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## Religious Accommodation and the National Labor Relations Act

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# Religious Accommodation and the National Labor Relations Act

Roberto L. Corrada†

*This Article argues for amending the National Labor Relations Act ("NLRA") to require employers and unions to accommodate a broader array of employee and third party religious beliefs. By detailing the experiences of several religious adherents, the Article seeks to demonstrate that current statutory and constitutional doctrines fail to adequately protect religious freedom.*

*After identifying numerous conflicts between the NLRA and religious exercises, the Article explains why a legislative accommodation for religion is appropriate given the long-standing history in United States labor law of accommodating various secular interests (e.g. federalism and free speech) that may conflict with optimal labor policy. In the author's view, religion is an interest as worthy of protection as these secular interests.*

*Finally, the author tests his proposal under the appropriate Establishment Clause standards. Due to inconsistent Supreme Court jurisprudence in cases involving the intersection of the Free Exercise and Establishment Clauses of the First Amendment, the author analyzes in detail how the proposed legislative accommodation complies with the dictates of Court precedent. The Author concludes that the current Supreme Court would uphold a meaningful level of legislative accommodation of religious liberties impinged by the NLRA against challenges that such accommodation violates the Establishment Clause.*

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† Associate Professor, University of Denver College of Law. B.A., 1982, George Washington University; J.D., 1985, Catholic University of America Law School. The author would especially like to thank his wife, Theresa Corrada, for her research involving the Religion Clauses and her insights regarding state action and the Establishment Clause. The author would also like to thank the following people for their helpful comments at various stages of this article: Dennis Lynch, William Marshall, Martin Malin, David Steinberg, David Barnes, Arthur Best, Alan Chen, Federico Cheever, Nancy Ehrenreich, and Stephen Pepper. In addition, the author would like to thank the following former students for their research assistance: Alice Rydberg, Bart Johnson, Charlotte Sweeney, Lisa Zeiler, Dale DeCesare, and David Joeris. The author is grateful to the University of Denver and to the Hughes Research & Development Fund for its financial support of this research.

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#### INTRODUCTION

The National Labor Relations Act ("NLRA" or "Act")<sup>1</sup> has occasionally burdened religious liberty. Members of some religions hold sincere, deeply-rooted beliefs that do not square with certain rights and requirements created or endorsed by the NLRA.<sup>2</sup> Despite these impingements, federal courts have often completely denied NLRA exemptions or accommodations to individual religious objectors whose beliefs are in conflict with the Act's requirements.<sup>3</sup> Neither the original Wagner Act nor any of its major amendments provide any guidance for resolving conflicts between

1. Hereinafter, the Wagner Act and its major amendments (Taft-Hartley & Landrum Griffin), all codified at 29 U.S.C. §§ 151-67 (1994), are collectively referred to as the National Labor Relations Act.

2. Of these minority religions, the Seventh Day Adventists have been by far the most discussed in the law. See *International Ass'n of Machinists v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988); *Anderson v. General Dynamics*, 648 F.2d 1247 (9th Cir. 1981); *Tooley v. Martin Marietta*, 648 F.2d 1239 (9th Cir. 1981); *Nottelson v. Smith Steel Workers*, D.A.L.V. 19806, 643 F.2d 445 (7th Cir. 1981); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338 (6th Cir. 1978); *Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976); *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971); *Wondzell v. Alaska Wood Prods.*, 601 P.2d 584 (Alaska 1979); *Scandia Log Homes, Inc.*, 258 N.L.R.B. 716 (1981). Fewer claims have been made by members of other religions objecting to NLRA requirements, mostly Christian Fundamentalist sects. These cases have presented unique problems because the *individualistic* nature of many fundamentalist beliefs, drawn from outside known church doctrines or creeds, requires particularized accommodations only workable on a case by case basis. See, e.g., *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990) (Faith Assembly Church); *Service Employees Int'l Union, Local 6*, 117 L.R.R.M. (BNA) 1503 (1984) (Advice mem. NLRB Gen. Counsel) (Country Bible Church); see also *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (Worldwide Church of God); *Yott v. North American Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979) (The Church Which is Christ's Body). Six additional religions have beliefs that conflict with compelled union financial support, as evidenced by their involvement in attempting to amend the NLRA to allow for religious accommodation. See HOUSE COMM. ON EDUC. AND LABOR, CONSCIENTIOUS OBJECTION TO JOINING A LABOR ORGANIZATION, H. REP. NO. 768, 95th Cong., 1st Sess. 5 (1977) (In addition to Seventh Day Adventists, other religions with objections to joining or supporting labor unions are the Amish, the Mennonites, Plymouth Brethren IV, the National Association of Evangelicals, the Christian Missionary Alliance, and the Old German Baptists). Recently, NLRA-endorsed activity has also conflicted with the beliefs of the Orthodox Jewish, Islamic, and Zoroastrian faiths. See *Cannon v. Edgar*, 825 F. Supp. 1349 (N.D. Ill. 1993), *aff'd*, 33 F.3d 880 (7th Cir. 1994).

3. This Article will highlight the claims of some of these religious objectors. The Act's support for collective bargaining has superseded Worldwide Church of God member Larry Hardison's religious need to keep holy the Sabbath. See *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). The NLRA's endorsement of the union shop (requiring union financial support) has overcome Seventh Day Adventist Beatrice Linscott's sincere belief that employees should not be adversaries of their employer. See *Linscott v. Millers Falls Company*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); see also *Faith Assembly Church member Maurice Wilson's case*, *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992). The NLRA's regulation of strikes by labor organizations has triumphed over Carole Katz's desire to honor her mother's Orthodox Jewish request to be buried within one or two days of her death. See *Cannon v. Edgar*, 825 F. Supp. 1349 (N.D. Ill. 1993), *aff'd*, 33 F.3d

religion and the statute's requirements. Congressional inaction requires individual religious objectors to employ ill-fitting legal theories in the hope of gaining relief. In those few cases in which courts or legislatures have afforded relief, religious institutions have fared well<sup>4</sup> while accommodations for individual religious objectors have been either very limited or short-lived.<sup>5</sup> This Article proposes that Congress amend the NLRA to provide accommodations for individual religious objectors when the Act's requirements conflict with religious liberties.<sup>6</sup>

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880 (7th Cir. 1994) (lock out of cemetery workers delayed burials beyond the Orthodox Jewish requirement of two days).

4. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding the NLRA inapplicable to Catholic religious schools, even those which employ secular teachers and which teach secular subjects, because the complex regulatory scheme established by the Act might require excessive entanglement of government with religion, a state of affairs not clearly intended by Congress). *Id.* The resulting government inquiries about the school's religious mission would "implicate sensitive issues that open the door to [church/state] conflicts" and "which may impinge on rights guaranteed by the Religion Clauses." *Id.* The Court's decision in *Catholic Bishop* has generated controversy. Some commentators favoring governmental separation from religious institutions have seen the decision as a paradigmatic example of Establishment Clause jurisprudence. See, e.g., Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989). Other commentators have agreed with the decision's result, but have disagreed with the Court's approach to the conflict between government regulation and church claims for exemption. See, e.g., Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). Still other commentators have viewed the Court's decision in *Catholic Bishop* suspiciously, either criticizing its result or minimizing its impact as a constitutional precedent because of its statutory rationale. See, e.g., Robert J. Pushaw, Jr., *Labor Relations Board Regulation of Parochial Schools: A Practical Free Exercise Accommodation*, 97 YALE L.J. 135 (1987); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 411-13 (1987); William P. Marshall and Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 297-99 (1986).

5. For example, Title VII's requirement that religion be reasonably accommodated in the private workplace is severely restricted by the Supreme Court's requirement that any impositions on employers must be no more than *de minimis*. See *Hardison*, 432 U.S. at 63. Section 19 of the NLRA, 29 U.S.C. § 169 (1994), enacted in 1980 expressly to alleviate the burden imposed on minority religions by the union shop, affords only partial accommodation and excludes many religious objectors who cannot satisfy the provision's definition of religion. The provision, which allows religious objectors to make a payment to charity rather than to a union, only applies to an employee who "adheres to established and traditional tenets and teachings of a *bona fide* religion" with "*historically held*" objections to labor unions. *Id.* (emphasis added). See *Wilson*, 920 F.2d 1282 (6th Cir. 1990). At least one successful attempt to obtain relief from a state legislature was ultimately preempted by federal law. See *Cannon*, 825 F. Supp. 1349 (N.D. Ill. 1993). See also David L. Gregory, *Government Regulation of Religion through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992) (maintaining that while religions as institutional actors have received wide-ranging exemptions from labor and employment laws of general applicability, the exemption requests of individual religious objectors have often been denied); David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991) (noting the failure of courts to grant exemptions for individual religious objectors, and suggesting an affirmative action standard for such claims).

6. This Article assumes, for purposes of more fully comparing the Religion Clauses and the NLRA, that so long as there is a burden on religion, legislative accommodation of religion should be undertaken. The Article's central purpose, then, is to show that a carefully constructed statutory accommodation is constitutionally viable. However, the Article strives also to illuminate the general debate surrounding government involvement with religion. In that debate, Michael McConnell has been one of

Unfortunately, this proposal runs squarely into a vigorous debate over the scope of the Religion Clauses of the First Amendment of the United States Constitution.<sup>7</sup> Indeed, one of the most lively discussions surrounding the interpretation of the Religion Clauses has involved the validity of accommodations for religion enacted at Congress' discretion but not required by the Constitution's Free Exercise Clause.<sup>8</sup> In *Employment Division v. Smith*,<sup>9</sup> the Court reformulated free exercise doctrine by holding that the Free Exercise Clause does not mandate exemptions from facially neutral, generally applicable laws or government actions.<sup>10</sup> The Court's *Smith* deci-

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the primary proponents of legislative accommodation of religion. See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 GEO. WASH. L. REV. 685 (1992) [hereinafter McConnell, *Update*]; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1. [hereinafter McConnell, *Accommodation*]. Ira Lupu has taken up the other side. See Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991) [hereinafter Lupu, *Discretionary Accommodation*]; Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992) [hereinafter Lupu, *Accommodation Trouble*].

To the extent that readers hesitate to agree that nonmajoritarian religious beliefs should be accommodated, they may wish to consult, in addition to the cited works by Michael McConnell, the following: Marc S. Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217; Steinberg, *supra* note 5. A more recent work that supports some accommodations and operates from neutral principles is JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY*, 119-40 (1995).

7. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

8. Some scholars espouse that the Free Exercise Clause mandates accommodation even absent congressional action, but also generally agree that even if accommodation is not mandated by the Constitution, it should certainly be tolerated in the form of legislative directive. See McConnell, *Update*, *supra* note 6; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); McConnell, *Accommodation*, *supra* note 6; see also STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1993); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299. Several other scholars believe that the Free Exercise Clause should not mandate exemptions because of concerns about establishment, and thus also tend to be suspicious of legislative accommodations for religion. See Lupu, *Accommodation Trouble*, *supra* note 6; Lupu, *Discretionary Accommodation*, *supra* note 6; William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L. J. 1691 (1988). This Article deals largely with legislative accommodations of religion; those that are enacted at Congress's discretion but are not mandated by the Constitution. With respect to these, the Article uses the terms "legislative," "discretionary," and "permissible" interchangeably.

9. 494 U.S. 872 (1990).

10. *Id.* at 878-82. Until *Smith*, the Supreme Court's free exercise doctrine mandated exemptions in cases where the law or government action substantially burdened a plaintiff's exercise of her religious beliefs and the government could not show that the law was necessary to further an important objective and was the least restrictive means of accomplishing that objective. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402-10 (1963). The results of the Court's application of this doctrine, however, had been counterintuitive. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1194 & n.41 (2d ed. 1988) (contrasting the Court's formal requirements for free exercise claimants with the Court's application of those requirements); Pepper, *supra* note 8, at 316. For the twenty years leading up to *Smith* the Court rejected nearly every claim for an exemption, even where the challenged law or government action severely burdened religious exercise and the government interest seemed relatively unimportant. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (declining to stop the building of a road through sacred burial sites); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (denying an exemption to work schedules for Muslim prisoners to accom-

sion arguably has reduced the Clause to a specialized equal protection guarantee for religion and religious observance.<sup>11</sup>

The *Smith* decision at first glance would seem to diminish religious objectors' chances for accommodation from the requirements of generally applicable laws like the NLRA. Specifically, if accommodation of religion is almost never required, is any statutory accommodation of religion presumptively an impermissible establishment in that it privileges religion?<sup>12</sup> Certain language in *Smith*, however, strongly suggests that the Court is moving toward a narrower or weaker interpretation of the Establishment Clause at the same time that it is weakening free exercise guarantees. The Court suggested in *Smith* that the legislature, as opposed to the judiciary, is authorized, but not required, to make some accommodations that do not violate establishment principles.<sup>13</sup> Indeed, the Court's more recent Establishment Clause decisions involving accommodation of religion, though striking down most of the accommodations at issue, have increasingly stated a favorable disposition to such legislative action.<sup>14</sup> As a result of the Supreme Court's general stand in favor of legislative accommodation and the guidelines for proper accommodations that it has put forth, this Article concludes that the proposed religious accommodation amendment to the

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modate Friday worship services); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying an exemption to Air Force dress regulations for an Orthodox Jewish officer to accommodate his wearing a yarmulke). See also Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994).

11. Congress' passage of the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C.A. §§ 2000bb-bb(4) (West Supp. 1995)), a reaction to the *Smith* decision, does little to change the Court's overall approach to the Free Exercise Clause. If RFRA survives constitutional scrutiny (for a list of constitutional concerns regarding RFRA and its promulgation under Section 5 of the Fourteenth Amendment, see Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 52-66 (1993)), the Act will purportedly require courts to strictly analyze government impositions on religion through laws of general applicability. Despite RFRA's facial application of expansive free exercise ideals to laws of general applicability, however, both the Senate and House Committee Reports accompanying the law emphasize that RFRA only restores the law to its state prior to *Smith*. According to the Senate Report, for example, "[RFRA] is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*." See S. REP. NO. 111, 103d Cong., 1st Sess., at 9 (1993) (emphasis added). Accord H. REP. NO. 88, 103d Cong., 1st Sess., at 7 (1993). For an analysis of all the ways in which RFRA may be marginalized by the federal courts, see Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994); but see Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994). Even if RFRA survives constitutional attack and is applied more broadly than Congress intends, it remains only a federal statute, meaning that it is not necessarily certain that its commands will supersede those of the NLRA. Cf. Joanne C. Brant, "Our Shield Belongs to the Lord:" *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. LAW QUARTERLY 275, 282 n.32 (1994).

12. See Lupu, *Discretionary Accommodation*, *supra* note 6, at 560-61.

13. *Smith*, 494 U.S. at 890.

14. See *Kiryas Joel Village School District v. Grumet*, 114 S.Ct. 2481 (1994); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).



NLRA would survive constitutional scrutiny under the Establishment Clause.

Part I of the Article explores individual religious conflict with the NLRA through the eyes of individual religious objectors who have been denied relief from NLRA burdens. Their stories illustrate the need for change by showing that the Free Exercise Clause, Title VII's religious accommodation provision, Section 19 of the NLRA, and state legislative initiatives, which have all been used in attempts to challenge NLRA impositions on religious belief, are unreliable, inappropriate, and often inadequate avenues of relief.

After making the case for individual religious accommodation in Part I, the Article outlines, in Part II, a specific proposal for individual religious accommodation under the NLRA. The proposal calls for a general amendment to the Act requiring the National Labor Relations Board (NLRB) to accommodate religious liberty. In particular, the Board would be required to create religious accommodations from labor policies in such a way as to destroy as little of one as is consistent with maintenance of the other. The Article argues that the NLRB should be comfortable with this role because it already performs a similar balance of labor rights with both free speech and private property rights. Part II suggests how the proposal's guidelines can be implemented and concludes by applying the suggested model to instances of conflict between individual religious objection and the NLRA.

Part III asserts that the Supreme Court's emerging doctrine of "permissible accommodation" condones legislative attempts to relieve religious burdens incidentally imposed by statutes of general applicability, like the NLRA. Part III begins its analysis of accommodation by emphasizing government neutrality toward religion, a notion that undergirds the Supreme Court's decisions in this area. An important neutrality requirement, embraced almost unanimously by the Court, is that any valid legislative accommodation must be aimed at relieving a religious burden that the government itself has imposed. After exploring the Court's apparent understanding of burdens that are governmentally-imposed and applying the Court's reasoning to NLRA religious impingement, the discussion isolates models of permissible accommodation that have emerged from the Court's Establishment Clause decisions—Justice Scalia's minimalist "Burden-Lifting" model, Justice O'Connor's "Endorsement" model, and Justice Brennan's formulation based loosely on principles derived from the Supreme Court's decision in *Lemon v. Kurtzman*. Finally, Part III analyzes the requirements of each accommodation model and applies them to religious accommodation under the NLRA.

## I. THE CONFLICT BETWEEN RELIGIOUS LIBERTY AND THE NLRA

The legal history of religious accommodation in the private unionized workplace is, at worst, a meandering path of hostility to the needs of religious conscience, and, at best, an exercise in piecemeal policymaking. The following stories of Beatrice Linscott, Larry Hardison, Maurice Wilson, and Carole Katz illustrate the history of the clash between religious values and the government-created union/management relations scheme set out in the NLRA. The stories show how these religious objectors were frustrated in their attempts to resolve through legal channels the conflict between their religious beliefs and NLRA-supported activity. The stories are analyzed separately to show why each different litigation strategy failed and to explain how the currently available legal avenues for resolving NLRA and religious conflicts are inadequate.

A. *Beatrice Linscott and the Constitution's Free Exercise Clause*<sup>15</sup>

BEATRICE LINSCHOTT was employed by Millers Falls Company as a production employee. She worked at the Company on a satisfactory basis from 1950 until 1968. In 1968, some two years after winning a representation election, the United Electrical, Radio & Machine Workers, Local 274 entered into a collective bargaining agreement with Millers Falls. The labor contract between the union and the company required employees to pay initiation fees and periodic dues to the union as a condition of continued employment.<sup>16</sup>

When informed of the contractual requirement, Beatrice told the union and the company of her religious objection to making financial contributions to a labor organization. Beatrice was a Seventh Day Adventist whose religious beliefs required that she not "bind herself up" with labor unions, which meant she could not become a union member nor could she financially contribute to a union. As a result of her failure to pay union dues and fees, Beatrice Linscott was discharged from her job. As there was no provision governing religious conflict in the NLRA, Beatrice, like other religious objectors, sought to be exempted from NLRA requirements by filing suit in

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15. Unless otherwise noted, all facts regarding Beatrice Linscott are from *Linscott v. Millers Falls*, 440 F.2d 14, 15-16 (1971).

16. The NLRA generally forbids discrimination in employment based on whether an employee is a union member, but the general rule carries with it an exception that allows a union and an employer to negotiate a "union shop" provision, an agreement that requires all employees, as a condition of their employment, to pay union dues and fees within thirty days of beginning their jobs. 29 U.S.C. § 158(a)(3) (1994); *see also* *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963) (interpreting the word "membership" in the statute to mean simply the tender of periodic dues and fees).

However, some twenty-one states have enacted "right to work" laws, permitted under section 14(b) of the NLRA. For these states, the NLRA's provision allowing unions and employers to agree to require union membership as a condition of employment is nullified. *See* FLORIAN BARTOSIC & ROGER C. HARTLEY, *LABOR RELATIONS LAW IN THE PRIVATE SECTOR* 458 (2nd ed. 1986); *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963) (permitting states to ban the agency shop).

federal court seeking relief under the U.S. Constitution's Free Exercise Clause.<sup>17</sup> Beatrice argued that the Free Exercise Clause required a "mandatory" judicial exemption from the NLRA's requirements. Arguing for a constitutional exemption was reasonable at the time because the Supreme Court's prevailing interpretation of the Free Exercise Clause required mandatory accommodations in some instances where general governmental regulatory schemes imposed a burden on religious belief.<sup>18</sup> In *Linscott v. Millers Falls*,<sup>19</sup> however, the First Circuit found that a constitutional free exercise exemption was not required because the strong government interest in the union shop coupled with Beatrice's presumed ability to find work in a nonunion workplace where she would not encounter a conflict between work and belief served to override the religious impingement.<sup>20</sup>

After deciding that the NLRA's dues payment requirement constituted "state action" for purposes of allowing a constitutional challenge,<sup>21</sup> the court analyzed Beatrice's Free Exercise claim. Relying primarily on *Sherbert v. Verner*,<sup>22</sup> the court stated that freedom of religious exercise is not absolute but must be balanced against the governmental interest involved.<sup>23</sup> The court distinguished *Sherbert*, which upheld a Free Exercise exemption for a religious objector after analyzing the differing governmental interests involved.<sup>24</sup> Beatrice was seeking exemption from the requirements of a strongly forged national labor policy whose goal is to ensure "[i]ndustrial peace along the arteries of commerce."<sup>25</sup> By contrast, the religious objector in *Sherbert* was merely seeking unemployment compensation, the grant of which would have only a minimal impact on the public fisc.<sup>26</sup> In denying Beatrice a Free Exercise exemption, the court also distinguished her dilemma from that of the religious objector in *Sherbert*. According to the court, *Sherbert's* alternative, if denied unemployment compensation, was "absolute destitution."<sup>27</sup> Beatrice, on the other hand, could choose to avoid

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17. U.S. CONST. amend. I reads in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." For the accounts of other objectors who sought exemption from dues payment under the Free Exercise Clause, see *Hammond v. United Papermakers and Paperworkers*, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972); *Gray v. Gulf, M. & O. R.R.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

18. See *Sherbert v. Verner*, 374 U.S. 398, 403-09 (1963).

19. 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

20. *Id.* at 17-18.

21. *Id.* at 16-17. See *infra* note 390 for a more detailed discussion of the "state action" requirement.

22. 374 U.S. 398 (1963).

23. *Linscott*, 440 F.2d at 17.

24. *Id.* at 18.

25. *Id.* at 17 (citing *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 233 (1956)).

26. *Id.* at 18.

27. *Id.*

any religious conflict by taking employment in a nonunion shop.<sup>28</sup> The cost to her would merely be "less remunerative employment."<sup>29</sup>

The *Linscott* court thus denied Beatrice Linscott a constitutional exemption by distinguishing *Sherbert* on two grounds—different state interests and different consequences of a denial to the religious objector. The court's distinctions illustrate the difficulty in obtaining a religious exemption from a statute of general applicability as a matter of constitutional law. The court's analysis of the differing state interests in the two cases is particularly instructive. In *Sherbert*, the state interest in the public fisc is measured by the impact of a "single individual's" draw while the state interests in Beatrice's case were "the principle and broad purposes of the union shop" and the "public and private interests in collective bargaining and industrial peace."<sup>30</sup> Thus, while the *Sherbert* Court refused to look beyond the impact of a single individual's claim on the public fisc, the court deciding Beatrice's claim chose instead to view religious objection as an amalgam of claims that would somehow pose a threat to industrial peace at a substantial level. In other words, the *Linscott* court weighed the entire NLRA, and its regulatory scheme, against Beatrice's individual request.

With respect to the court's other distinction between the two cases—the consequences of a denial—the court again stretches. The *Linscott* court characterized a denial of unemployment compensation in *Sherbert* as "absolute destitution,"<sup>31</sup> but with respect to the consequences of a denial in *Linscott*, the objector would merely be required to find another job.<sup>32</sup> Actually the denial of exemption for Beatrice resulted in a substantial penalty to her for exercising her religious beliefs—the loss of her job. While it is true that the religious objector in *Sherbert* attempted to find another job and indicated to the unemployment commission in her state that she would take any job not requiring Saturday work, even a job in another industry,<sup>33</sup> it cannot be gleaned from the *Sherbert* opinion exactly how important the search for, and the willingness to take, another job was to the Court's result. But, if those facts were indeed critical to the Court, it only serves to underscore the difficulty of gaining constitutionally-based exemptions.<sup>34</sup>

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28. *Id.*

29. *Id.* Arguably, this distinction is dubious. People make substantial investments in their jobs for which they are often paid in the form of higher wages and benefits. It may be difficult for an employee to replace this repayment in another job, particularly if the employee must seek nonunion employment.

30. *Id.* at 17-18.

31. *Linscott*, 440 F.2d at 18.

32. *Id.*

33. *Sherbert*, 374 U.S. at 399 n.2.

34. For a particularly thoughtful analysis of the Supreme Court's approach to defining burdens on religion worthy of strict scrutiny under the Free Exercise Clause, and a recommendation that the Court's baseline for treating such claims should be changed, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

*B. Larry Hardison and Title VII*<sup>35</sup>

LARRY HARDISON was hired by Trans World Airlines (TWA) in 1967 to work as a clerk in its Kansas City maintenance base, a 24 hour operation serving the critical needs of the company. TWA maintenance employees were represented by a union, the International Association of Machinists. Larry was required, as a condition of employment, to become a union member and to abide by the provisions of the collective bargaining agreement between the union and TWA. The agreement contained a seniority system for deciding which employees should be preferred in bidding for new jobs, vacancies, transfers, vacations, and shift assignments. Ordinarily, a seniority system is a highly efficient and properly discriminating method for establishing work preferences. However, in 1968 Larry Hardison began to study and to practice the religion known as the Worldwide Church of God, one of whose fundamental beliefs is that the Sabbath must be observed by refraining from performing any work from sunset on Friday until sunset on Saturday. The religion also forbids work on certain specified religious holidays.

The requirements of Larry's job came into conflict with his new religious beliefs. When Larry transferred to a better job within TWA that would allow him to work the day shift, he was asked, because of his relatively low seniority, to work on Saturdays when a fellow employee took vacation time. Larry requested an accommodation for his religious beliefs, but the union was unwilling to change its seniority system and TWA was unwilling to operate without a person to fill Larry's position. Larry apparently had no choice—he either had to leave his job, transfer to a much less desirable position, or violate the strict dictates of his faith. Unsuccessful constitutional challenges like Beatrice's forced religious objectors like Larry to seek other avenues of relief. Since Title VII of the Civil Rights Act of 1964 requires employers and unions to "reasonably accommodate" employees' religious beliefs,<sup>36</sup> many religious objectors, including Larry, sought accommodation in reliance on the language in Title VII.

Larry maintained that since the seniority system in operation at his workplace impinged on his religious beliefs, Title VII required an accommodation. When TWA and the union refused, Larry pressed the matter all the way to the United States Supreme Court. In *TWA v. Hardison*,<sup>37</sup> the Court found that Title VII does not require employers or unions to bear

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35. Unless otherwise noted, all facts regarding Larry Hardison are from *Trans World Airlines v. Hardison*, 432 U.S. 63, 66-69 (1977).

36. Section 703(a)(1) of Title VII makes it unlawful for an employer to discriminate against an employee on the basis of his or her religion. 42 U.S.C. § 2000e-2(a)(1) (1994). Section 701(j) defines "religion" to include "all aspects of religious observance and practice, as well as belief," and expressly requires employers to "reasonably accommodate" employee religious observances and practices. 42 U.S.C. § 2000e(j) (1994).

37. 432 U.S. 63 (1977).

more than a *de minimis* cost to "reasonably accommodate" religious objectors because any greater cost would impose an undue hardship on the conduct of the employer's business.<sup>38</sup> Although the Court's consideration of Larry's case required an analysis of the Railway Labor Act (RLA) which governs labor relations in the airline and railroad industries, the *Hardison* case has been viewed as precedent in the NLRA context as well.<sup>39</sup>

In denying Larry statutory relief, the Court reviewed and rejected three accommodation proposals.<sup>40</sup> Those accommodations included: 1) allowing Larry to work a four day workweek (using in his place a supervisor or another employee on duty elsewhere); 2) filling Larry's Saturday shift with other available personnel; and 3) allowing Larry to swap jobs with another employee for Saturdays.<sup>41</sup> The Court found that each alternative would have imposed an undue hardship on TWA or the union and therefore none was required by Title VII.<sup>42</sup>

The first two alternatives would have caused TWA undue hardship by disrupting shop functions or by requiring TWA to pay higher wages (as a result of overtime pay).<sup>43</sup> Curiously, though, the third alternative would not have involved an imposition on TWA *per se*, but instead would have imposed on the seniority system established in the labor agreement.<sup>44</sup> According to the Court, while there may be instances when a collectively-bargained seniority system might bend to "a strong public policy interest,"<sup>45</sup> TWA was not required to take steps to accommodate Larry that would be inconsistent with the requirements of the labor contract. The Court's reason for so believing was that "[c]ollective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts."<sup>46</sup> A later concurrence by Justices Marshall and O'Connor in *Estate of Thornton v. Caldor Inc.*<sup>47</sup> seems to bear this out. Even though Title VII played no part in *Thornton*, the concurrence defends Title VII's religious accommodation provision in part by maintaining that the provision only requires *reasonable* accommodation, which, of course,

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38. *Id.* at 84-85.

39. *See, e.g.,* Nottelson v. Smith Steel Workers, 643 F.2d 445 (7th Cir. 1981); Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978).

40. *Hardison*, 432 U.S. at 76.

41. *Id.*

42. *Id.* at 77.

43. *Id.* at 76-77.

44. *Id.* at 78-79.

45. *Id.* at 79 n.12.

46. This point was not expressly stated by the *Hardison* Court, but is raised subtly in footnote 4, which mentions the district court's Establishment Clause concern. *See id.* at 69 n.4.

47. 472 U.S. 703 (1985).

has been defined by the Court to mean nothing more than *de minimis* relief.<sup>48</sup>

The Court justifiably might be concerned by what it requires of private employers under Title VII since laws compelling the accommodation of religion by *private* actors almost intuitively raise the issue of the state fostering religion.<sup>49</sup> As valid as establishment concerns might be with respect to Title VII's demands on purely private actors, a strong argument can be put forth that the collective bargaining agreement is sanctioned and protected by the government under the NLRA. Indeed, the *Hardison* Court actually invoked national labor policy as a *government interest* to protect a specific term of a labor contract.<sup>50</sup> Accordingly, the Court should be able to do more to accommodate religion within the context of collective bargaining (the product of a government-created scheme) than it suggests in *Hardison*. Instead, the *Hardison* case, somewhat reminiscent of the *Linscott* decision preceding it, highlights the difficulty in using Title VII to seek an accommodation that requires interference with the national labor policy embodied in the NLRA.

None of this means that Title VII has been an utterly ineffective tool in addressing conflict between religious belief and practice and the NLRA. Indeed, when religious objectors have creatively framed compromise positions that state an accommodation falling within Title VII but without consequences that rise to the level of undue hardship, those objectors have been able to win accommodations in courts of law, but only for objection to dues payment. In *Anderson v. General Dynamics*,<sup>51</sup> for example, the Ninth Circuit faced an accommodation issue pressed by David Anderson, a Seventh Day Adventist, who had the same objection to paying union dues and fees as Beatrice Linscott several years before him. Instead of using the Free Exercise Clause, however, David chose to bring a Title VII action. Unlike Larry Hardison, who also challenged the NLRA's requirements using Title VII, David suggested an accommodation that addressed the union's primary concern about a religious exemption; he proposed paying an amount equivalent to union dues and fees to a nonlabor, nonreligious charity.<sup>52</sup> By so doing, David eliminated the union's argument that an exemption would

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48. *Id.* at 712 (O'Connor, J., concurring). Justices O'Connor and Marshall maintained that Title VII's accommodation requirement is constitutional despite the fact that it relieves burdens imposed by private interests because it only requires a "reasonable" accommodation, extends to all religions, and was intended as an anti-discrimination measure by Congress. *Id.*

49. The constitutionality of Title VII's accommodation requirement has not been squarely presented to the Supreme Court, but the concurrence by Justices O'Connor and Marshall in *Thornton* and two federal circuit court holdings stand for the proposition that the provision is constitutional. See *Thornton*, 472 U.S. at 711-12 (O'Connor, J., concurring); *International Ass'n Machinists v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987); *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981).

50. See *Hardison*, 432 U.S. at 79 n.12.

51. 589 F.2d 397 (9th Cir. 1978).

52. *Id.* at 399.

create a financial incentive for nonreligious union members to claim religious affiliation in order to avoid paying union dues and fees and thereby taking advantage of union resources and benefits at no cost.

The union's primary defense to the charge that it had failed to reasonably accommodate David Anderson under Title VII was that Anderson's suggestion would work an undue hardship as a matter of law because Anderson would become a "free rider."<sup>53</sup> Although accepted by the district court, the argument was rejected by the Ninth Circuit. Relying on a Sixth Circuit decision in *McDaniel v. Essex Int'l, Inc.*,<sup>54</sup> the court found that the union security provisions of the NLRA "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation[s]" for individual religious needs.<sup>55</sup> Furthermore, Anderson's proposed accommodation would not be an "undue hardship" for the union despite the union's claim, and the district court's belief, that it would. The court stated that "undue hardship" means "something greater than hardship" that "cannot be proved by assumptions nor by opinions based on hypothetical facts."<sup>56</sup> Accordingly, since there was no *factual basis* in the record to support the union's statement and the district court's belief, the Ninth Circuit reversed, holding that the union had failed to sustain its burden to accommodate.<sup>57</sup>

Although Title VII has been used to accommodate objection to dues payment, Title VII is not an effective accommodational tool in the long run, even for relief from the dues payment obligation. Many of the Title VII precedents requiring dues accommodation, like *Anderson* and *McDaniel*, were decided prior to *Hardison*. It is doubtful that their interpretation of the phrase "undue hardship" in Title VII truly survived *Hardison's* extremely restrictive *de minimis* standard, although at least two federal circuit courts have held that the charitable fund alternative has no more than a *de minimis* impact on unions.<sup>58</sup> However, the court in *Anderson*, explaining the legitimacy of the charitable fund alternative, stated explicitly that undue hardship meant "something greater than hardship"—a common sense interpretation that is nevertheless at odds with the Court's *de minimis* reading.<sup>59</sup> Moreover, the *Hardison* Court refused to read Title VII to require a change in the seniority system provision of a labor agreement—a term certainly not required by, nor even mentioned in, the NLRA. By contrast, *Anderson* and *McDaniel* and their progeny read Title VII to require a change in the union

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53. *Id.* at 401.

54. 571 F.2d 338 (6th Cir. 1978).

55. *Anderson*, 589 F.2d at 402 (quoting *McDaniel*, 571 F.2d at 343).

56. *Id.* at 402.

57. *Id.*

58. See *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243-44 (9th Cir. 1981); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 451-52 (7th Cir. 1981).

59. *Anderson*, 589 F.2d at 402.



shop provision of a labor contract, a provision expressly allowed by the statutory language of the NLRA.<sup>60</sup>

Because of the Court's narrow interpretation of its accommodation requirements, Title VII is also an inappropriate law for seeking accommodations under the NLRA. As mentioned before, Title VII generally imposes an accommodation requirement on purely private actors—private employers. Establishment Clause concerns run high because the law represents a governmental imposition of religion on private parties. Whatever the merits of such a scheme, the same cannot be said when the burden on religious liberty is created by the NLRA, a government-imposed labor relations framework. When government seeks to lift burdens imposed by the NLRA, it is seeking to relieve burdens that *the state* has imposed, not private employers. Thus, a better accommodation can be forged for religious objectors in this setting. Quite often, a more substantial accommodation is necessary.

In *Yott v. North American Rockwell*,<sup>61</sup> for example, Kenneth Yott, a longtime member of The Church Which Is Christ's Body, sought an accommodation for his religious objection to union support and membership when the union in his workplace entered into an agreement with his employer requiring the payment of union dues and fees as a condition of employment.<sup>62</sup> Kenneth was fired when he refused to pay.<sup>63</sup> Prior to his termination, he was offered an accommodation by the union and his employer: payment to the charity of his choice, including his own Church.<sup>64</sup> Kenneth rejected the accommodation on the ground that another tenet of his faith forbade compelled contributions to charity.<sup>65</sup> Instead, he proposed three alternatives: 1) that his employer provide him with a job outside the bargaining unit, 2) that he be exempted from the union security clause which required dues payment, or 3) that he be allowed to return to his former position at less pay.<sup>66</sup> The employer and the union refused Kenneth's alternatives and he sued. Despite the federal district court's finding that Kenneth's beliefs were sincere, it refused to find that his proposals were reasonable under Title VII.<sup>67</sup> The federal circuit court upheld the district court, based on *Hardison's* restriction of the accommodation requirement in Title VII.<sup>68</sup> For example, the court found that a transfer to a job outside the bargaining unit would require training, an additional expense exceeding the

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60. See *supra* note 16.

61. 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

62. *Id.* at 906.

63. *Id.*

64. *Id.* at 907.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 908.

*de minimis* standard.<sup>69</sup> The court concluded that Kenneth was unable to show that his proposals fell below *Hardison's de minimis* standard, stating that "a standard less difficult to satisfy than the 'de minimis' standard for demonstrating undue hardship is difficult to imagine."<sup>70</sup> Thus, Title VII failed Kenneth Yott much like it had failed Larry Hardison before him.

The charitable fund alternative is probably also an incomplete accommodation for the religious objectors, mostly Seventh Day Adventists, who have sought it and prevailed in Title VII litigation. While the charitable fund accommodation serves to relieve objectors of the obligation to pay union dues and fees, it in no way affects the exclusive nature of the union's representation.<sup>71</sup> The exclusivity of representation imposes independent burdens on religious belief. For many religions and religious believers who object to becoming members of or financially supporting labor unions, the source of their belief stems from the adversarial nature of the relationship with the employer. Representative Stump, a Seventh Day Adventist, stated that "[c]ollective bargaining forces us to make our own self-interests above that of our neighbor. We cannot conscientiously support collective bargaining without transgressing the law of God which demands that we love our neighbor as ourself, including our employer, for every man is our neighbor."<sup>72</sup> Other objectors have cited a related religious proposition in support of their biblically-based beliefs against supporting labor unions.<sup>73</sup>

To those objectors who refuse to become parties to an adversarial relationship with their employer, the product of that relationship—union extracted wages, benefits and other terms and conditions of employment (especially those received as a result of a successful labor stoppage)—must certainly be as religiously offensive as the process itself since the labor organization often takes positions that are adversarial vis a vis the employer. Yet, because of exclusivity, the objectors have no choice but to take what the labor contract provides. Moreover, if they have a request to make

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69. *Id.*

70. *Id.* at 909.

71. Section 9 of the NLRA provides that the union is the exclusive bargaining representative of all the employees in a bargaining unit. Thus, the union has the obligation to represent *all* employees in the workplace and also is the only entity allowed to bargain over terms and conditions of employment with the employer. 29 U.S.C. § 159(a) (1994). Moreover, the union decides whether to challenge management actions against bargaining unit employees by activating grievance procedures that are set out in most labor contracts. In fact, the Supreme Court has determined that unions have a duty to fairly represent all bargaining unit employees. *See Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

72. 126 CONG. REC. 2583 (daily ed. February 11, 1980) (statement of Rep. Stump); *see also* 126 CONG. REC. 2580 (daily ed. February 11, 1980) (statement of Rep. Hinson) ("It should be made clear that most of the religions holding conscientious objections to joining or financially supporting labor organizations do not object to unions or unionization as such, *but they do object to any source of potential conflict* and to membership in any organization other than their own church.") (emphasis added).

73. *See, e.g., Wilson v. NLRB*, 920 F.2d 1282, 1284 & n.1 (6th Cir. 1990) (religious objector cited to *Ephesians* 6:5-9, "Servants, be obedient to them that are your masters . . . .", in support of his religiously-based objection to supporting labor unions).

of their employer related to terms and conditions of employment, the exclusive nature of the union-management relationship requires that they go through the union. The *de minimis* standard for Title VII accommodations effectively would forestall any attempt to seek an exemption from the exclusivity rules of the NLRA.

Finally, Title VII litigation is costly. Requiring religious objectors to litigate each time an accommodation is refused places a heavy financial burden on objectors, many of whom cannot afford to underwrite the cost. The financial burden was one of the reasons that various congressional representatives introduced and passed a 1980 amendment to the NLRA automatically accommodating religious objection to dues payment by requiring the charitable fund alternative.<sup>74</sup> As Representative Erlenborn remarked when he spoke in favor of the amendment:

In continuing to avoid a constitutional confrontation, the courts have relied on title VII . . . . This bill before us . . . will clarify the areas of tension and, hopefully reduce the financial burden on those conscientious objectors who must go to court to enforce their rights. . . . Accommodation can be more rapidly achieved through congressional action than through costly and protracted court litigation.<sup>75</sup>

Although there are independent problems with the 1980 accommodation amendment that will be discussed in the following section, relieving the financial burden of Title VII litigation remains a strong reason for addressing religious accommodation in the NLRA itself.

### C. *Maurice Wilson and Section 19*<sup>76</sup>

MAURICE WILSON was hired by Grand Rapids City Coach Lines as a mechanic's helper in August of 1986. After he had been at work for more than 30 days, the union representing Coach Lines' employees, Amalgamated Transit Union, Local 836, asked Maurice to sign a card authorizing the company to deduct union dues and fees from his paycheck and to for-

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74. Section 19 reads, in relevant part:

Any employee who is a member of and adheres to established and traditional tenets and teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required . . . in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund . . . . If such employee holding conscientious objections pursuant to this Section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such a procedure.

29 U.S.C. § 169 (1994).

75. 126 CONG. REC. 2584 (daily ed. February 11, 1980) (statement of Rep. Erlenborn).

76. Unless otherwise noted, all facts regarding Maurice Wilson are found in *Wilson v. NLRB*, 920 F.2d 1282, 1284 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

ward the money to the union.<sup>77</sup> Maurice, a member of the Faith Assembly Church of Warsaw, Indiana, refused to sign the card because of personal religious convictions against union membership. Faith Assembly has no written creed or statement of doctrine, but Maurice's opposition to union membership is based on beliefs derived from the Bible.<sup>78</sup> Since failure to pay union dues and fees requires termination of employment, Maurice, like Beatrice Linscott and Larry Hardison before him, apparently had little choice—leave his job or violate the dictates of his faith.

Maurice chose to seek accommodation under section 19 of the NLRA,<sup>79</sup> an amendment passed by Congress in 1980.<sup>80</sup> Section 19, modelled after the charitable fund alternative created under Title VII, allows certain religious objectors to avoid paying dues and fees to the union by instead paying the equivalent of union dues and fees to an agreed-upon nonreligious and nonlabor charitable fund.<sup>81</sup> Unfortunately, one of the problems created by section 19 involves its definition of religion, which must be satisfied to trigger the law's protection.<sup>82</sup> The definition is too narrow to include a host of presumptively valid individual religious beliefs, as demonstrated in Maurice's case. In *Wilson v. NLRB*,<sup>83</sup> the Sixth Circuit held that section 19 was unconstitutional on its face, thereby invalidating the amendment and apparently leaving Maurice without an accommodation.<sup>84</sup>

Although Maurice maintained that Section 19 was constitutionally defective because it favored certain religions and religious beliefs over others, he argued for an expansive (and therefore constitutional) reading of the Section's membership requirement.<sup>85</sup> The court, however, could find no way to exempt Maurice from the union dues requirement because the Faith As-

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77. A "union shop," *see supra* note 16, is often accompanied by a "dues check-off" provision which allows for deductions directly from an employee's paycheck.

78. *See Wilson*, 920 F.2d at 1284 n.1. Among the scriptures upon which Maurice bases his opposition to unions are: *Matthew* 5, 6, and 7 (the Sermon on the Mount), 2 *Corinthians* 6:14-18 ("Be ye not unequally yoked together with unbelievers . . ."), and *Ephesians* 6:5-9 ("Servants, be obedient to them that are your masters . . ."). *Id.*

79. *Id.*

80. Act of Dec. 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452 (codified at 29 U.S.C. § 169 (1994)).

81. *Id.* *See also supra* note 74.

82. *See supra* note 74.

83. 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

84. *Id.* at 1290. Section 19 had previously been upheld by federal circuit court decision, although not squarely on constitutional grounds. *See International Ass'n of Machinists v. Boeing Co.*, 833 F.2d 165, 172 (9th Cir. 1987), *cert. denied*, 484 U.S. 1014 (1988) (interpreting section 19 as independent but not mutually exclusive from, or in conflict with, the constitutionally appropriate accommodation provision of Title VII). Since enactment of the section, the NLRB has avoided the issue of its constitutional status, and in each case has interpreted the section in a manner that avoids any constitutional conflict. *See Scandia Log Homes*, 258 N.L.R.B. 716, 719 (1981); *Service Employees Union Local 6*, 47 L.R.R.M. (BNA) 1503 (1984).

85. *Wilson*, 920 F.2d at 1285.

sembly Church has “no written creed or statement of doctrine,”<sup>86</sup> required to bring the Church’s members within the protection of the section, which on its face exempts only “employee[s] who [are] member[s] of, and adhere to *established or traditional* tenets or teachings of a *bona fide* religion, body, or sect which has *historically* held conscientious objections to joining or financially supporting labor organizations . . . .”<sup>87</sup> In striking down section 19 as unconstitutional, the Sixth Circuit confirmed the feelings of many commentators who believed that section 19’s definition of religion was too narrow and therefore facially discriminatory against nontraditional religions.<sup>88</sup>

In June of 1992, the United States Supreme Court denied certiorari in Maurice’s case.<sup>89</sup> The Court most likely avoided addressing the issue of religious accommodation in the workplace because resolving the constitutional issue became unnecessary when Maurice was finally “reasonably” accommodated in November of 1990 through a union concession to the Equal Employment Opportunity Commission that it would allow religious objectors to take advantage of the charitable fund alternative “regardless of membership in a religious organization.”<sup>90</sup>

The Sixth Circuit’s decision in *Wilson* finding section 19 unconstitutional effectively excises section 19 from the NLRA, although the section is still technically viable outside the Sixth Circuit. Congress should amend

86. *Id.* at 1284 n.1, 1287-89.

87. 29 U.S.C. § 169 (1994) (emphasis added). The court first found that section 19 discriminated on its face against some religions by authorizing that dues paying exemptions be extended only to bona fide religions with a history of objection to union membership. *Wilson*, 920 F.2d at 1287. Thus, according to the Supreme Court’s standard for statutory discrimination *among* religions, *see* *Larson v. Valente*, 456 U.S. 228 (1982), the Sixth Circuit applied a strict scrutiny analysis to section 19 and struck the provision due to the NLRB’s failure to articulate a compelling state interest. 920 F.2d at 1287. Even if a compelling interest had been articulated, an interest the court surmised might be the protection of religious freedom in the workplace, Section 19 could be more closely fitted to that interest by including *all* religious belief, paralleling the breadth of Title VII’s protection. *Id.* The court also found, though not a part of its holding, that section 19 failed the second and third prongs of the Supreme Court’s general standard for determining Establishment Clause violations. *Id.* at 1288 (analyzing section 19 under the *Lemon* test). Section 19’s requirement of a “particular sectarian affiliation” and a “particular theological position” for exemption has a primary effect of advancing religion. *Id.* Moreover, the same requirements cause excessive entanglement between church and state by compelling judicial inquiry into church doctrine and history. *Id.*

88. *See* BARTOSIC & HARTLEY, *supra* note 16, at 443; W. Sherman Rogers, *Constitutional Aspects of Extending Section 701(j) of Title VII and Section 19 of the NLRA to Religious Objections to Union Dues*, 11 T. MARSHALL L. REV. 1, 8-9 (1985); Bonnie Siber Weinstock, *The Union’s Duty to Represent Conscientious Objectors*, 3 THE LABOR LAWYER (ABA) 163, 163 (Winter 1987). Even President Carter understood the unconstitutional potential of section 19 when he signed it into law.

“[T]he language in this bill defining conscientious objection is not to be construed in such a way as to discriminate among religions or to favor religious views over other views that are constitutionally entitled to the same status. To put any other construction on this definition would, in my view, create serious constitutional difficulties.”

17 WEEKLY COMPILATION PRES. DOC. 2856 (Jan. 2, 1981).

89. *Wilson v. NLRB*, 505 U.S. 1218 (1992).

90. 126 Daily Lab. Rep. at A-1 (June 30, 1992).

the NLRA to withdraw the section and eliminate it from the Act altogether. If the section is not removed, the government's message of endorsement favoring certain religions over others and certain religious conduct over other religious conduct will remain memorialized in the NLRA, even if the section's accommodation requirement is never enforced in court. If the section were deleted, religious objectors could continue to seek the charitable fund alternative under Title VII since it has been held by various federal courts to constitute a "reasonable accommodation."<sup>91</sup> The definitional problem that plagues section 19 is not a problem under Title VII given its broader definition of religion, which has already withstood constitutional scrutiny in some federal courts. As stated previously, however, Title VII is only a very limited tool for seeking religious accommodation under the NLRA.

In addition to its discriminatory definition of religion, section 19 has another important shortcoming. For employees who pay union dues and fees, representation by the union throughout the grievance process is typically provided free of charge.<sup>92</sup> However, for religious objectors who pay into a charitable fund, unions are allowed by the express language of section 19 to charge separate fees to objectors who choose to file a grievance.<sup>93</sup> Therefore, for objectors who use the required arbitration process, the amount they pay includes not only the equivalent amount of union dues and fees paid to charity, but also an additional grievance process charge that other employees do not pay. Arguably, the additional charge, since it would require objectors to pay more than regular union members, is a facial discrimination favoring nonreligion over religion, raising free exercise concerns.<sup>94</sup>

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91. See, e.g., *Anderson v. General Dynamics*, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338 (6th Cir. 1978).

92. See generally *Weinstock*, *supra* note 88; see also *H. O. Canfield Rubber Co.*, 223 N.L.R.B. 832 (1976).

93. Section 19 states, "[i]f such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure." 29 U.S.C. § 169 (1994).

94. For a lengthier discussion of this disadvantage, and an argument that the extra charge is inconsistent with constitutional notions of religious free exercise, see *Weinstock*, *supra* note 88. The same article notes that the per case fee for a typical union arbitration is not insignificant. In 1984, for example, the average arbitration conducted through the American Arbitration Association resulted in a bill of \$1,030, while the average arbitration conducted through the Federal Mediation and Conciliation Service resulted in a bill of \$1,372. See *id.* at 166. While the legislative history of section 19 reveals that the Seventh Day Adventists agreed to the grievance processing charge because they did not believe any member would ever use the arbitration process, see *Religious Conscientious Objection to Joining or Financially Supporting a Labor Organization, 1979: Hearings on H.R. 4774 Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor, 96th Cong., 1st Sess. 20-21 (1979)* (testimony of Gordon O. Engen, Associate Director, General Conference of Seventh Day Adventists), the facial discrimination between religion and nonreligion remains problematic.

*D. Carole Katz and State Law Protections*<sup>95</sup>

CAROLE KATZ is Jewish and lives in Chicago, Illinois. Her faith requires that deceased members be buried on the first or second day after death. Ordinarily, this religious edict is easily met since cemeteries in the Illinois area are sensitive to the burial needs of the Jewish faith and have prepared themselves to respond properly and quickly. Indeed, forty percent of the cemeteries in the Northern Illinois area are operated for or were founded by Jewish congregations. However, all twenty-six Chicago area cemeteries, including those serving Jewish needs, are unionized and their employees are all represented by the same union, Service Employees International Union, Local 106.<sup>96</sup>

From December 30, 1991 until January 31, 1992, the union was involved in a labor dispute with the aforementioned cemeteries. The labor dispute ultimately escalated into a strike and then a lockout.<sup>97</sup> As a consequence, the labor dispute resulted in delaying the burial of Carole Katz's mother, Rose Michaels. Unlike Beatrice, Larry, and Maurice, Carole had no choice concerning the violation of her religious beliefs because she could not even choose between her job and her religion—any choice was in the hands of cemetery management and the union. Carole was able to obtain an injunction requiring that the Cemetery Association and the union allow her family to bury their mother on their own and with the help of nonunion personnel.<sup>98</sup> Unfortunately, the injunction was not issued until six days after her mother's death.<sup>99</sup>

To prevent a recurrence of the religious impingement caused by the Cemetery Association's lockout, the Illinois State legislature passed the Illi-

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95. Unless otherwise noted, all facts regarding Carole Katz are from *Cannon v. Edgar*, 825 F. Supp. 1349, 1352-54 (N.D. Ill. 1993).

96. A variety of employers may enter into one collective bargaining agreement with a single union representing all of the employers' workers. The combination of employers in such a manner is known as a multiemployer bargaining unit. For a more detailed description of multiemployer bargaining, see *BARTOSIC & HARTLEY, supra* note 16, at 155-58.

97. NLRA section 7, as interpreted, guarantees to employees the right to strike. 29 U.S.C. § 157 (1994). In addition, the strike is expressly protected under section 13, which provides that the Act shall not be construed "to interfere with or impede or diminish in any way the right to strike." 29 U.S.C. § 163 (1994). Although the "lockout" is not defined in the NLRA, it is mentioned in the Act and is generally viewed to be a common law protected practice of employers that has survived labor law codification. See *THE DEVELOPING LABOR LAW* 1128-30 (Patrick Hardin ed., 1992). The NLRB and courts have operationally defined the term to mean "the withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them." *Id.* at 1129.

98. See Report of Proceedings before Judge Edwin M. Berman on January 8, 1992, *Carole J. Katz v. Westlawn Cemetery Ass'n*, No. 92-CH-150 (Cooke County Cir. Ct.—Chancery Div.) (on file with author) [hereinafter *Report of Proceedings*].

99. See Complaint of Carole J. Katz (filed April 30, 1993), *Katz v. Westlawn Cemetery Ass'n*, No. 92-CH-150 (Cook County Cir. Ct.—Chancery Div.), at 8-9 (on file with author).

nois Burial Rights Act in 1992 (Burial Act).<sup>100</sup> In case of cemetery labor disputes that have the effect of interfering with certain interment rights secured because of religious belief (e.g., burial within one or two days), the Burial Act requires interment by workers selected from a union-management created pool.<sup>101</sup> The sanctions for failing to comply with the Burial Act's substantive provisions include injunctive relief and, in case of a willful violation, attorneys' fees and a fine not to exceed \$1,000 for each delayed burial.<sup>102</sup> Failure to negotiate in good faith over the establishment of a worker pool is treated by the Burial Act as a willful violation.<sup>103</sup>

Despite the Illinois Legislature's well-intended attempt to accommodate religious belief within the requirements of the NLRA, the Burial Act was short-lived. A federal district court judge found the state law to be preempted by the NLRA in *Cannon v. Edgar*.<sup>104</sup> The union challenged the Burial Act in federal court, arguing it was preempted by the NLRA and was also in violation of the Establishment Clause.<sup>105</sup> The court agreed that the state law was preempted by the NLRA and thus declined to address the Establishment Clause issue.<sup>106</sup> The union maintained that the state law was preempted under two different strands of NLRA preemption analysis. The court agreed, finding that the Burial Act regulates activities that are "arguably or actually protected by the NLRA" (*Garmon* preemption),<sup>107</sup> and that the Burial Act also regulates conduct that Congress "intended to be left unregulated" (*Machinists* preemption).<sup>108</sup> According to the court and the

100. Burial on Sunday or Holiday (Illinois Burial Rights) Act, P.A. 87-1174 (Sept. 18, 1992), ILL. REV. STAT. ch. 820, § 135 (West 1992 & Supp. 1995). See also *Cannon v. Edgar*, 825 F. Supp. 1349, 1352 (N.D. Ill. 1993).

101. Section 2.1 of The Burial Act provides:

Access to Interment Rights. (a) If the owner of an interment right in a cemetery or his or her legatees, executor or administrator desires to use that interment right for interment purposes, necessitated by the decedent's membership in a religious sect whose tenets and beliefs require burial within a specified period of time, and a labor dispute has resulted in a disruption of normal interment services at that cemetery, the owner of the interment right or his or her heirs and legatees, executor or administrator may arrange for the performance of the interment by notifying the cemetery authority and designating individuals to perform the interment; provided that such interment and all related work necessary to perform the interment is performed at the direction and under the supervision of the cemetery authority's management personnel and from a pool of workers established pursuant to an agreement between the cemetery authority and the appropriate labor union. An agreement establishing such pool of workers to provide for the religiously required interments as set forth in this Section shall be negotiated and entered into within 120 days of the effective date of this amendatory Act of 1992.

ILL. REV. STAT. ch. 820, § 135 (West 1992 & Supp. 1995); See also *Cannon*, 825 F. Supp. at 1353.

102. ILL. REV. STAT. Ch. 820, § 135 (West 1992 & Supp. 1995).

103. *Id.*

104. 825 F. Supp. at 1362. The district court's decision was later affirmed by the U.S. Court of Appeals for the Seventh Circuit. See *Cannon v. Edgar*, 33 F.3d 880 (7th Cir. 1994).

105. *Id.* at 1354.

106. *Id.* at 1362.

107. *Id.* at 1354.

108. *Id.* at 1359. For *Garmon* analysis, see *id.* at 1354-59. For *Machinists* analysis, see *id.* at 1359-61. Generally, these analyses are quite distinct and, typically, mutually exclusive. If state regulation interferes with what is actually or arguably protected by the NLRA, the analysis does not proceed to



union, the Burial Act interferes with both strike and collective bargaining rights protected by the NLRA.<sup>109</sup> The Burial Act requires the union to negotiate a substantive term of a collective bargaining agreement, the establishment of a worker pool, in contradiction of the NLRA's provision that agreement to substantive terms cannot be compelled.<sup>110</sup> The Illinois law also infringes the federally protected right to strike by mandating that union members in the designated worker pool work during a strike.<sup>111</sup> Although there are a few very narrow exceptions to this form of federal preemption, the court found that none of them were triggered by the Burial Act.<sup>112</sup>

The court also found (although it need not have reached the issue after finding *Garmon* preemption) that the Burial Act represented state regulation of an area that Congress intended to leave unregulated.<sup>113</sup> Under *Machinists* preemption, activity that is neither protected nor prohibited may have been intended by Congress to be left to the free-play of the economic system.<sup>114</sup> During a strike, Congress's general intention was to leave the employer and the union to their own means (self-help).<sup>115</sup> The notion, which underlies the NLRA, is that economic leverage (for the union, the withholding of labor, and for the employer, the withholding of a paycheck) will determine which side will accede to the other's demands after negotiations have stalled.<sup>116</sup> The Burial Act affects the leverage in this battle by strengthening the employer's hand. According to the court, since the Burial Act requires the creation of a worker pool to perform certain religiously required interments during a cemetery worker strike, the free-play of the economic system during a strike is affected in two ways.<sup>117</sup> First, Jewish cemeteries, in particular, will have a worker pool to perform most interments during a strike, allowing these employers, whose patrons are nearly exclusively Jewish, to weather a strike quite easily as little or no economic pressure can be brought to bear on them.<sup>118</sup> Moreover, according to the court, the Burial Act limits the effectiveness of partial strikes that might involve only a cessation of burial services.<sup>119</sup> Although partial strikes are

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*Machinists*, which is more in the nature of a "Congress occupying the field" analysis. See THE DEVELOPING LABOR LAW, *supra* note 97, at 1673-78. However, in the case of the Burial Act, different aspects of the law do seem to cross both strands of preemption.

109. *Cannon*, 825 F. Supp. at 1355-61.

110. *Id.* at 1355-56; see also 29 U.S.C. § 158(d) (1994).

111. *Cannon*, 825 F. Supp. at 1356.

112. *Id.* at 1357-59. On appeal, the State did raise the two exceptions to *Garmon* preemption as independent bases for preserving the Burial Rights Act from NLRA preemption. The Seventh Circuit refused to find that the Burial Act triggered either exception. *Cannon*, 33 F.3d at 884-85.

113. *Cannon*, 825 F. Supp. at 1359-60.

114. *Cannon*, 825 F. Supp. at 1359; *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147 (1976).

115. *Machinists*, 427 U.S. at 140; see also BARTOSIC & HARTLEY, *supra* note 16, at 39, 49-51.

116. BARTOSIC & HARTLEY, *supra* note 16, at 39, 49-51.

117. *Cannon*, 825 F. Supp. at 1359-60.

118. *Id.* at 1360.

119. *Id.*

neither protected nor forbidden by federal labor law (and employers are generally free to discipline workers for partial strike activity), the regulation of this activity is not even accorded to the NLRB, much less to the states.<sup>120</sup>

On appeal to the Seventh Circuit, the State of Illinois claimed that the NLRA cannot preempt the Burial Rights Act without violating the Free Exercise Clause.<sup>121</sup> The State cited as support the Supreme Court's decision in *Catholic Bishop* which had held that the NLRB lacks jurisdiction over labor issues involving teachers in church operated high schools.<sup>122</sup> The Seventh Circuit dismissed the claim by asserting that nothing in the Free Exercise Clause requires "private parties to a labor dispute to guarantee the free exercise rights of third parties."<sup>123</sup> Moreover, according to the Seventh Circuit, there is no federal source to guarantee the right to religious freedom since the Free Exercise Clause apparently has less force when the religious impingement is focused on a third party—someone not squarely involved in the labor dispute at issue.<sup>124</sup>

The NLRA is a broadly preemptive statute. As Carole Katz's experience with the Illinois legislature teaches, in addition to its piecemeal application, the NLRA will almost certainly invalidate any effort to persuade state lawmakers to accommodate religious belief under the NLRA due to the supremacy of federal law. The proposition holds true not only in the area of strike activity, but also with respect to seniority requirements and even the payment of union dues and fees (unless the state is willing to declare itself a right-to-work state, thus prohibiting the union shop—a dubious proposition in Illinois, for example).

## II. A PROPOSAL FOR LEGISLATIVE ACCOMMODATION OF RELIGION WITHIN THE NLRA

The foregoing stories illustrate a fairly straightforward proposition: when individual (and typically nonmajoritarian) religious liberty conflicts with the NLRA's requirements, the tension is almost always resolved in favor of the Act, usually on the basis of some discussion emphasizing the primacy of NLRA goals relating to industrial peace. However, stripping away constitutional and statutory modes of analysis leave a simple normative question: should labor law requirements be preferred over individual religious liberty when the two conflict?

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120. *Id.* at 1360-61.

121. *See Cannon*, 33 F.3d at 886.

122. *Id.*; *see also Catholic Bishop*, 440 U.S. 490 (1979).

123. *Cannon*, 33 F.3d at 886. Thus while *Catholic Bishop* provides constitutional immunity for religious institutions under the NLRA, no constitutional provision secures the rights of individual religious objectors who find their freedoms impinged by the Act's obligations. And, in the eyes of the court, there is apparently even less of a claim if the individual objector is a "third party"—affected by the labor dispute, but not a central part of it.

124. *Id.*

Prior to the shift in favor of legislative accommodation of religion mentioned at the beginning of the Article and explored more meaningfully in Part III, the question could not be entertained as more than a purely theoretical proposition because an answer in favor of religion would have encountered insurmountable Establishment Clause difficulties. Even now, however, it is hard to know where to begin. Therefore, the following accommodation proposal starts with a variety of assumptions. The first assumption is that religious liberty has value in our society. Many theologians, philosophers, and scholars have grappled with understanding and defining religion. This Article does not pretend to tap into that body of knowledge and literature, but takes as its starting position that religious liberty should be accommodated whenever possible.

A second assumption is that the value that society places on religious liberty is roughly equivalent, at the very least, to the value society places on any of the host of secular interests that are *currently* accommodated within or even entirely exempted from the requirements of the NLRA. For example, a strong accommodation exists in favor of federalism in section 14(b) of the Act, which allows state legislatures to outlaw the very union shop preserved in section 8(a)(3).<sup>125</sup> Agricultural workers and employers are excluded from the Act entirely.<sup>126</sup> This Article posits that religious liberty is at least as important as encouraging the growth of the agricultural sector (assuming a wage enhancing effect can be attributed to unionism in general) or preserving the rights of states to opt out of parts of federal laws. Given these two assumptions, this Part attempts to demonstrate that religious liberty can be accommodated under the NLRA without sacrificing other worthy goals and suggests a structure within which this accommodation can take place.<sup>127</sup> Thus, if labor policy and religious liberty can coexist, the answer to the normative question posed above is simply that neither be preferred over the other.

One definitional note is in order before proceeding. In this Article, use of the word "exemption" is intended to refer to absolute or complete exclusions from NLRA jurisdiction. There are certain categories of employers and employees, like those in the agricultural sector, who are completely excluded from the Act's coverage. These exclusions, which comprehensively forbid NLRB action and concern, are deemed "exempted" interests. Use of the word "accommodation," on the other hand, is intended to refer to

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125. 29 U.S.C. § 164(b) (1994).

126. 29 U.S.C. § 152(3) (1994).

127. Christopher Eisgruber and Lawrence Sager have maintained recently that the disarray characterizing religion clause jurisprudence is due, at least in part, to an emphasis on the "distinct value" of religion as opposed to its "distinct vulnerability" to discrimination. Thus, they argue for a new approach to religion emphasizing protection rather than privilege. See Eisgruber & Sager, *supra* note 10, at 1246-48. By struggling to formulate accommodations for religious liberty within the NLRA that are consistent with accommodations existing for secular interests, this Article strives, at least at a general level, to work within the "protection" model posited by Eisgruber and Sager.

those interests that are within the Act's scope, but for which there is either a complete or partial exemption from one or more requirements of the Act. For example, states are generally precluded from regulating labor relations in a way that conflicts with the NLRA's requirements. However, section 14 of the Act allows them to opt out of the proviso that protects the union shop.<sup>128</sup> This provision in favor of states' rights or federalism is deemed an "accommodation."

Part II starts, in Section A, by analyzing who is the most appropriate decisionmaker for balancing religious liberty and labor policy concerns to determine accommodations. Section B suggests a methodology by which to compare existing secular accommodations and exemptions in the Act to accommodations that might be required for religious liberty. The Section begins by identifying the various secular interests that are currently accommodated within the relevant NLRA requirements or exempted entirely from the Act. It then examines the methods by which specific accommodations are achieved for secular interests. Finally, Section C works within the methodology proposed in Section B and attempts to fashion NLRA accommodations for religious liberty that are consistent with those accommodations already existing for secular interests.

#### A. Structuring NLRA Religious Accommodation

Since the NLRA requirements that burden religion exist as a result of statutory creation and protection, the most direct, efficient, and therefore pragmatic means to relieve the Act's impingement on religious liberty would be a direct amendment to the NLRA. This is especially true if the Supreme Court continues to resist finding constitutionally mandated accommodations. Moreover, the Supreme Court accords more deference under the Establishment Clause to legislative accommodation.<sup>129</sup>

Since the accommodation must be broad and flexible to avoid the problems created by section 19 and to allow for scenarios of conflict that have not yet surfaced, some entity must be charged with making appropriate accommodations. Obvious possibilities are the federal courts and existing administrative agencies such as the EEOC or the NLRB. The federal courts have been involved with accommodations required by Title VII and have also been required to harmonize Title VII accommodation requirements with the NLRA.<sup>130</sup> A federal cause of action, however, would require an objector to bring suit each time an accommodation is denied by an employer, union or both.

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128. 29 U.S.C. § 164(b) (1994).

129. If courts interpret the Religious Freedom Restoration Act broadly, these accommodations might be created by courts within RFRA's statutory scheme.

130. See *supra* Part I.B.

Giving initial jurisdiction to federal court judges creates other problems as well. The proposed amendment requires identification of the religious liberty being impinged and then requires that an accommodation be forged for religion based on accommodations already existing in the Act for secular interests. Comparing secular interests accommodated within the Act (like federalism) to unaccommodated nonsecular interests (like keeping the Sabbath holy) in order to create similar accommodations raises a substantial issue of commensurability. Since the interests being compared have no relation to each other, it would seem on the surface a futile task even to identify them for purposes of comparison. Nonetheless, there seems to be no other way to accommodate religious liberty without violating constitutional principles or labor policy goals. The task is not as difficult as it seems, however, since virtually the entire judicial scheme of constitutional decisionmaking is geared toward comparing the incomparable with some regularity. In determining whether the government has violated a constitutional command, for example, courts often compare the governmental interest (peace, safety, health) to the often incommensurable individual interest at stake (religion, speech, privacy).<sup>131</sup> Close analysis of the conflicts discussed in Part I suggests they do not occur because labor policy and religious liberty are inherently irreconcilable. Because the interests seem incommensurable, courts are more apt to choose one interest over the other rather than attempt to engineer an optimal balance in order to ensure that the most can be done for one interest without sacrificing the other.

Thus, whoever decides disputes that require the weighing of incommensurable interests must recognize that justice (in the sense of accommodating all interests) can only be achieved if the decisionmakers are prepared to be more creative and active than most judges have been in the past. A case in point is the "charitable fund alternative" described in Part I,<sup>132</sup> a rare embrace of just such a creative approach by a federal judge. In the *Anderson* case discussed in that section, the judge, weighing labor law requirements against religious liberty needs, declared workable a solution that met the demands of both in a normatively better fashion than the "all or nothing" approach taken by federal judges in the other scenarios described in Part I.<sup>133</sup>

Having said that, it also seems that judges are less likely than other decisionmakers to attempt to balance incommensurable interests and then to

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131. For a more meaningful discussion of commensurability problems in constitutional decisionmaking, see David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753 (1994); Frederick Schauer, *Commensurability and its Constitutional Consequences*, 45 HASTINGS L.J. 785 (1994); Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825 (1994). For a good discussion of commensurability problems in the context of free exercise claims for exemption from government regulation, see Lupu, *supra* note 34.

132. See *supra* notes 52-74 and accompanying text.

133. See *Anderson v. General Dynamics*, 648 F.2d 1247 (9th Cir. 1981).

adopt accommodations that best meet the requirements of both. Indeed, Justice Scalia has decried any attempts by the judiciary to do so.<sup>134</sup> He is not alone. Many judges and commentators feel it is not the judge's role to make law, but rather to interpret it. Given this prevalent view, the balancing of these incommensurable values probably should be accomplished by more legislatively-oriented decisionmakers, such as administrative agencies. Administrative agencies are often more efficient than federal courts with respect to proposing, enacting, and enforcing rules.

There are two logical administrative agencies to whom delegation of the religious accommodation problem makes sense—the EEOC and the NLRB. The EEOC is a less satisfactory choice for a variety of reasons: first, the EEOC is less able to resolve a claim for accommodation than the NLRB and is also much less likely to step into the shoes of the religious objector and take up her claim.<sup>135</sup> In addition, the EEOC has become backlogged with charges resulting from the passage of major civil rights legislation in the 1990s, primarily the Civil Rights Act of 1991 and the Americans with Disabilities Act.<sup>136</sup>

The NLRB is the better entity to implement the proposed accommodations because of its flexibility, its experience balancing labor policy and other important private interests like property and free speech, and its knowledge of the NLRA and its regulatory scheme. In addition, the NLRB, unlike the EEOC, has generally seen its burdens reduced by a shrinkage in the number of unionized operations.<sup>137</sup> Another reason for authorizing the NLRB to make accommodations, however, is that religious accommodation can be more expansive under the NLRA than it has been under Title VII—a central point of this Article. The EEOC is, of course, familiar with Title VII's religious accommodation requirement and its limitations (no more than a *de minimis* hardship must be undertaken by any employer). The proposed NLRA accommodation amendment would require more than merely

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134. See *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

135. MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* § 5.02, at 200 (1988) (noting the differences between the EEOC and the NLRB, particularly the informal nature of EEOC processes and the EEOC's inability to issue final orders determining liability).

136. See U.S. GEN'L. ACCOUNTING OFFICE, *EEOC: AN OVERVIEW* 5 (July 27, 1993) (Statement of Linda G. Morra, Dir., Education and Employment Issues, Human Resources Div.) ("EEOC's responsibilities and workload have generally been increasing over the years. From 1989 to 1992, the number of charges received to process increased 26 percent, while staffing decreased 6 percent. EEOC anticipates an additional increase of about 18 percent in charges received in fiscal year 1993 over fiscal year 1992, with no additional increase in staffing."); *EEOC Must Change Approaches to Deal With Growing Workload*, 153 Daily Lab. Rep. at d22 (August 11, 1993) (describing 32% increase in EEOC pending workload in one year, without any corresponding increase in staffing); *EEOC Inventory grows to 92,000 Pending Charges*, 174 Daily Lab. Rep. at d5 (September 12, 1994) (describing backlog of pending charges, up 30.6% from 1993, due partially to the continued growth in charges filed under the Americans with Disabilities Act).

137. See generally PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 105-33 (1990).

a *de minimis* accommodation in most cases. The differing standards are likely to be very confusing for those familiar with Title VII's scheme.

The most important substantive reason for resting jurisdiction with the NLRB, however, is that the proposed amendment requires some balancing between religious needs and the requirements of the NLRA. In particular, the amendment will require that any accommodation take into account the various exemptions for secular interests in the NLRA (like free speech). Fortunately, balancing labor policy concerns with individual rights is a task to which the NLRB is accustomed. The EEOC, on the other hand, is not likely to have the kind of expertise about the NLRA that would be necessary to properly accommodate religious objectors. The Board is currently required by statute to balance employee section 7 rights against employer free speech rights.<sup>138</sup> For the most part, this balancing has been accomplished without controversy. NLRB balancing involving free speech interests outside the scope of labor law has at times been criticized, but that criticism has often been of a structural nature—suggesting the NLRB is not the best entity to deal with constitutional rights that arise in a labor setting—rather than of a practical bent, such as complaints about the way the Board has actually balanced the interests involved.<sup>139</sup>

Of course, there are also those who have criticized the NLRB for exactly the opposite of what one would expect—such as, weighing too heavily the free speech interests of employers vis-a-vis the section 7 rights of employees.<sup>140</sup> The fact that the NLRB has been criticized on both sides suggests that its approach to the problem of balancing free speech and the section 7 rights of employees may be more even-handed than any single commentator is willing to proclaim. Yet, there are also those who believe that the NLRB's approach, and in particular, its actual resolution of these thorny problems has been satisfactory.<sup>141</sup> Even if it were true that NLRB balancing of employee rights versus employer rights has been less than entirely satisfactory, it is hard to conceive of a better agent to perform this

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138. 29 U.S.C. § 158(c) (1994). For a general discussion of NLRB balancing of employee section 7 rights and employer free speech interests under Section 8(c), see Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. LAW 356 (1995); Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

139. The implication is that the NLRB tilts toward labor policy at the expense of individual liberties. See, e.g., Ian M. Adams & Richard L. Wyatt, Jr., *Free Speech and Administrative Agency Deference: Section 8(c) and the National Labor Relations Board—An Expostulation on Preserving the First Amendment*, 22 J. CONTEMP. L. (May 1996); Sylvia G. Eaves, Note, *Employer Free Speech During Representation Elections*, 35 S.C. L. REV. 617 (1984); Michael J. Bennett, Note, *Excessive Restriction on Employers' Predictions During Union Representation Campaigns*, 66 MARQ. L. REV. 785 (1983).

140. See, e.g., Story, *supra* note 138, at 405-36; Robert F. Koretz, *Employer Interference with Union Organization versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399 (1960).

141. See generally Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act*, 53 OHIO ST. L.J. 1, 25-27 (1992); Norman F. Burke, *Employer Free Speech*, 26 FORDHAM L. REV. 266 (1957).

balancing than the NLRB, which of course is subject to judicial review as a safeguard. Moreover, the NLRB's recent drift toward the use of rulemaking<sup>142</sup> may mean the Board will publish any accommodations for specific religions or religious practices as rules. Such an exercise hopefully will increase the precision and fairness of any accommodations by subjecting them to robust outside commentary prior to enactment.<sup>143</sup>

The Board also frequently draws lines between employee section 7 rights and employer private property rights. In *Hudgens v. NLRB*,<sup>144</sup> the Supreme Court stated that in determining the scope of a union organizer's right to distribute information to employees, an activity protected under section 7 of the NLRA, the NLRB must be careful to properly weigh the extent of an employer's property interest in determining who may enter his property and for what purpose.<sup>145</sup> According to the Court, "[a]ccommodation between employees' § 7 rights and employers' property rights . . . 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.'"<sup>146</sup>

This Article proposes that the same type of balancing the NLRB employed in deciding accommodations between labor policy and private property interests should occur with respect to individual religious liberty. Thus, any amendment to the NLRA should explicitly provide that balancing between religious accommodation needs and the policies of the Act should be obtained with as little destruction of one as is consistent with maintenance of the other.<sup>147</sup>

142. See generally Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991).

143. Cf. BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 216-17, § 4.18 (3rd ed. 1991); *Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1265 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 683 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

144. 424 U.S. 507 (1976).

145. *Id.* at 521. See also *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992). The U.S. Supreme Court in *Lechmere* substantially limited the circumstances under which the NLRB may engage in such a balancing, but the fact remains that the NLRB has in the past balanced these disparate interests and will continue to do so in the future, albeit in fewer cases.

146. *Hudgens*, 424 U.S. at 521 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). The NLRB has also resolved the tension between section 7 rights of employees and the managerial and production interests of employers *inside* the workplace itself. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943). See also John H. Fanning, *Union Solicitation and Distribution of Literature on the Job—Balancing the Rights of Employers and Employees*, 9 GA. L. REV. 367 (1975).

147. Clearly, this proposed framework would delegate quite a bit of discretion to the NLRB. A debate has raged for the last several years over whether the law should be more rule-like than standard-like. Balancing tests, like the one posited, are considered much more standard-like. For an excellent discussion of the parameters of the "rules versus standards" debate, see Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24 (1992). For a critique of standards and arguments for the rules approach, see FREDERICK F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Scalia, *supra* note 134. For a critique of rules-based decision-making and an argument for standards, see John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293 (1993).



One final note about defining religion is in order before proceeding with the analysis. Religious pluralism in general, and constitutional requirements in particular, would dictate that any accommodation should not favor any particular religion but should be directed at a broad range of religious beliefs. In other words, it should not be phrased, as is section 19, to prefer some religious views over others. In fact, a religious accommodation amendment should borrow from Title VII's comprehensive definition of religion, which has been appropriately fashioned through years of judicial review. The EEOC has adopted a definition of religion for Title VII purposes developed through an analysis of Supreme Court Religion Clause decisions. The EEOC defines religion as:

moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views . . . . The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether a belief is a religious belief.<sup>148</sup>

The EEOC's definition excludes personal preference grounded upon a non-theological basis, such as personal choice deduced from economic or social ideology.<sup>149</sup> Likewise, "religion" does not include notions totally devoid of religious or moral content, regardless of the strength of convictions.<sup>150</sup>

*B. Extracting Baselines for Religious Accommodation from Existing NLRA Exemptions and Accommodations*

If religious accommodations of NLRA requirements are to be constitutional and also consistent with current labor policy, they must be fashioned to match the accommodations for secular interests that already exist within the Act. Moreover, any accommodations should be closely tailored to religious need. The daunting task of achieving appropriate accommodations given these parameters requires not only a structural mechanism for balancing both labor and religious concerns, but also a methodology for comparing similar secular and nonsecular accommodation needs. With respect to such a methodology, there are no existing NLRA structures or frameworks from which to borrow.

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148. 29 C.F.R. § 1605.1 (1993). *Cf.* *United States v. Seeger*, 380 U.S. 163, 183 (1965) (defining religious belief under § 6(j) of the Universal Military Training and Service Act as a sincere meaningful belief occupying in the life of its possessor a place parallel to that filled by God).

149. *See Player*, *supra* note 135, § 5.26, at 257.

150. *Id.* This whole-hearted recommendation of the EEOC's definition is not to suggest that defining religion is free of difficulty. It merely acknowledges that this particular definition has proved workable for accommodation purposes in the labor and employment setting. A more stringent definition of religion that better distinguishes between religion and ideology by focusing on whether a sacred or transcendental reality acts to impose obligations on the religious faithful, as suggested by Stanley Ingber, would certainly also encompass the claims of religious objectors detailed in this Article. *See Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clause*, 41 *STAN. L. REV.* 233, 267-88 (1989).

One feasible baseline for comparison, however, can be drawn from the notion of *governmental intrusion*. A glance at the NLRA shows that its requirements are uneven or inconsistent when considered from the perspective of the governmental interest embodied in the Act. For example, the protection of “exclusivity” is much stronger than the protection accorded the “union shop” because the union is always the exclusive representative by virtue of NLRA section 9, while a union shop must be agreed upon by the union and the employer, and exists only as a matter of contract. Likewise, there are few exceptions to exclusivity, but there are a number of interests like federalism and speech that will supersede a contractual union shop clause. Thus, the level of government intrusion can be represented by both the nature of the statutory command (the extent to which the statutory provision imposes a certain regime) and the number of statutory and judicially implied exceptions (in the form of accommodations) to the statutory requirement.

Determining a level of governmental intrusion for each NLRA requirement tells us how much room there is within the requirement to forge an accommodation for religious liberty. This analysis ensures that attention is paid to labor policy when fashioning accommodations for religious liberty, but it also ensures that constitutional concerns are incorporated. The more a given accommodation is tailored to correspond to the strength of the governmental mandate, the more it is likely to be viewed as an accommodation created to forward governmental *neutrality* toward, rather than preference for, religion (this notion is explored more deeply in Part III). Likewise, if an accommodation for religion is in line with accommodations or exemptions for secular interests under the Act, it both shows neutrality toward religion and a sensitivity toward labor policy; neutrality because it cannot be said that religion has been given a preferred status over other concerns and sensitivity to labor policy goals because exceptions have not been created for religion that do not already exist as labor policy exceptions.

In order to survey the breadth and depth of exemptions and accommodations under the NLRA for purposes of understanding the current strength and scope of governmental interest in a given NLRA provision, it is first important to determine and explore the interests that are exempted under the Act by virtue of a complete exclusion from NLRA jurisdiction. The first section below explores these exemptions. After the review of absolute exemptions, the section turns to each of the NLRA requirements which specifically acted to impinge on a religious belief as analyzed in Part I. Each of the stories in Part I interestingly reveals a different baseline of government intrusion, as stated before, because various parts of the NLRA implicate different levels of government interest. Each provision implicated in each of the stories also carries with it a different set of accommodations for the various secular and nonsecular interests. Identifying the level of government involvement and the number and quality of existing accommodations

for any particular NLRA provision is critical to deciding how religion can also be accommodated within the relevant provision. Each of the religion burdening provisions discussed in Part I will be discussed in descending order of governmental intrusion.

### 1. Exemptions from NLRA Jurisdiction

Of the interests that are afforded complete exemption from the Act's requirements, two merit comment because their existence is actually contrary to the general thrust of the NLRA, yet created by Congress or the courts because they represent independent interests strong enough to overcome the labor policy reasons that argue against their exemption. The first of these is the NLRA's exclusion for "agricultural laborers" and the next is the Act's implied exemption of religious schools. Understanding why and how these exemptions were created is important for two reasons. First, their existence weakens arguments against religious accommodation because they suggest that labor policy goals can bow (and indeed have) to independent secular and nonsecular concerns. Second, under an Establishment Clause analysis that will follow in Part III, the breadth and depth of exemptions and accommodations that exist for secular and nonsecular interests are important in determining constitutional violations.

The NLRA itself contains specific limitations on NLRB jurisdiction. The Act actually narrows the NLRB's jurisdiction substantially by the way in which it defines the terms "employees," "employers," and "labor organizations" in section 2.<sup>151</sup> The term "employee" in the Act is defined as "any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute."<sup>152</sup> However, the definition expressly excludes, among others, individuals employed as agricultural laborers, those in the domestic service of any family or person at his home, any individual employed by parent or spouse, and independent contractors.

The reasons for these exclusions are not particularly set out in the legislative history of the NLRA, and thus it is difficult to establish whether they were crafted to meet policy concerns or for other more independent reasons.<sup>153</sup> The exclusion for agricultural laborers is ill-defined and largely unsupported. Indeed, the Act itself contains no definition of the term "agri-

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151. See *THE DEVELOPING LABOR LAW*, *supra* note 97, at 1576.

152. 29 U.S.C. § 152(3) (1994).

153. The exclusion for domestic service or for familial employees, for example, may well reflect a legislative concern for governmental intrusion into home life, although the Supreme Court has indicated that a reason for exclusion of family members is that they are likely to be more closely allied with management than with other workers. See *NLRB v. Action Automotive*, 469 U.S. 490, 496 (1985). If the reason for familial exclusion is that suggested by the Court, the exclusion may well serve the underlying policies of the Act, much in the same way as does the exclusion for supervisors. However, if the reason for familial exclusion is government resistance to regulation of familial relationships, the exclusion may be very meaningful for those who would craft religious accommodations since family units

cultural laborer."<sup>154</sup> The agricultural laborer exemption seems to have surfaced from a concern about applying the Act to small farms.<sup>155</sup> But, despite testimony about the plight of Mexican field workers in agricultural employment for large enterprises in California's Imperial Valley,<sup>156</sup> the Act was passed with an absolute exclusion for agricultural labor. The primary reasons for excluding agricultural laborers seem to have been expediency and administrative difficulties created by their inclusion.<sup>157</sup>

In contrast with the exclusion for "agricultural laborers," the basis for excluding religious schools from the NLRB's jurisdiction is well-documented, emerging as it did through Supreme Court interpretation of the

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and religious communities can lay claim to similar justifications for limiting government regulation in their domain.

154. See BARTOSIC & HARTLEY, *supra* note 16, at 33-34. The NLRB has followed the definition set out in Section 3(f) of the Fair Labor Standards Act because Congress has annually directed the Board to do so in a rider it has attached to the NLRB's appropriation since 1946. *Id.* Section 3(f) broadly defines the term as follows:

'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f) (1994).

155. For example, early testimony concerning the scope of the Act included a 1934 statement by Dr. William M. Leiserson, then Chairman of the Petroleum Labor Board, who advised Senators that "you might want to except a small farmer with a few employees, but you certainly would not want to except him in a situation like the one you have out in the Imperial Valley now, with a great number of people working in agricultural employment." *Hearings on S. 2926 Before the Senate Committee on Education and Labor*, 73d Cong., 2d Sess. (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1935, at 269 (1985).

The plight of the small farmer was echoed also in 1934 by Fred Brenckman, the Washington representative of National Grange, who filed a brief objecting to the inclusion of farm labor. He wrote: If farm labor is poorly paid in the United States today, then it can be said with emphasis that the farmer and his family are still more poorly paid. After we have restored the purchasing power of the farmer and converted agriculture from a losing to a gainful venture, it will be plenty of time for the government to talk about regulating the conditions of farm labor.

James R. Wason, *Legislative History of the Exclusion of Agricultural Employees from the National Labor Relations Act of 1935 and the Fair Labor Standards Act of 1935*, LRS-3, Library of Congress Legislative Reference Service, Arlington, Virginia (1966).

156. See testimony of Dr. William Leiserson, *supra* note 155; *Hearings on H.R. 6288 Before the House Committee on Labor*, 74th Cong., 1st Sess. (1935) (statement of James Rorty and accompanying report of Pelhelm Glassford, Special Conciliator for the Departments of Labor and Agriculture), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2509-12 (1985); see also 79 Cong. Rec. 9721 (daily ed. June 19, 1935) (statement of Rep. Marcantonio regarding the poor working conditions of agricultural workers in the United States in general and citing to resistance by Arkansas agricultural employers to workers' organizing efforts).

157. See S. REP. NO. 573, 74th Cong., 1st Sess. 7 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2306, 2300 (1985) ("for administrative reasons, the committee deemed it wise not to include under the bill agricultural laborers, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse."); Wason, *supra* note 155, at LRS-7 ("the decision to exclude agricultural workers from the Wagner Act was taken on the grounds of expediency, not of philosophy. With them included it was believed that sufficient votes might not be obtained to pass the bill, at least not in the form desired.").

NLRA. The Court announced in *NLRB v. Catholic Bishop of Chicago*<sup>158</sup> that church-operated schools are not within the jurisdiction granted by the NLRA even when secular subjects are taught along with religious ones.<sup>159</sup> In keeping with its prudential policy concerning interpretation of laws that have constitutional implications, the Court inquired first whether the exercise of jurisdiction by the NLRB would give rise to serious constitutional questions. The Court concluded that application of the NLRA to church-operated schools could have serious constitutional implications since some disputes under the Act may require the NLRB to entangle itself with religion.<sup>160</sup> For example, the Court found that in school actions already challenged by the NLRB, the schools had responded that their actions were mandated by religious creed.<sup>161</sup> Accordingly, the Court believed that the resolution of such charges by the NLRB would involve an investigation into the good faith of the clergy-administrators and the relationship of the school's position to the religious mission, potentially impinging on rights guaranteed by the Religion Clauses.<sup>162</sup> Eventually, the NLRB would be called upon to decide what are mandatory subjects of bargaining (assuming a dispute about the delineation of such subjects would arise), leading inevitably to an NLRB inquiry that "will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board."<sup>163</sup> Thus, the Court concluded that NLRB jurisdiction over church-operated schools would give rise to "entangling church-state relationships of the kind the Religion Clauses sought to avoid."<sup>164</sup>

The Court's ultimate decision to avoid finding NLRA jurisdiction was not grounded in the Constitution despite the Court's worries about entanglement. Rather, the threat of constitutional conflict led the Court to determine whether the NLRA *must* be read to confer jurisdiction over teachers in church-operated schools.<sup>165</sup> After a review of the NLRA and its amendments, the Court concluded that there was no "clear expression" of congressional intent to bring teachers in church-operated schools within the jurisdiction of the NLRB.<sup>166</sup> The Court thus refused to read the Act in such a manner as to require it to resolve "difficult and sensitive questions arising out of the . . . Religion Clauses."<sup>167</sup>

The implication of the Court's decision in *Catholic Bishop* and the effect of the statutory exclusion for "agricultural laborers" is that substantial

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158. 440 U.S. 490 (1979).

159. *Id.* at 507.

160. *Id.* at 501-02.

161. *Id.* at 502.

162. *Id.*

163. *Id.* at 503.

164. *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971)).

165. *Id.* at 504.

166. *Id.* at 506.

167. *Id.* at 507.

groups of employees who would normally be subject to the NLRA's requirements are completely exempted; because these employees are not protected by section 7's broad conferral of rights concerning concerted activity, these employees might legitimately be precluded from organizing a union, and they most likely would not be protected in their ability to strike.<sup>168</sup>

These exemptions represent concessions to powerful and independent secular and nonsecular interests. The exemptions are neither required by, nor consistent with, labor policy. These absolute exclusions from NLRA jurisdiction should be kept in mind whenever attempts are made to forge accommodations within the Act for individual religious objectors. The existence of absolute exemptions not required as a matter of labor policy diminishes the argument that labor policy should supersede individual religious liberty when the two conflict.

## 2. *Accommodations for Secular Interests within the NLRA*

This subsection identifies some of the major accommodations that exist for secular interests in certain parts of the NLRA that also impinge on religious liberty. The subsection strives for breadth in order to demonstrate the wide array of interests that are currently accommodated within the Act; however, not all such accommodated interests are mentioned. In addition, the subsection's breadth may at times foreclose opportunities to explore all aspects of the accommodations mentioned. The subsection necessarily emphasizes those secular interests whose definition (like free speech) or whose accommodation (like the test for balancing incursions on private property rights) will be useful in creating religious accommodations in the Article's next section.

### a. *NLRA Regulation of Strike Activity*

Carole Katz and her family fell victim to the effects of NLRA preemption as they were manifested through federal protection and regulation of the right to strike.<sup>169</sup> The NLRA, at its core, establishes and protects the right of employees to engage in "concerted activities."<sup>170</sup> The right to strike has long been viewed as being a concerted activity within the mean-

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168. For agricultural laborers, the above would not be true in California, where the state has chosen to confer union organizing rights to these laborers through its Agricultural Labor Relations Act. See CAL. LABOR CODE §§ 1140-1166 (Deering 1994).

169. *Cannon v. Edgar*, 825 F. Supp. 1349, 1362 (N.D. Ill. 1993). "Strike" is defined statutorily as "any strike or other concerted stoppage of work by employees (including stoppage by reason of the expiration of a collective—bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." 29 U.S.C. § 142(2) (1994).

170. Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1994).

ing of the Act.<sup>171</sup> The right to strike, however, is not absolute. The NLRA regulates strike activity and balances the right to strike with contract, property, and other rights of other parties.<sup>172</sup> Thus, the Act protects property rights of third party employers by proscribing strikes for secondary purposes,<sup>173</sup> and by limiting strikes for organizational purposes.<sup>174</sup> The timing of strikes is also regulated by the NLRA. The Act expressly establishes a "cooling off" period during which there can be no strike activity prior to the expiration of a collective bargaining agreement.<sup>175</sup> And, although not expressly mentioned in the Act, the courts and the NLRB have found that it is often unlawful for a union to strike during the term of a labor contract.<sup>176</sup>

The policies underlying the NLRA have also been used by courts and the NLRB to regulate the form of a strike, even though the Act itself fails to proscribe the manner of a strike (except, of course, with respect to "coercive" or "violent" activity). For example, "sit-down" or "sit-in" strikes are viewed by the courts as unprotected by the NLRA, and therefore strikers who engage in them may justifiably be discharged by their employer.<sup>177</sup> Partial strikes (slow-downs and intermittent strikes) are also forbidden by implied assumptions about the NLRA.<sup>178</sup>

The foregoing discussion reveals that the federal government has a substantial interest in strike activity. Moreover, although the federal government has heavily regulated and limited the strike right, it also carefully guards the right against erosion and regulation by other entities. Thus, section 13 of the NLRA states that the Act shall not be construed "to interfere with or impede or diminish in any way the right to strike," except as expressly stated in the Act.<sup>179</sup> Additionally, courts have held that state gov-

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171. See THE DEVELOPING LABOR LAW, *supra* note 97, at 1095.

172. *Id.* at 1096.

173. 29 U.S.C. § 158 (b)(4)(B) (1994).

174. 29 U.S.C. § 158 (b)(7) (1994).

175. 29 U.S.C. § 158 (d) (1994). When an employer or a union wishes to modify or terminate an existing, but expiring, labor contract, it must give sixty days' notice to the other party. *Id.* Both parties must continue work and operations without resort to a strike or a lockout and under the terms of the existing agreement. *Id.* This provision has been determined to be inapplicable to unfair labor practice strikes. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

176. See generally Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1407-15 (1982) (describing the role of contractualism in effecting a concession by unions generally that striking during the term of a contract should bow to the arbitration process). It should be noted that in most cases a strike during the term of a labor contract will be handled as a contract violation rather than as a statutory incursion, ultimately resulting, perhaps, in an appeal to federal district court pursuant to section 301 of the Act. See, e.g., *Teamsters Local 174 v. Lucas Flour*, 369 U.S. 95 (1962); *Gateway Coal Co. v. Mine Workers, District 4, Local 6330*, 414 U.S. 368 (1974).

177. See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *Peck, Inc.*, 226 N.L.R.B. 1174 (1976); see also James B. Atleson, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 44-50 (1983) (questioning the assumption that sit-down strikes should be unprotected because they violate policies underlying the Act).

178. See, e.g., *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950); *NLRB v. Blades Mfg. Co.*, 344 F.2d 998 (3d Cir. 1965); see also Atleson, *supra* note 177, at 50-60.

179. 29 U.S.C. § 163 (1994).

ernment action regulating strikes is broadly preempted by the NLRA even when the aspect of the strike that states have sought to regulate is not expressly dealt with in the NLRA and even if regulation is with respect to that which has been held unprotected by the Act.<sup>180</sup>

If it is true that Congress has freely limited when and how a strike may occur but is loathe to become involved in the “free play of economic forces” by siding with either management or the union once a strike is legitimately under way, it might be hard for Carole Katz to maintain that an accommodation should be made for her mother’s religious beliefs *during* a legitimate economic strike because of the effect it might have on private leverage, purposefully unregulated by Congress. However, the rhetoric about “private” struggle in this context is belied by the federal government’s history of regulation precisely in this “delicate” arena. For example, the Act’s provisions proscribing secondary boycotts were enacted in 1947 as part of the Taft-Hartley Act and passed after the Act’s protection of the right to strike in sections 7 and 13. The secondary boycott prohibition, like any interference in favor of Carole Katz’s religious beliefs, represents a concession to third party businesses’ ownership and property interests. They therefore represent nothing more than a strict limitation on a union’s ability to bring economic pressure on an employer during a valid strike.

The strike is regulated even more directly, and actually prohibited, in another, seldom used, provision of the NLRA. The Act’s provisions on national emergencies require that if the President of the United States deems a strike or lockout to imperil national health or safety, he or she may, under certain circumstances, direct the Attorney General to petition a federal district court to enjoin the strike or lockout.<sup>181</sup> The NLRA mandates that in such a case the parties to the dispute must make every effort to settle their differences with the help of the Federal Mediation and Conciliation Service.<sup>182</sup> Granted, the President’s national emergency power is very rarely used, but the situation that Carole Katz faced is not a common occurrence either (although probably more capable of repetition than any specific national emergency negatively influenced by a strike or lockout). Nevertheless, a very rough analogy can be made between national emergencies and strikes that bring religious pressures. Congress, if it had thought about it, may well have placed both religious pressures and national emergencies beyond the scope of the normal “economic” forces at play in the typical strike. Of course, even if Congress had decided not to exempt religious pressure from the free play of economic forces when it passed the NLRA, does not mean Congress should continue to ignore religious freedom that is affected by strikes or lockouts. If a belief is sufficiently solemn as to be

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180. See, e.g., *International Ass’n of Machinists v. Wisconsin Employment Relations Comm’n*, 427 U.S. 132, 155 (1976); Atleson, *supra* note 177, at 53-56.

181. 29 U.S.C. §§ 206-210 (1994).

182. 29 U.S.C. § 209 (1994).



religious, it might seriously be considered to be outside the NLRA's scope with respect to self-help.

The Court has regulated the "free play of economic forces" implicitly even when Congress has failed to do so. For example, the Court found early on in *NLRB v. MacKay Radio & Tel. Co.*<sup>183</sup> that employers are allowed to hire transient or permanent replacement workers during an economic strike.<sup>184</sup> The ability of employers to hire replacements has had a substantial impact on strike activity. As one commentator has noted, "[MacKay's language] drastically undercut the new act's protection of the critical right to strike."<sup>185</sup> It is fair to say that there are few accommodations from strike regulation that might be forged that would come close to upsetting private leverage in a strike in quite the same way *MacKay* has.

On the union-employee side of the strike equation, the Court has held that the NLRA does not preempt state laws providing unemployment benefits to employees during a strike.<sup>186</sup> The Court has also found that the Act does not preempt state laws that restrict unemployment benefits for strikers.<sup>187</sup> For strikers living in states that provide unemployment benefits to them, their heightened ability to endure the personal hardships of a strike because of the subsidy is not to be underestimated. In any case, state regulation of unemployment benefits certainly affects the "free play of market forces" during a strike.

*b. NLRA Grant of Exclusivity to Unions and its Endorsement of the Union Shop*

Beatrice Linscott and Maurice Wilson encountered two NLRA provisions that involve differing degrees of government interest and action. Their religious beliefs prohibiting the support of labor unions are tested in two ways. First, since they both worked in a union shop, section 8(a)(3) protects union and management's agreement to require the payment of union dues as a condition of employment.<sup>188</sup> In addition, as hypothesized earlier, section 9 of the NLRA, which makes the union the exclusive bargaining agent for all employees in a unionized workplace, requires that Beatrice and Maurice abide by the provisions of the union-negotiated labor contract and also that they work through and with the union should they have any request of management that touches upon a term or condition of employment.<sup>189</sup>

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183. 304 U.S. 333 (1938).

184. *Id.* at 345.

185. Atleson, *supra* note 177, at 19.

186. *See* *New York Telephone Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979).

187. *See* *Baker v. General Motors Corp.*, 478 U.S. 621 (1986).

188. 29 U.S.C. § 158(a)(3) (1994).

189. 29 U.S.C. § 159(a) (1994).

Section 9's designation of a union as an "exclusive" bargaining representative suggests a higher level of government interest than section 8(a)(3)'s endorsement of the union shop. If a union is voted in by a majority of employees in a workplace, the NLRA makes the union the exclusive bargaining representative.<sup>190</sup> By contrast, a union victory does not mean that the payment of dues will be required as a condition of employment. The NLRA merely provides that it is not a violation of the law for a union and an employer to agree to such a requirement, unless, of course, the state legislature has chosen to take away union and management's power to do so.<sup>191</sup> Since the NLRA does not require the union shop, the Act reveals a lesser government interest in such a provision.<sup>192</sup>

*i. Section 9 and the Union's Status as Exclusive Representative*

The government's interest in designating unions as exclusive bargaining representatives is revealed not only by the absolute nature of the mandate in the language of the NLRA itself,<sup>193</sup> but also by virtue of the lack of implied exceptions to the general rule. Within a decade after passage of the Wagner Act, the Supreme Court established section 9's grant of exclusivity as a rigid rule to be interpreted narrowly. In *J.I. Case Co. v. NLRB*,<sup>194</sup> the Supreme Court held that a union victory in a workplace whose employees were employed pursuant to one-year written contracts of employment required, by virtue of NLRA section 9, that those contracts yield to the requirements of any labor contract forged between the union and the employer.<sup>195</sup> Though resolutely rigid in its holding about the supremacy of the bargaining representative's "exclusive" status, the Court did recognize that there may be times when individual contracts retain some validity despite the presence of a labor union. For example, "where there is great

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190. *Id.*

191. See 29 U.S.C. §§ 158(a)(3), 164(b) (1994); see also *supra* note 16.

192. In this respect, the NLRA and the Railway Labor Act differ. The RLA does not allow circumvention of union shop agreements by state legislatures. Under the RLA the level of government intrusion is thus more akin to the NLRA's requirement of exclusivity in Section 9. The RLA's union shop provision has been viewed by the Supreme Court as strong enough to be considered state action. See, e.g., *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

193. Section 9(a) of the NLRA provides:

Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

29 U.S.C. § 159(a) (1994).

194. 321 U.S. 332 (1944).

195. *Id.* at 336. The Court stated, "[t]he individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits." *Id.* The Court also emphasized that, "[i]ndividual contracts . . . may not be availed of to defeat or delay . . . collective bargaining . . . ; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement . . . . Whenever private contracts conflict with [the NLRB's] functions, they obviously must yield or the Act would be reduced to a futility." *Id.* at 337.

variation in circumstances of employment or capacity of employees” certain areas may be left to individual bargaining by the labor contract itself.<sup>196</sup> The Court warned against allowing such individual advantages and stressed that such contracts would only be honored to the extent they are consistent with the collective bargaining agreement.<sup>197</sup> The strength of the Court’s admonition in *J.I. Case* has meant that over the years the presence of individual contracts in the unionized workplace is rare, although individual contracts are allowed and even endorsed by labor agreements in the entertainment industry (particularly in professional sports).<sup>198</sup> Since *J.I. Case*, the Court has continued to apply section 9’s exclusivity language strictly, striking down virtually all attempts by individual employees to bargain with employers.<sup>199</sup>

Despite the rigidity of the Court’s pronouncements concerning section 9 and the nature of the union’s exclusive status, some minor exceptions do exist. A weak proviso to section 9 carves out a statutory exemption from exclusivity for bargaining unit members who seek to adjust grievances directly with their employer.<sup>200</sup> The proviso expressly allows individual employees or even groups of employees to “present grievances to their employer, and to have such grievances adjusted, without the intervention of the bargaining representative.”<sup>201</sup> The proviso, however, contains two substantial limitations on the seemingly privileged employee conduct which render the proviso a virtual nullity—suggesting an unchanged and still very strong governmental interest in exclusivity. First, any adjustment by the employer must be consistent with the terms of a collective bargaining agreement, and second, the bargaining representative must be given an opportunity to be present at the adjustment.<sup>202</sup>

In addition to the express limitations found in the proviso itself, twice the Supreme Court has commented on the very limited nature of the right of employees to adjust grievances without intervention by the bargaining representative. In *Cabot Carbon Co.*,<sup>203</sup> for example, the Court disagreed with the Fifth Circuit that section 9(a)’s proviso purported to allow employers to set up employee committees to deal with employers concerning grievances.<sup>204</sup> The Court stated that the proviso merely allows employees to

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196. *Id.* at 338.

197. *Id.* at 338-39.

198. See THE DEVELOPING LABOR LAW, *supra* note 97, at 644 n.373.

199. See, e.g., *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *NLRB v. Insurance Agents*, 361 U.S. 477 (1960); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

200. 29 U.S.C. § 159(a) (1994).

201. *Emporium Capwell*, 420 U.S. at 61 n.12 (quoting section 9(a)).

202. 29 U.S.C. § 152(a) (1994).

203. 360 U.S. 203 (1959).

204. *Id.* at 212-13.

personally present their grievances to their employer.<sup>205</sup> The Court was even more circumspect about the proviso in its later decision in *Emporium Capwell Co. v. Western Addition Community Organization*.<sup>206</sup> The Court stated that the intention of the proviso is to allow employers to entertain grievances by employees without violating its duty to bargain with the exclusive representative.<sup>207</sup> According to the Court, the proviso's limited function is underscored by the fact that the NLRA "nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation . . . ."<sup>208</sup>

Judicial decisions have consistently viewed section 9's grant of exclusivity in a way that absolutely discourages individual action based on frustration with union processes. In consideration for such rigid interpretations of the section, however, the court has imposed a duty on the union to be mindful of individual interests within the bargaining unit and has placed certain individual interests beyond the power of the union to bargain away. In 1944, the very same year the Court decided *J.I. Case*, it held in *Steele v. Louisville & Nashville Railroad*,<sup>209</sup> a Railway Labor Act case, that contemporaneous with the union's status as exclusive bargaining representative is a duty of fair representation; that is, the sacrifice of individual interests by statute must be balanced by the duty of the union to represent everyone fairly.<sup>210</sup> Based on the duty of fair representation, the Court found unlawful in *Steele* the union's actions eliminating the jobs of African American workers through collective bargaining.<sup>211</sup> The duty created by the *Steele* Court has served as a substantial check on union power since 1944.<sup>212</sup>

Thirty years later, the Court determined in *NLRB v. Magnavox*<sup>213</sup> that a union cannot waive by collective bargaining agreement the right of employees to distribute literature in the workplace regarding the selection or the retention of a union.<sup>214</sup> The Court rationalized that allowing an incumbent union to waive the rights of dissidents to campaign against the established union would lead to entrenchment of the incumbent, contradicting the NLRA's philosophy of employee free choice in selecting a labor organization.<sup>215</sup> According to one commentator, *Magnavox's* result suggests that there are certain individual rights conferred by the NLRA that cannot be

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205. *Id.*; see also THE DEVELOPING LABOR LAW, *supra* note 97, at 294.

206. 420 U.S. 50 (1975).

207. *Id.* at 61 n.12.

208. *Id.*

209. 323 U.S. 192 (1944).

210. *Id.* at 201; see also MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 347-48 (BNA 1988).

211. *Steele*, 323 U.S. at 207.

212. See MALIN, *supra* note 210, at Chapter 8 (tracking the development of the Duty of Fair Representation).

213. 415 U.S. 322 (1974).

214. *Id.* at 324.

215. *Id.* at 325.

abrogated by collective agreement despite the Act's overall premise that collective bargaining leads to industrial stability.<sup>216</sup>

Although *Steele* and *Magnavox* suggest that some balance must be struck between the power accorded to the bargaining representative through the rule of exclusivity and the rights of individuals necessarily sacrificed to the goal of union power in section 9, neither decision suggests that individual employees may bargain directly with the employer, the kind of exception necessary to accommodate the religious interests that are impinged by the NLRA.<sup>217</sup> An exception of exactly that sort, though not arising under the NLRA, was found by the Court in 1976 when a grant of union exclusivity clashed with a union member's First Amendment free speech rights in *City of Madison v. Wisconsin Employment Relations Commission*.<sup>218</sup> There, the Court found that the right of a public school teacher to criticize a union bargaining position in an open meeting with a public employer could not be superseded by the Wisconsin's grant of exclusive bargaining status to the union.<sup>219</sup>

It is interesting to note that in reaching its decision, the Court reversed both the Wisconsin Employment Relations Commission (WERC), which had determined that the school board had committed an unfair labor practice, and the Wisconsin Supreme Court, which had affirmed WERC's position.<sup>220</sup> WERC had issued an order requiring the school board to cease and desist from permitting employees other than union representatives to speak

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216. Matthew W. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 190 (1980).

217. In this vein, another decision implying a possible trend by the Court to add to the union's burden in exchange for its exclusive status is *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). The crux of the dispute in *Caterpillar* involved the independent validity of certain union members' common law contract claims. The U.S. Supreme Court stated that "individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee . . ." *Id.* The Court maintained that an employee who is a union member may sue in state court on the basis of breach of contract so long as the contract relied upon is not the collective bargaining agreement. *Id.*

Although the Court's logic seems impeccable, it ignores the import of certain language from *J.I. Case*—"[i]ndividual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them . . . we leave to be determined by appropriate forums . . ." *Id.* (quoting *J.I. Case*, 321 U.S. at 339) (emphasis added). It is hard to see how a court can determine whether an individual employee's contract claims add or subtract from the collective bargaining agreement without reviewing the agreement, and even interpreting it. The Court addresses this argument indirectly, later stating that an employer may still claim in *state court* that the pre-existing individual contract claim is no longer viable because of the collective bargaining agreement. *Id.* at 397. Moreover, the Court emphasizes that an employer may still argue in *state court* that the individual contract "has been pre-empted due to the principle of exclusive representation in § 9(a) of the [NLRA] . . ." *Id.* Even if the exclusive representation doctrine remains untouched after *Caterpillar*, the Court's decision, allowing state court judges to make the initial determination about whether a collective agreement supersedes any individual contracts that may benefit from state law protection, must deal some setback to the notion of exclusivity, even if the diminution only detracts from notions of uniformity of interpretation of federal law.

218. 429 U.S. 167 (1976).

219. *Id.* at 176-77.

220. *Id.* at 173-74.

on matters subject to collective bargaining between the union and the school board.<sup>221</sup> A lower state court affirmed WERC's decision, which was then approved by the Wisconsin Supreme Court.<sup>222</sup> The Wisconsin court acknowledged that both the United States and Wisconsin Constitutions protect freedom of speech and the right to petition government, but emphasized that these rights must yield when the speech constitutes a "clear and present danger" of bringing about "the substantive evils that [the legislature] has a right to prevent."<sup>223</sup> The Wisconsin court then found that the school teacher's speech before the school board constituted "negotiation" and held that permitting the negotiation "would undermine the bargaining exclusivity guaranteed the majority union under [the Wisconsin Labor statute]."<sup>224</sup>

The Supreme Court reversed the Wisconsin Court and struck down WERC's order on three grounds, two of which implicated free speech concerns. First, the Court disagreed that the teacher's speech amounted to "negotiation" since he did not seek to bargain or offer to enter into a bargain.<sup>225</sup> Second, the Court was disturbed that the teacher could be silenced in a meeting that was open to the public.<sup>226</sup> Finally, the Court was troubled by the order's application to future conduct, calling the prohibition against individual employee speeches about collective bargaining subjects "in the future, . . . the essence of prior restraint."<sup>227</sup>

Although *City of Madison* presents a unique set of facts that might well be used to distinguish it from other scenarios, the Court's failure to analyze the state's interest in exclusivity in deciding the case may reveal a reluctance on the part of the Court to engage in any meaningful balance between labor policy and individual rights when a substantial fundamental liberty is present. For example, it would not have been surprising for the

221. *Id.*

222. *Id.* at 173; see also *City of Madison v. WERC*, 231 N.W.2d 206 (Wis. 1975).

223. *Id.* (citing *Schenck v. United States*, 249 U.S. 47 (1919)).

224. *Id.* (citing Wis. STAT. § 111.70(3)(a)4 (1973)).

225. *Id.* at 174. Despite the lack of an express intention on the teacher's part to "bargain," his proposal, presented along with the signatures of other teachers, requested that a union security clause be excluded from any agreement between the union and the school board. The ultimate agreement excluded the clause. *Id.* at 170-72 & n.2.

226. *Id.* at 176-77. The Court cited to numerous decisions in which it had held that teachers do not relinquish "rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Id.* at 175 (citing *Pickering v. Board of Education*, 391 U.S. 563 (1968)). Although those prior cases did not involve the kind of state interest implicated by the "exclusivity" rule, the Court rested its rationale on the lack of balance on a debatable question (since WERC's order did not prohibit the union from taking up labor contract issues at the public meeting). *Id.* at 175-76. The "lack of balance" rationale also fails to take into account the state's interest in exclusivity, which is expressly calculated to eliminate debate and division in front of an employer in order to allow the union to take the greatest advantage of its collective leverage.

227. *Id.* at 177. The Court felt that "subjects of collective bargaining" was too broad a prohibition and would act to undermine the board's ability to govern the district by cutting off critical teacher input about the operation of the schools. *Id.* Again, the Court failed to explain why requiring teacher input to come to the board through the union would have an impact on teacher expression.

Court to have balanced the free speech interest in *City of Madison* with Wisconsin's interest in ensuring that a labor representative not be undermined by individual employees in bargaining, and then to conclude that the free speech interest implicated in the case superseded the labor policy interest because of the nature of the forum (a public one) and the nature of the breach (a public "petition" that was not representative in nature). The Court's overreaching concern for the liberty interest involved with no mention at all of the countervailing state interest probably bodes well for an individual religious liberty exemption. On the other hand, another fair reading of the case would be that the unique facts and circumstances involved so overwhelmingly implicated First Amendment rights that the Court felt it could easily dispense with any balancing. Given the nature of the court's First Amendment free speech jurisprudence, however, it seems unlikely that the Court would so easily have eschewed its usual careful consideration of all interests involved in the name of expediency.

ii. *Section 8(a)(3)'s Union Shop Proviso*

Section 8(a)(3)'s proviso is weaker, allowing private parties to agree to a "union shop" despite the section's overall prohibition against using conditions of employment to encourage participation in a labor organization.<sup>228</sup> Governmental action here is felt less than it is in section 9's exclusivity mandate because the NLRA does not require the establishment of a union shop in the workplace; however, the NLRA contains procedures to protect such an agreement and it is clear that the NLRA's procedures can be used to secure such a clause if agreed to by management and the union.<sup>229</sup> Nevertheless, since the decision about whether to have a union shop in the first place is left to private parties (unlike exclusivity), governmental presence is simply not as deeply felt as it is under the guarantee of "exclusivity."<sup>230</sup>

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228. 29 U.S.C. § 158(a)(3) (1994).

229. See, e.g., *Sales, Service and Allied Workers' Union, Local No. 80 (Capitol-Husting Co.)*, 235 N.L.R.B. 1264 (1978); *Union Starch & Refining Co.*, 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951).

230. Admittedly, this conclusion is derived from a common sense (or even literal) reading of section 8(a)(3) compared to Section 9. If one were to judge the level of government intrusion in the two sections by reference to federal court "state action" jurisprudence, one might conclude differently. For example, some courts have hesitated to find "state action" in the context of section 8(a)(3)'s union shop provision, in large part because of the lack of government compulsion. See *infra* note 390. The Board and sometimes the courts have refused to find "state action" in section 9's mandate of exclusivity. See, e.g., *Bell & Howell Co. v. NLRB*, 598 F.2d 136 (D.C. Cir.), *cert. denied*, 442 U.S. 942 (1979); *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977) (reversing the Board's initial position in favor of a state action finding in *Bekins*, 211 N.L.R.B. 138 (1974)). Some courts have found state action requirements to be met by the language of section 9. See *NLRB v. Heavy Lift Serv., Inc.*, 607 F.2d 1121 (5th Cir. 1979), *cert. denied*, 449 U.S. 822 (1980); *NLRB v. Mansion House Center Management Corp.*, 473 F.2d 471 (8th Cir. 1973). See generally Dennis O. Lynch, *Incomplete Exclusivity and Fair Representation: Inevitable Tensions in Florida's Public Sector Labor Law*, 37 *UNIV. MIAMI L. REV.* 573 (1983).

In addition to a generally weaker level of government intrusion, the proviso protecting the union shop brings with it a number of substantial exemptions for secular interests. Section 14(b) of the NLRA allows states to render the union shop proviso void, effectively prohibiting union shop agreements in states that do so.<sup>231</sup> This conferral of power on states to circumvent union shop agreements has proven substantial since, to date, twenty-one states, known also as "right to work" states, have opted to prohibit the union shop.<sup>232</sup> Thus, "federalism," a secular interest, is heavily accommodated in the NLRA since no worker in a "right to work" state can be compelled to pay union dues and fees as a condition of employment.

Section 8(a)(3) has also yielded to judicially-implied accommodations or limitations. For example, in *Communication Workers of America v. Beck*,<sup>233</sup> the Supreme Court held that dues required of nonmember employees under a union shop provision cannot be used to advance political interests which the employee does not personally support;<sup>234</sup> the Court essentially found that the NLRA mandates an accommodation requiring the pro-rated return of union dues and fees earmarked for political activity. In *Beck*, the Court narrowed the scope of union security agreements under section 8(a)(3) by finding that the Act limits union use of nonmember dues and fees<sup>235</sup> to those activities which are related to collective bargaining.<sup>236</sup>

231. 29 U.S.C. § 164(b) (1994); *See also supra* note 16.

232. *See supra* note 16. Those States are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. In addition, Colorado has a state law regulating labor relations that requires a separate vote on the issue of a union shop alone before such a form of union security can be validly enforced. *See Colorado Labor Peace Act*, §§ 8-3- (101-123) COLO. REV. STAT. (1986 & Supp. 1995). *See also THE DEVELOPING LABOR LAW, supra* note 97, 1529 & n.227. The phrase *right to work* appears to be a misnomer. The phrase appears in the legislative history of the Labor Management Relations Act of 1947 where it is used to explain an impingement of the *closed* shop, not the *union* shop. *See H.R. REP. NO. 245, 80th Cong., 1st Sess. (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947*, at 324-25 (1985).

233. 487 U.S. 735 (1988).

234. *Id.* at 745.

235. Section 8(a)(3) expressly allows a union and an employer to negotiate for a "union shop" in all states that have not precluded such agreements by exercising their power to do so under section 14(b) of the Act. The "union shop" form of union security requires that all employees in a unit must become union members within 30 days of employment or forfeit their job. An employee has the option, in a union shop, of actually joining the union or merely paying union dues and fees. Employees have this option because the Supreme Court held that "membership" as described in section 8(a)(3) is "whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). *See also supra* note 16.

236. *Beck*, 487 U.S. at 762-63. The Court reached its decision by comparing section 8(a)(3) of the NLRA to its analogous provision in the Railway Labor Act (RLA). Finding the two sections to be "nearly identical," the Court proceeded to find its earlier decision in *Machinists v. Street*, 367 U.S. 740 (1961) controlling. The Court's analogy to the RLA has been severely criticized for deviating substantially from the usual norms of statutory interpretation. *See, e.g., Beck*, 487 U.S. at 763-64, 768-69 (Blackmun, J., dissenting); Kenneth G. Dau-Schmidt, *Union Security Agreements under the National Labor Relations Act: The Statute, The Constitution, and The Court's Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 103-10 (1990).



In affirming the decision of the United States Court of Appeals for the Fourth Circuit, the Court specifically struck down the use of nonmember dues and fees for organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events.<sup>237</sup>

The key to the Court's decision was its analysis of the rationale underlying security agreements, which it culled from section 8(a)(3)'s legislative history. The Court found that Congress was concerned about the abuses of the "closed shop" when it decided to amend the Wagner Act in 1947.<sup>238</sup> At the same time, however, Congress was concerned that without any form of union security, many employees who decided not to become union members, but who were nevertheless members of the bargaining unit, would be "free riders," reaping the benefits of union negotiations without being required to contribute any financial support.<sup>239</sup> Congress's carefully tailored solution, allowing the union shop as the highest form of union security, was aimed at eliminating the abuses of the closed shop and at ensuring that financial support of collective bargaining through union dues and fees would be fairly apportioned among all employees who stood to benefit.<sup>240</sup> According to the Court, Congress's sole reason for section 8(a)(3)'s sanction of any form of union security whatsoever was the elimination of "free riders."<sup>241</sup> Having established that, it was then an easy step for the Court to find that the union violated its duty of fair representation by charging nonmembers for activities not related to collective bargaining.<sup>242</sup>

It is easy to see that *Beck* is a decision substantially favoring the individual over the collective since it ultimately allows individual dues payers in union shops to decide the extent of labor union expenditures on activities beyond those related to collective bargaining. Moreover, although the decision is expressly based on an interpretation of the NLRA, it is clear that fundamental notions of free speech and associational rights were at play in

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237. *Beck*, 487 U.S. at 739-42.

238. *Id.* at 747-48.

239. *Id.* at 748.

240. *Id.* at 749-50.

241. "'Congress' decision to allow union-security agreements *at all* reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them.'" *Id.* at 750, 755 (quoting *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976)).

242. *Id.* at 762-63. The union had defended the duty of fair representation (DFR) claim by arguing that its dues and fees expenditures were at least implicitly allowed by section 8(a)(3), which provides for "union shop" agreements. By interpreting section 8(a)(3)'s sanction of union security to be limited to the elimination of free riding, the Court stripped away 8(a)(3)'s ostensible protection of charges for expenditures beyond those related to collective bargaining and left unchallenged the dues objectors' original DFR claim. *See id.* at 744-54. For an interesting discussion about the Court's manipulation of DFR principles in *Beck* to circumvent the jurisdiction of the NLRB, see Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127 (1992).

the minds of the Justices who composed the majority.<sup>243</sup> In addition, the significance of Justice Brennan's authorship of the majority decision cannot be downplayed since he typically has represented an unwavering vote in favor of unions and a collectivist interpretation of the NLRA.<sup>244</sup> Justice Brennan's interpretation of the NLRA in *Beck* could be read as a decision in favor of First Amendment-like individual rights rather than as a vote against unions or collectivism.<sup>245</sup> Accordingly, an accommodation for individual religious liberty could be compared with some ease to the accommodation carved out for free speech interests in *Beck*.

c. *NLRA Protection of the Private Labor Contract*

The cases of Carole Katz, Beatrice Linscott, and Maurice Wilson are to be contrasted greatly with the cases of those whose religious burdens are imposed by the substantive provisions of privately bargained labor contracts. Larry Hardison's religious liberty was affected by a seniority system contained within the privately negotiated labor contract between his employer and the union.<sup>246</sup> Seniority systems are not required under the NLRA. Neither are they regulated, or even mentioned, by the Act. Nevertheless, a labor contract is not an ordinary contract, and its violation can be challenged in federal district court.<sup>247</sup> Despite the protection accorded the labor contract within the framework of the NLRA, government presence or connection with the particularized and specific terms of any collective bargaining agreement is acknowledged to be relatively slight.<sup>248</sup> But slight does not mean nonexistent.

That the government has an interest in privately bargained labor contracts cannot be doubted. Recall that the Supreme Court in *TWA v. Hardison* refused to require that the seniority system be changed for Larry

243. See generally Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 HASTINGS L.J. 1 (1989).

244. See generally B. Glenn George, *Visions of a Labor Lawyer: The Legacy of Justice Brennan*, 33 WM. & MARY L. REV. 1123 (1992).

245. Glenn George suggests that *Beck* presented a "direct conflict between a union and the employees it represented" and indicates that although Brennan's opinion is not consistent with his 'non-interference' vision of labor law, one explanation for Brennan's decision is that his "well-established concern for individual rights simply overrode his interest in protecting the power of the group." *Id.* at 1165-66.

246. See *supra* text accompanying notes 37-46.

247. 29 U.S.C. § 185 (1994).

248. See, e.g., 29 U.S.C. § 158 (d)(4) (1994) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession."); *H.K. Porter v. NLRB*, 397 U.S. 99 (1970).

One of these fundamental policies [of the Act] is freedom of contract. While the parties' freedom . . . is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

*Id.* at 108. See also Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1388 (1982).

Hardison, viewing the seniority system within the labor agreement as part and parcel of “collective bargaining” which “lies at the core of our national labor policy.”<sup>249</sup> The rhetoric of *TWA*, characterizing the labor contract itself as inherently public in its relation to the Railway Labor Act (RLA), is consistent with an overall trend in labor law since World War II to view collective bargaining agreements as public documents subject to substantial government regulation rather than private contracts in which the government should have only a very slight interest at least as concerns any specific provisions. Karl Klare, for example, has maintained that postwar interpretation of labor law provisions concerning collective bargaining agreements can be characterized by a “pronounced drift toward public expansionism.”<sup>250</sup> According to Klare, this trend is manifested in three ways: increased legal regulation of collective bargaining negotiations, the expanded judicial role in administering the collective bargaining contract, and increased statutory regulation of the employment relationship.<sup>251</sup>

Despite his argument that labor contracts have taken on significant public attributes, Klare finds that the public-private distinction performs the ideological function of preserving authoritarianism in the American workplace.<sup>252</sup> However, he concludes that public-private rhetoric in labor law is incoherent, in part because it is manipulated to ensure employer control of labor law processes.<sup>253</sup> It seems fair to infer from Klare’s conclusion that the public/private framework is incapable of serving as an effective baseline for determining the true nature of labor law, particularly with reference to the status of the collective bargaining agreement. Thus, with respect to labor contracts in particular it may well be an insuperable task to characterize, and certainly to measure, the degree of governmental intrusion.

Nevertheless, it is possible to think about collective bargaining agreements in a useful way for our purposes by following the framework suggested at the beginning of this subsection. The first step is to analyze the nature of the statutory command. Despite the Board and courts’ increasing tendency to regulate the bargaining relationship—even suggesting from time to time, and in fairly detailed fashion, what exactly parties to a labor contract may or may not agree to<sup>254</sup>—the language of the Act itself generally still governs. The wording of the Act carries with it the very strong

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249. See *supra* note 46 and accompanying text.

250. See Klare, *supra* note 248, at 1394-95 (“The most salient characteristic of postwar collective bargaining law is the redefinition of the role of public intervention in the collective bargaining process, a change often capsulized in the notion that the ‘public sphere’ expanded at the expense of the ‘private sphere.’”). See also Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 596-604 (1990) (discussing generally the expansion of the public sphere and the rise of the regulatory welfare state).

251. Klare, *supra* note 248, at 1395.

252. *Id.* at 1415-18.

253. *Id.* at 1361-62.

254. See generally Finkin, *supra* note 216.

notion that the substance of a collective bargaining agreement is a matter best left to private ordering.<sup>255</sup> If this remains even partly true, then the statutory command places the government's interest in the subject matter of a collective bargaining agreement at a fairly low level—certainly much lower than the government's interest in strikes, the union's status as collective bargaining representative, and even the government's interest in certain forms of union security (like the closed shop and the union shop). This characterization of labor contracts, especially regarding substantive terms, has been adhered to by the Supreme Court fairly consistently, except possibly when labor peace has been directly threatened. The Court has held generally that the NLRA does not compel agreements between labor and management.<sup>256</sup> Nor can the government by virtue of the Act impose, or forbid, particular substantive terms.<sup>257</sup> The Act itself only requires that labor and management "meet at reasonable times and confer in good faith."<sup>258</sup>

Does the conclusion regarding the nature of the statutory command, however, imply that we should simply ignore Klare's finding that the governmental interest in the subject matter of labor contracts is on the rise because of increasing regulation of collective bargaining agreements? Not at all. Rather, it may be more helpful to view increasing governmental regulation of these agreements as adding to the number of accommodations that have been created within the statutory command. Indeed, the substance or subject matter of collective bargaining is limited by existing laws and regulations.<sup>259</sup>

Like the secular interest in federalism which is accommodated in NLRA section 14(b), the variety of laws and regulations reflecting concerns that serve to override strictly private agreements memorialized in labor con-

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255. See 29 U.S.C. § 158(a)(5) (1994) (unfair labor practice for employer to refuse to bargain collectively with the representatives of the employees), § 158(d) ("to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees"), § 159(a) (representative of employees shall be exclusive representative for purposes of collective bargaining).

256. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106-09 (1970).

257. See *NLRB v. American National Ins. Co.*, 343 U.S. 395, 401-04 (1952).

258. 29 U.S.C. § 158(d) (1994).

259. See Klare, *supra* note 248, at 1399.

The dramatic expansion of federal and state statutory programs regulating the employment relationship is perhaps the most important category of postwar public law "incursions" into labor-management affairs. Some of these statutory developments reflect a political consensus that collective bargaining has not and perhaps cannot by itself resolve certain basic social problems of the workplace: race, sex, and other forms of invidious discrimination in employment, the dangers of occupational injury and disease, and problems of retirement income security.

*Id.* (footnotes omitted). See also Finkin, *supra* note 216.

The subject matter of collective bargaining is limited by existing statutes and regulations. Federal law may establish minimum standards, which the parties cannot waive by collective agreement. Such minimum standards are imposed, for example, by the Fair Labor Standards Act, the Occupational Safety and Health Act, and Title VII of the Civil Rights Act of 1964.

*Id.* (footnotes omitted).

tracts can also be thought of as accommodated secular interests even though they are not strictly mentioned in the NLRA itself. At the time the Wagner Act was passed in 1935, there were few statutes that regulated the private workplace in such a way as to override private labor contracts encouraged and protected by the Act. The antitrust laws embodied in the Sherman<sup>260</sup> and Clayton<sup>261</sup> Acts, enacted in 1890 and in 1914 respectively, are good examples of laws that would govern the subject matter of collective bargaining from the outset. Since passage of the Wagner Act, a myriad of laws, reflecting a wide variety of secular interests, have been enacted that directly, if not expressly, limit the subject matter of collective bargaining. Those laws include: The Fair Labor Standards Act of 1938;<sup>262</sup> Title VII of the Civil Rights Act of 1964;<sup>263</sup> the Age Discrimination in Employment Act of 1967;<sup>264</sup> the Occupational Safety and Health Act of 1970;<sup>265</sup> the Employee Retirement Income Security Act of 1974;<sup>266</sup> the Worker Adjustment Retraining Notification Act of 1988;<sup>267</sup> the American with Disabilities Act of 1990;<sup>268</sup> and the Family and Medical Leave Act of 1993.<sup>269</sup> Today's social welfare legislation can work as a constraint on the ability of employers and unions to decide on their own what rules will govern their particular workplace.<sup>270</sup> These laws and regulations effectively require automatic accommodation of a host of secular interests running the gamut from safety standards to minimum wages.<sup>271</sup>

Although it has been acknowledged that these laws generally override provisions of private labor contracts,<sup>272</sup> Congress's passage of the Americans with Disabilities Act of 1990 (ADA) has served in particular to emphasize the position of these laws when they conflict with labor contract provisions. The ADA<sup>273</sup> and its legislative history<sup>274</sup> expressly address the

260. 15 U.S.C. §§ 1-7 (1994).

261. 15 U.S.C. §§ 12-27 (1994).

262. 29 U.S.C. §§ 201-219 (1994) (setting minimum requirements for wages and hours of work).

263. 42 U.S.C. §§ 2000e-2000e-17 (1994) (prohibiting discrimination in employment on the basis of race, sex, color, national origin, and religion).

264. 29 U.S.C. §§ 621-634 (1994) (prohibiting discrimination in employment on the basis of age over 40).

265. 29 U.S.C. §§ 651-678 (1994) (establishing minimum standards for health and safety in the workplace).

266. 29 U.S.C. §§ 1001-1461 (1994) (establishing minimum standards governing pension benefits provided by private employers).

267. 29 U.S.C. §§ 2101-2109 (1994) (establishing minimum notice requirements for plant closings or mass layoffs).

268. 42 U.S.C.A. §§ 12101-12213 (West Supp. 1995) (prohibiting discrimination in employment on the basis of disability).

269. 29 U.S.C. §§ 2601-2654 (1994) (establishing minimum requirements for family and medical leave in the workplace).

270. See Finkin, *supra* note 216, at 188-89.

271. *Id.*

272. *Id.*

273. 42 U.S.C. § 12112(b)(2) (West Supp. 1995).

274. Both the Senate and House Reports state:

potential conflict between its requirements and the terms of a labor contract. The ADA establishes that an employer may not simply ignore its obligation to reasonably accommodate qualified individuals with a disability by merely citing to the requirements of a collective bargaining agreement.<sup>275</sup>

As substantial as the foregoing laws might be, they do not represent the only sources of laws impinging private agreements between employers and unions that we should view as exceptions to the statutory command found in section 8(d)(4) of the NLRA. The NLRA itself places certain subjects outside the sphere of private bargaining. The Act directly proscribes the closed shop,<sup>276</sup> for example, as well as "hot cargo" clauses<sup>277</sup> and provisions connecting job rights and union affiliation.<sup>278</sup> In addition, the Act has been interpreted to foreclose or severely limit the discussion of certain subjects at the bargaining table.<sup>279</sup> The law now speaks to which subjects employers and unions may or must bargain about by classifying specific topics as "mandatory" or "permissive."<sup>280</sup> There are also certain workplace rights created impliedly by section 7 that inhere in the individual and thus cannot be waived by the union at bargaining. For example, in *NLRB v. Magnavox*,<sup>281</sup> the Supreme Court found that an employee's section 7 right

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The section 504 regulations [of the Rehabilitation Act of 1973] provide that 'a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.' 45 C.F.R. 84.11(c). This policy also applies to the ADA. An employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this legislation.

S. REP. No. 116, 101st Cong., 1st Sess. 32 (1989); H.R. REP. No. 485 (II), 101st Cong., 2d Sess. 41 (1990). See also *Emrick v. Libbey-Owens-Ford Co.*, 875 F. Supp. 393, 396-97 (E.D. Tex. 1995).

The U.S. Court of Appeals for the Seventh Circuit recently heard oral argument in a case involving a conflict between the ADA and a labor contract seniority provision. See *Eckles v. Consolidated Rail*, 1996 Daily Lab. Rep. 68 at D6 (Apr. 9, 1996) (No. 95-2856).

275. See *supra* notes 273-74. But cf. Stephen M. Crow and Sandra J. Hartman, *ADA Versus NLRA: Is a Showdown Imminent over Reasonable Accommodation?*, LAB. L.J. 375 (June, 1993) (the issue may be more complicated than a literal interpretation of the ADA's language suggests).

276. 29 U.S.C. § 158(a)(3) (1994). See also Finkin, *supra* note 216, at 189. In addition, as mentioned previously, the Act provides a mechanism in section 14(b) by which States may act to prohibit employer and union agreement on a union shop as well. 29 U.S.C. § 164(b) (West 1978).

277. 29 U.S.C. § 158(e) (1994). Hot cargo clauses are agreements between a union and an employer through which the employer promises not to deal in the products of another employer or promises to cease doing business with another person. Section 8(e) of the Act has been held to apply only to hot cargo agreements with secondary objectives. See *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 620 (1967).

278. See Finkin, *supra* note 216, at 189 & n.24.

279. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-51 (1974) (collective cannot bargain away members' Title VII rights); *NLRB v. Magnavox*, 415 U.S. 322, 325-26 (1974) (right to distribute literature in a plant cannot be waived by a collective agreement); *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 203 (1944) (cataloguing permissible factors unions may use in negotiating differential treatment).

280. See generally *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676-84 (1981); *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 212-15 (1964); *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958). See also Klare, *supra* note 248, at 1395 & n.158.

281. 415 U.S. 322 (1974).

to distribute literature in opposition to an incumbent union is not a right that may be waived or restricted by that very incumbent in a collective bargaining agreement.<sup>282</sup> The Court doubted that an incumbent union would have much of an incentive to preserve the right in order to effectuate the broad policies of the NLRA regarding employees' unfettered choice of a bargaining representative.<sup>283</sup> According to the Court, a limitation of the right to in-plant distribution by employees opposing an incumbent union tips the balance of section 7 rights too much in favor of the incumbent.<sup>284</sup>

In striking down a particular provision of a collective bargaining agreement, and in finding that at least certain NLRA rights inhere in individuals and not the union, the Court strongly establishes the "public" stake in such agreements. Moreover, the Court creates an entirely new set of concerns external to privately negotiated labor contracts that can serve to override the terms of an agreement. The suggestion and identification of certain inalienable individual rights in the NLRA creates a regime of regular review of labor contracts by the state to ensure that unions and employers have not impeded rights granted by section 7 that may not be bargained away. This trend increases the number of accommodations that exist for secular concerns, and, at the same time, suggests a higher public interest in labor contracts than the statutory command implies.

### *C. Creating Accommodations for Religion within the NLRA*

An NLRA amendment calling for accommodation of religion will require the NLRB to assess three separate factors and achieve an accommodation that takes each into account. The first factor is religious need; the NLRB would need to identify which particular religious liberty is being impinged by an NLRA requirement. The second factor is the level of government involvement; to what extent does the Act require, or allow, or endorse the particular workplace rule that is burdening religion? This analysis is based on a reading of the statutory provision at issue. Finally, the third factor is the numerical and qualitative extent of the exemptions from the burdening requirement that are allowed for other secular interests.

The second and third factors should be viewed by the NLRB roughly in inverse proportion to each other; thus, the stronger the statutory command, the fewer the number of secular exemptions necessary to achieve a strong religious accommodation, and vice versa. The reason for this relationship was discussed briefly in Part I, and will be explored more deeply in Part III, which details the requirements for Establishment Clause viability. That reason, briefly stated, is that the more government can be said to have burdened religion, the more it can be said that an accommodation merely

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282. *Id.* at 324-25.

283. *Id.* at 325.

284. *Id.* at 326.

lifts the burden imposed by the state, thus eventually achieving a neutral end result. Likewise, the more a particular NLRA requirement is peppered with exceptions for secular reasons, the less any similar accommodation for religious liberty can be claimed to be religious favoritism.

It may perhaps be easier to understand the relationship between the second and third factors by analyzing them in the context of the NLRA requirements that acted to impinge religion in the cases of Beatrice, Maurice, Larry, and Carole. Beatrice Linscott and Maurice Wilson were burdened by the same NLRA provisions, section 8(a)(3) (allowing the union shop) and section 9 (establishing unions as exclusive bargaining representatives). Carole Katz was burdened by section 7's protection of "concerted" activities, which includes strikes. Larry Hardison was burdened by the seniority system established in a labor contract between his employer and his union. Finding an accommodation for each of these religious interests need not be difficult. For example, if the statutory command is strong and the number of secular exclusions is high, it would be hard for the NLRB to craft a religious accommodation that would violate the Establishment Clause or that would be inconsistent with labor policy concerns gleaned from the Act. The following subsections take each of the scenarios from Part I in turn and explore what accommodations might be valid based upon the methodology discussed in Section B.

### *1. Carole Katz and NLRA Regulation of Strike Activity*

The high level of government interest in protecting and regulating strike activity means that an accommodation consistent with the Establishment Clause might be afforded to individuals whose beliefs are burdened by these requirements. In Carole Katz's case, the Cemetery Association's lockout of unionized cemetery workers meant that Carole's mother Rose, an Orthodox Jew, could not be buried within two or three days of her death as required by her religion.<sup>285</sup> The proposed accommodation in this setting is to place the burden of timely burials on the party that initiates self-help. If the owners lock out the union, they must decide how best to perform the burials. If the union chooses to strike, the burden shifts to it. This arrangement, as shown below, best ensures that an accommodation is struck between religious liberty and employer-union NLRA rights with as little destruction of one as is consistent with maintenance of the other.

Virtually any regulation or modification of the law to help Carole in ensuring that her mother's religious beliefs are carried out would tip the existing balance between union and employer leverage in the private marketplace during a strike. For example, any requirement that forces cemetery owners to bury Orthodox Jews within two or three days of their death would tax the owners' resources more substantially than if they were not

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285. *Report of Proceedings, supra* note 98, at 30.



faced with such an imposition. To perform burials within a short time period during a strike or lockout might require the hiring of temporary replacements depending on the number of Orthodox Jewish ceremonies required during the strike. In addition, if the cemeteries use highly technical methods and equipment to bury the deceased, the cemetery may not be able to get by with temporary replacements, and would then have to capitulate to union demands in order to comply with the law.

If, on the other hand, the law were to place the burden on unions of ensuring that burials take place within the required time, the leverage tips in favor of the cemetery owners. For example, the preempted Illinois Burial Rights Act would have required that, in any strike, a pool of unionized workers would have to remain on call to perform any burials required by religious belief to be completed within two or three days.<sup>286</sup> For workers in the pool, there would effectively be no strike. Moreover, one must assume that complaints to cemetery management that their lockout is affecting not just economic interests of their clients, but religious interests as well, would impose some pressure to resolve the dispute that is greater than the ordinary economic pressure on an employer that locks out and ceases to operate. If that is true, requiring that a pool of unionized workers be on hand to perform the sensitive burials would allow the employer to dodge a substantial source of private marketplace pressure to resolve the dispute with the union.

One could assert that, despite the effect on self-help leverage, the provision of the Illinois Burial Rights Act requiring a pool of workers to perform religiously time-sensitive burials should be required as a matter of federal law, as an exception to the NLRA itself. Obviously, preemption would no longer be an issue if the NLRA were so amended. Neither would the Establishment Clause be violated. Even though the requirement of a labor pool would certainly favor religion, it would be enacted to lift a government burden and, arguably, is similar to other secular exemptions already existing that affect self-help leverage, like the provision of unemployment compensation benefits to strikers and the allowance of permanent replacements to owners, to say nothing of the absolute exclusions that exist for both secular and nonsecular interests from all the NLRA's requirements.

From a labor policy perspective, the labor pool created by the Illinois Burial Act might serve as a justifiable federal accommodation if the number of Orthodox Jewish patrons of Chicago's Jewish cemeteries is relatively low. In such a case, the impact of the pool on the strike would be negligible because the strike would still affect the great bulk of the burials that take place. Labor policy goals favoring the use of self help or "the free play of

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286. See ILL. REV. STAT. ch. 820, § 135 (1992 & West Supp. 1995); see also Cannon, 825 F. Supp. at 1353.

economic forces"<sup>287</sup> to resolve disputes would not be thwarted. If the number of Orthodox Jewish patrons is high, however, the creation of a pool will have graver consequences for labor policy because burials completed within two or three days of death will act substantially to nullify the economic impact of the lockout on cemetery management. The great bulk of the work of the enterprise will be performed regardless of any strike.

Nevertheless, the pool might still be justified despite its impact when compared to exemptions that exist for other nonsecular interests. For example, it seems incongruous for Catholic operated schools to receive an *absolute* exemption from the Act's requirements while Jewish family members are forced to run to state court in the hopes that they will be granted access to cemeteries despite the requirements of the NLRA. The reason this comparison is important has to do with the Court's rationale in *Catholic Bishop*. There the Court refused to apply the NLRA to a Catholic operated school because the potential for entanglement with religion was so high that the Act should not be applied unless Congress clearly indicated that the Act should be so extended.<sup>288</sup> Likewise, it is not at all apparent that Congress's notion of "free play of economic forces"<sup>289</sup> to be left unregulated included *religious* pressure of the kind brought to bear on employers and then the state in the Katz case. To deny a religious accommodation in Carole Katz's case would be arguably inconsistent, since the situation represents only the flip side of the coin that the Court used in *Catholic Bishop*. In a broader sense, is there any less "entanglement" with religion when the government (local court) passes judgment on an individual's claim for religious relief, and denies the relief because it cannot supersede a federal law of general applicability?

Assuming, for the moment, that the number of Orthodox Jewish patrons at these cemeteries is high enough such that an employer will feel almost no pressure in a strike or lockout if there is an accommodation, is there any accommodation short of a labor pool that would tip the leverage less substantially in favor of the employer, despite the fact that a labor pool might be justified because of the exemption that exists for Catholic schools? One could place the onus of timely burial on the cemetery owners. Although this seems at first to inure to the benefit of the union, viewed broadly it does not. Owners are allowed to operate during a strike with permanent replacements, and can now operate during an offensive lockout with temporary replacements.<sup>290</sup> This grant from the Supreme Court during

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287. See *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

288. *Catholic Bishop*, 440 U.S. at 502-03.

289. *Machinists*, 427 U.S. at 140.

290. See *NLRB v. MacKay Radio*, 304 U.S. 333 (1938). While employers were once barred during offensive lockouts from hiring even temporary replacements unless they had a substantial business reason for so doing, see *Ottawa Silica Co.*, 197 N.L.R.B. 449 (1972), *aff'd*, 482 F.2d 945 (6th Cir. 1973),

strikes, and from the NLRB during offensive lockouts, has been cited by many as a substantial economic weapon that has served to tip the balance of leverage in favor of employers during strikes or lockouts.<sup>291</sup> If employers may already hire replacements during a strike or lockout, *requiring* them to do so in order to avoid religious impingement should not act against labor policy goals.<sup>292</sup> Moreover, to the extent that creating a situation in which an employer is compelled to hire temporary replacements is a departure from the status quo, it arguably, when required, restores some balance of leverage between employer and union by limiting employer freedom to choose between hiring replacements or not. The ultimate effect of the requirement might be to restore the balance that was upset, and therefore aid labor policy goals, not destroy them.

But what if the cemetery owner, now *required* to perform burials in a timely manner, is unable to operate with temporary replacements—either because there is little interest in the position or because the cemetery equipment or the job of burial is too complex? In this case, the employer, to avoid a violation of the law, would be forced to end the lockout and reach some agreement with the union when he would otherwise be able to exert pressure in the form of a lockout. In such a case, placing the onus on the employer arguably goes too far and shifts the balance of leverage markedly in favor of the union. Even in this circumstance, placing the burden on the

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*cert. denied*, 415 U.S. 916 (1974); *Inland Trucking Co.*, 179 N.L.R.B. 350 (1969), *aff'd*, 440 F.2d 562 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971), the general trend now seems to be that employers who lockout in order to exert economic pressure on unions may hire temporary replacements so long as there is no specific proof of anti-union motivation. See *Harter Equipment*, 280 N.L.R.B. 597 (1986), *review denied*, 829 F.2d 458 (3d Cir. 1987).

291. Regarding the use of temporary replacements during an offensive lockout, see *Inland Trucking*, 440 F.2d at 564.

[The use of replacements in an offensive lockout] would not merely pit the employer's ability to withstand a shut down of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation. Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked-out employees were endeavoring to bargain.

*Id.* Regarding the impact of *MacKay*, see ATLESON, *supra* note 177, at 19; WILLIAM B. GOULD, IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 186-203 (1993).

292. There may be problems with this suggestion in certain limited circumstances involving "defensive" lockouts. For example, if the cemetery union adopted a "whipsaw" strategy and struck only one cemetery in the Cemetery Association, and that cemetery decided not to operate during the strike, under the rule described in *NLRB v. Truck Drivers, Local 449 (Buffalo Linen)*, 353 U.S. 87 (1957), the other cemeteries could lock out as well to preserve the integrity of the multiemployer bargaining unit, but could not hire replacements without violating the law. In such a situation, if the onus were on the cemeteries to perform timely burials, the other cemeteries might be compelled due to the required religious accommodation to hire temporary replacements in violation of principles described in *Buffalo Linen*. On the other hand, if the struck cemetery chose to operate during the strike, the other cemeteries could do likewise under the rule described in *NLRB v. Brown*, 380 U.S. 278 (1965). Since the line between defensive and offensive lockouts is effectively being erased, especially since the Board's decision in *Harter Equipment*, 280 N.L.R.B. 597 (1986), the impact on labor policy due to a change in defensive lockout rules defined in *Buffalo Linen* should not be substantial.

employer might be justified by comparing the result here to the resulting impact of *MacKay Radio*. It would be hard to argue that an accommodation for religion that has the effect, in some cases, of ending a lockout turns the tide more in favor of unions than *MacKay Radio's* dictum indicating that employers could hire permanent replacements turned the tide in favor of employers.

Admittedly, a substantial danger exists that a mandated accommodation for religion may in some cases place pressure on the NLRB or the courts to allow permanent replacements during a lock out. Such a result would clearly violate labor policy goals in the sense that no similar exception currently exists for secular interests. To be consistent with the accommodation mandate, the Board and the courts would simply have to forbid the hiring of permanent replacements.

Despite good arguments for placing the burden on employers to perform timely burials when a lockout impinges religious requirements, a third approach focusing on the initiator of self-help may be more consistent with labor policy. The approach is the following: place the burden of performing timely burials on the party, union or employer, who chooses to end negotiations and resort to self-help. In the case of a lockout, the burden would be on the employer, who may then be required to hire temporary replacements. In the case of a strike, the burden would be on the union to designate a pool of workers to perform the timely burials.

This approach seems at first to change the prior analysis very little. A closer look, however, shows that self-help strategy is affected in a way that is more consistent with current labor policy goals. First, with respect to cemeteries with few Orthodox Jewish patrons, shifting the burial burden to the side that initiates self-help will have very little impact on union and management choices. In such a case, if the employer bears the burden, it is likely it will be able to perform the burials with management or, if temporary replacements are necessary, very few temporaries. Such a scenario is unlikely to affect in any significant way management's decision to lock out. Likewise, if the burden of timely burials falls on the union, the impact would not be significant. For cemeteries with few Orthodox Jewish patrons, the union will be required to designate a labor pool staffed with only a very small percentage of unionized workers.<sup>293</sup> Moreover, the strike continues to have a substantial effect on the great bulk of the cemetery owner's business. Thus, the burden of timely burials is unlikely to affect the union's decision to strike.

In situations where the Jewish cemetery's patrons are substantially Orthodox, allocating the burden of timely burials to one side or the other will

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293. The union can actually use this requirement to its advantage in a strike by assigning those workers in the worst position to endure a strike to the labor pool without worrying about losing those workers as crossovers.

clearly affect either party's decision to resort to self-help. However, an unfettered ability to resort to self-help is not necessarily a strong policy of the Act. The NLRA, in its provisions and in its judicial interpretation, erects significant hurdles to self-help in order to encourage collective bargaining, arguably the true cornerstone of the NLRA's scheme. For example, during the sixty days prior to contract expiration neither side may resort to self-help even if negotiations have stalled.<sup>294</sup> In addition, the Supreme Court has interpreted the Act to favor arbitration rather than strikes,<sup>295</sup> even when the parties have not expressly bargained for such a preference.<sup>296</sup> The Act generally favors collective bargaining over disruptions in commerce.<sup>297</sup> Although it is true that these policies discourage strikes during the term of a collective bargaining agreement rather than after its expiration (as in the *Katz* case), similar types of hurdles have been erected when public policy dictates that labor disruptions should be avoided. For example, national emergencies will trump resort to self-help. Likewise, under the RLA, a mediator decides when self-help may be used because of fears regarding the paralysis of transportation networks. In the public sector, strikes are restricted in areas where public safety is implicated. Placing the burden on the initiator of self-help in a case where the cemeteries' patrons are largely Orthodox Jewish will indeed inhibit the use of self-help measures to achieve bargaining goals. At the same time, unwillingness or hesitancy to resort to self-help necessarily encourages resolution of disputes through collective bargaining.

In sum, the NLRB should have several workable options from which to choose in forging an accommodation for Orthodox Jewish patrons like Carole Katz without sacrificing important labor policy goals or violating the Establishment Clause. Placing the burden of timely burials on the party that initiates self-help seems to be the best of these options.

## 2. *Beatrice Linscott and Maurice Wilson: Union Exclusivity and Regulation of the Union Shop*

### a. *Exclusivity*

Beatrice Linscott and Maurice Wilson might not be granted an exclusion from the NLRA's "exclusivity" requirement, which would mean that they would have to continue to take union-negotiated wages and benefits even if they were excused from paying dues and fees. An accommodation resulting in some exemption from section 9's grant of exclusivity to unions would be difficult despite a high level of government interest in exclusivity

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294. 29 U.S.C. § 158(d)(4) (1994); *see also* *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956).

295. *See* *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235, 249 (1970).

296. *See, e.g., Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962); *Gateway Coal Co. v. Mine Workers District 4, Local 6330*, 414 U.S. 368, 377-78 (1974).

297. 29 U.S.C. § 151 (1994).

because of the few number of exemptions from exclusivity for secular interests. The proposed accommodation for Linscott and Wilson would allow religious objectors to separate from labor unions so that they owe no allegiance to the union and the union need not concern itself with representing them. This recommendation is bound to be controversial and meet with some resistance. Certainly exclusivity has traditionally been a mainstay of labor unionism under the NLRA.<sup>298</sup> However, over the years exclusivity has been questioned by commentators.<sup>299</sup> In some instances, alternatives to complete exclusivity have been crafted and implemented.<sup>300</sup>

It seems fair to infer that Beatrice and Maurice might wish to avoid as many ties to unions as possible. As we know from their civil suits, their respective religions prohibit support for labor unions. But even if financial support is not required because of an accommodation allowing them to make separate payments to nonunion, nonreligious charities, the question arises whether it is proper, as a matter of religious doctrine, for them to receive in salary and benefits what the union has obtained for them. If the opposition to unions stems from the adversarial nature of union-management relations, aren't the benefits of collective action effectively ill-gotten gains? Benefits aside, what if Beatrice or Maurice should decide at some point to question an employment decision that affects them? Is it fair, or even appropriate as a religious matter, to require them to grieve through the union and pay a fee for use of any arbitration process? And what about from the union's perspective? Is it fair that Beatrice and Maurice should benefit from union activity and representation despite the fact that they pay no dues and fees to the collective in a union shop?

It may be best for all involved if Beatrice and Maurice are allowed to sever ties with the collective. In such a case, the union would owe them no duty whatsoever and they would likewise negotiate directly with their respective employers regarding their wages and benefits. Since section 9 of the NLRA makes the collective bargaining representative the "exclusive" agent of all employees in the bargaining unit, implementation of the suggested proposal would require an exception from "exclusivity" for religious dissenters.

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298. See Finkin, *supra* note 216, at 186 ("The keystone of the American system of collective bargaining is exclusive representation by a union selected by a majority of the employees in the bargaining unit.").

299. See, e.g., Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975).

300. Florida, for example, amended its Public Employee Relations Act in 1977 to allow public sector unions to refuse to process nonmembers' contract grievances. 1977 Fla. Laws ch. 77-343, § 14 (codified at FLA. STAT. § 447.401 (1983)). While dealing a blow to exclusivity, the change acted also to relieve the burden on unions of processing nonmember claims and served as an incentive for employees to join unions. See Lynch, *supra* note 230.

As detailed earlier, the government's interest in exclusivity is high, and the number of secular exemptions from the requirement are few.<sup>301</sup> Since by requiring exclusivity in each unionized bargaining unit the government's intrusion is substantial, there is little question that government may act to accommodate religion from any impingement caused by exclusivity. However, to the extent that circumventing the union to bargain with the employer separately can be viewed as advantageous, forging an exception only for religion might be viewed as favoritism, creating an establishment conflict.

A review of the exemptions from exclusivity that do exist reveals that exclusivity, if it is to bow to any competing interest, may be required to yield to individual liberty interests recognized in the Constitution's Bill of Rights. In *City of Madison v. WERC*,<sup>302</sup> the Supreme Court suggested that First Amendment free speech rights should prevail over interests related to a union's grant of exclusivity.<sup>303</sup> Although the speech protection in *WERC* was constitutionally compelled, and therefore might be distinguished from any statutorily drawn exception to exclusivity in favor of religion, the implications of the Court's decision in *Employment Division v. Smith* to leave religious accommodation to the legislature, and thereby to narrow greatly the category of religious impingements requiring constitutionally compelled relief,<sup>304</sup> may mean that any legislative accommodation for religion can be equated to the free speech interest that superseded exclusivity in *City of Madison*. In other words, and for purposes of line drawing, if the Supreme Court consistently protects free speech by deeming relief from government action to be constitutionally compelled, but, by contrast, decides that the favored route for protecting religious interests should be by legislative command, there is no reason that exclusivity should not bow as easily to religious liberty interests, since in each instance an exception is being carried out for a constitutionally defined, if not constitutionally enforced, interest.

Granted, a complete separation from the union will raise administrative issues. For example, how will religious objectors be able to participate in union health insurance and pension plans? What about seniority systems? Can employers simply place the objectors in any job they wish, bypassing seniority requirements set out in the collective bargaining agreement? These are issues that have been addressed in some form or another by commentators who have struggled with the notion of nonexclusive representation.<sup>305</sup> It would have to be understood that a separation of religious objectors and the union should not change the employer's commitment to the collective bargaining agreement. Recall that the idea behind the accom-

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301. See *supra* text accompanying notes 190-227.

302. 429 U.S. 167 (1976).

303. *Id.* at 175-76.

304. See generally Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1.

305. See, e.g., Finkin, *supra* note 299; Schatzki, *supra* note 299.

modation amendment is to protect religious liberty without doing violence to labor policy goals. Thus, employers would continue to view religious objectors as members of the bargaining unit for most contract purposes. The substantive terms of the agreement would be applied to objectors through the employer. In this way, religious objectors would be kept on the seniority list and would continue to pay into union health insurance and pension plans.

The only substantial differences between religious objectors and their co-workers would relate to union representation. The union would not represent objectors in a proactive sense. For example, the union would not grieve objectors' claims. By the same token, objectors would have the right to take complaints directly to the employer. This privilege might well be accompanied by a loss of the objectors' ability to invoke the protections accorded to union members in *NLRB v. Weingarten, Inc.*<sup>306</sup>

This modification of exclusivity should prove workable. For the most part, unions will only give up the burden of representing religious objectors. Religious objectors lose their ability to appeal decisions made by employers and unions about which they become dissatisfied. To the extent a decision is solely the employer's to make, religious objectors lose the union's leverage in attempting to persuade the employer to change his mind.

However, members of religions that object to support of or membership in labor unions do so, at least in part, because of their belief that employees should not be adversaries of their employer.<sup>307</sup> Based on biblical command, they are satisfied to adhere to an employer's decision without objection. To them, the symbolic importance of having contract obligations and privileges placed on them by the employer rather than the labor union itself must be viewed as a substantial accommodation of religious liberty without imposing a hardship on the union. Thus, the proposed change accommodates religious liberty in a manner that does very little damage to the union's position in the workplace.

Even though such a change can be rationalized with labor policy goals, the requirements of the Establishment Clause are another matter. Such a change in exclusivity may be viewed by some as religious favoritism because the modification would be made only for religious objectors. The Court's decision in *City of Madison*, which made exclusivity yield to free speech,<sup>308</sup> may not present a convincing argument for making exclusivity yield to religion as well. After all, free speech is absolutely protected in the

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306. 420 U.S. 251 (1975). In *Weingarten*, the Supreme Court held that the NLRA protects employee requests for union representation at investigatory interviews that the employee reasonably believes may result in disciplinary action. *Id.* at 268. The NLRB has viewed the *Weingarten* right as an organizational one and has refused to extend it to nonunion employees. See *E.I. duPont De Nemours*, 289 N.L.R.B. 627, 629-31 (1988); *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 231-32 (1985).

307. See, e.g., *supra* note 78.

308. 429 U.S. 167, 175-76 (1976).



text of the Constitution while religious liberty can only be accommodated by government if it does not establish religion.<sup>309</sup> In the end, a religious accommodation from exclusivity may fail under establishment principles if the only secular exception of any weight is constitutionally compelled.

*b. The Union Shop*

Of all the scenarios discussed in this Article, religious impingement caused by the union security provisions of section 8(a)(3) has yielded the greatest degree of accommodation for religious liberty under the NLRA. Section 19 and Title VII have been used to create an accommodation for religious liberty that allows religious objectors to avoid paying union dues and fees by instead paying the equivalent of union dues and fees to a non-religious, nonlabor charitable organization.<sup>310</sup> Perhaps the accommodation has evolved because courts and legislators have understood that the government's interest in the union shop is not very high, based on the Act's mere allowance of, rather than requirement of, the union shop. Or perhaps courts and legislators have understood that applying union shop clauses rigidly to religious objectors may smack of religious hostility given the substantial accommodations from union shops granted to States and to free speech interests. Regardless of the reason, the NLRB would satisfy the requirements of the test posited by this Article merely by continuing this accommodation.<sup>311</sup> Nevertheless, the proposed accommodation for union shop requirements allows religious objectors to forego even the payment of monies equivalent to dues and fees to a substitute charitable fund.

The NLRB can do more for religion than section 19 and Title VII currently require. For example, the NLRB can forge a greater accommodation for religious interests than is represented by the charitable fund alternative. Recall that the charitable fund alternative was allowed under Title VII because it was a reasonable accommodation that imposed only a *de minimis* burden on employers and unions.<sup>312</sup> But the *de minimis* standard was created to save Title VII from violating the Establishment Clause by its requirement of accommodation for religion foisted on purely private impingements by private employers.<sup>313</sup> Since Title VII's religious accom-

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309. U.S. CONST. amend. I.

310. For Title VII, see, for example, *Anderson v. General Dynamics*, 589 F.2d 397 (9th Cir. 1978); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338 (6th Cir. 1978). For Section 19, see 29 U.S.C. § 169 (1994).

311. In addition to collecting dues and fees for all bargaining unit members to ensure each pays her "fair share" for representation, the union has an interest in deterring "free riders." The charitable fund alternative requires religious objectors to suffer the same financial detriment as other unit members without compromising religious beliefs against the support of labor unions. Thus, the fund reaches an accommodation with as little destruction of labor policy goals as is consistent with the maintenance of religious liberty.

312. See *supra* text accompanying notes 52-71.

313. See *supra* text accompanying notes 47-51.

modation provision was not passed to lift a government burden, the Establishment Clause analysis is less forgiving.

However, when Title VII is applied to burdens imposed by government, as does the union shop given its endorsement in the NLRA, Title VII's accommodation mandate should be applied without the *de minimis* limitation. If so, the NLRB can go further in accommodating religious objection to a union shop than it does under the charitable fund alternative. For example, the NLRB could simply forgive the payment of even the equivalent of union dues and fees to a substitute charitable fund. As discussed in Part III, a complete exemption from dues payment can be justified under the Establishment Clause, not simply because the accommodation would serve to lift a government burden, but also because the accommodations for secular interests, like federalism and free speech, are absolute.

Even if an absolute accommodation for religion can be justified, should it be pursued? In favor of forgiving religious objectors' dues payments is the fact that other secular interests that clash with union shop provisions have been granted complete exemptions. In *Beck*,<sup>314</sup> the Supreme Court held that the NLRA was not intended to require employees to fund by dues payment union political activities to which they were opposed.<sup>315</sup> No one has ever proposed in this context that political objectors pay the "equivalent" of forgiven union dues and fees to a nonpolitical, nonlabor charitable fund. Political objectors are granted a refund for that part of their dues and fees funding union political activities.<sup>316</sup> The free speech interest is thus granted complete exemption from nonpayment of dues that conflict with the speech right.

The interest in federalism is accorded an even greater exemption than speech. Pursuant to section 14(b) of the Act, States may choose by legislation to prohibit the union shop altogether.<sup>317</sup> Some twenty-one states have exercised this prerogative.<sup>318</sup> Again, there is no limitation or compromise embodied in this secular exemption. States may choose to rid themselves entirely of this form of union security. The argument for a complete exclusion here might be that no compromise is possible between states' rights and the union shop. The notion of choosing one extreme or the other is belied, however, by Colorado's exercise of its rights under section 14(b). In Colorado, the union shop choice resides not exclusively with the union and the employer, but in the employees that comprise the bargaining unit, who must vote separately on the issue of union security before a union shop

314. 487 U.S. 735 (1988).

315. *Id.* at 745.

316. After *Ellis v. Railway, Airlines & Steamship Clerks*, 466 U.S. 435 (1984), and *Beck*, 487 U.S. 735 (1988), it is questionable whether a refund scheme is satisfactory. The requirement now seems to be that dues and fees must be reduced for political objectors even prior to payment.

317. 29 U.S.C. § 164(b) (1994).

318. See *supra* note 16.

clause may be enforced.<sup>319</sup> To allow speech and federalism as bases for complete exclusion from union shop requirements and to fail to extend the same accommodation to religious objectors arguably shows hostility to religion.

Proponents of the charitable fund alternative may argue that to completely excuse religious objectors from the financial burden imposed on other members of the union would seem to prefer religion. That preference might translate into more religious objector exemption claims as disgruntled union members "find" religion in order to avoid the financial obligations of the union shop. Various arguments may be posited in response to this concern. First, nobody has articulated the same argument in the free speech realm. Wouldn't the lower dues schedule for political objectors hold the same appeal for disgruntled members, causing shifts in political allegiances? The issue was not even raised in *Beck* by the Supreme Court.

Second, when religious objectors were accorded complete exemptions from military conscription, although there were more claims of conscientious objector status, such status was not easy to obtain and, in any case, the number was certainly not unmanageable, even though much more seemed to be at stake and a high number of draftees would rather not have gone to war.<sup>320</sup> Third, an accommodation from NLRA requirements for religious reasons would not be granted simply because a bargaining unit member requests an exemption. Courts and even administrative agencies have always been able to inquire into sincerity of belief.<sup>321</sup> If a member's beliefs are found to be insincere, no accommodation would be allowed. Fourth, if forgiveness of union dues and fees is accompanied by a separation from union representation, an accommodation for religious liberty carries with it some hardship for insincere objectors. They would be at the mercy of employer decisionmaking and would not be entitled to grieve adverse decisions through the union. Finally, if religious accommodation claims exceed the numbers that might be expected by statistical prediction, the NLRB would be authorized to conduct hearings on the matter. If a problem is found to exist, the NLRB could retreat back to the charitable fund alternative. In sum, the NLRB has two options for exemptions that both ensure

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319. Colorado is the only state that has sought to regulate, rather than eliminate, the union shop. As such, it is not usually claimed to be a "right to work" state. See *supra* note 232.

320. See, e.g., MICHAEL USEEM, CONSCRIPTION, PROTEST, AND SOCIAL CONFLICT: THE LIFE AND DEATH OF A DRAFT RESISTANCE MOVEMENT 57 (1973) (noting that although the "SDS adopted a program to encourage large-scale application for conscientious objector (CO) status . . . the CO classification was always difficult to obtain . . . [T]he relative number of COs remained static through at least mid-1966."); Edward M. Kennedy, *Inequities in the Draft*, N.Y. TIMES, Feb. 24, 1971, at 41, reprinted in THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION 529 (Martin Anderson & Barbara Honegger eds., 1982). But see THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE 42-43 (Charles C. Moskos & John W. Chambers II eds., 1993); GEORGE Q. FLYNN, THE DRAFT, 1940-1973 179 (1993).

321. See, e.g., *Welsh v. United States*, 398 U.S. 333, 339 (1970); EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1995).

accommodations for labor policy and religious liberty interests will be obtained with as little destruction of one as is consistent with maintenance of the other.

### 3. *Larry Hardison and Regulation of Private Labor Contracts*

The government interest in the substantive terms of a collective bargaining agreement measured by the NLRA's statutory command seems to be quite low. Indeed, the Act explicitly requires only that parties "meet and confer in good faith."<sup>322</sup> The Act does not compel even the reaching of an agreement, much less the inclusion of any particular substantive terms.<sup>323</sup> Attempts by the government to require, or to forbid, particular proposals have been consistently rejected by the Supreme Court.<sup>324</sup> At the same time, and probably partly as a result of the NLRA's noninterference, other federal laws must be taken into account by the parties who engage in bargaining.<sup>325</sup> These "purely private" agreements must bow to applicable federal mandates in the same manner as any other private contract.<sup>326</sup> Thus, the number of secular exemptions from private labor contracts is high.

This state of affairs, wherein there is a low government interest with a high number of secular exemptions, creates a dilemma of sorts for religious accommodation. If the terms of a labor contract serve to make the accord truly private then there is no government imposed burden that can be said to be lifted by an accommodation if religious impingement is caused by a substantive term of the agreement. Thus, the Supreme Court would not have been able to find a constitutionally viable way to exempt Larry Hardison when he was compelled to work on the Sabbath by the ostensibly neutral application of the collective bargaining agreement's seniority system.<sup>327</sup> The Court, in Larry's case, could not have applied Title VII more forcefully than it did. If the labor contract is private, Title VII only operates constitutionally if the burden it imposes on private employers is *de minimis*.<sup>328</sup> To apply the provision more harshly would conflict with the Establishment Clause.

However, one of the accommodations pursued by Larry—the job swap—would have satisfied Title VII's reasonable accommodation mandate without imposing more than a *de minimis* burden on TWA or the union. The Court stated that the job swap accommodation was not required because of the RLA's encouragement of collective bargaining, which lies at

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322. 29 U.S.C. § 158(d) (1994).

323. *Id.*

324. *See supra* notes 256-57 and accompanying text.

325. *See Finkin, supra* note 216, at 188-89.

326. *See supra* note 259 and accompanying text.

327. *See supra* text accompanying notes 47-51.

328. *See supra* notes 47-50 and accompanying text.

the core of our national labor policy.<sup>329</sup> In finding the proposed job swap accommodation to be unnecessary, the Court, interestingly, shifts from the rhetoric of the private labor contract. The Court expressly places the seniority system, a substantive term of a purportedly private agreement, squarely in the public realm.<sup>330</sup> By shifting the characterization of the labor accord from private to public, the government is able to avoid most legal obligations like those that would be imposed by Title VII. On the other hand, the Court avoids free exercise obligations by claiming that labor contracts are private in nature. This is the exact type of shift that caused Karl Klare to label the public-private distinction in labor law as incoherent.<sup>331</sup>

There is growing support among commentators that the public-private distinction is blurred in the era of the modern regulatory state.<sup>332</sup> This observation has led many to conclude that "state action" should be viewed more liberally, and government generally should be held more accountable for its actions.<sup>333</sup> However, since it is unlikely that such a shift will occur in the near future,<sup>334</sup> the proposed accommodation of a religious liberty impinged by the substantive terms of a collective bargaining agreement is simply to eliminate the "public interest" rationale from the discourse. The NLRA's encouragement of collective bargaining, specifically, should not be used as a shield when the statutory command, as well as overall Supreme Court interpretation, conceives of these agreements as being private in nature.

Thus, the accommodation for Larry would have been to estop the government from asserting its separate "public" interest in the agreement between TWA and the Union, allowing the Court to approach Larry's case as if it were an ordinary Title VII action. The Court would then require as a reasonable accommodation the job swap between Larry and a fellow employee. The proposal merely prevents the government from taking advantage of *both* sides of the public-private line of distinction. If labor accords are truly private agreements, then Title VII should be able to require that employers and unions reasonably accommodate religious belief. It is appropriate also to frame the requirement in terms of *de minimis* burdens. After all, if employers and unions agree to terms that act to burden religion,

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329. See *supra* notes 44-46 and accompanying text.

330. See *Hardison*, 432 U.S. 63, 79 & n.12 (1977); see also *supra* text accompanying note 46.

331. See Klare, *supra* note 248, at 1395, 1415-18.

332. See, e.g., Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989). For a general critique of these broader approaches to the public-private distinction, see Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENTARY 361 (1993).

333. See generally Tribe, *supra* note 332; Alexander, *supra* note 332.

334. See Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95, 128 (1994) ("Criticized by feminists, Critical Legal Studies scholars, and others, the [public/private] distinction nonetheless exists and will undoubtedly remain an important, if troublesome feature of our constitutional order for the foreseeable future.") (footnotes omitted).

the imposition is a private one, and concern for establishment of religion may well be sparked by governmental compulsion of greater accommodations.<sup>335</sup>

Of course, the reasonable accommodation requirements of Title VII might be imposed without resolving the private-public tension in judicial analysis of private labor contracts. The NLRA religious accommodation amendment should simply require the NLRB and the courts to analyze conflicts between labor contracts and religion in the same way that the ADA requires the EEOC to view tensions between labor agreements and disability accommodations. The labor contract's requirements are a factor in determining whether disability accommodation is reasonable, but do not supersede the ADA's accommodation command.<sup>336</sup> Likewise, labor contract requirements should not overcome reasonable accommodation of religion. Viewed this way, the job swap proposed by Larry Hardison would have been allowed.

### III. THE ESTABLISHMENT CLAUSE AND LEGISLATIVE ACCOMMODATION OF RELIGION UNDER THE NLRA

Any accommodation amendment must be scrutinized under the Establishment Clause since government action on the basis of religion necessarily implicates constitutional concerns about the state favoring religion. Although the Supreme Court's decision in *Employment Division v. Smith*<sup>337</sup> invites legislatures to entertain and enact proposals for religious accommodation,<sup>338</sup> a specific amendment to the NLRA with religious accommoda-

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335. To the reader who believes that labor contracts have more "public" than "private" attributes, the result achieved by proposed accommodation should not be distressing. The same result can be reached by viewing labor contracts from a public perspective. The public nature of labor contracts would act to elevate how we should view the government's interest in these accords. If government may regulate the substantive terms of these contracts under the NLRA, then the government may do more to unburden their impact on religious exercise. Requiring employers to reasonably accommodate religious liberty, which would include permitting Larry Hardison's job swap, should fall well within what the government can mandate without causing establishment problems. Indeed, under the "public" view of labor contracts, more than merely a *de minimis* burden on employers and unions may be compelled.

336. See *supra* notes 273-75.

337. 494 U.S. 872, 890 (1990).

338. This interpretation of *Smith* is not varied by the Court's 1993 decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217 (1993), which found city health ordinances not to be neutral or of general applicability in that they were targeted directly at a particular religion. Justice Kennedy, writing for the majority in *Hialeah*, found that the wording of the ordinances at issue, which on their face mention "sacrifice" and "ritual," along with a resolution adopted by the Hialeah City Council, revealed an "improper attempt to target [the] Santeria [religion]." *Id.* at 2227-28.

Although the Court arguably broadens *Smith* to allow more than a mere facial analysis to determine a challenged law's neutrality and applicability, such an inquiry addressing the *purpose* of the law has always been understood to be encompassed within notions of formal neutrality that lay at the core of the *Smith* decision. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1419 (1990). Moreover, Justice Kennedy sweepingly reaffirms the *Smith* decision by repeated citation in the majority-supported portions of his *Hialeah* opinion. While *Smith* and *Hialeah*, read together, require that courts uphold neutral laws unless enacted for the

tion as its primary aim may at first blush raise significant Establishment Clause doubts; simply to state the proposal suggests an overarching concern for religion. But as the following discussion shows, the Supreme Court's more recent decisions involving legislative accommodations for religion, coupled with *Smith's* shifting of responsibility for religious exemptions to the political arena, have created a judicial climate that will be increasingly favorable to legislative exemptions for religion.

#### A. *The Tension Between Establishment and Free Exercise*

The tension and conflict between the Free Exercise Clause and the Establishment Clause has often attracted comment.<sup>339</sup> Justice Stewart, concurring in *Sherbert v. Verner*, lamented that legitimate free exercise claims would often "run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause."<sup>340</sup> Almost a decade before *Smith*, Justice Rehnquist decried the Court's "overly expansive interpretation of both Clauses" and likened the Religion Clauses to a "Scylla and Charybdis through which any state or federal action must pass."<sup>341</sup> The tension between free exercise claims and the Establishment Clause springs from the Court's application of a three-pronged test, first announced in *Lemon v. Kurtzman*,<sup>342</sup> for evaluating whether challenged practices violate the Establishment Clause. Under *Lemon*, government action does not violate the Establishment Clause if it (1) serves a "secular legislative purpose;" (2) has "a principal or primary effect . . . that neither advances nor inhibits religion;" and (3) does not foster an "excessive government entanglement" with religion.<sup>343</sup>

The tension is especially pronounced where the Court uses the *Lemon* test to evaluate Establishment Clause challenges to legislative accommodations of religion. As Justice O'Connor has noted, "a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations,"<sup>344</sup> which exemptions, until *Smith*, the Court had said the Free Exercise Clause sometimes requires.<sup>345</sup> Any accommodation arguably advances religion; conversely, any legisla-

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purpose of discouraging religion, *Smith* invites legislatures to accommodate religion in *substantively* neutral ways. *Smith*, 494 U.S. at 890.

339. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970); TRIBE, *supra* note 10, at 1194-95; Lupu, *Discretionary Accommodation*, *supra* note 6, at 574-76.

340. *Sherbert*, 374 U.S. 398, 414 (1963) (Stewart, J., concurring).

341. *Thomas v. Review Board*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting).

342. 403 U.S. 602 (1971).

343. *Id.* at 612-13.

344. *Wallace v. Jaffree*, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring); see also *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972) ("The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . ."); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987) ("At some point, accommodation may devolve into 'an unlawful fostering of religion.'") (citation omitted).

345. See *supra* note 10.

tive benefit conferred upon religion can be viewed as an accommodation of free exercise rights.<sup>346</sup> In the context of free exercise claims, the Court incrementally widened the channel between Scylla and Charybdis first in its narrow application of the *Sherbert* standard and more recently with the *Smith* decision. However, in the context of Establishment Clause challenges to legislatively granted religious exemptions, the Court has demonstrated a willingness to defer to the legislature in applying the *Lemon* criteria.<sup>347</sup> It appears that, consistent with *Smith*, the Court will continue to move in the direction of validating a broader range of exemptions whether or not it ever overrules *Lemon*.

Nevertheless, analyzing whether an NLRA accommodation amendment is valid under the Establishment Clause presents a substantial challenge since the Court has failed to agree on any decisive establishment standard for accommodations. While the Court has failed to overrule *Lemon*, its members are clearly uncomfortable with the rigidity *Lemon* presents at least in its articulated form. Such discomfort has led the Court to discuss and even apply, but not to wholeheartedly embrace, various other tests for establishment—"endorsement" and "coercion" being the most emphasized of these alternatives.<sup>348</sup>

### B. *Establishment and Legislative Accommodation*

Despite the lack of a singular, unified establishment standard, an NLRA accommodation amendment can be tested against the three prevailing views of establishment limits for legislative exemptions that have surfaced in four recent Court accommodation decisions. All four decisions

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346. *Wallace*, 472 U.S. at 82 (O'Connor, J., concurring). See also Lupu, *Discretionary Accommodation*, *supra* note 6, at 560-61.

347. The Court has expanded its approach to legislative accommodations for religion. Its decisions in the late 1980s have signalled a different, less rigid establishment standard for these exemptions. See, e.g., *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). See also McConnell, *Update*, *supra* note 6, at 696 (McConnell cites to *Amos* and *Texas Monthly* when he states that, "recent decisions regarding Establishment Clause challenges to religion-specific accommodations likewise suggest a change in doctrine, this time favoring accommodations."). This expansion is consistent with substantial evidence that the framers must have intended that government would forge religious accommodations. For a discussion of this originalist evidence, see David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption*, 75 B.U. L. REV. 241, 265-67 (1995). But cf. Lupu, *Accommodation Trouble*, *supra* note 6, at 768 (suggesting that accommodations for religion before the Supreme Court have not fared as well as McConnell believes). Although Professor Lupu has stated his general opposition to religious exemptions, even he acknowledges that the Supreme Court is "steamrolling" in the direction of weakening the Establishment Clause as a check on government involvement with religion. See *id.* at 780. And, despite striking down an accommodation, the Court's very recent decision in *Kiryas Joel Village School District v. Grumet*, 114 S.Ct. 2481 (1994), purports to view accommodations in the same expansive way.

348. The most recent version of this debate over the viability of *Lemon* appears in *Zobrest v. Catalina Foothills School District*, 506 U.S. 1 (1993). See also *Kiryas Joel*, 114 S.Ct. at 2494 (deciding an Establishment Clause case without applying or citing *Lemon*). Justice Blackmun separately concurs in *Kiryas Joel* for the sole purpose of defending the continued validity of *Lemon*. *Id.* at 4671 (Blackmun, J., concurring).



from which the three accommodation views are distilled, *Estate of Thornton v. Caldor*,<sup>349</sup> *Corporation of the Presiding Bishop v. Amos*,<sup>350</sup> *Texas Monthly v. Bullock*,<sup>351</sup> and *Kiryas Joel Village School District v. Grumet*,<sup>352</sup> are highly relevant in that each involved an expansive legislative accommodation for religion.

In *Thornton*, the Court reviewed and struck down a state law absolutely accommodating religion against private employer imposition by ensuring job protection for those employees whose Sabbath conflicts with job requirements.<sup>353</sup> In *Amos*, the Court examined and upheld a federal statutory provision expansively exempting religious organizations from Title VII's religious nondiscrimination requirement.<sup>354</sup> In *Texas Monthly*, the Court analyzed and invalidated a state law provision exempting religious organizations from a generally applicable tax on publications.<sup>355</sup> Finally, just last year in *Kiryas Joel*, the Court struck down a law carving out a separate school district for the disabled children of Satmar Jews.<sup>356</sup>

Although the Court invalidated three of the four exemption statutes it reviewed in these cases, the Court's decisions comment extensively on how accommodations might avoid constitutional problems. For example, all four decisions reveal that a constitutionally valid legislative exemption for religion is more likely if the exemption alleviates a religious burden imposed by a generally applicable statute. Although a legislative enactment favoring religion over *private* interests may survive an Establishment Clause challenge, it is evident that such a law must be extremely limited to pass constitutional muster. Title VII's religious "reasonable accommodation" requirement, which carries a Court imposed *de minimis* limitation, is a good example.<sup>357</sup> The following two subsections explore the notion of governmentally-imposed burdens. Subsection 1 shows that the Court requires exemption statutes to lift governmentally-imposed burdens as a prerequisite for expansive Establishment Clause analysis, and subsection 2 explores the more obscure issue—what exactly does the Court mean by the words "government-imposed"?

### 1. *Alleviating a Government-Imposed Burden: A Prerequisite for Expansive Establishment Analysis*

A legislative accommodation of religion that requires a broad exemption from neutrally applied secular requirements is likely to be invalidated if

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349. 472 U.S. 703 (1985).

350. 483 U.S. 327 (1987).

351. 489 U.S. 1 (1989).

352. 114 S.Ct. 2481 (1994).

353. *Thornton*, 472 U.S. at 709-11.

354. *Amos*, 483 U.S. at 339.

355. *Texas Monthly*, 489 U.S. at 25.

356. *Kiryas Joel*, 114 S.Ct. at 2484.

357. See *supra* notes 36-49 and accompanying text.

the secular requirements are privately imposed rather than imposed by the government. For example, the Court struck down a Connecticut state law immunizing Sabbath observance from private employer work requirements in *Estate of Thornton v. Caldor*.<sup>358</sup> The state statute in *Thornton* was not enacted to relieve religion of a government-imposed burden.<sup>359</sup> The burden at issue in the case was private employer unwillingness to accommodate the Sabbath days of all religions in establishing work schedules.<sup>360</sup> The Court's holding invalidating the Connecticut Sabbath Protection law triggered a fear by Justices O'Connor and Marshall that the decision might call into question the constitutional propriety of Title VII.<sup>361</sup> Justice O'Connor, writing a concurrence joined by Justice Marshall, found Title VII's accommodation requirement constitutional in part because it requires only "reasonable" rather than "absolute" accommodation,<sup>362</sup> but the Justices' fear about the constitutional implications for Title VII clearly arose from the fact that the law at issue in *Thornton*, like Title VII itself, required a preference for religion over workplace burdens purely created and imposed by private employers.<sup>363</sup> As Justice O'Connor emphasized, "Title VII attempts to lift a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause."<sup>364</sup>

The Court's decision in *Corporation of the Presiding Bishop v. Amos*<sup>365</sup> is a further example that the presence of a government created burden on religion is instrumental in determining whether the Establishment Clause has been breached by a legislative accommodation. In *Amos*, the Court upheld a statutory exemption from the Title VII prohibition against religious discrimination in employment as applied to the secular nonprofit activities of religious organizations.<sup>366</sup> Justice White, writing for the major-

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358. 472 U.S. 703, 710-11 (1985).

359. *Id.* at 712 (O'Connor, J., concurring).

360. *Id.*

361. Title VII's provision prohibiting religious discrimination in employment looks like the Sabbath law invalidated in *Thornton* in many respects. Title VII, for example, boldly provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . ." 42 U.S.C. § 2000e-2(a)(1) (1994). Unlike the Sabbath law, which required absolute accommodation regardless of hardship or special circumstances, however, Title VII requires only such *reasonable* accommodation as can be accomplished without *undue hardship*. 42 U.S.C. § 2000e(j) (1994) (emphasis added). And, the Supreme Court has interpreted undue hardship to mean that an employer does not have to accommodate in more than a *de minimis* fashion. See the discussion of the *Hardison* case, *supra* text accompanying notes 36-49.

362. *Thornton*, 472 U.S. at 712 (O'Connor, J., concurring).

363. *Id.* at 706.

364. *Id.* at 712 (emphasis added).

365. 483 U.S. 327 (1987).

366. *Id.* at 339. Section 702 of Title VII, 42 U.S.C. § 2000e-1 (1994), provides in relevant part that "[Title VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with

ity, stated that "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions," is a "permissible [secular] legislative purpose" under the first prong of the *Lemon* test, even assuming that the Free Exercise Clause does not require such alleviation.<sup>367</sup>

Under *Lemon*'s second prong of inquiry into whether the law's principal or primary effect advances religion, the Court conceded that the exemption as extended to secular activities made religious organizations "better able . . . to advance their purposes;" however, it stated, the relevant inquiry was not whether the law "allows churches to advance religion," but whether it can be fairly said "that the *government itself* has advanced religion through its own activities and influence."<sup>368</sup> The district court reasoned that Title VII's exemption for religious employers was constitutionally invalid as applied to secular activities because it "singles out religious entities for a benefit, rather than benefiting a broad grouping of which religious organizations are only a part."<sup>369</sup> Although the Court acknowledged that it had at times given weight to this consideration,<sup>370</sup> it stated that statutes giving special consideration for religious groups were valid "*where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion.*"<sup>371</sup> Justice O'Connor, concurring in *Amos*, echoed the majority opinion when she maintained with respect to her "endorsement" view of the Establishment Clause that "in order [for an objective observer] to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action."<sup>372</sup>

The Court's focus on whether a legislative accommodation relieves a governmentally-imposed, as opposed to a privately imposed, burden on religion in deciding whether the legislature has violated the Establishment Clause has been mentioned and followed in accommodation decisions after *Thornton* and *Amos*. In *Texas Monthly*,<sup>373</sup> for example, Justice Brennan,

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the carrying on by such corporation, association, educational institution, or society of its activities." Section 702 was amended in 1972. Before the amendment, only the religious activities of religious employers were exempted from Title VII's prohibition against discrimination in employment on the basis of religion. The 1972 amendment extended the exemption to all activities of religious organizations. *Id.*

367. *Amos*, 483 U.S. at 335.

368. *Id.* at 337.

369. *Id.* at 333 (characterizing the District Court's opinion).

370. *See, e.g.,* *Mueller v. Allen*, 463 U.S. 388, 397 (1983) (that a law provides benefits to groups other than religious groups indicates secular effect); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (narrowness of benefitted class is an important factor in evaluating whether the law has an impermissible effect).

371. *Amos*, 483 U.S. at 338 (emphasis added).

372. *Id.* at 348 (O'Connor, J., concurring) (emphasis omitted).

373. *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

writing for a plurality,<sup>374</sup> conceded that the Court's prior cases finding legislative accommodations to be valid either involved legislative exemptions that imposed no substantial burdens on nonbeneficiaries or "that were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause."<sup>375</sup> Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy in dissent in *Texas Monthly*, determined that in reviewing legislative accommodations, "[h]owever the reconciliation with the *Lemon* terminology is achieved, our cases make plain that it is permissible for a State to act with the purpose and effect of 'limiting governmental interference with the exercise of religion.'"<sup>376</sup>

Although the Supreme Court's 1989 decision in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*<sup>377</sup> did not involve a legislative accommodation of religion, Justice O'Connor explained her views of legislative accommodation in defending her view of the Establishment Clause to Justice Kennedy, who had claimed that her perspective was hostile to religion.<sup>378</sup> Justice O'Connor stressed that in her view, government can "acknowledge" the role of religion in society in numerous ways without violating establishment standards.<sup>379</sup> In particular, she pointed out that "the government can accommodate religion by lifting government-imposed burdens on religion."<sup>380</sup> Indeed, one of the reasons given by Justice O'Connor for her decision finding a constitutional violation in *Allegheny County* was that the cases before the Court "[did] not involve lifting a governmental burden on the free exercise of religion."<sup>381</sup>

Finally, in *Kiryas Joel*,<sup>382</sup> Justice Souter, writing for the majority, which included Justice Ginsburg, resolved any question about his position with respect to a threshold for legislative exemptions when he stated

[w]e do not deny that the Constitution allows the state to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.<sup>383</sup>

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374. The Court was deeply divided in *Texas Monthly*. Justice Brennan's plurality opinion was joined by only Justices Marshall and Stevens. *Id.* at 2.

375. *Id.* at 18 n.8. Justice Brennan cites specifically to *Zorach v. Clauson*, 343 U.S. 306 (1952), and to *Amos*, 483 U.S. 327 (1987).

376. *Id.* at 40 (Scalia, J., dissenting) (quoting *Amos*, 483 U.S. at 339).

377. 492 U.S. 573 (1989).

378. *Id.* at 631-32 (O'Connor, J., concurring in part and concurring in the judgment). Justice Kennedy had attacked Justice O'Connor's "endorsement" standard as reflecting "an unjustified hostility to religion." *Id.* at 655, 668-79 (Kennedy, J., concurring in the judgment in part and dissenting in part).

379. *Id.* at 631-32 (O'Connor, J., concurring).

380. *Id.* (citing *Wallace v. Jaffree*, 472 U.S. 38, 83-84 (1985)).

381. *Id.* at 632.

382. 114 S.Ct. 2481 (1994).

383. *Id.* at 2492.

What the majority opinion in *Amos*, Justices Brennan's and Scalia's opinions in *Texas Monthly*, the majority opinion in *Kiryas*, and Justice O'Connor's concurring opinions in *Thornton*, *Amos*, and *Allegheny County* have in common is that they all acknowledge that the constitutional validity of an expansive legislative accommodation largely depends upon whether its purpose and effect are to relieve a governmental burden on the exercise of religion. If the accommodation relieves a burden, it is substantively neutral; if there is no pre-existing burden, the statute impermissibly favors religion. Thus, in *Thornton*, the Sabbath statute did not serve any neutrality purpose because it did not act to lift a state burden on religion, and therefore it constituted a preference for a particular religious practice.<sup>384</sup> In *Texas Monthly*, according to Justice Brennan's plurality opinion, the governmental burden imposed by the sales and use tax on religious literature was too insubstantial to warrant the exemption, given the exemption's burden on nonbeneficiaries.<sup>385</sup> On the other hand, in *Amos* the burden imposed by Title VII's prohibition against discrimination on the basis of religion was substantial enough to warrant an exemption for religious organizations.<sup>386</sup> Finally, in *Kiryas Joel*, the Court emphasized that the legislative accommodation in question, which was passed to alleviate religious burdens created by governmental requirements, was not an unconstitutional establishment because of its facilitation of religion, but because of its singling out of "a particular religious sect for special treatment."<sup>387</sup> The weight of modern Supreme Court authority, then, stands behind the proposition that legislatively enacted accommodations for religion, like the suggested NLRA amendment, are quite a bit more likely to pass constitutional muster if enacted to lift governmentally-imposed burdens.

## 2. What is a Government-Imposed Burden?

If alleviating a government imposed burden is the linchpin for expansive accommodation it would seem necessary, at the least, to attempt to define what is meant by it. To some, a government imposition might be consonant with "state action," the general doctrine which defines the applicability of federal constitutional analysis.<sup>388</sup> Indeed, using state action as a defining mark for accommodation analysis would be highly efficient and elegant in the sense that it would enhance uniformity of constitutional anal-

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384. *Thornton*, 472 U.S. at 710.

385. *Texas Monthly*, 489 U.S. at 18.

386. *Amos*, 483 U.S. at 336.

387. *Kiryas Joel*, 114 S.Ct. at 2493.

388. See, e.g., McConnell, *Accommodation*, *supra* note 6, at 31-32 (suggesting the Supreme Court has erringly used the "state action" doctrine as the line for determining government impositions on religion); Tushnet, *supra* note 8, at 1704 (arguing that allowing legislative exemptions that lift governmental burdens will make it critical to define such burdens, thus opening up key questions about the "state action" doctrine).

ysis.<sup>389</sup> However, given the crux of religion clause analysis and also the ways in which the notion of a government imposed burden have come to be understood by the various Supreme Court Justices, the state action benchmark is too limited to help in deciding whether a legislative accommodation is constitutional.

If an important Establishment Clause determination in analyzing legitimacy of religious accommodations is whether government can be perceived as favoring, preferring, or endorsing religion, then justifications for governmental exemptions for religion cannot possibly be tied to the fine technical distinctions characteristic of the state action doctrine.<sup>390</sup> The state action doctrine exists to determine whether an individual citizen may challenge an action as a constitutional violation since the Constitution's guarantees of individual rights only shield individuals from *government action*.<sup>391</sup> The purpose of identifying a "government burden" for determining whether a legislative accommodation is an establishment is entirely different. The existence of a government burden on religion is important in deciding whether the legislative exemption was enacted to further government *neu-*

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389. Uniformity of constitutional analysis, aside from being a rather nonsubstantive goal for constitutional decisionmaking, seems to hold very little weight among members of the current Court, especially with respect to the Religion Clauses. Many commentators, for example, have decried the fact that *Smith* creates a different analytical framework for the Free Exercise Clause (essentially an equal protection type of scrutiny) than that which exists for other "substantive" constitutional rights. See, e.g., Laycock, *supra* note 4, at 17-21. In any case, striving for uniformity of constitutional analysis among the various enumerated rights may smack of an attempt at "hyper-integration," the fallacy of attempting to describe the constitution through one unifying theory. For a discussion of this fallacy, see LAURENCE H. TRIBE & MICHAEL G. DORF, *ON READING THE CONSTITUTION* 24-30 (1991).

390. The "state action" doctrine has often been called a non-doctrine. See, e.g., TRIBE, *supra* note 10, at 1690. The Supreme Court itself has noted that formulation of an infallible test of state action is an "impossible task." *Id.*; *Reitman v. Mulkey*, 387 U.S. 369, 378 (1969). It is beyond the scope of this Article to set out the contours of the Court's "state action" cases; nor is it necessary since to compare state action and government burden in the religious accommodation context is to severely conflate the two ideas. However, it should be briefly noted that there has been some controversy regarding whether certain parts of the NLRA, which allow, but do not require, certain agreements between private parties constitute state action. For example, there is some question about whether section 8(a)(3)'s provision allowing union shop agreements between employers and unions rises to the level of "state action" for purposes of "triggering" a constitutional analysis. See David H. Topol, Note, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135, 1136 (1992); The Supreme Court, in a decision involving the Railway Labor Act, has suggested "state action" might be present in a scheme that endorses private agreements compelling union membership (*Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956)), but has not provided any definite answer to the question with respect to those agreements under the NLRA since the Court has never been directly presented with the question. *But cf.* Topol, *supra*, at 1140 (maintaining that although the Court acknowledged in *Beck v. Communication Workers of America*, 487 U.S. 735 (1988), that it need not decide whether "section 8(a)(3) involves state action," the Court cited to two cases which suggest state action is not present in NLRA union shop agreements). The circuit courts are divided on the issue. See, e.g., *Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971) (requisite "state action" is present in NLRA section 8(a)(3) provision allowing "union shop" agreements between private parties); *Reid v. McDonnell-Douglas Corp.*, 443 F.2d 408, 410-11 (10th Cir. 1971) (no "state action" where NLRA merely allows a union shop agreement and, even then, only if state law has not prohibited it).

391. Tribe, *supra* note 10, at 1688.

trality toward religion. If the accommodation lifts a government burden it can be said to be allowing free exercise from impingement by the government. If the accommodation lifts no burden then it can be seen as government advancing religion. For example, the majority's view in *Amos*, which asks primarily whether Congress in accommodating religion was attempting to alleviate a government imposed burden was not focusing on state action, but, instead, was attempting to determine whether the exemption constituted a preference for religion.<sup>392</sup> Thus, the relevant question is not whether government is *sufficiently* present to raise a constitutional concern, but whether government is involved enough to credibly justify an exemption as an accommodation, and not an advancement, of religion.

This view of government imposition is confirmed by Justice O'Connor. Although the *Amos* majority upheld the accommodation in question largely because it was intended to lift a government imposed burden, Justice O'Connor, in an important concurrence, faulted the majority opinion for leaning toward " 'deference to all legislation that purports to facilitate the free exercise of religion' " by suggesting that government action is legitimate as long as it does not directly advance religion but merely " 'allow[s]' religious organizations to advance religion."<sup>393</sup> Her criticism was that since *any government benefit* could be characterized as merely allowing religious organizations to advance religion, the distinction would not "separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations."<sup>394</sup> It is important to note that Justice O'Connor's criticism is not that the *Amos* majority's definition of government burden is too broad, but that there should be an additional level of analysis, after identifying that the exemption lifts a burden, to aid in determining whether the accommodation violates the Constitution. To Justice O'Connor, once an exemption is determined to be burden-lifting, the inquiry should then proceed to a determination about whether the exemption is nonetheless an "endorsement" of religion and therefore a violation of the Establishment Clause.<sup>395</sup>

Justice O'Connor characterizes the majority in *Amos*<sup>396</sup> as agreeing with her view that the notion of a government imposed burden is a broad idea—certainly not so limited as the requirements for "state action." This view of the Court's understanding has been discussed by Professor Mark Tushnet, who addresses the scope of the Court's definition as one of the primary potential pitfalls of the emerging principle of legislative accommo-

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392. See *Amos*, 483 U.S. 327 (1987).

393. *Id.* at 347 (O'Connor, J., concurring).

394. *Id.* at 348.

395. *Id.*

396. Chief Justice Rehnquist and Justices Powell, Stevens and Scalia were in the majority along with Justice White who wrote the opinion.

dation.<sup>397</sup> Professor Tushnet acknowledges the Court's emphasis on lifting governmental burdens, and then probes the underlying meaning of government burdens in the accommodation context. He maintains that

[g]overnment-imposed burdens on religious belief can be found in virtually every situation where a legislature is moved to act in the arena of religion. Therefore, the technique is to locate a web of governmental regulations that taken together make it more difficult for a believer to follow the dictates of his or her conscience so that the particular statute can be said to alleviate the burden.<sup>398</sup>

Professor Tushnet goes on to show how the "technique"—the ease with which a web of regulation can be detected—can be used to blur meaningful lines between accommodation and establishment. For example, he argues that the statute struck down in *Thornton* could be viewed as relieving a burden that "arose out of the network of state labor laws restricting the hours of employment coupled with Connecticut's decision to repeal its Sunday closing laws thereby leaving it to employers to decide how to comply with the wage and hour laws."<sup>399</sup> Tushnet extends his argument by showing how the "web of regulation" approach to accommodation could be used to defend public aid to nonpublic education or even a moment of silence in public schools.<sup>400</sup>

Professor Tushnet's point about alleviating government burdens might cause concern if it were true that the Court would draw no line whatsoever in defining those burdens. In fact, the opposite has been true. The Supreme Court did not view the law in *Thornton* as one that relieved a governmental burden.<sup>401</sup> Nor did the Supreme Court justify a moment of silence in public schools as an accommodation lifting a burden when it decided *Engel v. Vitale*.<sup>402</sup> Moreover, Justice O'Connor has stated that accommodations must be analyzed in two steps, only the first of which inquires about government burdens.<sup>403</sup> Thus, under Justice O'Connor's formulation the notion of government burden, no matter how broad, is mediated by a second level of analysis. Finally, despite a majority of Justices arguably open to expansive notions of establishment in a legislative exemption context, the Supreme Court has only upheld one accommodation in the four most recent accommodation cases before it, although only in *Thornton* did the Court fail to view the accommodation as lifting a government burden.

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397. See Tushnet, *supra* note 8, at 1708-14.

398. *Id.* at 1710.

399. *Id.*

400. *Id.* at 1710-12.

401. *Thornton*, 472 U.S. at 709-10.

402. 370 U.S. 421 (1962). While it is true that the 1962 Court was not required to view the *Engel* case through an accommodationist lens, as the current Court would be required to based on its recent decisions, one of the Court's first accommodation cases, *Zorach v. Clauson*, 343 U.S. 306 (1952), preceded *Engel*.

403. See *supra* text accompanying notes 394-95.



Nevertheless, Professor Tushnet's reading of *Thornton* and *Amos* reveals that the Court's view of "government burden" for purposes of analyzing legislative accommodations of religion is quite broad—it is not parallel in scope to traditional notions of "state action." Viewed in this way, the proposed NLRA accommodation amendment clearly lifts a governmentally created burden: the NLRA establishes and legitimizes a host of regulations and an administrative bureaucracy that sweepingly governs private sector union-management relations. Tushnet's criticism of accommodation, that it can be abused simply by identifying a web of regulation,<sup>404</sup> does not apply to the NLRA—the Act, by itself, is a juggernaut of government involvement in the private employment relationship. Indeed, the NLRA represents more of a regulatory network than even Title VII, the "governmentally-burdensome" scheme that served to justify the legislative accommodation for religion upheld by the Court in *Amos*. More importantly, the government's involvement is *viewed* as substantial by the general public, and particularly those who are union members. They probably know, for example, that they have certain rights as a result of government decree. It is highly likely they also understand that those rights can be vindicated through government agencies and the courts. Indeed, in heavily unionized sectors of the country, many employees may even believe that a union shop is *required* by the NLRA. Certainly, they at least understand the union shop is protected by government action. Accordingly, any prohibition or protection found in the Act certainly, but also any agreement endorsed by the NLRA and enforced through its provisions, must be deemed products of government action for the purpose of analyzing legislative accommodations for religion.

### C. *The Constitutionality of an NLRA Religious Accommodation Amendment*

Three primary models of legislative accommodation have emerged from the Supreme Court's more recent accommodation cases: Justice Scalia's view that legislative accommodations are appropriate if they merely act to lift a government imposed burden (Model 1); Justice O'Connor's view that legislative exemptions are proper if they lift a government imposed burden and do not endorse religion (Model 2); and Justice Brennan's view that statutory accommodations are constitutional if they lift a government imposed burden with no impact on nonbeneficiaries or, if there is an impact on nonbeneficiaries, that the burden lifted be a grave one (Model 3).

Justice Scalia's view (Model 1) is gleaned from his position in *Amos* and his dissenting opinions in *Texas Monthly* and *Kiryas Joel*. This view has been adopted also by Chief Justice Rehnquist who dissented with Jus-

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404. Tushnet, *supra* note 8, at 1711.

tice Scalia in *Texas Monthly* and *Kiryas Joel*, and who joined Justice Scalia in the *Amos* majority. Justice Kennedy also subscribes to this model. Justice Kennedy dissented with Justice Scalia and the Chief Justice in *Texas Monthly*. Although he voted to strike down the accommodation in *Kiryas Joel* (unlike Justices Scalia and Rehnquist), he wrote a separate concurrence in the case explaining his very narrow reason for doing so and, at the same time, solidifying his pro-accommodationist stance.<sup>405</sup> Justice Thomas can be said to align with Justice Scalia since Justice Thomas has voted with Justice Scalia in every First Amendment religion case since becoming a member of the Court, and, true to form, joined Justice Scalia's dissenting opinion in *Kiryas Joel*.

Justice O'Connor's views of accommodation (Model 2) are taken from her concurrence in *Thornton*, her concurrence in *Amos*, her position in *Texas Monthly*, and her position and concurrence in *Kiryas Joel*. The Justice closest to her position is Justice Blackmun, who has retired from the Court. However, Justice Stevens' views may also have shifted somewhat to this model, but such a characterization is as yet uncertain. Although Justice Brennan applied a modified form of the *Lemon* test to the accommodation challenged in *Texas Monthly*, there is some indication that Justice Stevens, who joined the Brennan opinion in *Texas Monthly*, may have changed his position to favor the weaker "endorsement" view of the Establishment Clause since Justice Stevens, along with Justice Brennan, joined the part of Justice O'Connor's concurring opinion in a later case, *Allegheny County*, in which she defends her view of accommodation to Justice Kennedy.<sup>406</sup>

Based solely on his opinion in *Kiryas Joel*, it appears that Justice Souter is also an adherent of the endorsement view. What little he says about accommodation, despite striking down the exemption in *Kiryas Joel*, strongly suggests a position that is more expansive than Justice Brennan's in *Texas Monthly*, yet not as broad as Justice Scalia's view. Since Justice Ginsburg joins the majority in *Kiryas Joel*, she is also a likely follower of Justice O'Connor.

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405. Justice Kennedy explained his reason for striking down the accommodation as very narrow—New York drew a *political* boundary on the basis of religion. 114 S.Ct. at 2501 (Kennedy, J., concurring). But Justice Kennedy explained also that he remains committed to the principle of accommodation. According to Justice Kennedy, "[g]overnment policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage." *Id.* (quoting his opinion in *Allegheny County*). He concurred separately in *Kiryas Joel* because of his concern that the majority opinion could be read to limit legislative accommodations. *Id.* at 2500-01. Although he agreed that accommodations demand careful scrutiny to ensure they do not discriminate among religions or burden nonadherents, he disagreed with the suggestion that the *Kiryas Joel* School District violated either concern. *Id.* at 2501.

406. See *Allegheny County*, 492 U.S. at 627-32 (Part II of O'Connor's concurring opinion in which she defends the "endorsement" standard for Establishment Clause cases and legislative accommodation cases and in which she is joined by Justices Stevens and Brennan).

The view of accommodation enunciated by Justice Brennan in *Texas Monthly* (Model 3), was approved by Justices Marshall and Stevens, who joined Brennan's opinion in that case.<sup>407</sup> Accordingly, the view's only known advocate today would be Justice Stevens, who, as discussed, possibly has shifted more toward "endorsement."<sup>408</sup> Thus, what follows is a description of all three of the legislative accommodation models and an analysis of the NLRA accommodation amendment within those frameworks.

### 1. *Accommodation Model 1: Burden-Lifting*<sup>409</sup>

If the Court follows Justice Scalia's lead in *Texas Monthly*, minimizing the burden necessary to justify an accommodation, few accommodations will be invalidated. After all, Justice Scalia would have allowed the tax exemption in *Texas Monthly*, an exemption exclusively designed for religion and enacted without any real inquiry into the extent of the tax's burden on religion.<sup>410</sup> Justice Scalia also would have upheld the separate school district at issue in *Kiryas Joel* as a valid accommodation despite evidence that the district was fashioned exclusively for the Satmar Hasidim religious sect and that such an exemption had not been created for any other entity, secular or nonsecular.<sup>411</sup>

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407. Justice Brennan's opinion in *Texas Monthly* sets out three ideas which independently could serve to justify a legislative accommodation under the Establishment Clause. First, an exemption will be valid if neutral on its face and secular in its purpose, but incidentally benefitting religion. *Texas Monthly*, 489 U.S. at 9. Second and foremost, an exemption will be valid if it alleviates a grave, serious, or significant burden on religion, presumably, even if there is some impact on nonbeneficiaries. *Id.* at 18 n.8. Finally, an exemption will be valid if it merely frees religious activity and has little or no impact on nonbeneficiaries. *Id.* at 18-19 n.8.

Justice Brennan's standard poses a perhaps insurmountable challenge for the proposed NLRA accommodation amendment, but may be met by an accommodation which bows even somewhat to valid government interests found codified in the NLRA. Certainly, Justice Brennan's standard, read strictly, would seem to oppose any *broad* accommodation of religion not mandated by the Free Exercise Clause. However, Justice Brennan does admit there is room between free exercise and establishment sufficient for some legislative action.

408. Michael McConnell has argued the accommodationist view using this perspective—the most restrictive of the accommodation models. He uses Justice Brennan's test in *Texas Monthly* to indicate how legislative exemptions might be crafted to survive constitutional scrutiny because, "it is safe to predict that the Court's position toward accommodation will not be more restrictive than this test." McConnell, *Update*, *supra* note 6, at 698. While McConnell's point is well-taken, this Article analyzes a possible NLRA accommodation under only two of the views gleaned primarily from *Amos* and *Texas Monthly* since at least a majority of the current Justices favor a less restrictive test. Since the purpose of this Article is to have the proposed amendment viewed as a viable exemption, it is not so "accommodating" as McConnell on this particular issue.

409. Justice Scalia is the primary proponent of this view. The view is also embraced by Chief Justice Rehnquist, Justice Thomas, and Justice Kennedy, although Kennedy parts company with the view when religion enters into the drawing of political boundaries. Since the proposed NLRA amendment does not involve boundary drawing of the type that was problematic for Justice Kennedy in *Kiryas Joel*, Justice Kennedy's view is not distinguished from Justice Scalia's position in this Article.

410. See *Texas Monthly*, 489 U.S. at 29 (Scalia, J., dissenting).

411. See *Kiryas Joel*, 114 S.Ct. at 2505-16 (Scalia, J., dissenting).

Justice Scalia called the Court's *Texas Monthly* decision a "judicial demolition project" and characterized the assertion of Justices Brennan and Blackmun that government may not convey a message of endorsement of religion as a "bold but insupportable assertion."<sup>412</sup> He accused Justice Brennan of "completely block[ing] off the already narrow channel between the Scylla [of what the Free Exercise Clause demands] and the Charybdis [of what the Establishment Clause forbids] through which any state or federal action must pass in order to survive constitutional scrutiny."<sup>413</sup> He interpreted Justice Brennan's opinion to say that what the Free Exercise Clause does not require, the Establishment Clause disallows.<sup>414</sup> He emphasized that the Court had often made clear that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause."<sup>415</sup>

Justice Scalia stated that the lack of breadth of coverage, relied upon so heavily by Justice Brennan to invalidate the sales and use tax exemption, is irrelevant in evaluating a law, the very purpose of which is to accommodate religion and which by definition singles out religion.<sup>416</sup> He asserted that in the "accommodation" context, an exemption meets the *Lemon* criteria if it has the "purpose and effect of 'limiting governmental interference with the exercise of religion.'"<sup>417</sup> Justice Scalia saw the sales and use tax as "interference with the dissemination of religious ideas" and the tax exemption as an alleviation of that interference which protected free exercise concerns and maintained the "necessary neutrality."<sup>418</sup>

Justice Scalia's dissent in *Kiryas Joel* is certainly no less favorable to legislative accommodation than his remarks in *Texas Monthly*.<sup>419</sup> He initially challenged the majority's two primary premises for finding that the exemption amounted to an establishment, maintaining that the school district does not repose governmental power in a religious group (at least not any more than making states of Utah and New Mexico)<sup>420</sup> and that the New York legislature did not discriminate on the basis of religion in enacting the special school district; the secular basis for the law lay in providing special education to disabled children in a community where all the unimpaired

412. *Texas Monthly*, 489 U.S. at 29-30 (Scalia, J., dissenting).

413. *Id.* at 42 (quoting *Thomas*, 450 U.S. at 721 (Rehnquist, J., dissenting)).

414. *Id.* Justice Brennan's answer to Justice Scalia's assertion is that benefits can be conferred on religion without being mandated by the Free Exercise Clause (suggesting there is no Scylla and Charybdis), but Justice Brennan's test is contradictory, or at least confusing, because he uses the phrase "conduct protected by the Free Exercise Clause" to describe the type of conduct which legislative accommodations can legitimately protect. *See id.* at 18 n.8.

415. *Id.* at 38 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)).

416. *Id.* at 39-40.

417. *Id.* at 40 (quoting *Amos*, 483 U.S. at 339).

418. *Id.*

419. *See Kiryas Joel*, 114 S.Ct. at 2505-16 (Scalia, J., dissenting).

420. *Id.* at 2507.

children attend private school.<sup>421</sup> Justice Scalia argued further that even if the special school district law had been enacted by the New York legislature “to create a special arrangement for the Satmars *because* of their religion . . . it would be a permissible accommodation.”<sup>422</sup> To support this point he detailed the long history of religious accommodation by Congress and the history of Court acknowledgement of the permissibility of those accommodations before attacking the particular points of dispute between himself and the majority and concurring opinions.<sup>423</sup> Unfortunately, Justice Scalia’s opinion sheds no additional light on the extent of the governmental burden necessary to justify legislative accommodation. It is possible that Justice Scalia thought the burden imposed by laws requiring education for the disabled to be too obvious to merit comment, but it is more likely that he passed the opportunity to comment about burdens because the majority opinion expressly concedes that it is *not* the special district’s facilitation of religion that creates the constitutional problem in the case.<sup>424</sup>

The burden imposed by the NLRA’s endorsement of collective bargaining, union shop provisions and labor strikes will almost certainly be severe enough to justify some level of accommodation under Justice Scalia’s formulation. The only real issue would be whether the proposed accommodations offend the Establishment Clause in going beyond what is necessary to relieve the burden imposed. Unfortunately, Justice Scalia’s dissents in *Texas Monthly* and in *Kiryas Joel* provide little guidance about where exactly he would draw his line of deference to the legislature on issues of religious accommodation. For now all we know with any certainty is that the sales and use tax exemption at issue in *Texas Monthly* and the special district created in *Kiryas Joel* did not sufficiently establish religion to raise concerns in Justice Scalia’s mind. It may well be that Justice Scalia’s ultimate test, and one entirely consistent with *Smith*, will involve only one inquiry—does the legislative exemption alleviate a government-imposed burden on religion? The central problem with Justice Scalia’s formulation is, as he acknowledges, that “[i]t is not always easy to determine when accommodation slides over into promotion, and neutrality into favoritism . . . .”<sup>425</sup> Justice Scalia determined that the tax exemption at issue in *Texas Monthly* fell on the accommodation and neutrality rather than on the promotion and favoritism side of the line, not by *drawing* the line, but by determining that the exemption was only “narrowly distinguishable” from other tax exemptions that the Court had held were mandated by the Free

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421. *Id.* at 2509-11.

422. *Id.* at 2511.

423. *Id.* at 2511-14. Justice Scalia specifically cites to the Court’s opinion in *Amos* for the proposition that it is “a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” *Id.* at 2512 (quoting *Amos*, 483 U.S. at 335).

424. *Id.* at 2498.

425. *Texas Monthly*, 489 U.S. at 40.

Exercise Clause.<sup>426</sup> He reasoned that because “the exemption comes so close to being a constitutionally required accommodation, there is no doubt that it is at least a permissible one.”<sup>427</sup> It is interesting to note that no such justification appears in *Kiryas Joel*—all the Justices appear to assume that the special district would be valid except for its preference of a particular religious sect or the very political implications of the school district’s boundaries.

As described earlier, Professor Mark Tushnet’s broad description of “governmental burden”<sup>428</sup> is probably true of Justice Scalia’s accommodation philosophy at least as that philosophy has become apparent by virtue of the accommodations he would uphold. Under Justice Scalia’s model, then, all that must be done to justify an “accommodation” is to find a web of government regulations that makes it slightly more difficult for a believer or church to practice a belief so that the statute in question can be said to alleviate this “interference.”<sup>429</sup> It makes sense that the Court, and especially Justice Scalia, will move toward removing legislatively granted exemptions from the realm of “presumptively impermissible favoritism for religion,” because this is consistent with what the Court accomplished in *Smith*, which was to make “virtually all special and positive treatment of religion a matter of political discretion.”<sup>430</sup> The goal of the conservative members of the Court appears to be neither to favor nor to disfavor religious interests, but rather to expand the zone of permissibility between the Free Exercise Clause and the Establishment Clause so as to allow the legislature to favor or disfavor religious interests as it pleases. This expansion of legislative freedom under the Constitution would create a favorable climate for judicial approval of the proposed NLRA accommodation.

## 2. Accommodation Model 2: Endorsement<sup>431</sup>

Justices O’Connor and Blackmun concurred jointly in both *Amos* and *Texas Monthly*. Justice O’Connor wrote the joint opinion in *Amos* approv-

426. *Id.* at 41-42. Justice Scalia discussed *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (holding it unconstitutional to apply a municipal license tax on door-to-door sellers of religious books and pamphlets) and *Follett v. McCormick*, 321 U.S. 573 (1944) (holding a municipal license tax on book sellers unconstitutional as applied to sellers of religious books).

427. *Texas Monthly*, 489 U.S. at 42. If the method for determining whether a statute is a neutral accommodation of religion or a promotion of religion is to determine whether it “comes close” to being constitutionally required, then *Smith* makes this method even more unworkable than it first appears. In *Smith*, Justice Scalia’s majority opinion held that exemptions from generally applicable, facially neutral laws are *almost never* constitutionally required. *Smith*, 494 U.S. at 879-82.

428. See Tushnet, *supra* note 8, at 1710.

429. *Id.* See also *supra* text accompanying notes 397-400.

430. Lupu, *Discretionary Accommodation*, *supra* note 6, at 573; see also Lupu, *Accommodation Trouble*, *supra* note 6, at 754.

431. The primary proponent of this view is Justice O’Connor. There is some information from *Kiryas Joel* and *Allegheny County* which would also place Justices Souter, Ginsburg, and Stevens among those favoring this perspective. See *supra* text accompanying note 406.

ing of the legislative exemption for religion under Title VII, but taking exception to the majority's expansive view of accommodation under the Establishment Clause.<sup>432</sup> Justice Blackmun wrote the joint opinion in *Texas Monthly*, in which both Justices struck down the sales and use tax exemption for religion while at the same time taking a more expansive view of accommodation than the one set out in Justice Brennan's opinion.<sup>433</sup>

Justices O'Connor and Blackmun clearly favor a legislative role in accommodating religion.<sup>434</sup> Like the Justices following conservative Model 1, these Justices would ease the tension between the Free Exercise and Establishment Clauses, but like the Justices following liberal Model 3, they would accord more weight to establishment concerns than would the conservatives espousing Model 1. To Justice O'Connor, it is not enough that the legislature, in enacting an accommodation, is seeking to lift a burden imposed by government. She views such an inquiry as critical, but still merely a first step in accommodation analysis. A second step would ask whether the accommodation carries a message of endorsement. Such a message would be conveyed by a legislative exemption for religion if religion is singled out for preferential treatment. An accommodation *solely for religion* without any other exemptions for substantial secular interests under a generalized legislative scheme, for example, would require exacting scrutiny by the judiciary in the Justice O'Connor's mind. This view of accommodation finds explicit support in Justice O'Connor's concurrence in *Amos* and Justice Blackmun's concurrence in *Texas Monthly*.

In *Amos*, Justice O'Connor expressly stated that an expansive establishment analysis is triggered only after demonstration of an "identifiable burden on the exercise of religion."<sup>435</sup> She then articulated her view of how to apply the endorsement standard—a proposition tested by asking whether the exemption would be "perceived" as an endorsement "by an objective observer, acquainted with the text, legislative history, and implementation of the statute."<sup>436</sup> To Justice O'Connor, the exemption for religion under Title VII at issue in *Amos*, was appropriate for a religion's *non-profit* activities because an objective observer should perceive that a religion's non-

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432. See *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

433. See *Texas Monthly*, 489 U.S. at 26 (Blackmun, J., concurring).

434. Justice O'Connor's view that "endorsement" envisions a role for the legislature was re-emphasized in her strident defense of endorsement (which Justices Blackmun and Stevens joined) against Justice Kennedy's challenge in *Allegheny County* that endorsement was hostile to religion. *Allegheny County*, 492 U.S. at 631-32. Justice O'Connor stressed that government can "acknowledge" religion in numerous ways that do not amount to endorsement, and can "accommodate" religion by lifting government-imposed burdens on religion. *Id.* at 631 (emphasis added). Further, she criticized Justice Kennedy for using acknowledgement and accommodation interchangeably and explained that *Allegheny County* is not an accommodation case, which might implicitly receive more favorable constitutional treatment, because "Allegheny County has neither placed nor removed a governmental burden on the free exercise of religion . . ." *Id.* at 632.

435. *Amos*, 483 U.S. at 348 (O'Connor, J., concurring) (emphasis omitted).

436. *Id.*

profit activity will itself be involved in the organization's religious mission.<sup>437</sup> The issue remains open regarding whether a religion's profit-making enterprises can be exempted since they are not likely to be perceived by an objective observer to be as directly involved in the organization's religious mission, and thus not viewed as a true accommodation.

In *Texas Monthly*, Justice Blackmun, more tersely and without mentioning endorsement expressly, agreed to strike down the sales and use tax exemption for religion because the accommodation was limited to the sale of religious literature by religious organizations.<sup>438</sup> Accordingly, Justice Blackmun stated that "Texas engaged in preferential support for the communication of religious messages."<sup>439</sup> This analysis recalls Justice O'Connor's opinion in *Amos*. And it is easy to see that the exemption in *Texas Monthly* would not pass muster under an endorsement analysis since an objective observer would view an *exclusive* accommodation for religion under a generally applicable statute to convey government preference for religion. To aid in determining where an appropriate line should be drawn, Justice Blackmun concluded that the Texas law might be upheld if simply extended to allow an exemption for "the sale of atheistic literature distributed by an atheistic organization."<sup>440</sup> Taking the *Amos* and *Texas Monthly* concurrences together reveals two "endorsement" concerns in an accommodation context: First, a concern for preferring religion over other legitimate secular interests (*Texas Monthly*); and second, a concern for accommodations that may be perceived as enabling religions or religious entities to do more than merely practice religion (*Amos*)—again, an exemption viewed as establishing a preference rather than providing an accommodation for religion.

The proposed NLRA amendment can be justified under an endorsement theory of accommodation. With respect to the endorsement concern that religion not be preferred over other legitimate secular interests, the proposed amendment differs substantially from *Texas Monthly's* sales and use tax exemption. The proposed amendment would only include religion as one of a variety of interests shielded from the NLRA's provisions. An objective observer generally acquainted with the NLRA, its provisions, its purpose, and its history, knows that there are a host of exclusions, both secular and nonsecular, from many of the NLRA's provisions. In particular, and as discussed in Part II, there are a variety of interests accommodated under the particular provisions of the NLRA that will be affected by the proposed accommodation.<sup>441</sup> Section 8(a)(3) strongly accommodates

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437. *Id.* at 349.

438. *Texas Monthly*, 489 U.S. at 26.

439. *Id.* at 28.

440. *Id.* at 29.

441. This analysis may be more narrow than necessary. Nothing in Justice O'Connor's statements about endorsement suggests that the objective observer is limited to considering the purpose and history



“federalism” by allowing individual states to declare themselves “right to work” states under section 14(b).<sup>442</sup> Section 8(a)(3) has also been read to bow to the political free speech preferences of workers in a unionized setting.<sup>443</sup> The notion of “exclusivity” may be required to bend in some settings also to free speech interests. The NLRA’s protection of the strike, and particularly its policy that parties to a strike should be left to the “free play” of market forces, has bowed to state laws providing unemployment benefits to strikers and to a Supreme Court interpretation of the Act allowing employers to hire permanent replacements for striking employees.<sup>444</sup> Finally, private labor agreements are required to comply with and be understood alongside any number of federal statutory requirements.<sup>445</sup> Those contracts are also subsidiary to the NLRA itself, which dictates the scope of those agreements.<sup>446</sup>

Admittedly, the proposed accommodation amendment would be enacted solely to benefit religion. Viewed as a single legislative measure the accommodation would not appear as one in a list of various exemptions. Nor would the exemption be enacted as a general measure, not mentioning religion on its face, but including religion within its meaning. In this regard, a strict reading of the concurrences in *Amos* and *Texas Monthly* might cause the proposed accommodation some problems because those opinions arguably require analysis of the religious accommodation *itself* to determine whether it comparably treats secular interests as well.<sup>447</sup> Such a limited analysis of legislation was appropriate in *Texas Monthly* since the tax scheme and the accommodation were enacted simultaneously. However, when an accommodation for religion is passed as an amendment to a general law like the NLRA which has existed for some sixty years, it would be unrealistic and inexact to view the accommodation alone without analyzing

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of the particular provisions affected by any accommodation. The proposed amendment does exactly this, but Justice O’Connor’s observer may be allowed to analyze the scope of *all* exclusions across the entire breadth of the statute. Thus, for example, although none of the religious objectors that are the focus of this Article were burdened by section 8(a)(1) of the Act or the way the section has been construed, a substantial limitation of section 8(a)(1) has been written into the Act to accommodate the free speech interests of employers. While section 8(a)(1) prohibits employers from interfering with the exercise of employees’ section 7 rights, section 8(c) provides that employer expressions, arguments or opinions shall not constitute or be evidence of an unfair labor practice under the NLRA so long as they contain no “threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(a)(1) and § 158(c) (1994). The language of section 8(c), according to the Supreme Court in *NLRB v. Gissel Packing Co.*, “implements the First Amendment.” 395 U.S. 575, 617 (1969).

442. 29 U.S.C. § 164(b) (1994).

443. See *Communication Workers of America v. Beck*, 487 U.S. 735 (1988).

444. See, e.g., *New York Telephone Co. v. New York State Dep’t of Labor*, 440 U.S. 519 (1979); *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938).

445. See Finkin, *supra* note 216, at 188-89.

446. *Id.* at 189.

447. *Texas Monthly*, 489 U.S. at 27-28. Justice Blackmun’s analysis focuses consistently on the accommodation “statute.” Commentators like Michael McConnell have referred instead to the “government program” in analyzing the array of beneficiaries and interests. See McConnell, *Update, supra* note 6, at 698-99.

and comparing the NLRA's historical exemptions. Moreover, the concurrences in *Texas Monthly* and *Amos* must be read against the backdrop of a test which uses "endorsement" as its label. The objective observer, about whom Justice O'Connor writes, must not only be acquainted with the text, legislative history, and implementation of the *accommodation* statute, but must have the same acquaintance with the *general* statute to which the accommodation will pertain. It is only familiarization with the entire regulatory scheme which will allow the observer to judge whether the accommodation indeed lifts a burden—a critical inquiry under accommodation analysis generally and endorsement analysis in particular. Even if a limited view of the objective observer test is the one favored by Justice O'Connor, a recitation of the other prevailing accommodations in the legislative history and purpose statement of the accommodation bill would serve to apprise the objective observer.<sup>448</sup> And, since the proposed amendment requires the NLRB to assess both the level of government involvement and the level of exclusion for secular interests from the NLRA's requirements, it is crafted specifically with Justice O'Connor's objective observer in mind. Indeed, the proposed accommodation could be labelled the "endorsement" amendment since it takes the critical elements of Justice O'Connor's test and incorporates them into the accommodation amendment's requirements. Finally, if the amendment can withstand review under O'Connor's endorsement test for legislative exemptions, it will pass constitutional muster since her test is more rigid than the standard that would be imposed by at least four other Justices.

### 3. Accommodation Model 3: Modified Lemon<sup>449</sup>

A strict application of *Lemon* (at least in its articulated and sometimes enforced form) would serve to invalidate virtually any statutory religious exemption from generally applicable laws.<sup>450</sup> Although Justice Brennan faithfully followed *Lemon* in striking down *Texas Monthly's* sales tax exemption for religion, he expressly emphasized that he "in no way suggests

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448. What about the nonobjective observer? Why would a First Amendment Establishment Clause analysis not focus on the "perceived" impact of the accommodation on an affected nonbeneficiary? In the case of the proposed accommodation, for example, some nonobjective observers might be union members required to pay dues and fees without exception. Would they believe an accommodation for a fellow religious employee is a government endorsement of religion? Or would they, after *TWA v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989); *Beck*, 487 U.S. 735 (1988); and *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985); merely perceive the accommodation in a holistic sense as a further secularly-motivated diminution of union power by government?

449. This model, enunciated by Justice Brennan in *Texas Monthly*, was approved by Justices Marshall and Stevens, who joined the opinion in that case. Accordingly, the view's only known advocate today would be Justice Stevens, who arguably has shifted to "endorsement." See *supra* text accompanying note 406. This model serves as the focus for one of Michael McConnell's more recent articles (from which I borrow generously) in support of the "accommodationist" view. See McConnell, *Update, supra* note 6, at 712.

450. See *supra* note 344 and accompanying text.

that *all* benefits conferred exclusively upon religious groups . . . are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause.”<sup>451</sup>

Justice Brennan expressed the view in *Texas Monthly* that the exemption was not justified by any proof that religious belief was indeed burdened and found that the exemption violated all three prongs of the *Lemon* test.<sup>452</sup> In addition to finding the accommodation unsupported by proof that religion was burdened by the sales tax, Justice Brennan contended that the exemption was not broad enough. Because it did not provide benefits to a “wide array of nonsectarian groups as well as religious groups,” the exemption lacked the secular purpose and effect mandated by the Establishment Clause.<sup>453</sup> According to Justice Brennan, the tax exemption, in effect a subsidy, was not required by the Free Exercise Clause, burdened nonqualifying taxpayers, and did not “remov[e] a significant state-imposed deterrent to the free exercise of religion,” and therefore was an impermissible state sponsorship of religion.<sup>454</sup>

As mentioned before, Justice Brennan offered three examples, two from past Supreme Court decisions, which he believed would be justified as legislative exemptions for religion even though accommodation would not be mandated under the Free Exercise Clause.<sup>455</sup> He also set out his standard for constitutionally valid legislative accommodations for religion. Justice Brennan’s standard is disjunctive, suggesting two scenarios under which an accommodation will be proper: he initially maintains that a legislature can act to exempt religion if it is seeking to lift a burden that 1) “significantly deters” conduct protected by the Free Exercise Clause *or* 2) presents a “demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause” *or* 3) is a “potentially serious encroachment on protected religious freedoms.”<sup>456</sup>

Justice Scalia interpreted this articulation of an accommodation test to be in line with a rigid view of *Lemon*, so that what the Free Exercise Clause does not require, the Establishment Clause disallows.<sup>457</sup> Justice Scalia’s analysis, however, is contradicted by Justice Brennan’s introductory statement in footnote eight indicating that some benefits to religion are valid even though not mandated by the Free Exercise Clause.<sup>458</sup>

Michael McConnell has expressly interpreted Justice Brennan’s statement to be less rigid than Justice Scalia asserts. McConnell takes Justice

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451. *Texas Monthly*, 489 U.S. at 18 n.8.

452. *See id.* at 7.

453. *Id.* at 14-15.

454. *Id.* at 15.

455. *See supra* notes 407-08 and accompanying text.

456. *Texas Monthly*, 489 U.S. at 18 n.8.

457. *See supra* notes 413-14 and accompanying text.

458. *Texas Monthly*, 489 U.S. at 18 n.8.

Brennan's meaning contextually and indicates that Justice Brennan is calling for an inquiry into whether "the effect [of the exemption] is to remove a significant obstacle to the exercise of a religious belief adopted independently of the government action . . ." <sup>459</sup> In other words, McConnell would ask whether the exemption is indeed an accommodation (viewed as such if the burden relieved is substantial) or whether the government action is rather an inducement of religious belief. <sup>460</sup> In McConnell's view, this inquiry takes place without any reference to the Free Exercise Clause.

The second part of Justice Brennan's test is clearly a departure from the strictures of *Lemon*. Brennan suggests that even if the burden on religion created by a generally applicable law is not "grave," "significant," or "serious," an exemption from the law in favor of religion may be constitutionally valid if it allows individuals "to act according to their religious beliefs" without imposing "substantial burdens on nonbeneficiaries." <sup>461</sup> Justice Brennan also suggests, earlier in his opinion, that an exemption is appropriate if it is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end. <sup>462</sup>

Justice Brennan's opinion in *Texas Monthly* thus sets out three ideas which independently could serve to justify a legislative accommodation under the NLRA that would not violate the Establishment Clause. First, an exemption will be valid if neutral on its face and secular in its purpose, but incidentally benefitting religion. Second and foremost, an exemption will be valid if it alleviates a grave, serious, or significant burden on religion, presumably even if there is some impact on nonbeneficiaries. Finally, an exemption will be valid if it merely frees religious activity and has little or no impact on nonbeneficiaries. <sup>463</sup>

Justice Brennan's standard may pose an insurmountable challenge for accommodation of religion under the NLRA. Certainly Justice Brennan's

459. McConnell, *Update*, *supra* note 6, at 700.

460. *Id.*

461. *Texas Monthly*, 489 U.S. at 18 n.8.

462. *Id.* at 14-15.

463. See *supra* note 447. In analyzing an accommodation under Justice Brennan's *Texas Monthly* test, McConnell somewhat changes the view articulated by Justice Brennan. McConnell would first review the "array of beneficiaries" entitled to exemption by the legislature. According to McConnell, if a government program is "wholly neutral in offering . . . assistance to a class defined without reference to religion," it is not necessary to carry the analysis any further—the action is legitimate. McConnell, *Update*, *supra* note 6, at 699 (citation omitted). If there is no array of beneficiaries, McConnell would then proceed, as Justice Brennan does, to inquire whether the exemption is an inducement and whether the exemption has an impact on nonbeneficiaries. *Id.* at 700-05. McConnell is unclear about which combination of these last two requirements is sufficient to establish the constitutional validity of a legislative exemption. Presumably, if the exemption can be determined not to be an inducement and not to have an impact on nonbeneficiaries, then the exemption is valid. However, my reading of Justice Brennan is different. It seems to me that Justice Brennan is suggesting that a religious accommodation may be valid without further inquiry if it relieves some government burden and has very little or no impact on nonbeneficiaries. This reading makes Justice Brennan's test a variety of tests actually—all independent of each other.

standard, read strictly, would seem to oppose any *expansive* accommodation of religion not mandated by the Free Exercise Clause. However, Justice Brennan does admit there is room between free exercise and establishment sufficient for some legislative action. The following, then, are a few arguments that would place the proposed accommodation in its best possible posture for an analysis under Justice Brennan's test.

a. *The "broad and neutral exemption" test*

The proposed accommodation would be valid to Justice Brennan if it conferred an exemption on a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end.<sup>464</sup> Justice Brennan's articulated requirement for the accommodation statute itself may be too rigid to include the NLRA accommodation amendment within this construct. Justice Brennan clearly requires under this test that the legislative enactment be neutral in its phrasing and secular in its purpose, only incidentally benefitting religion. The proposed optimal accommodation singles out religion for a benefit, has no secular purpose, and viewed by itself does not benefit any nonsectarian groups. Accordingly, the accommodation is most likely invalid under this formulation.

However, a reading beyond the exact text of Justice Brennan's test reveals a truer concern on his part—that the government not be seen as favoring religion. It is possible that his test was worded with the facts of *Texas Monthly* in mind—facts which show that the taxing scheme and the exemption for religion were enacted simultaneously. Thus, Justice Brennan's requirement that the statute itself be reviewed to isolate similar exemptions for nonsectarian groups makes sense. But how would Justice Brennan phrase his test if faced with an exemption for religion that is an amendment to a long-standing law, like the NLRA, with a history of similar accommodations for nonsectarian interests?

It would seem to me that Justice Brennan, not a strict constructionist, might actually change his rigidly worded statement in *Texas Monthly* to conform to the different facts presented by a religious accommodation amendment to the NLRA. Such a change would reflect his real concern, preference for religion, and would allow him to decide whether the accommodation statute when viewed with the regulatory scheme *as a whole* prefers nonsecular over secular interests. If Justice Brennan could bend his test, the analysis would be similar to that which is outlined under accommodation model 2—the only difference being one of perspective; Justice O'Connor's "endorsement" standard requires the comparison between secular and nonsecular exemptions to be made by an "objective" observer, and Justice Brennan's "*Lemon*" formulation requires a judicial weighing of the various exemptions. The perspective should not change the outcome sub-

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464. See *Texas Monthly*, 489 U.S. at 18 n.8.

stantially since judges are facile with objective tests, although arguably a judge, more familiar with the way in which the NLRA is interpreted in general and more familiar with the class struggle embodied in the legislation since it is played out in court at a very real level, may be more likely to distinguish between a governmental-legislative preference for religion and a governmental-legislative nonpreference for labor unions in general and collective bargaining, the strike, and the union shop in particular.

*b. The "grave or serious burden" test*

The proposed accommodation would be independently valid to Justice Brennan even if it does not benefit an array of secular and nonsecular interests if it acts to lift a grave, serious or significant burden on religion.<sup>465</sup> Since *Smith*, no exemptions are required by the Free Exercise Clause unless a general law is specifically targeted to place a burden on religion.<sup>466</sup> Therefore, constitutional validity of an accommodation under this alternative may no longer be possible except for cases presenting the exact facts of *Sherbert v. Verner*<sup>467</sup> and *Wisconsin v. Yoder*.<sup>468</sup> However, if Justice Brennan's test has survived *Smith*, it will probably require a showing that the government-imposed burden on religion is substantial enough to have required accommodation under the *Sherbert* Free Exercise standard (i.e., a pre-*Smith* mandatory accommodation of the type now arguably required by the Religious Freedom Restoration Act<sup>469</sup>) or that the burden is similar to those which have been the subject of valid legislative accommodations in the past.

Whether the religious burden created by the union shop, exclusivity, collective bargaining, and strike provisions and protections that are a part of the NLRA is sufficient to require a "mandatory" free exercise exemption under a *Sherbert* analysis will depend upon how comparable the NLRA-imposed burden is to those burdens requiring relief in *Sherbert* and *Yoder*. In *Sherbert*, the Court held that a state's unemployment compensation could not be denied to a woman who failed to qualify for them because she refused Saturday work in order to be faithful to her religious beliefs.<sup>470</sup> In *Yoder*, the Court held that a state could not require, through criminal punishment, Amish children to attend school in violation of the Old Order Amish Religion's belief that high school attendance would endanger the salvation of Amish children.<sup>471</sup>

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465. *Id.*

466. See Laycock, *supra* note 4, at 41.

467. 374 U.S. 398 (1963).

468. 406 U.S. 205 (1972).

469. 42 U.S.C. § 2000b (1994).

470. See *supra* text accompanying notes 22-34; *Sherbert*, 374 U.S. at 410.

471. *Yoder*, 406 U.S. at 209-13.

The religious interests involved in *Sherbert* and *Yoder* cannot meaningfully be distinguished from the religious interests invoked by those whose religious beliefs and rituals are negatively impacted by collective bargaining, union strike rights, or the requirement that they pay the equivalent of union dues and fees or otherwise support a labor union. Although the evidence of religious burden presented in *Yoder* was quite impressive,<sup>472</sup> almost no evidence regarding depth of belief or sincerity was set out in *Sherbert*; the Court relegated its analysis of the religious interest to a footnote describing the plaintiff's belief that her Saturday Sabbath, as mandated by the Seventh Day Adventist religion's beliefs, is holy and therefore inconsistent with work on that day.<sup>473</sup>

What has been used primarily to distinguish *Sherbert* and *Yoder* from other claims for Free Exercise exemptions is the state's interest. Most courts unwilling to find similar exemptions for religion as a matter of constitutional law have exaggerated the consequences to the religious objectors and have minimized the state's interest in *Sherbert* and *Yoder* as compared to the consequences and governmental interest involved in the cases before them.<sup>474</sup> This emphasis on interests other than religion used to distinguish *Sherbert* and *Yoder* is especially characteristic of federal court reasoning in virtually every case in which a religious objector has claimed that the Free Exercise Clause mandates an exemption from dues payment under the NLRA. For example, in *Linscott v. Millers Falls Company*,<sup>475</sup> the First Circuit denied a dues payment exemption for a Seventh Day Adventist pursuant to the Free Exercise Clause because the state's interest in the union shop is strong, claiming "industrial peace" as its underlying justification.<sup>476</sup> By contrast, the state's interest in *Sherbert* was merely the monetary cost incurred in providing unemployment benefits.<sup>477</sup> The court in *Linscott* also distinguished the consequences to the plaintiff in *Sherbert*, who faced a denial of physical sustenance, from the consequences to the religious objector before it, who merely faced the prospect of work in a nonunion shop—"less remunerative," according to the court, but not "absolute destitution."<sup>478</sup> This weighing of interests and attempt to distinguish *Sherbert* has been followed unquestioningly by virtually every federal court facing the issue.<sup>479</sup>

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472. The *Yoder* Court sets out in detail at the outset of its opinion the reasons and the depth of sincerity underlying Amish objection to compulsory high school attendance. 406 U.S. at 209-13 (relating Amish history, detailing the burdens of Amish life, explaining the conflict between high school and Amish values, and summarizing psychiatric evidence about compulsory education's psychological harm to Amish children).

473. *Sherbert*, 374 U.S. at 399 n.1.

474. See *supra* text accompanying notes 22-34.

475. 440 F.2d 14, 17-18 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

476. *Id.* at 17.

477. *Id.* at 18.

478. *Id.*

479. See, e.g., *Gray v. Gulf, M. & O. R.R.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); *Hammond v. United Papermakers & Paperworkers Union*, 462 F.2d 174, 175 (6th Cir.),

Justice Brennan only writes about the burden on religion in discussing the legitimacy of a legislative religious accommodation. Presumably, then, if the sincerity of the NLRA religious objectors is unquestioned, there is no way to distinguish the religious burden imposed by the NLRA from that imposed by state unemployment compensation laws and from state truancy laws. One might, as earlier federal courts did, try to distinguish the NLRA imposition from the imposition of unemployment compensation and truancy laws by focusing on the consequences to the objector.<sup>480</sup> However, even if "absolute destitution" resulting from the denial of unemployment benefits is more onerous than "less remuneration," how does "less remuneration" compare to the possible consequences in *Yoder*? That comparison has not yet been made in a federal court.

Since in determining the validity of a legislative accommodation, Justice Brennan focuses on the importance of the religious interest, with no statement concerning the state's interest, he must be acknowledging that the state interest in the general regulatory scheme has already been evaluated by the legislature, and that any accommodation in favor of religion necessarily reflects an appropriate balancing of state and religious interest. Thus, the only question to be asked when reviewing a legislative exemption for religion is whether the religious imposition is serious. A weighing of the state's interest vis-a-vis the religious liberty is unnecessary since it would have already been accomplished by the legislators enacting the amendment. If the above is accurate, then federal case law following *Sherbert* is entirely inapposite since all federal cases following *Sherbert* reflect a weighing of both a religious interest and a nonsecular state interest.

If Justice Brennan's test merely focuses on the religious interest that is accommodated by statute then the test will certainly be met if the interest can be substantially likened to the religious liberties at odds with general regulatory schemes in *Sherbert* and *Yoder*. The proposed accommodation amendment can be analyzed in this manner. Although the amendment itself is a general accommodation, it meets Justice Brennan's "substantiality" test in two ways: first, the amendment itself requires a burden shift only after sincerity of belief is established. After sincerity is established, a religious objector's only hope of securing an accommodation lies in framing the proposed exemption to include the policy and constitutional concerns that any court would have with respect to the general regulatory scheme. Second, Justice Brennan's "substantiality" test is met if one considers the particular

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*cert. denied*, 409 U.S. 1028 (1972); *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 403-04 (6th Cir. 1974), *cert. denied*, 445 U.S. 928 (1980). No Free Exercise claims were made by NLRA religious objectors after 1974 because the objectors, probably frustrated by continuous defeats on a constitutional level, chose instead to pin their hopes on the religious accommodation provisions of Title VII. As a result, no federal court denying a religious exemption under the NLRA has had to face an argument based on *Yoder*.

480. *Linscott*, 404 F.2d at 17-18.



instances of conflict between religious liberty and NLRA or RLA statutory requirements. For example, in Larry Hardison's case, the conflict between seniority requirements and his Sabbath should compare favorably with the religious interest in *Sherbert*, which also involved the conflict between a general scheme and the religious objector's Sabbath day.

*c. The "no impact on nonbeneficiaries" test*

Justice Brennan has stated that a religious exemption would be valid if it freed religious exercise and had little or no impact on nonbeneficiaries.<sup>481</sup> Arguably, a general accommodation would have an impact on members of a bargaining unit who are not also members of the religion being allowed an exemption. The only way to analyze the impact is to view it in reference to the scenarios of conflict between religion and the NLRA discussed earlier in this Article. In Larry Hardison's case, the impact of an accommodation would be felt by the employer, who might have a critical position be unfilled for one day per week, or other union members, who would have to forfeit seniority to fill Larry's weekly vacancy. An accommodation would clearly have an impact on nonbeneficiaries in Larry's case if the above two accommodations are viewed to be required by the NLRA accommodation amendment. And they might be, unless Larry can be accommodated by the third option discussed in *TWA v. Hardison*—a job swap with another employee. If the job swap is voluntary between the two employees, which one must assume it is, then the only impact on nonbeneficiaries will be the residual impact on the TWA seniority plan, which would have to yield to the job swap as a matter of federal law.

In Maurice Wilson's and Beatrice Linscott's cases, an accommodation might allow for a complete exemption from paying union dues and fees. The impact on nonbeneficiaries would be manifested by the classic "free rider"—union members would argue that Maurice and Beatrice benefit from union advances in the workplace without paying their fair share of the cost of those advances. Their free riding has an impact on nonbeneficiaries by presumably increasing the amount that each union member has to pay by virtue of Maurice's and Beatrice's exemptions. However, Maurice and Beatrice would not technically be free riders if the exemption would allow the union to sever any ties with them (an exemption from section 9's "exclusivity" requirement). The union would not have to grieve their complaints, for example, because Maurice and Beatrice would have a direct and unfettered path to management to discuss any possible complaints. Maurice and Beatrice would not use the union's resources and thus their exemptions should not have the effect of increasing dues and fees for others.

And what of Carole Katz? Would the creation of a barrier to traditional strike rights to workers at Jewish cemeteries have an impact on

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481. See *Texas Monthly*, 489 U.S. at 18 n.8.

nonbeneficiaries? Since the goal of a strike is to bring economic pressure on the employer in order to get the employer to accede to union demands at the bargaining table, a religious exemption that would diminish pressure on the employer has a negative impact on the union that goes to the effectiveness of the union's fundamental tool. Indeed, to the extent that religious pressure on an employer during a strike is a legitimate means of pressure, it must also be one of the most effective pressure points—a religious plea by cemetery patrons cannot simply be viewed as purely economic pressure. However, as argued earlier in Part II, religious pressure was probably not what Congress had in mind when it decided to leave the strike itself unregulated.<sup>482</sup> The free play of market forces—purely an economic idea—is not embodied by religious pressure. Indeed, the religious pressure arguably skews the playing field unfairly to the side of the union. If the strike which impinges religious conduct cannot be counted as an impact on nonbeneficiaries because it is legitimately regulated under NLRA principles, then it should also be excluded in any Establishment Clause analysis under Justice Brennan's formulation.

But can the same be said for making it more difficult for cemetery owners to lockout workers? Placing the onus on employers to perform timely burials during a lockout certainly has an impact on a cemetery owner who would have decided to shut down during the labor dispute. Of course, one might argue that placing the burden of timely burials on the party that initiates self-help does not eliminate the *right* to self help. But, despite this, and even if it can be said that placing a barrier in front of the right actually encourages peaceful resolution of disputes through collective bargaining, a secular goal, the accommodation still has an impact on nonbeneficiaries taking it out of the ambit of Justice Brennan's formulation.

A strict reading of Justice Brennan's test would result in almost no scenario under which a clash between religious liberty and the NLRA could be legitimately resolved in favor of the religious interest. The reason lies in the purposes and goals of the NLRA itself. Since the NLRA fundamentally empowers workers' representatives at the expense of individual worker liberties, an accommodation for individualized religious liberties will probably always affect other workers, the union, or the employer. However, a general exemption provision like the one proposed is intended to be applied in a reasonably malleable fashion, meaning that so long as the religious interest is absolutely accommodated, the accommodation can be tailored more or less to avoid an impact on nonbeneficiaries. The arguments forwarded above are arguably extreme—their adoption would require quite a bit of judicial deference to the idea of accommodation. Nevertheless, the *Smith*

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482. See *supra* text accompanying notes 181-82.

opinion suggests that deference should be accorded to legislative accommodations.<sup>483</sup>

#### IV. CONCLUSION

Attempts to accommodate religious liberty when it is impinged by the requirements and policies of the National Labor Relations Act have to date been mostly ineffective. Many times, no accommodation of religious liberty is required because the impingement on religion has been viewed by courts as relatively unimportant compared to the NLRA's goal of achieving labor peace. When attempts at accommodation have been made, they generally fail because they are underinclusive in that they are crafted only to aid majoritarian religions, they improperly weigh the religious interest involved by placing much greater emphasis on secular goals, or they are created in an inappropriate forum like a state legislature subject to preemption by the NLRA. A comprehensive review of labor law doctrine and its past conflicts with religious liberty reveals that an approach that better weighs the competing concerns by treating them as equals is both feasible and constitutional. Taking religious accommodation seriously seems to be the only prerequisite to making the NLRA less hostile to individual religious objectors.

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483. See generally *Employment Div. v. Smith*, 494 U.S. 872 (1990).