

PASTORAL POLITICS AND PUBLIC POLICY:
REFLECTIONS ON THE LEGAL ASPECTS OF
THE CATHOLIC BISHOPS'
PASTORAL LETTER ON WAR
AND PEACE*

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Taken as a whole, the Roman Catholic Bishops' 1983 pastoral letter on war and peace, "The Challenge of Peace, God's Promise, and Our Response"¹ has two purposes: first, to assist Catholics in the formation of their consciences; and, second, to contribute to the ongoing public policy debate concerning the morality of war in general, and of nuclear war in particular.² This article will address the stated purposes of and the suggestions made in the pastoral letter from the vantage point of American statutory and constitutional law. It will make no attempt to provide definitive legal answers to the many questions raised by and in the letter, for there are none in this complex and challenging area of law. Its purpose is to raise some of the practical legal and moral questions which are critical to the conscientious choices of the individuals to whom the letter is addressed: government officials, citizens, members of the armed services, workers in defense industries, clergy and religious and others.

The letter calls upon each person to whom it is addressed to "probe the meaning of the moral choices which are ours as Christians"³ respecting the issue of nuclear war, and states that peace "is the fruit of ideas and decisions taken in the political, cultural, social, military, and legal sectors of life."⁴ It correctly recognizes that conscientious choices are not made by individuals in a moral vacuum, but by "citizens [who] wish to affirm [their] loyalty to [their] country and

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1. National Conference of Catholic Bishops, *The Challenge of Peace, God's Promise and Our Response*, Washington, D.C. (May 3, 1983) [hereinafter cited in text as "pastoral letter" or "letter"].

2. *See id.* [hereinafter cited in notes as "The Challenge of Peace"].

3. *The Challenge of Peace* at ¶ 67.

4. *Id.* at ¶ 21.

its ideas" and who must also remain both "faithful to the universal principles proclaimed by the Church" and sensitive to the needs of the world as a whole.⁵

In keeping with this view, this article will sketch the structural framework of the American statutory and constitutional law which necessarily comes into play, formally or informally, whenever religiously motivated citizens or religious institutions act in the public sphere, or explicitly take action with legal effect and defend those actions on the basis of sincerely held religious beliefs or teachings. Part I discusses the constitutional and policy questions raised whenever organized religious groups explicitly seek to involve themselves in the political process. Part II discusses constitutional and statutory issues raised whenever individual believers seek exemptions from social or employer-imposed duties on religious grounds.

I. INTRODUCTION

Religious Freedom in American Law

American law has valued religious freedom as an essential element of individual liberty and civil society from its earliest beginnings. When the Pilgrims landed at Plymouth in 1620, they intended that the newly-formed Massachusetts Bay Colony would be as a biblical "city on a hill."⁶ In 1952 the late United States Supreme Court Justice William O. Douglas frankly recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being."⁷ The American people and their leaders have defended and fostered freedom of conscience as an important dimension of our understanding of religious freedom. Express legislative⁸ and judicial action has been taken to protect and continue the ongoing constitutional commitment⁹ to provide maximum protection for religious belief and

5. *Id.* at ¶ 326.

6. "Wee shall be [. . .] as a Citty upon a Hill, the eies of all people are uppon us; soe that if wee shall deal falsely with our god in this worke wee have undertaken and soe cause him to withdrawe his present help from us, wee shall be made a story and a by-word through the world." John Winthrop, "A Model of Christian Charity" (1630), a sermon delivered aboard the *Arbella*, quoted in D. BOORSTIN, *THE AMERICAN: THE COLONIAL EXPERIENCE* 3 (New York: Vintage Books, 1958).

7. *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952).

8. See, e.g., Virginia Declaration of Rights, Art. 16 (1776); Civil Rights Act of 1964, Title VII §§ 701(j), 702, 703(e)(1,2), 42 U.S.C. §§ 2000e, et seq., 78 Stat. 255 (employment discrimination); 20 U.S.C. § 4071, P.L. 98-377, 98 Stat. 1303 ("The Equal Access Act"); 29 U.S.C. § 169 (religious objections to union membership).

9. See, e.g., U.S. CONST. art. VI, cl.3, U.S. CONST. amend I; CAL. CONST. art. I, § 4 (West, 1983); FLA. CONST. art. I, § 3, 25A FLA. STATS ANN. art. I, § 3.

practice.

In the early years, protection for individual religious belief and conscience was seen as the logical extension of a theological and moral imperative. In his famous "Memorial and Remonstrance Against Religious Assessments,"¹⁰ James Madison argued that:

[R]eligion, or the duty we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The Religion then of every man must be left to the conviction and conscience of every man, and it is the right of every man to exercise it as these may dictate

. . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation to the claims of Civil Society.

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.¹¹

In Madison's view, it was critical that each individual should be responsible only to God for abuses of this freedom,¹² and that the rights of all religious believers and dissenters should be placed on an equal footing.¹³ This view was carried forward into his first draft of what later became the first amendment to the Constitution of the United States:¹⁴

The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.¹⁵

10. J. Madison, "Memorial and Remonstrance Against Religious Assessments" (1785) *quoted in*, *Everson v. Board of Education*, 330 U.S. 1, 63-72 (1947) (Rutledge, J., dissenting) [hereinafter "Memorial and Remonstrance"].

11. *Id.* at ¶ 1 (note in the original to "Va. Decl. Rights, Art. 16"). *Compare* *The Challenge of Peace* at ¶ 326.

12. *Id.* at ¶ 4.

13. *Id.*

14. U.S. CONST. amend. I provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

15. 1 ANNALS OF CONGRESS 434 (June 8, 1789), *quoted in* M.J. MALBIN, *RELIGION & POLITICS* 4 (1978). This version of the proposed amendment, along with one which would have prohibited the states from "violat[ing] the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases," went through several modifications before it emerged in its present form from a House-Senate conference committee comprised of Reps.

Although the language of Madison's proposal seems tailored specifically to accommodate the needs of the present-day conscientious religious dissenter,¹⁶ neither its author,¹⁷ nor the individual whose views have been most influential in shaping the contemporary American understanding of the constitutional guarantee of religious freedom, Thomas Jefferson,¹⁸ would have given it a particularly expansive reading in cases when religious belief was in clear conflict with the requirements of either the public order or the public welfare.¹⁹

In Jefferson's view, a clear distinction could be drawn between two aspects of religious liberty: belief and action. In his 1802 letter to the Danbury Baptists,²⁰ Jefferson stated that because "religion is a

James Madison (Va.), Roger Sherman (Conn.) and John Vining (Del.) and Senators Oliver Ellsworth (Conn.), Charles Carroll (Md.), and William Patterson (N.J.). The committee's language was accepted by the House and Senate on September 24-25, 1789, respectively. See *id.*, 13-14. The Senate had rejected an amendment which would have prohibited the states from infringing upon the equal rights of conscience. 1 ANNALS OF CONGRESS at 72 (Sept. 7, 1789), *Id.* at 13, note 34.

16. Compare text accompanying notes 80-95 *infra*.

17. A good statement of Madison's views on the extent to which sincerely held religious belief might be set up in opposition to government authority appears in Madison's 1832 Letter to Reverend Adams, in which he stated that "it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions and doubts on unessential points." Letter from James Madison to Reverend Adams (November, 1832), reprinted in IX THE WRITINGS OF JAMES MADISON 485 (G. Hunt ed. 1909), quoted in Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L. REV. 205, 223 (1980). Madison fully accepted the proposition that "no other rule exists, by which any question which may divide a society, can be ultimately determined, but the will of the majority" and felt that all believers were best served by an equality principle forbidding the "subjecting of some to peculiar burdens [and] granting to others peculiar exemptions." See "Memorial and Remonstrance," *supra* note 10, at ¶¶ 1, 4. It is particularly relevant to the present topic that Madison chose "the Quakers and Menonists" as examples of religious groups whose beliefs ought not to "be endowed above all others, with extraordinary privileges, by which prostelytes may be enticed from all others." *Id.* at ¶ 4. Compare text accompanying notes 77, 78, 81 *infra*.

18. Although Thomas Jefferson was not involved in the drafting of the first amendment, his views on the proper relationship of church and state form the starting point for contemporary analysis. Jefferson's letter of 1802 to the Danbury Baptists is the source of the now-famous metaphor, "a wall of separation between Church and State", which has influenced the outcome of nearly all cases involving the religion clauses since 1947. See, e.g., *Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203 (1948); *Everson v. Board of Education*, 330 U.S. 1 (1947). Whether the Jeffersonian view of "separation" is appropriate given the language and history of the first amendment is a topic beyond the scope of this article. Compare, *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479, 2508 (Rehnquist J., dissenting) with *id.* at 2481 (majority opinion per Stevens, J.).

19. See generally, Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U.L. REV. 57 (1976); MALBIN, RELIGION AND POLITICS, *supra*, note 15, at 25-29.

20. Letter of Thomas Jefferson to a Committee of the Danbury Baptist Association, (January 1, 1802), reprinted in A. KOCH & W. REDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332-33 (1944).

matter which lies solely between a man and his God . . . the legislative powers of government reach action only, and not opinions."²¹ This distinction, between beliefs, which are deserving of absolute protection, and religiously motivated actions, which may be regulated "when [religious] principles break out into overt acts against peace and good order,"²² has been accepted as a truism by most courts deciding cases involving religious freedom claims,²³ for Jefferson was "convinced that [man] has no natural right in opposition to his social duties."²⁴

The holdings of the United States Supreme Court on the topic since 1963 are somewhat inconsistent with the Jeffersonian view of deference to be accorded to religious conscience when it comes into conflict with legislatively determined social duty.²⁵ Although an exhaustive treatment of this issue is beyond the scope of this paper,²⁶ those cases do provide a good framework for analysis of the relevant constitutional principles to be applied when a religious liberty claim based on the pastoral letter is made by a member of one of the groups

21. *Id.*

22. J. BOYD, *THE PAPERS OF THOMAS JEFFERSON* 545 (1950), *quoted in* Little, *supra*, note 19, at 62, nn. 27-29.

23. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) where the Court stated:

[The Constitution] forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organizations or form of worship as the individual may choose cannot be restricted by law. . . . [Free Exercise] embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. . . . [The] freedom to act must have appropriate definition to preserve the enforcement of that protection. . . . [although] the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Where the distinction between belief and action has been the starting point for the judicial analysis of a free exercise claim, the result is commonly the rejection of the religious claim. *See, e.g., United States v. American Friends Service Committee*, 419 U.S. 7 (1974) (levy on Quaker funds); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (enforcement of Sunday closing laws against Orthodox Jews); *Hamilton v. Regents of the University of California*, 293 U.S. 633 (1934) (military training); *Reynolds v. United States*, 98 U.S. 154 (1878) (polygamy).

24. Letter of Thomas Jefferson to a Committee of the Danbury Baptist Association, *supra* note 20.

25. *Compare, e.g., Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963), *with, e.g., United States v. Lee*, 455 U.S. 252 (1982); *Johnson v. Robison*, 415 U.S. 361 (1974); *Gillette v. United States*, 401 U.S. 437 (1971); *Autenreith v. United States*, 279 F. Supp. 156 (N.D. Cal. 1968), *aff'd sub nom. Autenreith v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. den.*, 397 U.S. 1036 (1970).

26. *See generally*, Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679 (1969); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development-Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967); Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217.

specified in the pastoral letter on which this paper focuses public officials, clergy and religious, the military, civilian employees in defense industries, and the citizenry at large.²⁷

II

A. Pastoral Direction of Public Officials and Catholics as Citizens: Constitutional and Public Policy Implications.

For purposes of American constitutional law, the legal principles governing the activities of religiously motivated public officials are, in large part, the same as those which govern the citizenry at large. To be sure, the constitutionally prescribed oath taken by each federal official to "support and defend the Constitution of the United States"²⁸ imposes a higher degree of responsibility and adherence to constitutional norms upon the public official than it does on the citizen.²⁹ Ultimately, however, control of the acts of public officials is relegated by the Constitution to the political process.³⁰

27. See Parts II and III, *infra* regarding the political process and defense workers. The questions arising for military personnel are similar to those which apply to defense workers, but the room for permissible dissent and accommodation is far more narrow.

28. The Presidential oath of office is set forth verbatim in U.S. CONST. art. II, § 8. The oath of office for all other federal officials, including members of Congress, judges and executive officials, and for members of every state's legislature must include an oath or affirmation to support the Constitution. U.S. CONST. art. VI, § 3.

29. By its terms, the Constitution speaks only to the structure and operation of the federal system: (*i.e.*, to the federal government federal officials, the states and state officials). In only one instance does it speak directly to the rights of individuals, rather than imposing a limit on the power of government, and, even then, it does so by negative implication. *Compare*, U.S. CONST. amend XIII (abolishing slavery and involuntary servitude directly) with U.S. Const. Amend. XV (right to vote shall not be infringed "by the United States or by any State"). For generalized discussion of the implications of the "state action" doctrine, see *generally*, LOCKHART, KAMISAR, CHOPER AND SHIFFRIN, CONSTITUTIONAL LAW 1410-71 (6th ed. West 1986).

30. Political control of the legislative branch is accomplished through three basic methods: election (art. I, § 2); presidential veto of enactments (art. I, § 7, cl. 2, 3); expulsion and control of members (art. I, § 5, cl. 1, 2). Political control of the executive is exercised through six basic methods: election (art. II, § 1); impeachment (art. II, § 4; art. I, § 2 cl. 5; § 3, cl. 6); the power to advise and consent to nominations and treaties (art. II, § 2 cl. 2); the Congressional power of the purse (art. I, § 7, cl. 1, § 8, § 9, cl. 7)); and the power to override Presidential vetoes (art. I, § 7, cl. 3). Political control over judicial authority is accomplished; through legislation resting on an express constitutional power, *Katzenbach v. Morgan*, 384 U.S. 641 (1966); impeachment (art. II, § 4, art. III, § 1); control of the Supreme Court's appellate jurisdiction (art. III, § 2); and by self-restraint in the exercise of the power of judicial review of legislative or executive action. Political control over the entire federal system is guaranteed through the dual method for proposing constitutional amendments provided in Article V: the first is legislative and depends entirely on the will of Congress, the second is also legislative, but rests upon the authority of a special convention called for the purpose by the Congress upon petition of three-fourths of the states. Interestingly, no member of Congress may, at the same time, sit as a member of such a convention, art. I, § 6, cl. 2, (the Incompatibility Clause) thus

The question for citizens, politicians, and public officials, therefore, is the degree to which they should permit their religious views to influence their voting patterns or their official activities. Not surprisingly, this question evokes sharp responses and critical commentary whenever it surfaces on the American political scene.³¹ It dominated the presidential campaigns of Al Smith³² in 1928 and John F. Kennedy in 1960.³³ President Jimmy Carter was often criticized for his use of "born again" religious language and rhetoric.³⁴ The 1984 Presidential campaign witnessed an ongoing debate among politicians themselves³⁵ and between church leaders,³⁶ politicians,³⁷ and com-

assuring that "incompatible" political allegiances will not develop. *But cf.*, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 108 (1974) (action based on Incompatibility Clause dismissed for want of standing). In either case, proposed constitutional amendments must be ratified by the requisite number of state legislatures or state ratifying conventions, as specified by Congress. Art. V. The convention method, which has never been used under this Constitution but which produced it, has become a politically controversial issue of late, in large part because approximately 32 of the 34 states needed to call a convention have petitioned the Congress to do so. *See* *Washington Post*, October 2, 1984, p. A4, col. 2. On the topic of the political nature of the amendment process, *see generally* *Coleman v. Miller*, 307 U.S. 433 (1939).

31. *See generally*, W. Berns, "The Nation and the Bishops," *Wall Street Journal*, December 15, 1982, p. 28W. col. 3; E. Goodman, "Bishops as Bosses," *Washington Post*, September 11, 1984, p. A.23 col. 1; J. Kraft, "Debate Among Catholics," *Washington Post*, September 18, 1984, p. A19 col. 1; J. Lofton, "Jackson Debases Religion, Politics," *Washington Times*, September 5, 1984, p.3A col. 1; C. Rowan, "An Unnatural Alliance," *Washington Post*, September 16, 1984, p. B8, col. 2.

32. O. HANDLIN, *AL SMITH AND HIS AMERICA* (1958); G. MYERS, *BIGOTRY* (1940).

33. Remarks of Senator John F. Kennedy Before a Meeting of the Greater Houston Ministerial Assn., Houston, Texas, September 12, 1960.

34. *See* J. Johnson, "A Born Again Style at the White House," *Washington Post*, January 21, 1977, p. A18, col. 3.

35. Remarks of President Ronald W. Reagan to the Ecumenical Prayer Breakfast, Dallas, Texas, August 23, 1984; Remarks of Walter F. Mondale to the International Convention of B'nai B'rith, Washington, D.C., September 6, 1984; Senator Edward M. Kennedy, "Faith and Freedom," delivered at Tavern on the Green, New York City, before the Coalition of Conscience, September 10, 1984; Governor Mario M. Cuomo, "Religious Belief and Public Morality: A Catholic Governor's Perspective" delivered to the Department of Theology, University of Notre Dame, South Bend, Indiana, September 13, 1984; Representative Henry J. Hyde, "Keeping God in the Closet: Some Thoughts on the Exorcism of Religious Values from Public Life," delivered at the Thomas J. White Center on Law & Government, School of Law, University of Notre Dame, South Bend, Indiana, September 24, 1984.

36. *See, e.g.*, Bernardin, "Role of the Religious Leader in the Development of Public Policy" in *Symposium: The Religious Leader and Public Policy*, 2 *J. LAW & REL.* 367, 369 (1984); Gaffney, *Biblical Religion and American Politics: Some Historical and Theological Reflections*, 1 *J. LAW & REL.* 171 (1983). K.A. Briggs, "Catholic Theologians Have Mixed Reactions to Cuomo's Notre Dame Talk," *New York Times*, September 17, 1984 p. B12 col. 3; H. Cox, "Our Politics Needs Religion," *Washington Post*, September 2, 1984, p. D8, col. 1; R.D. McFadden, "Episcopal Bishop Says Officials Must Put Law Before Tenets," *New York Times*, September 17, 1984, p. B12, col. 1.

37. "Ferraro Denies Charges on Abortion" *Washington Post*, September 11, 1984, p. A9, col. 2; G. Larder, "Cuomo Urges Wider Debate of Religion," *Washington Post*, August 4,

mentators³⁸ on the "proper" role of religion in political action and discourse.³⁹ Most recently, political commentators have begun to comment on the legitimacy of a 1988 Presidential campaign by a minister widely known for his television ministry.⁴⁰

Although phrased most often in popular parlance as a matter of "separation of church and state,"⁴¹ the concept of "separation of church and state" is neither useful, nor particularly relevant when religiously motivated individuals seek to draw upon their religious or moral belief systems as sources for public policy choices.⁴² The real

1984, p. A5, col. 1; McNeill-Lehrer News Hour, P.B.S., Sept. 11, 1982, segment 2, (Robin McNeill and Charlayne Hunter-Gault interview with Archbishop Bernard Law of Boston and Senator William Mitchell of Maine).

38. See generally R. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984). See also, R. Cohen, "Religion: Reagan's Divider . . .", *Washington Post*, September 5, 1984, p. A19, col. 1; R. Evans & R. Novak, ". . . And Mondale's Wedge," *Washington Post*, September 5, 1984 p. A19, col. 4; N. Hentoff, "Bishops, Bigots . . .", *Washington Post*, September 21, 1984 p. A21, col. 1; J. Kraft, "Elmer Gantry Time," *Washington Post*, September 6, 1984, p. A21, 01. 1; W. McPherson, "God and Man in Dallas," *Washington Post*, September 4, 1984, p. A19, col. 5; W. Pruden "The Shootout at God's Corral," *Washington Times*, September 5, 1984, p. 2A col. 1; W. Pruden "'Holy War' Pits North vs. South," *Washington Times*, September 19, 1984, p. 2A, col. 1; J. Sobran, "Of Political Piety and Pandering," *Washington Times*, September 6, 1984, p. 2C, col. 2; E.M. Yoder, Jr., "Religion's Place," *Washington Post*, August 29, 1984, p. A25 col. 6; E.M. Yoder, Jr., "The Pope's Example," *Washington Post*, September 6, 1984, p. A21, col. 1. See also sources cited note 31, *supra*.

39. See also, *Harris v. McRae*, 448 U.S. 297 (1980), *rev'g*, *McRae v. Califano*, 491 F. Supp. 630 (E.D. N.Y. 1980) (discussing the role of religion in the political process when the issue is one which is commonly identified with particular religious traditions). See also text at notes 68-78 *infra*.

40. See, e.g., G. Epps, "Pat Robertson's a Pastor, But His Father Was a Pol," *Washington Post*, October 19, 1986, p. H1, col. 4. For a discussion of the issue of clergy holding public office, see text and notes 65-69 *infra*.

41. The United States Constitution does not contain the phrase "separation of church and state" but rather the following admonitions respecting limits on governmental activity:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . U.S. CONST. amend. I. . . [N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States" U.S. CONST. art. VI, cl. 3.

42. As a practical matter, there has never been "absolute separation" of church and state in the United States. The language of first amendment ("Congress shall make no law") itself bears witness to the desire of the framers of the Constitution to leave intact then-existing state established churches, see, e.g., C.J. ANTIEAU, A.T. DOWNEY, E.C. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* (1964), and contemporaneous statutory enactments make it clear that religion and morality were important factors influencing public discourse. See, e.g., Northwest Ordinance of 1787, as adopted by Congress, Statutes of 1789, c.8 (August 7, 1789) ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."); J. STORY, II *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, Ch. XLIV § 1870-1879 (1851). George Washington's farewell address also made the point:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . let it simply be asked where is the security for

issue is the political role of religious discourse and influence in the development of public policy on issues of great public importance.

In their letter, the Bishops correctly recognize that "public opinion . . . can, through a series of measures, indicate the limits beyond which a government should not proceed."⁴³ This is especially true in a representative democracy such as the United States, where the electronic and print media regularly report the latest public opinion polling results on issues of importance, and politicians regularly consult the latest figures. As a result, the immediate problem for the Bishops is how to define the permissible limits of the task they have set out to accomplish "in concert with public officials, analysts, private organizations and the media to set limits beyond which our military policy should not move in word or action."⁴⁴

Some of the current political interpretations of American church-state principles would place severe constraints on the permissibility of such participation,⁴⁵ and events in the 1984 presidential campaign show clearly that attempts by church leaders to "encourage a public attitude which sets stringent limits on the kind of actions our own government and other governments will take"⁴⁶ on issues of ma-

prosperity, for reputation, for life—if the sense of religious obligation desert . . . and let us with caution indulge the supposition that morality can be maintained without religion.

D.H. MATHESON, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 569-70 (1941), *quoted in* ANTIEAU, *supra* at 188. During the nineteenth century, the federal government took an active part in assuring the spread of organized religion in the territories, *see, e.g.*, *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (Indian treaty funds could be used to finance education for Indians in Catholic schools on grounds that funds were Indian property); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (payments to Catholic hospital); *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (exemption from immigration law; the Court insisted that government must be friendly toward religion); and in limiting religious practices deemed to be harmful to the public interest, *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy). Examples of close interaction and protection can be multiplied. *See, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Since the late 1940s, a more "absolutist" view has begun to take root in Supreme Court decisions, but even that is far from being either consistent or "absolute". *See, e.g.*, *Aguilar v. Felton*, 105 S. Ct. 3232 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Everson v. Board of Education*, 330 U.S. 1, 28 (1947) (Rutledge, J., dissenting). *Compare* *American Baptist Churches in the U.S.A. v. Reagan*, 786 F.2d 194 (3d Cir. 1986), *cert. den.*, 55 U.S.L.W. 3249 (October 21, 1986) (taxpayers have no standing to challenge appointment of ambassador to Vatican). *See generally*, Hastings, *United States - Vatican Relations*, 69 CATH. HIST. REV. 20 (1958); Marrero, *The Closing of the American Diplomatic Mission to the Vatican and Efforts to Revive It, 1868-1870*, 33 CATH. HIST. REV. 423 (1948).

43. The Challenge of Peace ¶ 140.

44. The Challenge of Peace ¶ 141.

45. *See* sources cited at notes 31-40, *supra*.

46. The Challenge of Peace ¶ 141.

major political and social importance—such as nuclear war or abortion—can have predictable consequences for both political leaders and the electorate at large.

In order to probe the issue of “religion in politics” in a useful way, however, it is necessary to set out a few of the constitutional ground rules which govern religiously based attempts to influence the course of public policy. There are statutory rules as well,⁴⁷ but they too must be seen in light of the constitutional principles which govern the discussion from the outset.

The most critical of these constitutional considerations are the other rights protected by the first amendment: the express rights of freedom of speech, press, and peaceable assembly, and the right to petition government for a redress of grievances; as well as the implied right of freedom of association.⁴⁸ Taken together, these rights serve as a powerful shield protecting virtually all political speech⁴⁹ from government regulation.⁵⁰ As a result, any attempt to limit speech intended to influence public officials or public opinion on the basis of either the identity of the speaker⁵¹ or the content of the message⁵²

47. See note 87, *infra*.

48. U.S. CONST. amend. I. The right to freedom of association is not expressly mentioned in the Constitution, but has been implied as being necessary to protect those rights which are express. See generally, *Herndon v. Lowry*, 301 U.S. 242 (1937); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Whitney v. California*, 274 U.S. 357 (1927).

49. See generally *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Mills v. Alabama*, 384 U.S. 214 (1966). See also Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); J.H. ELY, *DEMOCRACY AND DISTRUST* (1980); R. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1.

50. But see *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978) (sustaining FCC regulations which limited the use of vulgar language during certain hours); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (limitation on political advertising in public transit vehicles); *Adderly v. Florida*, 385 U.S. 39 (1966) (limitation on demonstration on jail property); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (government may impose reasonable “time, place and manner” restrictions on speech).

51. For purposes of this discussion, the only relevant identity-based restrictions would be 1) limits on the ability of church officials to speak on political matters; 2) limits on the ability of politicians to address issues; and 3) limits imposed on the citizenry at large.

52. Content-based regulations are presumptively unconstitutional, *Widmar v. Vincent*, 454 U.S. 263 (1981); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), and the government must demonstrate a “clear and present danger of imminent lawless action” before such regulation can be justified. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In practice, attempts by government to regulate speech with a political impact have rarely succeeded. See, e.g., *National Socialist Party v. Skokie*, 432 U.S. 43 (1977); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (“Pentagon Papers”); *Mills v. Alabama*, 384 U.S. 214 (1966); but see *United States v. Progressive, Inc.*, 467 F.Supp. 990 (W.D. Wis. 1979), (preliminary injunction against publication of directions for building hydrogen bomb upheld), *request for writ of mandamus denied sub. nom. Morland v. Sprecher*, 443 U.S. 709 (1979), *dismissed as moot*, Nos. 79-1438, 79-1664 (7th Cir., Oct. 1, 1979).

would be subject to the strictest judicial scrutiny.⁵³

Thus, the first question for discussion is the degree to which American traditions of church-state relations⁵⁴ should limit religiously motivated speech designed to influence public policy on any question of political significance, including war and peace. Phrased in this manner, however, the question becomes not merely one of constitutional law, but a political issue of major significance.

Although a discussion of the politics of religious influence on political debate is beyond the scope of this article, examination of the underlying constitutional rules which should guide the discussion sheds considerable light on the "religion in politics" issues which captured so much public attention during the 1984 presidential campaign.⁵⁵ Review of the cases and relevant statutes makes it clear that the debate over religion as a force in American politics is based more on philosophical and political considerations than it is on constitutional rules.

Aside from the most obvious professional distinctions to be drawn among church leaders, politicians and interested members of the public, all are entitled to the general political rights of citizenship: to speak out on issues,⁵⁶ to run for public office,⁵⁷ and to take an active part in political campaigns and debates.⁵⁸ Traditionally, the only

53. The "clear and present danger" standard represents the highest standard of judicial review in American constitutional law, for it allocates the entire burden of proving an extraordinary degree of justification to the government, which must rebut the presumption of unconstitutionality discussed in the previous note. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-9 to 12-11 (West, 1978); NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 853-865 (West 3d ed., 1986).

54. *See* text at notes 6-25, *supra*.

55. *See* political commentary cited in notes 31-38 and 40, *supra*.

56. *See* text at notes 48-53, *supra*. The Speech and Debate Clause of the U.S. CONSTITUTION, art. I, § 6, confers a broad privilege for speech by elected legislators when acting in their legislative capacities. *See* *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gravel v. United States*, 408 U.S. 606 (1972). *See generally*, Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973).

57. Although Pope John Paul II has indicated that Catholic clergy and religious should not hold public office, W. Brown, "Pope John Paul II Bars Priests from Serving in Public Office," *Washington Post*, May 5, 1980, p. A1, col. 1, nothing in American constitutional law would prevent them from doing so. U.S. CONST. art. VI, § 2; amend. I, *McDaniel v. Paty*, 435 U.S. 618 (1978).

58. There are limitations on the ability of church leaders to use church facilities and tax-exempt funds for political purposes, *see generally* materials cited in note 87, *infra*, and generally applicable campaign spending limits for federal election campaigns. Federal Election Campaign Act, *as amended*, 2 U.S.C. §§ 431-441, 451-455; 5 U.S.C. §§ 1501-1503; 18 U.S.C. §§ 276, 6012, 9002-9012, 9031-9042; 42 U.S.C. § 5043; 47 U.S.C. §§ 312, 315; Pub. Laws 92-255, Feb. 7, 1972, 86 Stat. 3; 93-443, Oct. 15, 1974, 88 Stat. 1263; 94-283, Title I, §§ 101-115(f, h, i), Title II, §§ 201-210, Title III §§ 310, 312, May 11, 1976, 90 Stat. 475-496; 95-

constitutional arguments against such participation have arisen when the speaker or official is a member of the clergy,⁵⁹ or when the issue itself can be characterized as a religiously based or motivated issue such as abortion, school prayer, or support for religiously affiliated, nonpublic schools.⁶⁰ The rationale advanced in support of constitutional restrictions in these policy areas has generally been that debates over religious issues, especially those led by clergy, are politically "divisive" and merit strict judicial oversight.⁶¹

In recent years, the Supreme Court has spoken clearly on the "political divisiveness" issue on two major occasions. The first, a case challenging the right of a Baptist clergyman to hold elective political office.⁶² The Supreme Court of Tennessee had ruled that Article VIII, Section 1 of the Tennessee Constitution of 1796⁶³ barred clergy from holding seats in the Tennessee legislature, and supported its judgment on the grounds that the participation of clergy in legislative debates could foster divisiveness along religious lines and might lead to the enactment of religiously preferential laws.⁶⁴ The Supreme Court reversed in a series of opinions which were in agreement regarding the result, but divided as to the proper approach.⁶⁵ Of the various posi-

127, Oct. 12, 1977, 91 Stat. 1110; 95-216, Title V, § 502(a), Dec. 20, 1977, 91 Stat. 1504-1565; 96-187, Jan. 8, 1980, 93 Stat. 1339.

59. See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978), *rev'g*, *Paty v. McDaniel*, 547 S.W.2d 897 (Tenn., 1977).

60. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (prayer); *Harris v. McRae*, 448 U.S. 297 (1980) (abortion); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (nonpublic schools); *Everson v. Board of Education*, 330 U.S. 1 (1947) (student transportation).

61. Such a theory of judicial oversight raises substantial questions regarding the role of the judiciary in a representative democracy. Such questions are, for the most part, beyond the scope of this paper. On this topic, see generally A. HAMILTON, J. MADISON, J. JAY, *THE FEDERALIST* (No. 78) (1788).

62. *McDaniel v. Paty*, 435 U.S. 618 (1978). This case took on added significance during the 1984 Presidential campaign when the Rev. Jesse Jackson announced his candidacy for the Democratic Party's nomination for the presidency. Compare text at note 40, *supra*.

63. The Tennessee Constitution of 1796 provided:

Whereas ministers of the gospel are, by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions, therefore, no minister of the gospel, or priest of and denomination whatever, shall be eligible to a seat in either house of the legislature." TENN. CONST. art. VIII, § 1 (1796).

Seven of the original states (Maryland, Virginia, North Carolina, South Carolina, Georgia, New York and Delaware) disqualified clergy from legislative office. Three of the seven (New York, Delaware, and South Carolina) barred clergy from holding any political office. *McDaniel v. Paty*, 435 U.S. 618, 622 & note 3 (1978), quoting L. PFEFFER, *CHURCH, STATE AND FREEDOM* 118 (Rev. ed. 1967).

64. See *Paty v. McDaniel*, 547 S.W.2d 897 (Tenn. 1977).

65. Chief Justice Burger, joined Justices Powell, Rehnquist and Stevens, argued that the Tennessee constitutional provision impermissibly conditioned Rev. McDaniel's right to free exercise of religion on the surrender of his right to seek public office. The Chief Justice cited

tions taken, perhaps the most succinct and relevant to the present inquiry was made by Justices William Brennan and Thurgood Marshall:

The state's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach and practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities. . . . In short, government may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as over involved with religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political association generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.⁶⁶

Having disposed of the argument that clergy should have no place in legislative chambers in *McDaniel v. Paty*, it remained to be seen just how far the Court's "political divisiveness" standard⁶⁷ for cases would be taken in a case involving allegedly "religious" issues or the active involvement of religious institutions or believers in the political process at large.⁶⁸ That opportunity finally arose in *Harris v.*

Sherbert v. Verner, 374 U.S. 398 (1963) as the controlling case. *Sherbert* is discussed at some length in the text accompanying notes 150-163, *infra*. Justice Brennan joined by Justice Marshall, argued that the prohibition was a religious test absolutely prohibited by U.S. CONST. art. VI, cl. 3, and *Torcaso v. Watkins*, 367 U.S. 488 (1961); that it imposed an impermissible burden on the rights conferred by the Free Exercise Clause, citing *Sherbert*; and violated the Establishment Clause by establishing a religiously based classification which had a primary effect of inhibiting religion, 435 U.S. at 630. Justice Stewart argued that *Torcaso* alone controlled the case because it was directed at prohibitions which do not turn on statements of belief, but upon action dictated by belief. 435 U.S. at 643. See also text at notes 16-25, *supra*. Justice White argued that the prohibition violated the Equal Protection Clause of the fourteenth amendment, and that it was both underinclusive and overinclusive. 435 U.S. at 644.

66. *McDaniel v. Paty*, *supra*, 435 U.S. at 641 (Brennan and Marshall, J.J., concurring) (footnote omitted).

67. The "political divisiveness" argument had its genesis in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), when the late Justice John Harlan cited one sentence in Professor Paul Freund's article, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969), to support the idea that highly charged political controversies such as debates over the funding for church-related schools "engender a risk of politicizing religion" and that "history cautions that political fragmentation on sectarian lines must be guarded against." 397 U.S. at 695.

68. By the time the Court decided *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the "political divisiveness" argument had become what appeared to be an additional factor to be considered in first amendment cases involving the Religion Clauses. In *Lemon* the Court formalized

McRae,⁶⁹ a challenge to Congress' refusal to provide Medicaid funding for abortions.⁷⁰ In *McRae*, the plaintiffs, which included the City of New York, welfare rights organizations and several religious groups,⁷¹ argued that the statutory refusal to pay for abortions—commonly referred to as the “Hyde Amendment”⁷²—imposed “one religious view” (*i.e.*, the Catholic view) on the community regarding the humanity of the unborn and the morality of abortion. From this, it was argued that the identity of the religious view allegedly imposed could be proved by examining the religious identity, motives, and activities of the major participants in the political debate (*e.g.*, the tactics and positions of the major lobby groups and sponsors of the legislation).⁷³

The practical effect of accepting such an argument and allowing such “proof” as relevant evidence in constitutional litigation would

what has since become known as a “three-pronged” test for “secular purpose,” a “primary effect which neither advances nor inhibits religion,” and lack of “excessive entanglement” between religion and government, 403 U.S. at 612-613. It also seemed to raise the “potential” for division along religious lines to the status of an independent factor in constitutional analysis, see, 403 U.S. at 622-624. Although the “political divisiveness” point was arguably unnecessary to the Court’s decision, the Court apparently felt some need to speak on the issue. Chief Justice Burger’s opinion for the Court states flatly that “[i]t conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government[,]” and that it was unwise to force “candidates to declare and voters to choose” on such issues. 403 U.S. at 623. When the Court has been forced to consider the full implication of “the political divisiveness” argument in the context of individual participation in the political process, however, it has backed away. See *Harris v. McRae*, 448 U.S. 297 (1980) (attempted invalidation of Congressional spending restrictions on divisiveness grounds); *McDaniel v. Paty*, 435 U.S. 618 (1978) (exclusion of clergy from state legislative post based, in part, on potential for political “divisiveness” on religious grounds. *But see*, *Aguilar v. Felton*, 105 S.Ct. 3232, 3239 (1985) (Powell, J., concurring) (raising political divisiveness issue). See also Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L. REV. 205 (1980); Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1995 (1980).

69. 448 U.S. 297 (1980), decided together with *Williams v. Zbaraz*, 448 U.S. 358 (1980).

70. Act of September 30, 1976, Pub. L. 94-493, 90 Stat. 1434 (1976); Act of December 9, 1977, Pub. L. 95-205 § 101, 91 Stat. 1460 (1977); Act of October 18, 1978, Pub. L. 95-480 § 210, 92 Stat. 1586 (1978); Act of November 20, 1979, Pub. L. 96-123 § 109, 93 Stat. 926 (1980).

71. Among the plaintiffs in the *McRae* case were: Cora McRae, the Women’s Division of the Board of Global Ministries of the United Methodist Church, and the Health & Hospitals Corporation of the City of New York.

72. The statute, an amendment to numerous appropriations bills in addition to the ones cited in note 70, *supra*, bears the name of its original proponent, Rep. Henry Hyde of Illinois.

73. *Harris v. McRae*, 448 U.S. 297 (1980); See First Amended Complaint of Plaintiffs, *McRae v. Califano*, 491 F. Supp. 630 (E.D. N.Y. 1980), *rev’d sub nom.* *Harris v. McRae*, *supra*.

be twofold: first, the high profile involvement of clergy and religiously motivated individuals in public policy debates involving controversial issues would become a negative factor to be considered in later constitutional controversies over the validity of the challenged legislation; and, second, religious rhetoric in political debates would be perceived as an impermissible, or at least suspicious, influence on the course of the political debate. To the degree such evidence would be considered persuasive or relevant to the constitutional validity of legislative or other political action, overt religiously motivated involvement or overtly religious political rhetoric would be judicially discouraged.

The Court responded to this novel—and constitutionally suspect⁷⁴—application of the “divisiveness” rationale with an affirmation, albeit a grudging one,⁷⁵ of the role of religious and moral ideas in the formulation of public policy.

Although neither a State nor the Federal Government can constitutionally ‘pass laws which aid one religion, aid all religions, or prefer one religion over another,’ *Everson v. Board of Education*, 330 U.S. 1, 15, . . . , it does not follow that a statute violates the Establishment Clause because it ‘happens to coincide or harmonize with the tenets of some or all religions.’ *McGowan v. Maryland*, 366 U.S. 420, 442, That the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. *Ibid.* The Hyde Amendment, as the District Court noted, is as much a reflection of ‘traditionalist’ values towards abortion, as it is an embodiment of the views of any particular religion. 491 F. Supp. at 741. *See also Roe v. Wade*, 410 U.S.,

74. *See* notes 49-53, *supra*, and accompanying text.

75. In his opinion for the majority in *Harris v. McRae*, Justice Stewart made the traditional comment that “[i]t is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy[.]” 448 U.S. at 326, but added, somewhat uncharacteristically, that “[i]f that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so.” *Id.* Justice Marshall was not so circumspect regarding the nature of the process and the role of the Supreme Court. Justice Marshall’s dissent argued that the Court should never have permitted such a highly charged issue to be exposed to the normal political process because “. . . the Court’s decisions [in *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); and *Poelker v. Doe*, 432 U.S. 519 (1977)] [were] an invitation to public officials, already under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions on governmental funding for abortion”, 448 U.S. at 337 (Marshall, J., dissenting). *But see* U.S. CONST. art. I, § 7, cl. 9; Brief of Rep. Jim Wright, et al, and Certain Other Members of Congress of the United States as *Amici Curiae*, *Harris v. McRae*, 448 U.S. 297 (1980) (arguing that under art. I, § 7, cl. 9 of the United States Constitution, the Court had no constitutional authority to order an appropriation from the Treasury where Congress had expressly refused to exercise its spending power). *See also* note 30, *supra*.

at 138-41, In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.⁷⁶

76. 448 U.S. at 319-20. Although the decisions in *McDaniel v. Paty* and *Harris v. McRae* constitute a rejection of the most extreme applications of the political divisiveness argument, the theme that religion as a driving force in the body politic is politically divisive and constitutionally suspect runs like a strong undercurrent through the writings of Justices Brennan, Marshall, Powell and Blackmun. Although a thorough discussion of their apparent disdain for religious involvement in political affairs is beyond the scope of this article, it does deserve some attention here. See generally sources cited note 68, *supra*.

From a review of their writings on religious involvement in the political process, it appears that the problem arises when the object or result of that involvement is to modify or challenge the scope or direction of judicially established public policy. The contrast between the approach taken by several of these justices in *Harris* and *McDaniel* illustrates the point.

Where, as in *McDaniel*, the use of the political divisiveness argument limits the ability of clergy to run for political office, Justices Marshall and Brennan speak eloquently concerning the right of individuals to make their voices heard on the floor of legislative councils. Where the issue is not the identity of the speaker, but the topic presented for discussion, the views of both Justice Brennan and Marshall are different. Where the issue is controversial, and religious groups have articulated strong moral positions in opposition to those taken by the courts, these justices appear to believe that the judiciary has a special role in assuring that the political process is not tainted by divisive debates over the relative merits of issues having moral or religious dimensions. In their opinion, such issues should be decided by the courts. Justice Brennan, whose opinion in *Harris v. McRae* was joined by Justice Marshall, summarized the issue as follows:

[T]he Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state mandated morality. The instant legislation thus calls for more exacting judicial review than in most other cases. 'When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.' *Beal v. Doe*, 432 U.S. 438, 462 (1977) (Marshall, J., dissenting).

The issue in *Harris v. McRae* was abortion funding. More precisely, it was Congress' refusal to provide it after being lobbied extensively by those with identifiably religious and moral beliefs in opposition to abortion. The Brennan-Marshall view that judicial intervention is needed "to enforce the Constitution for the benefit of the poor and powerless" whenever "elected leaders cower before public pressure" is extraordinary. The "public pressure" about which they are concerned is voter opposition to the Court's policy views on the legitimacy of abortion. Because these justices reject the religiously motivated voter's viewpoint on this issue, they also see religiously motivated public pressure on the Congress to adopt it as a constitutionally illegitimate basis for legislative judgment. Justice Powell's opinion in *Aguilar v. Felton*, makes essentially the same point in a slightly different manner in the context of aid to religiously affiliated education:

This risk of [excessive] entanglement [between church and state] is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here. I do not suggest that at this point in our history the Title I program or similar parochial aid plans could result in the establishment of a state religion. There likewise is small chance that these programs would result in significant religious or de-

B. The Pastoral Letter as a Call for Political Action

When one applies these principles to the policy suggestions contained in the pastoral letter, it seems clear that the bishops were not only well within their rights as citizens to call for specific public policy responses, but were also entitled to call upon Catholic politicians to formulate public policy positions which would clearly reflect the legitimate legal needs of Catholic citizens for laws which protect "selective" conscientious objection.⁷⁷ Simply stated, those of draft age

nomination control over our democratic processes. [citation omitted] Nonetheless, there remains a considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources. . . . In states such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools. . . . In short, aid to parochial schools of the sort at issue here potentially leads to 'that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.'" *Walz v. Tax Commission*, 397 U.S. 664, 694 (1970) (opinion of Harlan, J.). Although the Court's opinion does not discuss it at length, [citation omitted] the potential for such divisiveness is a strong additional reason for holding that the Title I and Grand Rapids programs are invalid on entanglement grounds. *Aguilar v. Felton*, 105 S. Ct. 3232, 3239 (1985) (Powell, J., concurring)

The "entanglement" with which Justice Powell is concerned is the involvement of voters who, for religious reasons, have chosen to send their children to nonpublic schools. Because the Court has taken the position that such aid is problematic, further debates over the allocation of scarce education funds would simply open up further opportunities for "elected officials to cower before public pressure" and reopen debates the Court had hoped were settled.

The views of Justices Blackmun and Stevens are the most direct on this point; for they make no attempt to couch their views in a mantle of judicial concern for the integrity of the political process. They would simply substitute the Court's moral judgment for that of the legislature when the issue is one on which the Court has spoken. *See, e.g., Bowers v. Hardwick*, 106 S. Ct. 2841, 2854 (1986) (Blackmun, J., dissenting) (sodomy restrictions and the right to privacy; Judeo-Christian tradition, standing alone, is not a legitimate source of law on which to base restrictions of personal sexual activity); *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169, 2187-88 (1986) (Stevens, J., concurring) (abortion; protection of unborn as illegitimate adoption of a religious view of prenatal life); *Harris v. McRae*, 448 U.S. 297, 348 (1980) (Blackmun, J., dissenting) (abortion funding; "the Government 'punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound'").

77. *Id.* Protection of the right to object "selectively" to government policy would expand the scope of currently available legal protection for Catholic conscientious objectors who subscribe to traditional Catholic views on "just wars". As construed by the Supreme Court of the United States, the Military Selective Service Act of 1967 Section 6(j), 50 U.S.C. App. § 456(j), as amended, required that the objector plead and prove that he objects to war in general. *Gillette v. United States*, 401 U.S. 437 (1971). Such a construction of the statutes raises a multitude of constitutional and statutory policy questions. *See Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918); *Reply Brief of Behalf of Petitioner, Negre v. Larsen*, No 70-325, *Gillette v. United States*, 401 U.S. 437 (1971) (companion case involving Catholic objector). For discussion of other critical constitutional questions raised by the selective service cases *see generally* Donnici, *Governmental Encouragement of Religious Ideology: A Study of the Current Conscientious Objection Exemption from Military Service*, 13 J. PUB. L. 16 (1964); Greenawalt,

who would respond to the bishops' call to conscience in such a manner would be at legal risk.⁷⁸

Needless to say, such episcopal intervention in the political process in pursuit of stated public policy goals rooted in identifiably doctrinal needs is inevitably controversial, and becomes even more so when the goal requires the explicit cooperation of Catholic politicians.⁷⁹ Notwithstanding this difficulty for Catholic politicians when the topic is one which has traditionally been identified by the major media as a "Catholic" issue—such as abortion or tuition tax credits,⁸⁰ it would be difficult, under any reading of the first amendment, to argue that active involvement by clergy in the fight for freedom of conscience—especially where the law itself discriminates in the protection it affords religious believers⁸¹—is constitutionally inappropriate.

The pastoral letter simply reflects both the Bishops' willingness to join in, and to influence, the political debate by stressing the moral dimensions of political acts. That such episcopal activity might be uncomfortable for Catholic politicians who traditionally distance themselves from the official representatives of the teaching Church

All or Nothing at All: The Defeat of Selective Conscientious Objection, 1971 SUP. CT. REV. 31; Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142 (1963); Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORN. L.Q. 231 (1966); Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968).

78. *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting "selective" conscientious objection).

79. Compare Governor Mario M. Cuomo, *supra* note 35, with Representative Henry J. Hyde, *supra* note 35. Interestingly, it is Catholic politicians who are most affected by this problem. President John F. Kennedy's Houston speech is a classic example of a Catholic politician forced by political forces to distance himself from his religious affinity group and its issues. Governor Cuomo's speech is similar in political motivation, although the speaker's position on the particular issue causing the most controversy is well aligned with that of the dominant forces in the Democratic Party in 1984. Perhaps the best example of such "singling out," however, is the use of asterisks by the *Congressional Quarterly* to identify Catholic politicians in reports on Congressional action on abortion related issues. See note 80, *infra*. One could imagine the public outcry if such "reporting" of religious affiliation—or lack of it—became commonplace.

80. Although these are not really "Catholic" issues, as such, they have been so identified in the popular and other press. See, e.g., Remarks of Senator John F. Kennedy Before a Meeting of the Greater Houston Ministerial Association, September 12, 1960, cited at note 33, *supra* (pledge regarding support for parochial schools); *Congressional Quarterly*, February 4, 1979, at 258-267 (Catholic legislators marked with an asterisk in reference to votes on abortion-related issues).

81. See *Gillette v. United States*, 401 U.S. 437 (1971); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918); *Reply Brief of Behalf of Petitioner, Negre v. Larsen*, No 70-325, *Gillette v. United States*, 401 U.S. 437 (1971) (companion case involving Catholic objector holding traditional view).

whenever the issues are particularly sensitive to non-Catholics⁸² was clearly recognized in the difference between the second and final drafts of the letter. The Bishops explicitly account for the fact that the moral responsibilities of politicians may sometimes be in conflict with the tenor of the political times, but do not absolve any politician from those responsibilities. "The difficult yet noble art of politics,"⁸³ simply requires that the two be resolved.

Thus, the call in the final draft for all public officials to "[be] particularly attentive to the consciences of those who sincerely believe that they may not support warfare in general, a given war, or the exercise of a particular role within the armed forces,"⁸⁴ and the specific admonition to Catholic politicians to support selective conscientious objection which appeared in the second draft⁸⁵ are perfectly legitimate pastoral admonitions suggesting the revision of existing public policy. Although specific directions to Catholic politicians regarding their own duties to "[propose] and [support] legislation designed to give maximum protection to . . . true freedom of conscience"⁸⁶ may be politically controversial, they do not present any legal problem insofar as they are clearly within the context of pastoral teaching.⁸⁷ The Jeffersonian metaphor, "a wall of separation between church and state,"⁸⁸ has been acknowledged by the United States Supreme Court as a "useful figure of speech," but it "is not a wholly

82. See sources cited notes 35-38, *supra*.

83. "The Challenge of Peace" ¶ 323, quoting Pastoral Constitution #75.

84. *Id.* at ¶ 324.

85. National Conference of Catholic Bishops, Ad Hoc Committee on War and Peace, *The Challenge of Peace: God's Promise and Our Response* (second draft), 12 ORIGINS 305, 325 (N.C. Documentary Service, Washington, D.C., October 28, 1982). The Second Draft contained the following specific suggestion:

Catholic public officials might well serve all of our fellow citizens by proposing and supporting legislation designed to give maximum protection to . . . true freedom of conscience.

86. *Id.* Compare The Challenge of Peace ¶ 324 (admonition to public officials generally).

87. Pastoral teaching should not be understood, however, to include the official support of particular candidates or particular pieces of legislation by the church as an institution. Such activities, while constitutionally protected, may result in a proportionate or total loss of tax exemptions available to religious and charitable institutions under federal and state tax laws. See, e.g., Internal Revenue Code §§ 501(c)(3), 511; N.Y. Real Property Tax Law § 421, N.Y. Tax Law §§ 601(d), 1116; art. 9A. A detailed discussion of the statutory and public policy implications of the tax exemption issue is beyond the scope of this paper. For general discussion of these issues, see *Bob Jones University v. United States*, 461 U.S. 574 (1983) (public policy and tax exemptions); *Walz v. Tax Comm'n*, 397 U.S. 664, (1970) (constitutionality of tax exemptions); *Christian Echoes National Ministry v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. den.*, 414 U.S. 864 (1973). See also, Caron and Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J. LAW & REL. 169 (1985).

88. See notes 18-20, *supra*.

accurate description of the practical aspects of the relationship that in fact exists between church and state." The "wall" is, in fact, only a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship"⁸⁹ which should neither restrain church leaders, politicians or believing citizens from suggesting solutions based on church teaching, nor reduce the nation's Bishops to the ubiquitous political device of calling for a committee to study nuclear disarmament.⁹⁰ All who are concerned with the potential for nuclear destruction—regardless of their particular suggestions for preventing it—should heed the admonition of Professor Alexander Meiklejohn regarding the value of speech on issues of great controversy:

The First Amendment [does] not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so. [What] is essential is not that everyone shall speak, but that everything worth saying shall be said. . . . And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. [No] speaker may be declared 'out of order' because we disagree with what he intends to [say].

Conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters need to hear them. [To] be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval.⁹¹

By calling for active public dialogue over nuclear war and peace, the Bishops and those who debate the merits of their suggestions will be following in the time-honored American tradition of free and open discussion of important controversial ideas. Given the necessity for free and open debate on issues of public importance, even the architect of the metaphorical "wall of separation between church and state" would find it difficult to question either the bishops' right to get the debate over the moral aspects started, or the right of the citizenry and its representatives to act upon the principles identified in the

89. *Lynch v. Donnelly*, 465 U.S. 668 (1984), quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

90. See *The Challenge of Peace* ¶ 324.

91. Meiklejohn, *Free Speech and its Relation to Self-Government*, reprinted in part in LOCKHART, KAMISAR, CHOPER & SHIFFRIN, *CONSTITUTIONAL LAW* 684-86 (6th ed. West 1986).

process.⁹²

III. CONSCIENTIOUS OBJECTION AND THE WORKER IN DEFENSE INDUSTRIES

Perhaps the most difficult area in which to predict the legal impact of the pastoral letter on individuals is the situation of the worker in defense industries engaged in the production of weapons of mass destruction. For politicians and the citizenry at large, the analysis is largely one which focuses on the relationship of freedom of speech and exercise of religion to debates which, because of either the subject matter or the participants, appear to occur in the zone where religion and generalized public policy concerns intersect. For military personnel, the analysis is confined by the limits, both practical and legal, that a tightly structured and focused military command must impose on its members.⁹³ In the case of the worker in a defense industry, however, the analysis is complicated by the civilian status of the employee, the need of the contractor for reliable workers, inherent limitations on the reach of constitutional rights,⁹⁴ and express provisions which limit the duty of employers to accommodate employee religious practices which exist in many employment discrimination laws.⁹⁵

In order to obtain a clear picture of the status of the worker in a defense industry, it will be helpful to start with the relevant text of the pastoral letter itself:

92. See Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U.L. REV. 57 (1976).

93. It is well settled that the needs of the military services command substantial deference in the analysis of constitutional claims which will have an impact on either military action or discipline. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Brown v. Glines*, 444 U.S. 348 (1980) (upholding Air Force regulation requiring authorization "from the appropriate commander" before signatures could be collected on a petition); *Greer v. Spock*, 424 U.S. 828 (1976) (upholding regulations banning demonstrations, picketing, protest marches, political speeches or similar activities on the post, and prohibiting the posting of any publication without prior written approval of post headquarters); *Parker v. Levy*, 417 U.S. 733 (1974) (upholding conviction of Army officer for urging soldiers to disobey orders to go to Vietnam under Articles 133 and 134 of the Uniform Code of Military Justice for "conduct unbecoming an officer and gentleman" and "prejudicial to good order and discipline"); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (standing; judicial refusal to intervene in war powers controversy); *Korematsu v. United States*, 323 U.S. 214 (1944) (Japanese exclusion cases). See also *Dronenburg v. Zech*, 746 F.2d 1579 (D.C. Cir. 1984).

94. Substantive constitutional rights which find their source in either the Bill of Rights or the fourteenth amendment are limitations on the powers of government. In order to hold a private party as being involved in "state action" a nexus must be shown between government and the private action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. (1974); *Moose Lodge v. Iris*, 407 U.S. 163 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Civil Rights Cases*, 109 U.S. 3 (1883).

95. See text at notes 105, 120-122, *infra*.

To Men and Women in Defense Industries: You also face specific questions, because the defense industry is directly involved in the development and production of the weapons of mass destruction which have concerned us in this letter. We do not presume or pretend that clear answers exist to many of the personal, professional and financial choices facing you in your varying responsibilities. In this letter we have ruled out certain uses of nuclear weapons, while also expressing conditional moral acceptance for deterrence. All Catholics, at every level of defense industries, can and should use the moral principles of this letter to form their consciences. We realize that different judgments of conscience will face different people, and we recognized the possibility of diverse concrete judgments being made in this complex area. We seek as moral teachers and pastors to be available to all who confront these questions of personal and vocational choice. Those who in conscience decide that they should no longer be associated with defense activities should find support in the Catholic community. Those who remain in these industries or earn a profit from the weapons industry should find in the Church guidance and support for the ongoing evaluation of their work.⁹⁶

From an examination of the final recommendations in the text, it is possible to glean several key points, which may be summarized as follows:

1. Physical or economic participation in the production of nuclear weapons raises, for each individual, the same moral questions which have been raised in the letter as a whole;
2. The teachings of the pastoral letter are a guide for Catholics involved in defense industries, and should be used in the formation of a position of conscience on continued participation (to whatever degree) in the industry;
3. Diverse judgments of conscience are possible, for there are no clear answers to many of the concrete questions which will face the defense worker; and
4. The Church will provide guidance and support, whatever decision is made.

Each of these points is critical to an examination of the legal rights and obligations of defense workers who elect to take a position of conscience which is based on the teachings of the letter and is at odds with the requirements of their employer.

96. *The Challenge of Peace*, ¶ 318.

A. Formulation of the Conscientious Position:
A Legal Requirement

In any analysis of the rights of the religious dissenter, it is imperative to begin with that which is most basic: the nature and sources of the conscientious objection. For a Catholic or adherent of another religion who seeks to utilize the letter in defense of a position of conscience, it is important, for legal purposes, that the pastoral letter be seen as the teaching tool the bishops designed it to be—as a guide to the formulation of conscience which contains both “universally binding moral principles found in the teaching of the Church” and “recommendations which allow for diversity of opinion of the part of those who assess the factual data.”⁹⁷ Because it is not, by its own admission, a definitive statement of binding moral norms, but rather an invitation for extended discussion and reflection on the morality of nuclear war,⁹⁸ the person intending to rely on the text of the letter, without more, to defend himself or herself against foreseeable employer reactions, would be well advised to reconsider reliance on the text alone;⁹⁹ for the letter itself makes no meaningful distinction between the official responsibilities of government officials, and the discrete obligations of individuals who are searching for the place to draw the line in their own lives and careers.¹⁰⁰

What the letter appears to call for,¹⁰¹ and what the law demands,¹⁰² is a clear statement of personal moral principle on the part of each individual who wishes to take advantage of the limited freedom of action protected by both the first amendment¹⁰³ and employment discrimination law.¹⁰⁴ It is only when the individual has formed a conscientious position—and disclosed it—that the protections of the law, to whatever extent they are applicable, come into play. The inherent limitations of the letter itself and their impact on the average Catholic are discussed in the concluding sections of this paper.

97. The Challenge of Peace, Summary ¶ 3.

98. The Challenge of Peace, ¶¶ 4, 10.

99. See text at notes 133-153, *infra* (reference to employment discrimination cases).

100. The Challenge of Peace, ¶¶ 66, 70, 75-111.

101. See The Challenge of Peace, ¶ 318.

102. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

103. See text at notes 25-26, *supra*.

104. See text at notes 119-122, *infra*.

B. Conscientious Objection and Employment Discrimination Law:¹⁰⁵ Allocating the Burdens of Conscience

Because the pastoral letter calls upon men and women in defense industries to "confront . . . questions of personal and vocational choice"¹⁰⁶ which will inevitably involve either a decision to "no longer be associated with defense activities"¹⁰⁷ or to "remain in these industries or earn a profit from the weapons industry,"¹⁰⁸ it is critical that the risks and burdens which come with such decisions be analyzed. The Bishops pledge their availability "as moral teachers and pastors,"¹⁰⁹ but what about the practical legal risks attendant upon the making of a moral choice to resign, transfer, or continue employment with explicit reservations concerning the types of acceptable assignments? Surprisingly, these questions were not considered by the Bishops in the investigative process which led to the publication of the letter,¹¹⁰ even though the answers to many of them will determine the level and type of "support" the Catholic community should be expected to provide those whose actions have legal consequences such as job loss.¹¹¹

The primary focus of this section of the paper, therefore, will be the operation of the religious discrimination sections of Title VII of the Civil Rights Act of 1964,¹¹² and the degree to which they may be used to defend the conscientious choices of those who work in the defense industry against discrimination by employers. Also to be con-

105. The materials in this section deal only with the requirements of the main federal employment discrimination law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* The requirements of applicable state fair employment practices laws and the application of those statutes to federal defense contractors is beyond the scope of this paper. *See, e.g.,* ARIZONA REV. STAT. ANN. § 1-1463 (B)(1) (1974); HAWAII REV. STAT. § 378-2 (1976); MAINE REV. STAT. ANN. § 4572 (1964); NEBRASKA REV. STAT. § 48-1104 (1943); PA. STAT. ANN. Tit. 43 § 955(5)(g) (Purdon 1963); 4B UTAH CODE ANN. § 34-35-6 (1953). For a discussion of the application of those statutes to religiously affiliated colleges and universities see F.N. DUTILE AND E.M. GAFFNEY, *STATE AND CAMPUS* (1984).

106. *The Challenge of Peace* ¶ 318.

107. *Id.*

108. *Id.*

109. *Id.*

110. There is no indication in either the text of the Letter and its drafts or the news coverage which followed its publication, that the issue was given any consideration. The only relevant portions of the letter which could be said to address this issue were the references to the *Statement on Registration and Conscription for Military Service* (Washington, D.C. 1980) and *Human Life in Our Day* (Washington, D.C. 1980), but examination of the footnote material referenced in the text of the letter indicates that they are not on point, especially with respect to the obligation of civilians in the nonmilitary context.

111. *The Challenge of Peace* ¶ 318.

112. Title VII of the Civil Rights Act of 1964, as amended, §§ 701(j), 702, and 703(a-e), 42 U.S.C. §§ 2000e(j), 2000e-1, 2000e-2(a-e).

sidered will be the level of constitutional protection afforded workers who quit or are fired from their jobs for reasons of conscience. While Title VII governs the employer/employee relationship,¹¹³ eligibility for unemployment benefits turns on the construction of state law,¹¹⁴ which has been held to be subject to the constitutional restraints of the Free Exercise Clause.¹¹⁵

Title VII of the Civil Rights Act: Narrow Protection for Religious Belief and Practice

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex or national origin.¹¹⁶ For purposes of the statute, the term "religion" is defined as follows:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.¹¹⁷

Title VII thus defines and prohibits two distinct forms of employment discrimination based on religious factors:

- 1) that which is based on the identity or type of religious belief held or practiced by the employee (representation);¹¹⁸ and
- 2) failure to accommodate religious practices where it is possible to do so without "undue hardship" to the employer's business (accommodation).¹¹⁹

There are three related, but distinct, exceptions to the general prohibitions, but only one of them is relevant to workers in defense

113. Section 701(b) of Title VII, 42 U.S.C. § 2000e(b) extends Title VII coverage to any "employer . . . engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined by section 2101 of Title 5 of the United States Code), . . ." Title VII was amended in 1972 to include federal employees, P.L. 92-261, 86 Stat. 111, *as amended* 92 Stat. 3781 (1978) 42 U.S.C. § 2000e-16. *Morton v. Mancari*, 417 U.S. 105 (1974).

114. *See generally, e.g.*, OHIO REV. CODE § 4141.09. *et seq.* 29 (Page, 1984); 15 TEX. CIV. STATS. §§ 5221b-1 *et seq.* (Vernon supp. 1983).

115. *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

116. Section 703, 42 U.S.C. § 2000e-2.

117. Section 701(j); 42 U.S.C. § 2000(j), as amended.

118. *See note 143, infra.*

119. *See note 122, infra.* Cases arising in this category are, by far, the most common for reasons discussed in note 140.

industries.¹²⁰ In relevant part, it provides as follows:

Notwithstanding any other provision of [Title VII], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, . . . in those certain instances where religion, . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .¹²¹

Taken as a whole, therefore, Title VII imposes upon employers a duty of non-discrimination on the basis of religion except where 1) the "normal operation" of the particular business or enterprise "reasonably" requires differential treatment, and; 2) where accommodation will result in an "undue hardship" on the employer's business.¹²²

120. The other two sections, 42 U.S.C. §§ 2000e-1 and 2000e-2(e)(2), relate to the need for religious institutions and their affiliated educational institutions, to hire on the basis of religion whenever their activities reasonably require it. As such, these sections explicitly recognize that, for religious institutions, religious belief is often a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) [BFOQ]. The effect of these provisions is to remove a considerable, and probably unconstitutional, amount of discretion from the courts or administrative agencies which would, in the absence of such special rules, be asked to make determinations concerning the legitimacy of hiring practices designed to safeguard the doctrinal integrity and mission of religious institutions. *Compare* 42 U.S.C. § 2000e (religion as a bona fide occupational qualification) *with, e.g.,* EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (reporting requirements of Title VII); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (sex-discrimination, church-minister relationship).

121. 42 U.S.C. § 2000e-2(e).

122. It is significant that the statute is phrased in this manner, for it negates the applicability of the nondiscrimination provisions upon the showing of "reasonable" necessity. It has been held that, for purposes of religious discrimination, all that need be shown by the employer to claim the exemption is a *de minimis* impact on business or labor contract interests. *See* T.W.A. v. Hardison, 432 U.S. 63, 84 (1977) (accommodation); Equal Employment Opportunity Commission, Religious Discrimination Guidelines, 29 C.F.R. § 1605.2(e)(1) (defining "undue hardship"). The reasons for such a narrow construction of the statute are varied, and relate to both constitutional and statutory concerns.

In *Hardison*, for example, it was significant that the union involved claimed its duty to accommodate (based on Section 703 of Title VII, 42 U.S.C. § 2000e-2(e)) was negated by the impact of the requested accommodation (a shift change) on the seniority system, *see* 432 U.S. at 81-83 (relying on 42 U.S.C. § 2000e-2(h)). At this writing, the relationship of general nondiscrimination requirements and the requirements of bona-fide seniority systems is far from settled, especially where it is argued that the Constitution itself (rather than Title VII) is the source of the nondiscrimination rule. *Compare, e.g.,* *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984) (race discrimination; Title VII); *Franks v. Bowman Transportation, Co.*, 424 U.S. 747, 778 (1976) (race discrimination; retroactive seniority), *with* *Local No. 93, International Assn. of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 106 S. Ct. 3063 (1986) (race discrimination; Title VII); *N.A.A.C.P. v. Detroit Police Officer's Ass'n.*, 591 F. Supp. 1194 (E.D. Mich. 1984). Such a discussion is far beyond the scope of this paper and the subject is mentioned only to illustrate the difference in approach between representation cases involving race, sex or national origin discrimination, and accommodation cases involving religious discrimination as defined by Section 701(j) of Title VII.

In the former, a considerable burden on employer business practice is held to be justifiable

Given this background, the application of these rules to the conscientiously objecting worker in a defense-related industry can now be examined. Once again, the first reference is to the pastoral letter. Because the letter offers no concrete guidance to the individual who will not be involved with those activities which are deemed to be clearly immoral, such as targeting civilian populations,¹²³ a considerable amount of discretion has been vested in individual Catholics to form their own consciences on issues of nuclear war and peace.¹²⁴ Traditional Catholic doctrine distinguishes between "just" and "unjust" wars (*ius ad bellum*), and between means of waging war which are legitimate and illegitimate (*ius in bello*).¹²⁵ This method of analysis presupposes that some wars are just and that some means of waging war are legitimate. Positions which go beyond those teachings to generalized objection to all war or to any use of nuclear weaponry would be difficult to characterize as being based in what is commonly understood to be "traditional" Catholic teaching. The bishops appear to make this clear when they stated that while "[they had] ruled out certain uses of nuclear weapons, [they had] . . . also express[ed] conditional moral acceptance for deterrence"¹²⁶ [i.e. other uses]. Since

in order to eradicate discrimination, in the latter cases, only a slight burden is held to be permissible. Compare *T.W.A. v. Hardison*, 432 U.S. 63 (1977) with *Williams v. Southern Union Gas Co.*, 529 F.2d 483 (10th Cir. 1976); *Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975), *cert. den.*, 429 U.S. 964; *Johnson v. United States Postal Service*, 497 F.2d 128 (5th Cir. 1974) (finding undue burden on other employees); *Draper v. United States Pipe & Foundry, Co.*, 527 F.2d 515 (6th Cir. 1975); *Cummins v. Parker Seal Co.*, 576 F.2d 544 (6th Cir., 1975), *aff'd by equally divided Court*, 429 U.S. 65 (1976); *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972) (finding no undue burden and duty to accommodate). Although part of the distinction may be based on statutory language, not all of it can be explained on this basis. Compare 42 U.S.C. § 2000e(k) (defining "on the basis of sex" to include needed accommodation for pregnancy related conditions).

Another reason, rarely discussed in detail, relates to the duty of Congress under the Religion Clauses of the first amendment to avoid preferences for any one religion over another. On this topic, see generally *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Cummins v. Parker Seal Co.*, *supra*, 516 F.2d at 556 (Celebrezze, J. dissenting) (arguing that the religious accommodation requirements of Title VII are unconstitutional as a preference for and among religions). Note, *The Constitutionality of an Employer's Duty to Accommodate Religious Beliefs and Practices*, 56 CHI.-KENT L. REV. 635 (1980); Note, *The Reasonable Accommodation Rule Mandates Unconstitutional Preference for Religious Workers in Title VII Actions*, 30 VAND. L. REV. 1059 (1977).

123. The Challenge of Peace, ¶¶ 147-49.

124. See text at note 96, *supra*.

125. The Challenge of Peace ¶¶ 80-111. For a thorough discussion of the range of religious traditions which also adopt this position see PEACE IN A NUCLEAR AGE: THE BISHOPS' PASTORAL LETTER IN PERSPECTIVE (C. Reid ed. 1986). See also R. BAINTON, CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL REEVALUATION (1960); C. CURRAN, DIRECTIONS IN CHRISTIAN SOCIAL ETHICS (1984); G. ZAHN, WAR, CONSCIENCE AND DISSENT (1967).

126. The Challenge of Peace ¶ 318.

“different judgments of conscience will face different people” who can and should make “diverse concrete judgments” on these questions, all such individuals are entitled to support from both the clergy and the Catholic community at large as long as they form their respective consciences in a manner arguably consistent with the language of the pastoral letter.¹²⁷ Given such flexibility of approach, the bishops’ concern that the law protect “true” [i.e. selective]¹²⁸ freedom of conscience is well-founded. Traditional Catholic positions concerning selective conscientious objection have never been accepted by the courts in the military context,¹²⁹ and it would be devastating for Catholics as workers to face the same insensitivity to their conscientious needs. More importantly, however, the Bishops’ admission that individual Catholics may find it difficult to determine precisely how the letter applies to their own situations as workers in defense-related industries would make it nearly impossible for an individual Catholic to rely on the pastoral letter alone¹³⁰ to resolve questions of conscience which might have an impact on the “personal, professional and financial choices facing [them] in [their] varying responsibilities”.¹³¹

For purposes of Title VII, however, the law makes it clear that providing legal protection for conscientious objection claims, even those supported by positions which are not identified with the exact teachings of a given religion, is legitimate, and may be constitutionally required.¹³² The “Religious Discrimination Guidelines”¹³³ published

127. *Id.* This is especially true given the discussion of the value of nonviolence in ¶¶ 111-21.

128. The Challenge of Peace ¶ 324.

129. *Gillette v. United States*, 401 U.S. 437 (1971), *see generally* sources cited at notes 77, 78, 81, *supra*.

130. The Challenge of Peace ¶ 318 makes it clear that the Bishops “seek as moral teachers and pastors to be available to all who confront these questions of personal and vocational choice[, and that] . . . [t]hose who remain in [defense] industries or earn a profit from the weapons industry should find in the Church *guidance and support for the ongoing evaluation of their work.*” (emphasis supplied). From this it can be seen that the letter alone will not be sufficient to supply necessary answers. Reference to additional sources, in conjunction with the pastoral guidance the Bishops have pledged, is necessary.

131. *Id.*

132. *See Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). *But see, Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S. Ct. 2914 (1985) Although *Thomas*, *Welsh* and *Seeger* were cases decided outside the scope of Title VII, they do form a legitimate basis for administrative determination of the applicable law. Of these three cases, only *Thomas* presented an actual constitutional claim. Although both *Welsh* and *Seeger* turned on determinations of Congressional intent when it enacted the Military Selective Service Act, the Supreme Court made it very clear that a contrary result in either case would have raised serious constitutional questions. *See Gillette v. United States*, 401 U.S. 437 (1971);

by the United States Equal Employment Opportunity Commission (E.E.O.C.) state that "the Commission will define [the statutory term] 'religious practices' to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."¹³⁴ Thus, a defense worker need only show that the position of conscience taken on the basis of the teachings contained in the pastoral letter is sincerely held "with the strength of traditional religious views." It makes no difference whether the teachings are "identifiably" those of the faith to which the worker subscribes.

The fact that no religious group espouses such beliefs or the fact that the religious groups to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.¹³⁵

Notwithstanding the apparent breadth of Title VII coverage in such instances, the critical factor is not the belief or practice of the employee, but the degree of hardship accommodation which that belief will impose on the employer.¹³⁶ Because an employer may legitimately refuse to make anything more than a de minimis effort,¹³⁷ especially where it would involve dislocation of other employees,¹³⁸ the potential obstacles to accommodation of the conscientious objector's rights within the workplace will depend on whether the nature of the employer's business and labor contracts, if any, will limit or eliminate the dissenting employee's job flexibility.

An employer's duty to attempt accommodation arises at the point where an employee fulfills his or her preliminary obligation to disclose the religious need.¹³⁹ From this, it follows that an employer

Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); Reply Brief of Behalf of Petitioner, *Negre v. Larsen*, No 70-325, *Gillette v. United States*, 401 U.S. 437 (1971) (companion case involving Catholic objector).

133. Equal Employment Opportunity Commission, Religious Discrimination Guidelines, 29 C.F.R. § 1605.1, *et seq.*; CCH Employment Practices Guide ¶¶ 3970.01 *et seq.*

134. 29 C.F.R. § 1605.1.

135. 29 C.F.R. § 1605.1.

136. 42 U.S.C. §§ 2000e(j), 2000e-2(e)(1).

137. 29 C.F.R. § 1605.2(c). *T.W.A. v. Hardison*, 432 U.S. 63 (1977).

138. See 42 U.S.C. § 2000e-2(h). See also text at note 122, *supra*.

139. 29 C.F.R. § 1605.2(c) provides, in relevant part:

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each

has the right to assume that there are no religious objections to the type of work or duties assigned, religious or otherwise, unless they are voiced by the employee. Likewise, an employer may not make blanket assumptions during the hiring or promotion process concerning adherents of a given religion—here Catholics—without first ascertaining that the individual involved would be unable or unwilling to do the job. Title VII law does not favor broad class-based assumptions about job qualifications.¹⁴⁰ For that reason a defense industry employer who elects to avoid the burden of accommodation by simply refusing to hire or promote Catholics would be guilty of a prima facie violation of the statute¹⁴¹ unless it could be proved that the particular individual involved was unqualified,¹⁴² or that hiring only non-Catholics was “reasonably necessary” to the conduct of the employer’s business.¹⁴³

available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

140. 42 U.S.C. § 2000e-1. *Cf.* 29 C.F.R. § 1605.1 (by negative implication). *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

141. *See generally*, B.L. Schlei and P. Grossman, *Employment Discrimination Law* (B.N.A. 1976).

142. *Id.*

143. 42 U.S.C. § 2000e-2(e) (BFOQ). Such a showing would be impossible under these facts, and the author has found no cases where this section has been found to apply. The law simply does not permit such “broad brush” classification, *see, e.g.*, *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978) (sex-based pension annuity tables), and provides special protection in those few cases where scrutiny of religious belief by an employer is clearly proper. *See E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (reporting requirements of Title VII). Compare, 42 U.S.C. (2000e-2(e)(1) (BFOQ) and *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (standards for BFOQ), with 42 U.S.C. § 300a-7 (forbidding discrimination against those opposing abortion by employers and training programs receiving financial assistance from the Public Health Service). The E.E.O.C. Guidelines do not even permit employers to inquire concerning religious beliefs for statistical purposes. *See Blum v. Gulf Oil Corp.*, 597 F.2d 396, 398 (5th Cir. 1979) (Defendant denies during discovery that it kept records reflecting religious and sexual preferences of employees); *Equal Employment Opportunity Comm’n v. United States Fidelity and Guaranty Co.*, 14 E.P.D. ¶ 7528 (D. Md. 1977). *See also* United States Office of Federal Contract Compliance Regulations, 41 C.F.R. § 60-1.7 (adopting E.E.O.C. categories). In addition, some states expressly prohibit the gathering of such data, *e.g.*, ADMIN. CODE OF CITY OF N.Y. § BI-7.0(1) (d) and (1-a)(d); N.Y. Exec. Law § 296(1)(d) and (1-a)(d) (McKinney’s 1972) (prohibition of discrimination on the basis of “creed”); *Holland v. Edwards*, 307 N.Y. 38 (1954); *Cf.*, *State Div. of Human Rights v. Gorton*, 32 A.D. 2d 933, 302 N.Y.S. 2d 966 (2nd Dep’t. 1969) (discrimination found on the basis of employer’s repeated inquiries and constant harassment as to respondent’s religion). Given the importance of workplace demographics for most Title VII enforcement cases involving representation, *e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. den.*, 404 U.S. 984 (1971), such limitations force individuals to prove an intentional rather than a statistical case. *See generally* B.L. Schlei & P. Grossman, *supra*, at 1161-1195. Even though it is well settled that statistical

The difficulty, if any, will arise when the defense employer learns of the employee or potential employee's objections. Assuming that the employee and employer can locate an available¹⁴⁴ job within the employer's work force which does not compromise the employee's conscience, there is no guarantee that the employer will be either willing or able to accommodate the request. Simple unwillingness, of course, is not enough,¹⁴⁵ but any legitimate business reason will suffice as long as it is not a pretext for discriminatory conduct.¹⁴⁶ Thus, it has been held that disruption of the work force, adverse impact on morale, and simple unavailability of a suitable job are sufficient reasons.¹⁴⁷ When the issue is hiring or promotion, rather than accommodation, and the job or promotion would bring the candidate closer to levels of responsibility which might involve the actual planning or implementation of acts deemed by the letter to be immoral, both the employee and the employer may have legitimate reasons to discuss the situation in order

proof is relevant to the *prima facie* case in a Title VII action, the lack of statistics makes the already difficult task of proving intentional religious discrimination nearly impossible. The E.E.O.C. Guidelines currently require that employee demographics be kept only in the following classifications "White," "Black," "Hispanic," "Asian or Pacific Islander," or "American Indian or Alaskan Native," see 29 C.F.R. § 1602.20. The Guidelines do not carry the force of law and are, therefore, not binding on employers or judges. Nonetheless, the Supreme Court has indicated that they are to be given "great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971). A discussion on this point is beyond the scope of this article and is noted only to point out the difficulty this lack of data creates in dealing with questions of religious and national origin discrimination generally. See, e.g., *Sklenar v. Detroit Bd. of Education*, 497 F. Supp. 1154 (E.D. Mich. 1980).

144. 42 U.S.C. §§ 2000e(j)(burden); 2000e-2(h) (seniority). See *T.W.A. v. Hardison*, note 137, *supra*.

145. See *Minkus v. Metropolitan Sanitary Dist. of Greater Chicago*, 600 F.2d 80 (7th Cir. 1979); *Haring v. Blumenthal*, 471 F. Supp. 1172 (1979) (employer refusal to accommodate).

146. See B.L. Schlei & P. Grossman, *supra* note 141, at 1195-96 and sources cited. *Accord Oates v. United States Postal Service*, 458 F. Supp. 57 (S.D.N.Y. 1978), *aff'd without opinion*, 591 F.2d 1331 (2d Cir. 1978); *Levine v. Navapache Hospital*, 26 E.P.D. ¶ 32, 103 (D. Ariz. 1981) (anti-Semitic remark insufficient to prove religious discrimination where employee was insubordinate and disruptive; religious discrimination charge would not affect discharge for valid cause). The degree to which the courts have not settled on an approach to religious discrimination cases is illustrated by *Hershinow v. Bonamarte*, 735 F.2d 264 (7th Cir. 1984), a civil rights action pursuant to 42 U.S.C. § 1983. In *Hershinow*, a Jewish policeman unsuccessfully challenged his suspension from the police for "unprofessional conduct" during an incident where a driver stopped for a traffic violation made a series of anti-Semitic remarks about Jewish women generally. When Officer Hershinow told the driver that he was Jewish, she threatened "to get [his] Jewish wife." The alleged "unprofessional conduct" was the officer's attempt to arrest the driver for making such a threat, and his dropping the matter after the driver apologized.

147. See e.g., *Palmer v. Bd. of Education of City of Chicago*, 603 F.2d 1271 (7th Cir. 1979), *aff'g*, 466 F. Supp. 600 (N.D. Ill. 1979) (refusal to take part in essential activities); *Howard v. Haverty Furniture Companies, Inc.*, 615 F.2d 203 (5th Cir. 1980); *Jordan v. North Carolina National Bank*, 565 F.2d 72 (4th Cir. 1977).

to avoid serious future problems.¹⁴⁸

C. Conscientious Objection and the Impact of Voluntary or Involuntary Separation from Employment on Eligibility for Unemployment Benefits

In cases where an employee quits or is fired from a job because the employer cannot accommodate the employee's religious needs, there may be a period where the former employee seeks unemployment compensation pursuant to the laws of the state in which he resides. In such cases, the immediate legal question will be whether the individual is eligible for unemployment compensation. This, in turn, will depend upon the particular provisions of the state statute under which application is made. In cases where an employee quits, or is fired for legitimate reason, many states deny unemployment compensation,¹⁴⁹ but in a series of cases which commenced with *Sherbert v. Verner*¹⁵⁰ the United States Supreme Court has made it clear that the Free Exercise Clause of the first amendment imposes important limits on this discretion. It is now virtually impossible for the states to treat religiously based conscientious objection to continued employment as a valid reason for denial of unemployment compensation benefits.

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.¹⁵¹

148. According to the dual commands of both the law and the pastoral letter, the Catholic employee's obligation in such a situation would be both legal and moral. The moral obligation would be to use the teachings of the pastoral letter to analyze the new job responsibilities and integrate them into one's conscience. See *The Challenge of Peace* ¶ 318. The legal obligation would be to disclose any decision adverse to the employer's interests in order to invoke the protections of Title VII. E.E.O.C. Religious discrimination Guidelines, 29 C.F.R. § 1605.1, *et seq.* See *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977), *cert. den.*, 434 U.S. 1039 (1978). Such disclosure might also be required in the course of qualification for necessary security clearances. See 32 C.F.R. § 156.3. It should be obvious at this point that the employer's obligations are minimal, and that the courts are unlikely to impose any obligation which would interfere with routine operations. See cases cited at notes 122, 146, *supra*. It should also be noted that interference with defense-related operations might be a criminal offense. See 18 U.S.C. § 2156.

149. See, e.g., Ohio Rev. Code § 4141.29.

150. 374 U.S. 398 (1963).

151. *Thomas v. Review Board of the Indiana Employment Security Div.*, 450 U.S. 707, 718-19 (1981).

The most recent of the unemployment cases is *Thomas v. Review Board of the Indiana Employment Security Division*,¹⁵² a case which is particularly relevant to the subject matter of this article.¹⁵³ *Thomas* involved the refusal of an employee to transfer from a job in a defunct roll foundry which had been turning out sheet steel for a variety of industrial uses to another of his employer's divisions which fabricated military tank turrets. When Thomas found that his new job was related to the manufacture of military equipment, he checked for other available plant openings and found that all of the remaining departments of his employer were engaged in the manufacture of weapons. Since transfer would not solve his problem, he asked for a layoff, which would make him eligible for unemployment benefits under Indiana law,¹⁵⁴ but his employer refused. So he quit, asserting that he could not work on weapons without violating the principles of his religion.¹⁵⁵ When his unemployment claim was heard in the Indiana Employment Security Division, it was rejected on the ground that the termination of Thomas' employment was not based upon a "good cause [arising] in connection with [his] work" as required by the Indiana unemployment compensation statute.¹⁵⁶ On appeal, the Indiana Supreme Court upheld the decision of the Review Board, holding that "good cause which justifies involuntary unemployment must be job-related and objective in character."¹⁵⁷ In addition, it held that the basis and the precise nature of Thomas' views concerning his obligations as a Jehovah's Witness were unclear, apparently because Thomas' views were stricter than those of another Jehovah's Witness who had testified at the hearing, and that they amounted more to a "personal philosophical choice" than a religious belief which was entitled to protection under the Free Exercise Clause of the first amendment.¹⁵⁸ Nonetheless, it concluded its opinion by holding that even if Thomas had quit for religious reasons, he would not be entitled to

152. 450 U.S. 707 (1981).

153. The Supreme Court has recently agreed to hear two additional cases involving religious discrimination in employment and benefits. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 37 F.E.P. Cases 404 (2d Cir. 1985), *cert. granted*, 106 S. Ct. 848 (No. 85-495) (religious discrimination under Title VII); *Hobbie v. Unemployment Appeals Commission of Florida*, — So. 2d — (Fla. Dist. Ct. App. 1985), *juris. postponed to hearing on the merits*, 55 U.S.L.W. 3058 (No. 85-993).

154. Indiana Code § 22-4-15-1 (1976 and Supp. 1978).

155. 450 U.S. at 708.

156. *Id.*

157. 450 U.S. at 712-13, *quoting* *Thomas v. Review Board of the Indiana Employment Security Division*, 271 Ind. 233, 391 N.E.2d 1127, 1129 (1981).

158. *Id.*, 450 U.S. 707, at 708, 391 N.E.2d at 1131.

benefits under Indiana law because termination motivated by religion did not amount to "good cause" objectively related to the work.¹⁵⁹ The United States Supreme Court reversed, holding that a state court is not permitted to burden the employee's first amendment rights by conditioning the receipt of benefits on the rejection of sincerely held personal religious beliefs.¹⁶⁰ In this regard, the Court did nothing more than to reaffirm the general rule of *Sherbert v. Verner*,¹⁶¹ but the case is also significant insofar as it extended the general rule against judicial inquiry into the validity or consistency of an individual's belief system¹⁶² to the case where an individual is applying for government benefits.¹⁶³ The Court's words are significant given the

159. *Id.*

160. *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715.

161. 374 U.S. 398 (1963).

162. *United States v. Ballard*, 322 U.S. 78 (1944).

163. The extension of such reasoning to the provision of governmental benefits places the Supreme Court in an interesting constitutional quandary which it has yet to resolve. Its decisions under the Establishment Clause indicate that the first amendment "bespeaks a government . . . stripped of all power . . . to support, or otherwise to assist any or all religions . . ." and no State "can pass laws which aid one religion . . . [or] all religions." *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, at 725 (Rehnquist, J., dissenting) (quoting *Everson v. Board of Education*, 330 U.S. 1 (1947)). A long line of cases has invalidated government financial subsidies or support for religious activity, *see, e.g.*, *Aguilar v. Felton*, 473 U.S. —, 105 S. Ct. 3232 (1985); *Ball v. School District of Grand Rapids*, 473 U.S. — (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *McCollum v. Board of Education*, 333 U.S. 203 (1948), and the battle over this issue is far from over. *See, e.g.*, *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986), *rev'g*, 102 Wash. 2d 624, 689 P.2d 53 (1984); *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986), *aff'g*, 236 U.S. App. D.C. 248, 734 F.2d 1531 (1985); *Bowen v. Roy*, 106 S. Ct. 2147 (1986), *rev'g and remanding*, *Roy v. Cohn*, 590 F. Supp. 600 (M.D. Pa. 1984); *Bender v. Williamsport Area School District*, 106 S. Ct. 1326 (1986), *vacating and remanding* 741 F.2d 538 (3d Cir. 1984); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Mueller v. Allen*, 463 U.S. 388 (1983).

In *Thomas*, by contrast, the Court ruled that to deny otherwise available governmental benefits on the grounds that "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, [it] thereby put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." In the Court's view, such pressure constitutes a substantial and impermissible "burden upon religion" under the Free Exercise Clause of the first amendment. 450 U.S. 707, at 717-18 (majority opinion).

The difficulty with this argument is that most of the Court's holdings under the Establishment Clause involve its own attempts to condition otherwise available public assistance on an individual's willingness to give up the constitutionally protected right to choose to be educated in a religiously affiliated or private school rather than a public school. *Compare Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing this right), *with e.g.*, *Aguilar v. Felton*, *supra*; *Ball v. School District of Grand Rapids*, *supra*; *Thomas v. Allegany County Board of Education*, 51 Md. App. 312, 443 A.2d 622 (1982). *But cf.*, *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748

differences in opinion which have already arisen concerning the requirements of the pastoral letter.

Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. . . . Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [individual] or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.¹⁶⁴

Because the states will not be free to question the interpretation of Catholic doctrine accepted by a worker who quits or is fired from a defense-related job, it is irrelevant that the teachings of the pastoral letter may not be clear as they apply to individuals who work in defense industries. Even though "different judgments of conscience will face different people, and . . . diverse concrete judgments [may be] made in this complex area[.]"¹⁶⁵ the Church makes it clear that it will "be available to all who confront these questions of personal and vocational choice[.]" and will support those who "in conscience decide

(1986), *rev'g*, 102 Wash. 2d 624, 689 P.2d 53 (1984) (individual choice to allocate otherwise available educational benefits to religious education program does not violate the Establishment Clause); *Mueller v. Allen*, 463 U.S. 388 (1983) (child benefit theory); *Everson v. Board of Education*, *supra* (same). This fact was not lost in Justice Rehnquist's pointed dissent in *Thomas*, 450 U.S. 707, at 724, 727:

This decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment. Although the Court holds that a State is constitutionally required to provide direct financial assistance to persons solely on the basis of their religious beliefs and recognizes the 'tension between the two Clauses, it does little to help resolve that tension or to offer meaningful guidance to other courts which must decide cases like this on a day-to-day basis.' 450 U.S. 707 at 722.

Interestingly, Justice Rehnquist would not have protected *Thomas* by extending the Free Exercise Clause to cover his case, but rather would have supplanted the *Sherbert* rule with that of *Braunfeld v. Brown*, 366 U.S. 599 (1961). Such a development in the law of Free Exercise would lead to a contrary result in much of the foregoing analysis. See also *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986); *Bowen v. Roy*, 106 S. Ct. 2147 (1986).

One development worthy of note in this regard is the Court's decision in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), which appears to signal a shift in the Court's thinking in matters of Free Exercise. A thorough analysis of *Caldor*, which invalidated, on Establishment Clause grounds, a Connecticut state labor law which required accommodation of an employee's designated Sabbath—is beyond the scope of this essay. Since the case rests on Establishment Clause analysis, rather than a Free Exercise rationale, Justice Rehnquist's view of the reach of the Free Exercise Clause has gained little, if any, support within a Court which seems far more preoccupied with marking the proper boundaries of religious accommodation under the Establishment Clause than making sense of the religious freedom guarantee implicit in the first amendment as a whole.

164. *Id.*, 450 U.S. at 716 (majority opinion).

165. *The Challenge of Peace* ¶ 318.

that they should no longer be associated with defense activities"¹⁶⁶ It is therefore likely that unemployment benefits will be available as at least one source of the "support" for the conscientious objector which will be available in the community at large.¹⁶⁷

IV. CONCLUSION

The purpose of the foregoing summary of the law has been to address some of the major constitutional and legal questions which arise in light of the Bishops' pastoral letter on war and peace. Although no attempt has been made to address these questions exhaustively, it does seem clear that the Bishops were well within their rights to sound a moral alarm over the issue of nuclear weapons, and that individuals who elect to respond to their suggestions can find some support for their individual decisions of conscience in the law. Whether the Bishops' teachings were justified on moral, political, strategic or other grounds are topics which have been addressed elsewhere.¹⁶⁸ The impact of these teachings on the individuals who wish to form their consciences and take concrete steps in a manner consistent with the pastoral letter, however, is a matter which was not discussed, nor even considered by the bishops as they formulated their suggestions.¹⁶⁹ In the view of this writer, such an omission is unfortunate, not because these considerations should change the moral precepts which govern issues of war and peace—they should not—but because real people have been urged by their religious leaders to make real life "personal, professional and financial choices"¹⁷⁰ with legal significance based upon the teachings in the pastoral letter. Merely "rul[ing] out certain uses of nuclear weapons, while also expressing conditional moral acceptance for deterrence" does not give clear guidance to the individual who must make practical decisions which will inevitably have an impact on family and career. If the Bishops did "not presume or pretend that clear answers exist to many of these personal, professional and financial choices," they should have stated a bit more clearly the moral principles upon which the "average" Catholic worker (if such an individual exists) might base those judgments. They have done so in other contexts, including that of abor-

166. *Id.*

167. *Id.* Best v. California Apprenticeship Council, 161 Cal. App. 3d 626, 207 Cal. Rptr. 863 (1984).

168. See, e.g., PEACE IN A NUCLEAR AGE: THE BISHOPS' PASTORAL LETTER IN PERSPECTIVE (C. Reid ed. 1986) and sources cited therein. See also sources cited in note 126 *supra*.

169. Note 110, *supra*.

170. The Challenge of Peace ¶ 318.

tion—the other great evil condemned in the letter¹⁷¹—and it should not have been an unreasonable task for them to have done so for those who hold jobs at levels of the defense industry which are only remotely connected to that which is clearly immoral.

That such guidelines were not spelled out in the text of the letter is understandable given the breadth of the undertaking. Nonetheless, such guidance is necessary at a time when individual believers are subjected to varying interpretations of the letter's content by church leaders, theologians, religious commentators and representatives of the electronic and print media. Whose interpretation is one to believe? This question is a significant one indeed for the believer who intends to take steps which might affect his or her future.

The law requires a that the individual must demonstrate that a burden exists on a sincerely held religious belief in order to claim the protection of the constitutional provisions and laws of the United States which forbid discrimination on the basis of religion.¹⁷² For Catholics who traditionally rely on their bishops to articulate the moral principles they are to apply, it will be difficult to rely on the pastoral letter unless the affected individual can articulate, even roughly, why his or her Catholic faith mandates the course of action chosen.¹⁷³ The law looks dimly on exemptions from social obligations based on mere philosophical or political points of view,¹⁷⁴ and Catholics who intend to rely on the text of the letter for support would be well advised to seek some pastoral guidance in the process of forming their respective consciences if they intend to take a position which goes farther than the letter itself. While civil courts may not question the veracity or consistency of a religious view,¹⁷⁵ it is critical that the believer be able to explain it in terms which are religious in nature. Their own personal philosophy concerning nuclear weapons will not be enough.¹⁷⁶

171. *Id.*

172. See text at notes 102-105, *supra*.

173. See text at notes 132-139, *supra*.

174. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

175. See *United States v. Ballard*, 322 U.S. 78 (1944) and text accompanying note 162, *supra*.

176. *Thomas v. Review Board*, 450 U.S. 797, *supra*; *Wisconsin v. Yoder*, *supra* (mere personal belief or philosophy not protected by the Religion Clauses).

