rison officials stated that [such arrangements] might create an "affinity group" of Muslims representing a threat to prison authority. Officials pointed to no such problem in the five years in which Muslim inmates were permitted to assemble for Jumu'ah, and in which the alternate Friday work detail was in existence. Nor could they identify any threat resulting from the fact that during the month of Ramadan all Muslim prisoners participate in both breakfast and dinner at special times. Furthermore, there was no testimony that the concentration of Jewish or Christian inmates on work details or in religious services posed any type of "affinity group" threat. As the record now stands, prison officials have declared that a security risk is created by a grouping of Muslim inmates in the [less] dangerous security classification, but not by a grouping of maximum security inmates who are concentrated in a work detail inside the main building, and who are the only Muslims assured of participating in Jumu'ah. Surely, prison officials should be required to provide at least some substantiation for this facially implausible contention.
>
> Petitioners also maintained that the assignment of...Muslim inmates [to special details] might provoke resentment because of other inmates' perception that Muslims were receiving special treatment. Officials pointed to no such perception during the period in which the alternate Friday detail was in existence, nor to any resentment of the fact that Muslims' dietary preferences are accommodated and that Muslims are permitted to operate on a special schedule during the month of Ramadan. Nor do they identify any such problems created by the accommodation of the religious preferences of inmates of other faiths. Once again, prison officials should be required at a minimum to identify the basis of their assertions.
>
> * * *
>
> If the Court's standard of review is to represent anything more than reflexive deference to prison officials, any finding of reasonableness must rest on firmer ground than the record now presents.
>
> Incarceration by its nature denies a prisoner participation in the larger human community. To deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption. Such a denial requires more justification than mere assertion that any other course of action is infeasible..... I therefore dissent.

Justice Brennan was joined in this dissent by Justices Marshall, Blackmun and Stevens.

The result of *Shabazz* was that the long string of prisoners' complaints of restrictions on their free exercise of religion reviewed above was put to rest, at least for some time, and prison officials, state and federal, were assured that they could

170 . 405 U.S. 319 (1972), discussed at § 3b(1) above.

pursue their course with minimal interference by the federal courts, even as military authorities were assured that they could do the same after *Goldman v. Weinberger*. The Free Exercise Clause, then, could claim but very attenuated force in protecting the practice of the faith by the faithful in these two special environments. An example of that attenuation may be seen in the case law of the Eighth Circuit affecting American Indians in prison, a subject touched upon in *Teterud v. Burns, supra.* (See *Iron Eyes v. Henry*, *infra*.)

d. A New Flood of Prison Cases. Despite the new rule of deference to prison authorities, there were more cases emanating from prisoners in succeeding years, and with the adoption of the Religious Freedom Restoration Act (1993), the stream increased to a flood. Before noting the nature of that flood, it may be useful to see the effect of *Turner* and *O'Lone* on pre-RFRA litigation initiated by inmates.

(1) *Iron Eyes v. Henry* (1990). Robert Iron Eyes was a member of the Standing Rock Sioux Tribe incarcerated at the Missouri Correctional Center at Farmington. He entered the case law via a dispute over a prison requirement that he cut his long hair.

> He believes that his hair is a gift from the Great Spirit, and he considers cutting his hair, except to symbolize grief for the loss of a loved one, to be an offense to the Creator. Iron Eyes has had his hair cut five times during his twenty-seven years. The first three times he cut his hair by choice, in mourning for the loss of a loved one, consistent with the Sioux religion. The last two times his hair has been forcibly cut because of a Missouri prison grooming regulation....[171]

The Missouri regulation permitted excusal for members of an "indian [*sic*] tribe" who applied for exemption, with documentation of their tribal status, whose application was approved by a regional administrator of the prison system. Iron Eyes applied for exemption, but his application was denied. All other such applications from Farmington had also been denied. After his hair was forcibly cut, Iron Eyes sought relief in federal district court, which ruled against him. He appealed to the Eighth Circuit Court of Appeals, which ruled in an opinion written by Judge John R. Gibson for himself and Judge Frank J. Magill. Senior Judge Gerald W. Heaney dissented.

> To support his position, Iron Eyes relies primarily on Teterud v. Burns,[172] in which we held that a prison hair regulation impermissibly infringed upon a Native American's first amendment right to freely express his religious beliefs.... While Teterud has not been expressly overruled, we have limited it to its facts.... Further, the least restrictive means test we applied in Teterud has been rejected by the Supreme Court. See O'Lone v. Estate of Shabazz.[173]
>
> A prisoner's free exercise claim is currently "judged under a `reasonableness' test less restrictive than that ordinarily applied to alleged infringement of fundamental constitutional rights." O'Lone.

---

171 . *Iron Eyes v. Henry*, 907 F.2d 810 (1990).

172 . 522 F.2d 357 (1975), discussed at § b(5) above.

173 . 482 U.S. 342 (1987), discussed immediately above.

* * *

> Although we recognize how important the growing of his hair is to Iron Eyes, we simply cannot, under the Turner[174] factors, justify striking the short hair regulation at issue....
>
> Although we affirm the district court, we have serious concerns regarding the position of the State in two respects. First, Iron Eyes was initially required to present proof that he was a Native American. [His] prison photographs, which were in evidence in this case, together with his name, make this request an action just short of harassment. Second, we were deeply concerned that, while a motion for temporary injunction...was pending before this court, Iron Eyes was given the choice of disciplinary segregation or a hair cut, and he elected to comply with the order rather than face punishment. Such action in appropriate circumstances may require that we consider sanctions for contempt.[175]

So the court shook its finger at the state but upheld its action. Senior Judge Heaney, author of the *Teterud* decision, saw matters differently.

> I dissent. First, the Missouri hair-length regulation unreasonably infringes upon the beliefs of Native American inmates because it does not require that exemptions be granted on religious grounds absent the misbehavior of the individual seeking the exemption. The regulation permits exemptions only in the unfettered discretion of prison authorities.... This arbitrary discretion over exemptions is unjustified because there is no credible evidence that allowing exemptions to a handful of prisoners is harmful to the security or efficient administration of a prison. Second, the regulation, even if facially valid, was applied to Iron Eyes in an unconstitutional and arbitrary manner. His complaint properly raises issues particular to the brutal application of the regulation to him, and he is entitled to his day in court on these claims.
>
> Iron Eyes' pro se complaint set forth the following allegations:
>
> > On or about December 10, 1987, I received an order from Major Charles E. Harris that I was to get a haircut before 4:00 p.m., or that I would be locked up in the hole if I did not get it cut. I tried to explain to Maj. Harris that I am a full-blooded native American Indian and Maj. Harris told me that I was not an indian as there are no indians in his prison system and that I was really a white boy trying to get over on him. I even told Maj. Harris that he could look in my files and see that I am really an indian and verify my heritage but he said that was all lies too. Well, since I did not want my hair cut Maj. Harris handcuffed me and put me in the hole.
> >
> > On December 14, 1987, just before Christmas, Maj. Harris, Capt. Rosenberg and about 9 or 10 other guards handcuffed me behind my back real hard and put leg shackles on me and made me go in a room with all of them. Then they shoved a table in front of the door so nobody could get out. Then, Dan Henry, the Asst. Supt. said that I am

174 . From *Turner v. Safley*, 482 U.S. 78 (1987), discussed at § b(5) above.

175 . Ibid.

> going to get a hair cut one way or the other and that they didn't care if I was Geronimo. I told them that the courts also said us indians could keep our hair and Dan Henry said for me and the court to go and [obscenity] our selfs. I am sorry about that word but that is what he really said.
>
> Well, Dan Henry, Maj. Harris, Capt. Rosenberg and the guards all took my leg shackles and handcuffs real hard and held me down and this inmate barber named Earl Wells came over and cut my hair into a raggedy mess. That is when they all started laughing and Maj. Harris said that now I could get some white religion....
>
> [Footnote: Iron Eyes' version of the haircut...was supported by the deposition testimony of Earl Wells, the white prisoner who performed the haircut.]

* * *

The majority correctly notes that *Turner* has superseded the legal test stated in *Teterud v. Burns*. The defendants no longer must choose the least restrictive means possible in furthering administrative interests when constitutional rights are implicated. We must instead decide whether the regulation at issue is a reasonable way to address the issue, and we do not second-guess choices between reasonable policies.

While our inquiry is limited to the reasonableness of the policy adopted, our scrutiny of the record is not to be "toothless."[176]....

This observation has special force where there is plenty of accumulated real-world evidence and we do not need to rely wholly on the speculations of prison officials who admit that they have no empirical support for their position....

We have already found that the asserted justifications for hair-length regulations are pretextual. In *Teterud*, the defendant asserted that the hair-length regulation was necessary for easy identification of prisoners and for security against contraband. Yet, in that case the Warden testified that twenty percent of the prison population had been in noncompliance...for the past five months without a single incident. Two prison officials from West Virginia and Washington testified that the justifications offered in defense of such regulations "are `penological myth.'" The Supreme Court decisions in *Turner, O'Lone* and *Abbott* do not call this *factual* conclusion into question. Moreover, Missouri has produced no new evidence to support its position.... [A]llowing 4 prisoners out of 1700 to have longer hair for religious reasons aids their identification; it makes them instantly distinguishable. More particularly, from the photos submitted, it appears that the length of Iron Eyes' hair does little to alter his appearance.... [He] possesses distinctively Native American features, facilitating identification. Finally and conclusively, the defendants' conduct in this case is a frank confession of the importance and truth of this concern. Iron Eyes had long hair in his admission photograph[,] and the defendants never bothered to rephotograph [him] after the haircuts. The defendants' claim that short hair is necessary for identification is pretextual.

---

176 . Citing *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

> The claim that short hair is necessary for prison security is similarly exaggerated. [Superintendent] Dowd admitted that there had never been any contraband discovered in long hair despite a history of lax enforcement of the regulation.... Nor did the defendants introduce any evidence from any jurisdiction with a different policy to support their claims.... This cannot justify complete and uncompromising disregard for the religious significance of the regulated practice. It is our duty to evaluate the claims of prison officials for exaggeration; these claims are clearly exaggerated....
>
> The majority also bases its conclusion on the defendants' testimony regarding potential for inmate confrontations with guards during searches and the jealousy of other inmates.... There are several problems with each claim. Initially, the claim that exemptions will increase confrontations with guards is unfounded conjecture. Long hair has been allowed in the past. There was no evidence of past confrontations with guards over the examination of hair. There was also no evidence that Iron Eyes, during his previous years of incarceration, had ever objected to a search of his hair. This concern thus sweeps too broadly. Accommodations...are not automatically made unreasonable or excessively burdensome by the potential misbehavior of others.[177]....
>
> The claim that bestowing a special privilege causes jealousy among inmates also sweeps too broadly.... [O]n this theory, any accommodation of a religious practice where one prisoner was treated differently than another could not be required if other prisoners objected. A Jewish prisoner could not worship on the Sabbath. A Muslim prisoner could not have a pork-free diet. A Catholic prisoner could not take communion.... A rule against differential treatment makes hollow the notion that prisoners retain religious rights.... [R]ecognizing this type of justification would have a disproportionate impact on members of minority faiths because the practice at issue might seem unusual to many prisoners....
>
> In addition, I note that Missouri prison officials have decided that differential treatment based on behavior is desirable even if it causes jealousies, while differential treatment for free exercise reasons is not. I understand why prison officials would offer rewards for good behavior in spite of jealousies. That prison officials do not give similar weight to constitutional concerns in deciding whether the merits of a policy are outweighted by prisoner jealousies is also not surprising. Prison officials often do not feel that their primary obligation is the illumination or enforcement of constitutional rights. It is for this reason that our review cannot be passive. Accordingly, I reject the notion of a subjective "prisoners' veto."
>
> Finally, the justifications offered by state officials are not supported by the actions of any of their colleagues within this circuit; *only Missouri* restricts hair length. The federal government does not restrict the hair length of prisoners. Arkansas has no hair-length regulation. Iowa allows unrestricted hair length, except in limited circumstances, and takes two

177 . Citing *Bilal Ali-Salaam v. Lockhart*, 905 F.2d 1168 (CA8 1990).

> photographs of long-haired prisoners on admission, pulling back the hair for one. Minnesota has no hair-length regulations. Nebraska does not have a state policy on hair length. North Dakota does not restrict hair length. South Dakota does not restrict hair length.... This circuit contains the second highest number of states of any federal circuit in the country, and state prisoners in only one state are subjected to this regulation which we all agree infringes upon religious liberty. This is strong and persuasive evidence additional evidence that the security concerns of the defendants are greatly exaggerated and alternatives pose only a *de minimis* cost....
>
> * * *
>
> Iron Eyes' allegations of mistreatment by the defendants state a claim for the arbitrary and capricious application of the regulation and for the violation of his constitutional rights.
>
> First, the amended complaint alleges that despite knowing that Iron Eyes was a Native American, the defendants forcibly cut his hair without giving him time or notice to apply for an exemption. Subsequently, an exemption was denied without explanation. Where a prisoner possesses a liberty interest and the prison has procedures to protect that liberty interest, a section 1983 suit may properly challenge the decision of subordinate employees not to allow a prisoner access to the procedures. The failure of prison officials to state reasons for rejecting Iron Eyes' request and their failure to approve an exemption for anyone else may also state a claim for arbitrary and capricious behavior. Second, the amended complaint also alleges that Iron Eyes was treated in a vicious manner because of his heritage. This states an equal protection claim. Third, the amended complaint alleges that Iron Eyes suffered physical abuse and harassment. This may state a claim for cruel and unusual punishment. Finally, the abusive actions of the defendants in cutting Iron Eyes' hair or threatening him with discipline in step with the progress of this suit may state a retaliation claim.
>
> [Footnote: Wells, the inmate barber, related another incident where a Native American prisoner was "scalped" by one of the defendants. His hair was cut to the skin in patches around his ears and in other places was left long like a ponytail. If true, this makes a mockery of any claim that the defendants were just doing their job in making sure everyone's hair was simply above their collar. Native Americans believe that the hair is tied to communication with God and that being without it one cannot get to heaven. Being scalped is a sign of subjugation and humiliation.][178]

At least one judge was on the job in this instance, and—perhaps alerted by his previous experience in *Teterud* and offended by the conduct of the prison employees—wrote an opinion that makes the other two judges look complacent and superficial in comparison, but they had the votes, and Iron Eyes was denied the indemnification for his mistreatment to which he should have been entitled. In addition, the *Teterud* standard was swept away, and prisoners were left with little

178 . *Iron Eyes v. Henry, supra*, Heaney dissent.

recourse against prison officials who were not only unsympathetic to the Free Exercise claims recognized in their own unique regulations but obviously venomous in punishing an inmate who dared to make such claims. (Iron Eyes had been released from prison before this case reached the Circuit Court, but his [unsuccessful] claim for damages kept the case alive, at least until Judges Gibson and Magill interred it.)

(2) *Hamilton v. Schriro* (1994). A new note was sounded in prison cases with the adoption of the Religious Freedom Restoration Act. One of the first results was a reappraisal of the accommodation of Native American religions in prison. Mark Juan Hamilton was an Indian confined at Potosi Correctional Center in Missouri. For religious reasons he sought to let his hair grow long, to use a sweat lodge, and to have access to sage, cedar, sweet grass, kinnikinnik, pine, mint, medicine bags, eagle feathers, hawk feathers, owl feathers, prayer stick, beads, necklace, dancing belt and sacred pipe. The Missouri Department of Corrections required inmates to cut their hair so that it did not fall below the top of the collar. It also denied the use of a sweat lodge and some of the other items requested. The inmate took the matter to federal court, where it was assigned to Magistrate William A. Knox, who held hearings and issued a Report and Recommendations, from which the following is taken.

> During the pendency of this case, Congress passed and the President signed into law the Religious Freedom Restoration Act of 1993 (Nov. 16, 1993).179... Two purposes of the RFRA are "to restore the compelling interest test" and "to guarantee its application in all cases where free exercise of religion is substantially burdened."
>
> Senate Report No. 103-111 clearly shows Congress intended the law to apply to prisoners.... "[I]nadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not meet the act's requirements".... Prior to the enactment of RFRA [prison] grooming regulations were upheld as constitutional, even when challenged on religious grounds.180
>
> * * *
>
> Under case law in effect prior to enactment of the RFRA, an inmate's exercise of freedom of religion could be restricted if the restrictions were reasonably related to prison security. Prison officials had to produce evidence that the restrictions placed on an inmate's freedom was in response to a security concern. At that point, the burden shifted to the inmate to show by substantial evidence that the prison officials' response was exaggerated. Without ruling on the issue, the court notes plaintiff has submitted evidence to support his assertion that the response in this case was exaggerated.
>
> After enactment of the RFRA, plaintiff must show that the prison regulations and practices place a significant burden on the exercise of his religion. The burden then shifts to correctional personnel to show the

179 . 42 U.S.C. § 2000bb, discussed at § D2e(7) above.

180 . *Hamilton v. Schriro*, 863 F. Supp. 1019 (1994), citing *Sours v. Long*, 978 F.2d 1086 (CA8 1992); *Campbell v. Purkett*, 957 F.2d 535 (CA8 1992); *Iron Eyes v. Henry*, 907 F.2d 810 (CA8 1990), discussed immediately above.

regulations and practices further a compelling governmental interest and that [they] are the least restrictive means of furthering the compelling governmental interest....

Plaintiff seeks outdoor construction of a sweat lodge and fire pit because the tenets of his religion require contact with the ground during worship and religious ceremonies. Plaintiff asserts he cannot pray or otherwise practice his religion unless he has been purified in a sweat lodge ceremony. Although defendants do not concede plaintiff's religious beliefs are sincerely held, they did not produce evidence showing otherwise[,] and several corrections personnel testified the sincerity of [his] beliefs are [sic] not at issue. The court notes [he] actively practiced his religion in a penal institution in the state of Washington, and has continued to request to do so in Missouri. Thus, this court finds [his] beliefs are sincerely held. Furthermore, the evidence clearly establishes the sweat lodge purification ceremony as an essential component of the Native American religion which [he] practices.

Although Native American religion and its practices are not familiar to many, it is a bona fide religion. The practice of this religion has the same beneficial effect on its adherents as do other religions for their adherents. Within the prison system, it has the benefit of promoting inner peace, has a calming effect and causes the practitioner to become a more cooperative, peaceful, self-controlled individual. Defendants do not challenge the legitimacy of the Native American religion.

A sweat lodge ceremony consists of the use of a sweat lodge made of bent willow poles covered with hides, blankets or tarpaulins. Rocks are heated in a separate fire pit and then moved to the center of the lodge. Water is poured on the hot rocks, creating steam. Participants enter the lodge, which is completely covered to keep out the light and to keep in the steam and heat, and offer prayers. Participants are unclothed and sweat during the ceremony. The ceremony typically lasts between one and three hours.... Potosi Correctional Center...does not allow a sweat lodge, sweat lodge ceremonies or fires in the institution. All chapel facilities...are inside the buildings.

Maximum security correctional facilities in other states permit sweat lodge ceremonies and the growth of long hair as part of the Native American religious practices. The fire needed to heat the rocks can be contained and controlled to meet the Uniform Fire Code standards. The annual cost associated with the practice, as presented at the hearing, is minimal.

In denying plaintiff's request, corrections personnel in Missouri did not (1) make any inquiry of problems encountered by personnel at institutions which allow the practice of Native American religions; (2) contact any Native American religious leader to determine the feasibility of plaintiff's requests, or to determine whether other acceptable alternatives existed; or (3) do a cost analysis or make inquiry regarding the availability of funds or the amount of funds that would be required. Instead, Missouri's corrections personnel relied on their experience in corrections work and on a belief that such practices would interfere with the safety and security of

> the institution. They made absolutely no effort to determine whether the religious practices could be accommodated while still taking care of safety and security concerns. They also presented no evidence showing any serious effort had been made prior to the hearing to determine the experience of other institutions which allow Native American religious practices.... The testimony [at hearing] from administrators of [such]...institutions clearly indicates (1) such practice has not unduly compromised the safety and security of their institutions and (2) their initial concerns had not been realized.
>
> Within this framework, the court finds that the regulations and policies at issue in this lawsuit...substantially burden[] plaintiff's exercise of his religion. Although safety, security and cost concerns may be shown to be compelling governmental interests in the prison setting, defendants have not shown that [their] regulations and practices...are the least restrictive means of furthering that interest. Defendants have not even shown a willingness, after enactment of the statute, to implement less restrictive means in the absence of a court order to do so. Thus, plaintiff's attorney is entitled to attorney's fees. Defendants take substantial steps to accommodate Christians, Jews and Muslims in providing facilities and opportunities to meet and pray. Their reluctance to do the same for Native Americans is based on lack of information, speculation, exaggerated fears, and post-hoc rationalizations, not on real evidence of problems. Under these circumstances, the RFRA clearly mandates that prison officials make accommodations for plaintiff to practice his religion[,] and the court will recommend that injunctive relief be granted to plaintiff.[181]

The magistrate's recommendations were approved by Senior District Judge Scott O. Wright with one minor modification—that the parties attempt to negotiate a mutually acceptable means for carrying out the required accommodation; failing that, the court would order relief.

The magistrate's analysis displayed commendable effort to understand the Native American religion and to afford it parity with other, better known religions in the accommodations provided in prison. He supposed that such accommodation would have various utilitarian benefits to the participants and therefore to the correctional institution in the way of greater tractability and even rehabilitation of inmates. That may have been no less conjectural than the opposite suppositions of the corrections officials, though one would hope that the free exercise of religion would have some favorable behavioral results. But the rationale for religious freedom does not depend upon its beneficial by-products; it is a value in itself to accommodate the exercise of religion, whatever its observable outcomes may be in individual cases.[182]

---

181. *Hamilton v. Schriro, supra.*

182. The decision described above was reversed on appeal, *Hamilton v. Schriro*, 74 F.3d 1545 (CA8 1996). The appellate panel expressed the hope that its decision did not "foreclose the possibility of a successful sweat lodge claim under different circumstances," and "encourage[d] prisons to accommodate the religious needs of inmates, including American Indian inmates, by providing facilities beyond the bare minimum." It held, however, that the prisons rules at issue did not violate RFRA because they were narrowly tailored to advance compelling interests such as

(3) *Luckette v. Lewis* (1995). From Arizona came another case in this series involving an inmate seeking protection of his right to practice his religion in prison. He listed four religiously required practices of his faith that were burdened by prison officials: a Kosher diet, a vow of poverty, not cutting the hair on his head or face, and wearing a headcovering of red, white, black or any mixture of those colors. He professed to be an "Ambassador/Priest" of the "Freedom Church of Revelation" and asserted, "I have been a member of the Church for several years and my beliefs are very deeply held and my practices are outlined in the Freedom Church Creed, Articles of Association, letters of directions and the Holy Bible." His motion for an injunction was decided by the federal district court, Roger G. Strand, J., who based his decision on the recently enacted Religious Freedom Restoration Act.

> The legislative history of the RFRA...confirms that prisoner claims are covered by the statute. Congress debated an amendment that would have excluded prisoner claims from the purview of the Act and rejected it. [Footnote: "The amendment was rejected [in the Senate] by a vote of 58 to 41."]....
>
> The RFRA, its purpose, and the legislative history make clear that Congress intended the courts to vigorously protect the First Amendment rights of prisoners while balancing the State's interest in maintaining a safe and orderly prison system....
>
> The Plaintiff has presented substantial documentation of the legitimacy of his religious convictions.... [T]he Court finds that Plaintiff's religious beliefs cannot be construed as a "sham" or "devoid of religious sincerity."[183] A court need not condone each and every practice or belief system of a religion in order to determine that a religion is legitimate and that its members are entitled to First Amendment protections.
>
> Defendants have shown some concern that Plaintiff's religion is an "identity religion." Identity religions generally profess violence against blacks, Jews, and other religious and ethnic groups.[184] However, Plaintiff states that his religion does not profess violence against blacks, Jews or others. Moreover, the "Freedom Church Creed" specifically states:
>
> > We are aware that "Identity" has taken on an anti-Semitic character among such groups. Therefore, we plainly state that we are not so-called "Jew haters," we do not believe that the Jews are responsible for all the world's problems, nor do we believe that the "holocaust" of World War II is a hoax.... We are in no way connected to or associated with the Aryan Nations, the KKK, the Skinheads, or any other race hate group of similar persuasion.
>
> The Defendants have not presented the Court with any evidence that

---

prison safety. The court declined to consider the constitutionality of RFRA, but Judge Theodore McMillian dissented on that point, arguing that Congress did not have power under §5 of the 14th Amendment to "subvert the Supreme Court's underlying constitutional jurisprudence."

183. *Luckette v. Lewis*, 883 F.Supp. 471 (D.Ariz. 1995), citing *Theriault v. Carlson*, 495 F.2d 390 (CA5 1974).

184. See discussion of the Church of Jesus Christ Christian and the Aryan Nations, which are "identity religions," in connection with *Wiggins v. Sargent* and *McCabe v. Arave* at § 3b(10) above.

Plaintiff and his religion are committed to violence or profess hatred towards religious, ethnic or racial groups. Therefore, Defendants have failed to rebut Plaintiff's evidence demonstrating [his] sincere and legitimate religious beliefs.

This initial inquiry into the legitimacy of Plaintiff's religious convictions is an extremely important component of prisoner Free Exercise claims. Courts must be able to sort out the insincere and illegitimate...claims from the legitimate ones.... This initial inquiry serves as a flood-gate for prisoner Free Exercise claims and provides an efficient means of disposing of bogus claims undeserving of First Amendment protections....

Although the Plaintiff has demonstrated that his religion mandates the four religious practices he claims are burdened, [he] has only demonstrated that three of the four have been substantially burdened.... [He] has not demonstrated how the religious practice of taking a vow of poverty has been substantially burdened. The "Creed" merely states that Plaintiff, as a priest in the Church, must "Turn over income to this Church...to carry out the purposes of this church (also called a "vow of poverty")." The Court finds no evidence that Defendants have substantially burdened Plaintiff's ability to take a vow of poverty.

Plaintiff believes that since he must turn over all of his money to his Church, that he is entitled to indigency status under the prison regulations. Prisoners are permitted to donate their money or spend their money on a variety of charities, interests, or churches; nevertheless, this does not mean that a prisoner who spends all his money on his religion or some other cause is entitled to "indigency status." Further, Plaintiff fails to demonstrate that his vow of poverty requires that he not work, or that the work requirement substantially burdens the practice of taking a vow of poverty.... Accordingly, Plaintiff's request for equitable relief based on the vow of poverty claim will be denied.

Plaintiff does show that the remaining practices have been substantially burdened. [He] cannot effectively practice a Kosher diet, absent the approval of Defendants, he is not allowed to wear his facial hair at the required length, and he is prevented from wearing a headcovering of appropriate color.... The prison's basic response to Plaintiff's request is that since the prison does not officially recognize [his] religion, he is not permitted a Kosher diet, an appropriate headcovering or hair length. For example, Defendants conclusorily state, "Luckette is not claiming to be a Jew who keeps Kosher. Therefore, he is not entitled to claim a Kosher diet."... This does not suffice as a compelling government interest.

In general, two of the most compelling penological interests are budgetary concerns and safety concerns. The Defendants have suggested...that Kosher diets cost more money than regular prison diets. Although the cost may be greater, this additional expense is not a compelling governmental interest. Only a few prisoners have legitimate religious beliefs which require they maintain a Kosher diet, and the expense of providing Kosher meals to these few prisoners is minimal. Moreover, the Ninth Circuit has held...that provision of a Kosher diet may

> be required by the First Amendment.[185] In terms of the headcovering and hair length, the prison does not incur any cost by permitting Plaintiff to grow his hair or wear a headcovering.
>
> [With regard to] safety concerns[,] provision of a Kosher diet would not implicate any safety concerns.... Although there may be compelling [safety] reasons for not allowing prisoners to maintain extremely long hair, the Plaintiff is merely asking that he be allowed to maintain a beard one quarter of an inch in length. Prison officials permit, for medical reasons, some prisoners to maintain this one quarter inch beard length. The prison officials do not meet their burden of demonstrating a compelling interest for not allowing a short, kempt beard.... [A] trimmed beard, so long as it is clean, does not seem to present prison authorities with a major security or health risk....
>
> In terms of the headcovering, the Defendants...at oral argument, suggested ...that certain colors may be gang colors and thus the wearing of these colors may raise safety concerns. The Court is extremely concerned with the potential for violence that may arise from wearing gang-related colors.... Although the Plaintiff's religion may require him to wear certain colors, this Court cannot condone endangering the welfare of individuals by permitting the Plaintiff to wear a headcovering, the color of which may result in harm to himself or others. These safety concerns, though, must be viewed in the light of the First Amendment and RFRA. The governmental defendants have not clearly suggested which colors raise safety concerns.... The Court is confident that the Defendants will be able to work with the Plaintiff in devising a headcovering that will not present a safety risk....
>
> The Court will enter a preliminary injunction enjoining the Defendants from denying Plaintiff a Kosher diet and preventing Plaintiff from growing a one quarter inch beard and wearing an appropriate headcovering.[186]

e. New Cases after the Religious Freedom Restoration Act. Many other cases came from prison settings with the stimulus of the Religious Freedom Restoration Act. A catalog of some of them would include the following:[187]

- *Abdur-Rahman v. Michigan Dept. of Corrections*, 65 F.3d 489 (CA6 1995) (inmate's claim that refusal to release him from work detail to attend religious services violated Free Exercise Clause and RFRA rejected because prison policy "did not affect an essential tenet" of his religion and was justified by security concerns);
- *Abordo v. Hawaii*, 902 F.Supp. 1220 (1995) (summary judgment denied

185. Citing *McElyea v. Babbitt*, 833 F.2d 196 (CA9 1987), relying on *Kahane v. Carlson*, 527 F.2d 1975, discussed at § 3b(6) above; also *Ward v. Walsh*, 1 F.3d 873 (CA9 1993).

186. *Luckette v. Lewis, supra*.

187. This survey is by no means exhaustive of prison cases decided since adoption of RFRA but lists only the more notable ones as of June 26, 1996. It was compiled by J. Brent Walker and Melissa Rogers of the Baptist Joint Committee on Public Affairs (although abbreviating their summaries) and is used with their permission.

state on Native American inmate's claim that his free exercise of religion was infringed by cutting his hair);

• *Akbar-El v. Muhammed*, 663 N.E.2d 703 (Ohio Ct. App. 1995) (Moorish Science Temple inmate's claim of violation of free exercise because of prison's refusal to permit them religious services separate from general "Islamic" service or to wear "fez" instead of permitted "tarbush" denied because no substantial burden shown);

•*Alameen v. Coughlin*, 892 F.Supp. 440 (E.D.N.Y. 1995) (Sufi Muslim inmates granted preliminary injunction permitting wearing of dhikr [*sic*] beads as not least restrictive method of preventing gang violence);

• *Allah v. Beyer*, 1994 WL 549614 (D.N.J. Mar. 29, 1994) (inmate's objection to interstate transfer as burdening his free exercise of religion denied because transfer was least restrictive means of furthering compelling state interest of prison security);

• *Allah v. Menei*, 844 F.Supp. 1056 (E.D.Pa. 1994) (inmate's challenge to prison's equating his "Temple of Islam" faith with "Nation of Islam" for purposes of supplying facilities and chaplains upheld against state's motion for summary judgment because "bald assertion" of interest in maintaining order and discipline not adequate to support motion);

• *Bass v. Grottoli*, 1995 WL 565979 (S.D.N.Y. Sept. 25, 1995) (Jewish inmate's claim of anti-Semitic harassment via interference with religious rights upheld against state's motion for dismissal);

• *Belgard v. Hawaii*, 883 F.Supp. 510 (1995) (Native American inmate's claim that Free Exercise rights were violated by prison's depriving him of certain religious items, forcing him to cut his hair, and denying him access to religious counselor);

• *Bryant v. Gomez*, (inmate's claim that prison's refusal to hold "full" Pentecostal services violated RFRA rejected because such services were not "mandated" by his religion);

• *Campbell-El v. District of Columbia*, 874 F.Supp. 403 (D.D.C. 1994) (inmate's claim that certain prison regulations violated his rights under RFRA to pursue Moorish Science Temple religion upheld against motion to dismiss);

• *Campos v. Coughlin*, 854 F.Supp. 194 (S.D.N.Y. 1994) (inmates' motion for preliminary injunction granted permitting wearing of Santeria beads);

• *Canedy v. Boardman*, 16 F.3d 183 (CA7 1994) (Muslim inmate's objection to strip-search by two female prison guards dismissed; appellate court reversed dismissal and remanded for trial);

• *Crosley-El v. Berge*, 896 F.Supp. 885 (E.D.Wisc. 1995) (Moorish Science Temple inmate's demand that he be permitted to attend a service of his own faith rather than the general Muslim prison service rejected because no substantial burden shown);

• *Diaz v. Collins*, 51 F.3d 1041 (CA5 1995) (Native American inmate's claim that prison rules about hair length and headbands violated his rights under RFRA rejected because rules were narrowly tailored to advance compelling state interest of prison security);

• *Dickinson v. Austin*, 60 F.3d 832 (CA9 1995) (inmate's claim that prison's rule prohibiting him from wearing swastika medallion denied for failure

to show substantial burden on central tenet of religious belief);

• *Friend v. Kolodzieczak*, 72 F.3d 1386 (1995) (on remand from U.S. Supreme Court to reexamine award of attorneys' fees to prevailing Roman Catholic inmates seeking access to rosary beads and scapulars, court reaffirmed original award and added fees for inmates for time spent defending it);

• *George v. Sullivan,* 896 F.Supp. 895 (W.D.Wisc. 1995) (prison's denial of literature of Church of Jesus Christ Christian to inmates upheld against challenge under RFRA because material admittedly fostered racial animosity and prison ban was narrowly tailored to serve compelling interest of prison security);

• *Haff v. Cooke*, 1996 WL 180689 (E.D.Wisc. 1996) (Christian Identity inmate's RFRA objection to prison's seizure of white supremacy materials rejected on basis of compelling state interest justifying seizure);

• *Hall v. Griego*, 896 F.Supp. 1043 (D.Colo. 1995) (Nation of Islam inmate's RFRA objection to prison ban on religious headgear upheld against state's motion for summary judgment);

• *Hutchinson v. Lehman*, 1995 U.S.Dist. LEXIS 941 (E.D.Pa. 1995) (Muslim inmates' claim that prison's failure to allow them to attend Jumu'ah service at a particular time of day violated their RFRA rights rejected because of failure to show that Islamic doctrine mandated that the service occur at a precise time of day);

• *Jolly v. Coughlin*, 1996 U.S.App. LEXIS 1757 (CA2 1996) (Rastafarian inmate confined to "medical keeplock" for over three years for religious refusal to submit to latent TB screening test granted preliminary injunction against prison);

• *Levison-Roth v. Parries*, 872 F.Supp. 1439 (D.Md. 1995) (Jewish woman objected under RFRA to detention center's requiring her to remove wig and wear pantsuit; court found ban on wig did not substantially burden her Free Exercise rights but institution's failure to present evidence justifying pantsuit requirement precluded summary judgment on that claim);

• *Mack v. O'Leary*, 80 F.3d 1175 (CA7 1996) (Muslim inmate's and Moorish Science Temple inmate's objections to prison interference with ritual festivities were consolidated; court remanded former for trial but upheld dismissal of latter);

• *Malik v. Brown*, 65 F.3d 148 (CA9 1995) (upholding inmate's right to use religious name as well as committed name on prison records);

• *May v. Baldwin*, 895 F.Supp. 1398 (D.Or. 1995) (Rastafarian inmate objected under RFRA to prison requirement that he undo his dreadlocks; court ruled in favor of prison authorities);

• *Muslim v. Frame*, 891 F.Supp. 226 (E.D.Pa. 1995) and 897 F.Supp. 215 (1995) (Muslim inmate's complaint that prison ban on religious headgear violated his Free Exercise rights dismissed as moot because of his release from prison; on prison's motion for reconsideration on argument that only mandated religious practices are protected, court granted inmate—who had subsequently been reincarcerated—time to reinstate motion for injunctive relief);

• *Orafan v. Rashid*, 1995 WL 506808 (N.D.N.Y. 1995) (Shi'ite Muslim inmates objected under RFRA to prison policy requiring them to share a mosque with other Muslim groups; court rejected their claim, noting that prison also required Protestants and Catholics to share worship facilities);
• *Phipps v. Parker*, 879 F.Supp. 734 (W.D.Ky. 1995) (Hasidic Jewish inmate's RFRA objection to prison's cutting earlocks overruled in favor of "compelling" interest of prison safety, prisoner identification and sanitation);
• *Rust v. Clarke*, 883 F.Supp. 1293 (D.Neb. 1995) (Asatru inmates' claim to RFRA relief against prison's denial of various items, privileges and individualized worship time denied because prison could only partially accommodate all inmate's various religious needs);
• *Sasnett v. Dept. of Corrections*, 891 F.Supp. 1305 (W.D.Wis. 1995) and *Sasnett v. Sullivan*, 908 F.Supp. 1429 (1995) (inmate's RFRA challenges to prison limits on jewelry-wearing and amount of publications in cells upheld with respect to wearing jewelry and denied with respect to literature in cells; court rejected "centrality" standard in favor of "religiously motivated" standard);
• *Shaheed v. Winston*, 885 F.Supp. 861 (E.D.Va. 1995) (court upheld prison's requirement that Nation of Islam members sign up before attending services and other limitations on ministers and services because inmates practice of religion was not substantially burdened);
• *Smith v. Elkins*, 19 F.3d 29 (CA9 1994) (Muslim prisoner's disciplinary penalty for praying aloud in a foreign language upheld by district court; circuit court reversed and remanded for application of RFRA standard);
• *Van Dyke v. Washington*, 896 F.Supp. 183 (C.D.Ill. 1995) (inmate claimed prison violated his religious rights by refusal to recognize Church of Jesus Christ Christian or to allow him to receive its publications; court found case was moot because of inmate's transfer);
• *Weir v. Nix*, 890 F.Supp. 768 (S.D.Iowa 1995) (fundamentalist Christian inmate's challenges to prison rules—group worship led by nonfundamentalist, ban on taking Bible to exercise yard, etc.—did not substantially burden religious practice because the activities were not mandated or central to religious tenets);
• *Werner v. McCotter*, 49 F.3d 1476 (CA10 1995), *cert.* denied *sub nom. Thomas v. McCotter*, 115 S.Ct. 2625 (1995) (district court's denial of Native American inmate's RFRA claims to sweat lodge, medicine bag, spiritual advisor, literature and various symbols of his religion reversed by appellate court with respect to sweat lodge and medicine bag because they were "central and fundamental" to inmate's religion while other items were not);
• *Woods v. Commissioner Parker Evatt*, 876 F.Supp. 756 (D.S.C. 1995) (court granted summary judgment to prison official on ground that failure to furnish religious treatises and prayer rugs to Muslim inmates did not substantially burden their religious practice, and that to furnish such aid would violate the Establishment Clause).

This volume has explored a wide range of cases dealing with the legal problems encountered by individuals trying to observe the requirements of their religious duty in "the world," including in particularly constrained environments such as prisons and the military.