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### Recommended Citation

John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DePaul L. Rev. 1 (1986)

Available at: <https://via.library.depaul.edu/law-review/vol36/iss1/2>

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# THE RELIGION CLAUSES OF THE FIRST AMENDMENT AND FOREIGN RELATIONS

*John H. Mansfield\**

## INTRODUCTION

The constitutional law of church and state is a subject of deep and inexhaustible interest. It raises questions that present fundamental issues concerning human nature and the purposes of political society. In the present article I examine an aspect of this topic that has received little attention: the application of the religion clauses of the first amendment to situations having an international aspect, particularly situations involving United States activity in foreign countries. What I have to say about this topic will be exploratory in nature, with more questions raised than answered.

My interest in the present subject was aroused by the following sort of case:

The American Jewish Congress and officials and members of the Congress, who were also United States citizens and taxpayers, sued to enjoin a Saudi Arabian-United States cooperation program on the ground that because of the Saudi policy of discriminating against Jews, Jews would be excluded from the program.<sup>1</sup> One plaintiff alleged that he had been denied a job with a university consortium involved in the program because of his Jewish religion, ancestry and identity.<sup>2</sup> Dismissal of the complaint was affirmed because of lack of standing of the plaintiffs or "want of equity in the complaint."<sup>3</sup>

A pilot was hired in Fort Worth, Texas, to fly helicopters over a pilgrimage route in Saudi Arabia.<sup>4</sup> The pilot understood that a condition of his employment was that he become a Moslem. At first he agreed, but then changed his mind and instead filed suit under Title VII of the Civil Rights Act.<sup>5</sup> The court held that being a Moslem was a bona fide occupational qualification for the job.<sup>6</sup>

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1. *American Jewish Congress v. Vance*, 575 F.2d 939 (D.C. Cir. 1978).

2. *Id.* at 942.

3. *Id.* at 947; *id.* at 948 (McGowan, J., concurring).

4. *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984).

5. 42 U.S.C. §§ 2000e - 2000e-17 (1982).

6. *Kern*, 577 F. Supp. at 1201-02.

A religiously-affiliated organization doing work among refugees in Thailand received United States government support. The organization, it was said, mingled religious proselytization with humanitarian work.<sup>7</sup> The problem was handled administratively.<sup>8</sup>

The Islamic government of Pakistan was initially uninterested in permitting American religiously-affiliated organizations to be involved in providing assistance, some of it coming from the United States government, to Afghan refugees in Pakistan. As a result of negotiations, a compromise was reached by which a consortium of organizations was allowed to provide assistance under highly restrictive conditions.<sup>9</sup>

This topic is difficult to pursue because plaintiffs often have trouble obtaining standing in cases involving the foreign relations of the United States, and courts frequently avoid decision in these cases by invoking the "political question" doctrine.<sup>10</sup> These obstacles recently led a court to affirm the dismissal of a suit challenging the appointment of a United States ambassador to the Vatican.<sup>11</sup> Nevertheless, a substantial amount of litigation relevant to this topic has developed in which the standing requirement and the political question doctrine have not prevented decision.<sup>12</sup> Furthermore, even though sometimes there are reasons for courts to avoid these disputes, serious constitutional questions are presented that the political branches of the government must decide, and to which scholarship perhaps can make a contribution.

The problems presented by these cases are important because of the manifold involvements of the United States abroad. Mention need only be made of our government's support of development programs in many foreign countries. The topic is also important because of the light it can bring to

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7. B. NICHOLS, *AT HOME IN NO MAN'S LAND* 21, 625 (forthcoming, Oxford U. Press; pagination to 1986 manuscript).

8. *Id.* at 21.

9. *Id.* at 16, 381, 475.

10. For a recent discussion of the "political question" doctrine and a recommendation that "we must abandon the political question doctrine in all its manifestations," see Redish, *Judicial Review and the "Political Question"*, 79 *Nw. U.L. REV.* 1031, 1059-60 (1984-85).

11. *Americans United for Separation of Church & State v. Reagan*, 786 F.2d 194 (3d Cir.), *cert. denied sub nom. American Baptist Churches v. Reagan*, 107 S. Ct. 314 (1986). Dismissal of the suit was affirmed on the ground that the plaintiffs lacked standing as taxpayers, citizens or members of non-Catholic religions that arguably were disadvantaged by diplomatic recognition, and also on the ground that diplomatic recognition is a "judicially unreviewable political decision." *Id.* at 201. The final part of the court's holding may embrace the proposition that courts have no power to determine whether the political branches of government have violated the first amendment in extending diplomatic recognition. For a discussion of when the political question doctrine should not apply even though there is a foreign element in the case, see *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1512-15 (D.C. Cir. 1984) (en banc), *vacated and remanded*, 105 S. Ct. 2353 (1985) (case remanded for reconsideration in light of events occurring since court of appeals' decision), *aff'd*, 788 F.2d 762 (D.C. Cir. 1986) (dismissal of complaint affirmed on ground controversy too attenuated to justify equitable relief).

12. See, e.g., *infra* notes 176-87 and accompanying text.

domestic church-state issues. When we see ourselves as one society among many, some very different from our own, and ponder the perspective of the Constitution on this confrontation and interaction, we can deepen our insight into the philosophy that underlies the Constitution. Perhaps this philosophy endorses neither heavy-handed cultural imperialism nor complete cultural relativism, but while insisting upon certain fundamentals, also gives recognition to the many paths by which humanity makes its way.

In pursuing the present topic, I have found it necessary to paint on a large canvas. The challenge has been to see the subject in relation to other subjects. Consequently, in what follows, I will discuss some things that at first glance may not seem particularly relevant. For instance, I will begin with a discussion of familiar domestic church-state cases. Also, I will discuss cases that arise under provisions of the Bill of Rights other than the religion clauses. In due course, I hope to persuade that consideration of these matters is useful in approaching the problems we have to confront.

### I. DOMESTIC CASES

In domestic cases arising under the religion clauses, the essential question is the extent to which American governments are permitted or required to maintain the position in our society of the truths that make up the philosophy of the Constitution and the extent to which they are permitted or required to provide room for other beliefs that conflict with these truths. The answer to this question is found by inquiry into the content of the constitutional philosophy itself, what it asserts about human nature, about the purposes of political society and about the value of freedom of individuals and groups.

Let us review some familiar cases for the light they can bring to the content of the constitutional philosophy and the balance it strikes between social unity and the freedom of individuals and groups. Later we can ask what difference it makes if these cases arise in Kuala Lumpur rather than in Kansas and, if it makes a difference, what truths of the constitutional philosophy would explain that difference.

Mrs. Sherbert, a Seventh Day Adventist, lived in Spartanburg, South Carolina. Because of her religious beliefs she would not work on Saturday. As a result, she could not get work in the Spartanburg area because all of the mills in the area required Saturday work. Mrs. Sherbert applied to the state authorities for unemployment compensation. The South Carolina administrative authorities and courts determined, however, that because of Mrs. Sherbert's reason for not being able to get work, she was not qualified for unemployment compensation under South Carolina law. The unemployment compensation fund, they decided, was reserved for unemployment resulting from other causes. On review by the Supreme Court of the United States,<sup>13</sup> the Court held that the free exercise clause of the first amendment

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13. *Sherbert v. Verner*, 374 U.S. 398 (1963). The holding of *Sherbert* was reaffirmed in *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987).

entitled Mrs. Sherbert to be included in the unemployment compensation program, even though this undermined South Carolina's policy of preserving the unemployment fund for other purposes. Of course, South Carolina was not required to have unemployment insurance, but so long as it had an insurance program of the scope that it had, the program was required to include Mrs. Sherbert. Thus, South Carolina was constitutionally required affirmatively to help Mrs. Sherbert and other Seventh Day Adventists in the practice of their religion.

*Wisconsin v. Yoder*<sup>14</sup> is similar to Mrs. Sherbert's case. In *Yoder*, the Supreme Court held that the free exercise clause of the first amendment required Wisconsin to sacrifice its policy of mandatory schooling for all children up to the age of sixteen to the Amish belief that their children should not go to school past the eighth grade. Amish opposition to higher schooling is an integral part of their religiously-based way of life. They are in the sectarian tradition, which emphasizes keeping apart from the world.<sup>15</sup> From the point of view of modern, urban, technological society, they are a foreign people. The Supreme Court said in *Yoder* that to make the Amish send their children to school beyond the eighth grade would destroy their way of life, implying that from the point of view of the Constitution this would be an evil outcome.

But we know from other cases that there are limits to how far the Constitution requires or even permits government to go in accommodating distinctive ways of life, even those that are based on religion. A religious belief may conflict with values of such importance under the Constitution that a way of life founded on it need not or must not be accommodated. Polygamy, even though based on religious belief, may be prohibited.<sup>16</sup> It is interesting to note, however, that prosecutors in California overlook polygamy among the Hmong people living there.<sup>17</sup> The Hmong came from Laos at the end of the Vietnam War. Perhaps it is thought that since they were free to practice polygamy in Laos, and since we had something to do with their coming to California, it is only right that they should be allowed to continue in their traditional way. Do the Mormons have ground for complaint?<sup>18</sup> California authorities have interfered, however, with the Hmong

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14. 406 U.S. 205 (1972).

15. See I E. TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 328-43 (1981).

16. *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

17. See Sherman, *When Cultures Collide*, 6 CAL. LAW., Jan. 1986, at 33, 35.

18. Polygamy among American Indians has been recognized by American courts and the difference in treatment of them and Mormons noted. Cf. Bartholomew, *Recognition of Polygamous Marriages in America*, 13 INT'L & COMP. L.Q. 1022, 1060-61, 1067, 1068 n.70 (1964). For consideration of the special status of the Indians, see *infra* notes 27-57 and accompanying text.

Polygamous marriages in a foreign country have been given effect in the United States: In *re Dalip Singh Bir's Estate*, 83 Cal. App. 2d 256, 188 P.2d 499 (1948), a Hindu married two wives in India, moved to California leaving the wives in India, and then died intestate in

practice of marriage by capture.<sup>19</sup> Perhaps as time passes and the Hmong are assimilated to American life—if they ever are—their claim to special treatment will lose its force.<sup>20</sup> We will see that this is what happened in the case of American Samoa.<sup>21</sup>

The recent Supreme Court case of *Estate of Thornton v. Caldor*<sup>22</sup> made clear that there is a limit to required or permitted accommodation to religious belief. In *Caldor*, a Connecticut statute prohibited employers from requiring an employee to work on his chosen Sabbath. The prohibition was absolute and took no account of the burden on the employer or on other employees. The Court held that the statute violated the establishment clause. In the *Bob Jones* case,<sup>23</sup> the Court held that it did not violate the free exercise clause to deny tax exemption to an educational institution that because of religious belief discriminated in student admissions on the ground of race.

The school aid cases also predominantly show the limits to how far government must or may go in accommodating religious belief.<sup>24</sup> In the recent case of *Bowen v. Roy*,<sup>25</sup> an American Indian testified that his religious beliefs would be violated if a government agency used a Social Security number for his infant daughter, Little Bird of the Snow, in processing applications for food stamps and benefits under a program providing aid for families with dependent children. The Indian believed that a unique numerical identifier would rob Little Bird of the Snow of her spirit. But the Supreme Court held that use of the number did not violate the free exercise clause.<sup>26</sup>

## II. INDIAN TRIBES

Reference to *Bowen v. Roy* allows us to move on in our inquiry from purely domestic cases to those involving Indian tribes. Indian tribes have

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California. The court held that the wives were entitled to succeed to the Hindu's estate. It noted that the Hindu had not cohabited with the wives in California. See E. SCOLES & P. HAY, CONFLICT OF LAWS 446 (1982): "It may be doubted whether a foreign visitor would be permitted to cohabit here with his four wives although even this is uncertain."

19. Sherman, *supra* note 17, at 33, 36, 60; see also Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) (Hmong tribesman charged with felony homicide after he executed his adulterous wife).

20. See Note, *supra* note 19, at 1310.

21. See *infra* notes 114-15 and accompanying text.

22. 105 S. Ct. 2914 (1985).

23. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

24. *E.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985).

25. 106 S. Ct. 2147 (1986).

26. But five Justices in *Bowen* seem to have agreed that benefits could not be conditioned on the Indian providing a Social Security number if to do so would violate his religious beliefs. *Id.*

been described as "domestic dependent nations."<sup>27</sup> They are nations, but not foreign nations.<sup>28</sup> They are nations, but only "quasi-sovereign."<sup>29</sup> Sometimes they have a special relation to particular areas of land. Perhaps they may be thought of as having a status somewhere between the Amish and a foreign nation: the Amish are not a nation or in any sense sovereign, nor are they related to land other than as ordinary property owners; a foreign nation is fully sovereign and exercises complete jurisdiction over particular territory. Consideration of the Indian tribes and the application of the Bill of Rights, including the religion clauses, to them and to the United States in its relations with them, will enable us to move toward our objective of considering cases of a purely foreign character and in the process to gain insight into the possibility of varying applications of the religion clauses.

The Supreme Court has said that the Indian "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."<sup>30</sup> The provisions referred to would seem to include the Bill of Rights. Thus, under one view, even the grossest departure from due process of law by a tribal government would not result in a violation of the Constitution. Yet, in an earlier decision,<sup>31</sup> the Court said the tribes are "restrained by the general provisions of the Constitution . . .,"<sup>32</sup> without indicating what would be included in such "general provisions."

To say that the Constitution is not applicable to the Indian tribes assumes that the federal government is not so involved with them that they have no real autonomy and are in actuality mere instruments of the federal government.<sup>33</sup> There is no constitutional obstacle to Congress's abolishing Indian tribal governments altogether and fully subjecting Indians to state or federal rule, even though this might violate treaties.<sup>34</sup> There is no constitutional impediment, in other words, to putting the Indians on the same footing as the Amish. Also, there is no doubt about the de facto power of the United

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27. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

28. *Id.* at 20.

29. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

30. *Id.* at 56.

31. *Talton v. Mayes*, 163 U.S. 376 (1896).

32. *Id.* at 384. *See also In re Sah Quah*, 31 F. 327 (D. Alaska 1886) (thirteenth amendment prohibits slavery among Alaska Indians).

33. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 n.7 (1978); *Colliflower v. Garland*, 342 F.2d 369, 379 (9th Cir. 1965):

Under these circumstances, we think that . . . [the Indian courts in the Fort Belnap Reservation] function in part as a federal agency and in part as a tribal agency, and that consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court.

34. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 233, 261-62 n.378 (1984).

States to control the Indian tribes. But the existence of these powers, in the absence of their exercise, does not render the tribes simply instruments of the federal government. There are forms of federal involvement with the Indian tribes the purpose and effect of which is not to eliminate their autonomy, but to enable them to retain or regain it<sup>35</sup> and to pursue their own distinctive ways.

Are the religion clauses entirely inapplicable to the Indian tribes? Are they applicable in part, in the sense that certain values embodied in these clauses must be recognized by the tribes?<sup>36</sup> To hold the clauses applicable to some extent would not commit us to holding them applicable to foreign nations, which, of course, are fully sovereign.

In a 1954 case,<sup>37</sup> Protestant Indians complained that their pueblo government, which apparently favored Catholicism, refused to allow them to build churches on pueblo land or bury their dead in the pueblo cemetery, and refused to allow Protestant missionaries to enter the pueblo at reasonable times. One way to describe what was happening is to say that not only had the pueblo government established Catholicism, but it had also suppressed the free exercise of Protestantism. The court in that case held that it had no jurisdiction to hear the suit because the actions complained of were not taken under color of "state" law.<sup>38</sup>

The Indian Civil Rights Act of 1968<sup>39</sup> was the result of cases of this type. The Act may be thought of as an assimilationist statute because it forces Indian tribes to conform to some extent to standards applicable to the federal and state governments. The Act applies most of the provisions of the Bill of Rights to the tribes.<sup>40</sup> However, although it includes a free exercise clause, it does not have a nonestablishment clause.<sup>41</sup> Thus, under the Indian Civil Rights Act, some of the pueblo's actions in the case just referred to might have been illegal but not others. However, limitations on the pueblo would have derived entirely from the Act, not from the Constitution, unless the religion clauses have some application to Indian tribes by virtue of the Supreme Court's dictum, referred to above, that the "general provisions" of the Constitution are applicable to the tribes.<sup>42</sup>

Rights created by the Indian Civil Rights Act, including the free exercise right, are enforceable in the federal courts only by way of habeas corpus.

35. See, e.g., Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1982).

36. See *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134-35 (10th Cir. 1959) (religion clauses inapplicable).

37. *Toledo v. Pueblo Jemez*, 119 F. Supp. 429 (D.N.M. 1954).

38. As required by 42 U.S.C. § 1343(3) (1982).

39. 42 U.S.C. §§ 1301-1341 (1982).

40. *Id.* at § 1302.

41. *Id.* See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978); *Hearings on the Constitutional Rights of the American Indian Before the Constitutional Rights Sub-Committee of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 21, 221 (1965).

42. *Talton v. Mayes*, 163 U.S. 376, 384 (1896).



Other remedies for violations of the Act must be sought from tribal authorities. The Supreme Court reached this conclusion in a case involving an Indian woman who had married outside the tribe. Her tribe had an ordinance that excluded from tribal membership and its benefits the children of women who married outside the tribe, but not the children of men who married outside the tribe. The woman and her children claimed that this ordinance violated the equal protection clause contained in the Act.<sup>43</sup> The district court had held that it had jurisdiction to enforce the Act, but construed the equal protection clause in the Act not to condemn the tribal tradition of defining tribal identity through the male line.<sup>44</sup> In other words, its interpretation of equal protection took the cultural context into account.<sup>45</sup>

Does the philosophy of the Constitution embrace values that would support the proposition that the religion clauses are not applicable to the Indian tribes, or at least not applicable in the same way that they are to the federal government and the states? Perhaps importance is to be attached to the preservation of indigenous, pre-European traditions. In that case, Catholicism would not qualify. It might be thought that these indigenous, pre-European traditions give to the Indians a sense of meaning that cannot be supplied in any other way, and that they should have a sense of meaning is an important human good under the Constitution. Another possibility is that importance is to be attached to any tradition that a tribe has embraced, even though not indigenous. Under this approach, Catholicism might qualify. Importance would be attached simply to stability and continuity. Finally, importance might be attached not to indigenoussness or to stability and continuity, but to autonomy and self-determination, so that whatever path an Indian tribe chose, and regardless of when it chose it, that choice would be respected. This last suggestion includes two further possibilities: either importance is to be attached to the path chosen by traditional tribal authority, or importance is to be attached to the path chosen through a process conforming to some notion of what is fair. Thus it might be permissible for an Indian tribe to favor a religion only if that religion was chosen by the tribe through a process judged to be in some sense democratic.

The Indian Religious Freedom Act of 1978<sup>46</sup> has a different focus than the Indian Civil Rights Act of 1968. The earlier statute is concerned with

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43. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

44. *Id.* at 54.

45. See also *Janis v. Wilson*, 385 F. Supp. 1143, 1150 (D.S.D. 1974), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1975):

The legislative history of . . . [the bill of rights in the Indian Civil Rights Act] indicates that the scope of the individual rights contained therein is to be determined by balancing them against the legitimate interests of the tribe in maintaining the traditional values of their unique governmental and cultural identity.

A recent case in a court of the Yakima Indian Nation seems to have involved enforcement of the free exercise provision of the Indian Civil Rights Act. Members of the tribe had fished out of season, in violation of tribal regulations. They were tried to a jury in the tribal court and acquitted on the ground that the regulations infringed the free exercise of their religion. The defendants claimed to have acted in accordance with ancient religious custom. *N.Y. Times*, Apr. 30, 1987, at A26, col. 4.

46. 42 U.S.C. § 1996 (1982).

the exercise of power by tribal authorities, the later with relations between the United States government and the Indians. The Indian Religious Freedom Act calls upon the federal government to accommodate its programs to Indian religious practices.<sup>47</sup> Thus if a dam is to be built, efforts should be made to protect Indian sacred sites. What is it under this statute that the government should accommodate? Indigenous Indian religions? Religions that have become traditional with the Indians? Religions that have been adopted by Indian tribes through particular procedures? Whatever happens to be the religion of a particular Indian? The statute speaks of protecting and preserving the "traditional religions" of the American Indian.<sup>48</sup> Some of the legislative history supports the view that only indigenous Indian religions were intended to be protected by the statute.<sup>49</sup>

One view of the Indian Religious Freedom Act is that it does nothing that the religion clauses of the first amendment themselves do not do.<sup>50</sup> The purpose of the Act was not to give special treatment to Indian religions, but only to cause federal officials to consider whether government programs might adversely affect Indian religions and whether the religion clauses of the first amendment would permit or require adjustment of the programs.<sup>51</sup>

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47. [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and freedom to worship through ceremonials and traditional rites.

*Id.*

48. *Id.*

49. The Senate committee report refers to "native traditional religions," and contrasts the religious practices protected by the Act with those of Catholics, Protestants and Jews. S. REP. NO. 95-709, 95th Cong., 2d Sess. 2, 5 (1978). Section 2 of the Act orders the President to direct federal departments and agencies "to evaluate their policies and procedures in consultation with native traditional leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices." Pub. L. No. 95-341, 92 Stat. 469 (1978). The Senate committee report in referring to this provision states: "It is the intent that . . . [consultation be with] the practitioner of the religion, the medicine people, religious leaders, and traditionalists who are Natives—not Indian experts, political leaders, or any other nonpractitioner." S. REP. NO. 95-709, 95th Cong., 2d Sess. 5 (1978).

Would the belief of the Indian appellee in *Bowen v. Roy*, 106 S. Ct. 2147 (1986), discussed *supra* in text accompanying notes 24-26, that use of a Social Security number would rob his daughter of her spirit, qualify for protection under the Indian Religious Freedom Act? The father testified that he had recently formed the belief as a result of conversations with a tribal chief. *Id.* at 2150.

50. For what the religion clauses themselves can do, see *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 691-95 (9th Cir. 1986), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 55 U.S.L.W. 3741 (U.S. May 4, 1987) (No. 86-1013), where the court held that a Forest Service plan to permit commercial logging and the construction of a road in a part of a national forest sacred to Indians would violate the free exercise clause and that protection of the Indians' right would not conflict with the establishment clause. The court cited the Indian Religious Freedom Act, but did not rest decision upon it. *Id.* at 694.

51. The Senate committee report suggests that no special treatment was intended, S. REP. NO. 95-709, 95th Cong., 2d Sess. 1, 6 (1978), as do statements made during debate in the

Another view is that the Act gives special protection to Indian religions.<sup>52</sup> If it does, is this special protection consistent with the first amendment? Is a statute constitutional that protects a sacred Indian site from inundation by a federal dam but does not protect a site important to another religion?<sup>53</sup>

A recent federal court decision held it not unconstitutional for the federal and state governments to allow the Native American Church to use peyote in its ceremonies, although such use is forbidden to non-Indian religions.<sup>54</sup> "Congress has the power or duty to preserve our Native American Indians . . . as a cohesive culture until such time, if ever, all of them are assimilated in the main stream of American culture."<sup>55</sup> On the reasoning of this decision, it might be permissible to give financial aid to religiously-affiliated Indian schools even though this would be forbidden in the case of other religiously-affiliated schools.<sup>56</sup>

Indians occupied this continent before the Europeans came. They had their own religions, culture and political organizations. They were recognized by the European powers and subsequently by the United States as sovereign nations. Until the middle of the last century, the United States dealt with them by treaty.<sup>57</sup> These facts are the basis for the view that it is constitutional to attach special importance to Indian religions and for the federal government to give them special protection. The Constitution protects to some extent the right of any group, such as the Amish or the Seventh Day Adventists, to follow a distinctive, religiously-based way of life, but the special facts of Indian history are suggested to warrant additional protection.

### III. SUPPORTING FOREIGN VALUES IN THE UNITED STATES

Let us now direct our attention to situations in which American governments act within the United States to support the values of foreign nations and cultures even though these values may conflict with the values that

House. 124 CONG. REC. 21, 444-45 (1978). See *Bowen v. Roy*, 106 S. Ct. 2147, 2152 (1986); *Wilson v. Block*, 708 F.2d 735, 746 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); *Crow v. Gullet*, 706 F.2d 856, 858-59 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

52. This reading was suggested as possible by a representative of the Justice Department during the hearings held by the Senate committee. S. REP. No. 95-709, 95th Cong., 2d Sess. 10 (1978).

53. This constitutional concern was expressed by the representative of the Justice Department mentioned in note 52. Also, see the debate in the House of Representatives, 124 CONG. REC. 21,446 (1978), and *Crow v. Gullet*, 541 F. Supp. 785, 794 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

54. *Peyote Way Church of God, Inc. v. Smith*, 556 F. Supp. 632, 636-40 (N.D. Tex. 1983).

55. *Id.* at 639. See also *United States v. Warner*, 595 F. Supp. 595, 597-601 (D.N.D. 1984).

56. See *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (employment preference for Indians in Bureau of Indian Affairs not violative of fifth amendment). Cf. *Quick Bear v. Leupp*, 210 U.S. 50, 81-82 (1908) (constitutional for federal officials at direction of Indians to pay Indian treaty and trust funds to sectarian schools).

57. See Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 987 (1981).

American governments ordinarily must uphold. There are many such situations, but only a few will be discussed: cases involving discrimination in employment in the United States by foreign companies doing business here; extradition cases; cases involving prosecution in the United States of persons seized abroad, or the use of evidence here that was seized abroad; and, finally, cases involving the projection into the United States, through the use of property located here, of foreign ideas about the proper relation between government and religion. As in the discussion of the Indians, my purpose is to increase awareness of the possibility of varying applications of the religion clauses when other nations and cultures are involved.

In recent years many foreign companies have established businesses in the United States. In some cases treaties of friendship and commerce between the United States and the countries from which these companies come arguably permit them to discriminate in employment in the United States. For instance, the treaty with Japan permits "companies of either Party . . . to engage, within the territories of the other Party, accountants and technical experts, executive personnel, attorneys, agents and other specialists of their choice . . . ."<sup>58</sup> The motive for such discrimination may be the efficient and profitable operation of the business: it may be thought, for instance, that only if Japanese run an automobile plant in Tennessee, only if it is, so to speak, an island of Japanese culture, will the business be a success. If the executives and supervisors are Japanese, less training may be necessary and relations with the home office may be easier.<sup>59</sup> On the other hand, the motive may be simply to keep well paid jobs for one's own people. The motive of the United States in entering into such treaties is to encourage foreign investment and to gain favorable treatment for American companies doing business abroad.

In a recent case, the Supreme Court construed the treaty of friendship and commerce with Japan in fact not to authorize a company incorporated in the United States that was a wholly owned subsidiary of a Japanese company to discriminate on the ground of nationality.<sup>60</sup> The question of whether the parent company could discriminate was left undecided. But in another case, a federal court held that the treaty with Greece permitted a Greek company to favor Greek nationals in the upper levels of management, though not to discriminate on the basis of national origin.<sup>61</sup> Neither case discussed any constitutional issues.

The federal government, of course, is not required to prohibit discrimination in private employment at all. May it prohibit it generally, as it does

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58. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VIII (1), 4 U.S.T. 2063, T.I.A.S. No. 2863, at 9.

59. See Ritomsky & Jarvis, *Doing Business in America: The Unfinished Work of Sumitomo Shoji America, Inc. v. Avagliano*, 27 HARV. INT'L L.J. 193, 194 (1986).

60. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

61. *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984).

in Title VII of the Civil Rights Act,<sup>62</sup> but exempt foreign companies? Perhaps it is permissible to allow foreign companies to discriminate on some grounds but not on others, on the ground of religion, for instance, but not on the ground of race.

Suppose a company from an Islamic country wishes to start a business in the United States and employ only Moslems at the higher levels. The company's aim is to maintain an atmosphere believed to be helpful to business and also to strengthen Islam. American companies object on the ground that it would be useful for them in certain circumstances to discriminate on the basis of religion, but they are prohibited from doing so. Non-Moslems object because they are excluded from profitable employment and because they feel humiliated. The government, defending the treaty that permits the company to discriminate, invokes economic and foreign policy considerations. It also argues that implicit in the religion clauses of the first amendment is respect for the values of foreign nations, which would include allowing foreigners to do business in this country in their own way, especially when religion is involved.<sup>63</sup>

In extradition cases, the United States acts in this country to help foreign governments obtain custody of persons charged with crimes for the purpose of prosecution and punishment. The conduct with which these persons are charged is not always a crime in this country, and the procedure that will be employed in their foreign prosecutions may be forbidden in the United States. In one case it was held permissible to extradite a United States citizen to Australia even though it was claimed that the absence of a statute of limitations in Australia for the crime with which the defendant was charged would violate due process in the United States.<sup>64</sup> In another case, a court held it permissible to return a serviceman to Germany to serve a sentence imposed by a German court, even though the serviceman claimed that at his German trial he had been deprived of important procedural protections.<sup>65</sup> Dicta in other decisions, however, suggest that there are limits to the procedures and substantive rules that the due process clause will permit the

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62. 42 U.S.C. § 2000e (1982).

63. In *United States v. Abeyta*, 632 F. Supp. 1301 (D.N.M. 1986), the court held that a clause in the Treaty of Guadalupe Hidalgo, 9 Stat. 922, 930 (1848), providing that Mexicans in the territory ceded to the United States would be "secured in the free exercise of their religion without restriction," allowed Indians within the boundaries of a pueblo to take eagles for religious use, and that nothing in the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (1982), which prohibits the taking of bald and golden eagles generally, abrogated this privilege. *But see* *United States v. Dion*, 106 S. Ct. 2216, 2219 n.3, 2224 (1986) (holding that the Eagle Protection Act did abrogate rights under an Indian treaty to hunt bald eagles. In that case, no religious freedom claim was considered).

64. *Kamrin v. United States*, 725 F.2d 1225 (9th Cir.), *cert. denied*, 469 U.S. 817 (1984).

65. *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972). *See also* *United States v. Clark*, 470 F. Supp. 976 (D. Vt. 1979) (foreign government allegedly breached plea bargain).

United States, through extradition, to support. One court spoke of procedures antipathetic to a federal court's sense of decency.<sup>66</sup>

The remarkable Mexican prisoner transfer case<sup>67</sup> is another example of the United States acting in this country in a way that supports values that are in a sense alien to the Constitution. Under a treaty with Mexico, American citizens convicted in Mexico of crimes committed there and serving sentences in Mexican jails were transferred to United States prisons to complete their sentences. To be eligible for transfer, the prisoners had to agree not to attack their Mexican convictions in United States courts. Nevertheless, once they were in the United States, some of the prisoners did attack their convictions in American courts on the ground of a deprivation of due process in Mexico.

The Second Circuit dismissed petitions for habeas corpus in these cases, saying that it did not violate the due process clause of the fifth amendment to hold the prisoners to their bargains. The court stressed the interest of Americans still in Mexican jails, whose chance of transfer would be jeopardized if the treaty with Mexico was not observed, and the interest of the United States in good relations with Mexico.<sup>68</sup> Of course, such considerations would not allow the United States to agree to whatever conditions the Mexicans might require, even if the result was that no prisoners would be transferred. For instance, the United States could not agree to continue in this country abusive treatment to which the prisoners had been subjected in Mexican jails.<sup>69</sup>

The foreign abduction cases also test how far it is permissible for an American government to go in supporting foreign values in this country. In these cases, foreign officials, by means that would be illegal in the United States, seize a person and hand him over to American authorities for prosecution in the

66. United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974). See also Neeley v. Henkel, 180 U.S. 109, 122-23 (1901) (court stated that inability to assert a defense would be one situation where the court would inquire into the internal legal procedures that await the relator upon extradition).

67. Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980). For a discussion of the background to the United States-Mexico Prisoner Transfer Treaty and cases dealing with the problems presented by it, see Dalton, *United States Treaties on the Execution of Penal Sentences*, in INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 179 (R. Lillich ed. 1981).

68. 621 F.2d at 1198-1201.

69. See also Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975), in which the denial of survivor's Social Security benefits on the ground that the claimant had been convicted in Iran of murdering the wage earner, her husband, was affirmed:

[T]he administrative law judge found, in effect, that the procedure followed in Iran was not "so shocking to the forum community that it cannot be countenanced."

We think there is substantial evidence to support this finding and we are not inclined to disturb it . . . . The fact that Iranian procedures may not be consistent with due process protections guaranteed in United States criminal proceedings will not in itself prevent effect being given a judgment rendered in Iran in accord with Iranian Law.

*Id.* at 1155.

United States. In prosecuting the defendant, the United States to an extent supports what was done in the foreign country. Dismissal of the prosecution might have some deterrent effect on the conduct of foreign officials. Nevertheless, it is generally held that prosecution under these circumstances does not violate the fourth or the fifth amendment.<sup>70</sup> On the other hand, if American agents were involved in the abduction, prosecution may be barred, and it may be barred even if the defendant is an alien.<sup>71</sup> Some courts say that the conduct of the American agents must have been "shocking" or "outrageous."<sup>72</sup>

When evidence was obtained abroad by agents of a foreign government by methods that would violate the fourth amendment in the United States, it is generally held that there is no obstacle to the use of the evidence in prosecutions in this country.<sup>73</sup> On the other hand, if American agents participated in the seizure, the evidence will be excluded.<sup>74</sup>

With these suggestive fragments of law as background, let us now turn to a famous dispute over church property, which also involved the projection into the United States of values in a sense alien to the Constitution. In *Kedroff v. St. Nicholas Cathedral*,<sup>75</sup> a decision handed down by the Supreme Court in 1952, a dispute arose over the right to use St. Nicholas Russian Orthodox Cathedral in the City of New York. The dispute was between the appointee of the Patriarch of Moscow to be archbishop in New York and an American group which claimed that the appointment of the archbishop was void because the Patriarch was under the domination of the Soviet government. The United States Supreme Court overruled the New York legislature and courts, which had sustained the claim of the American group,

70. *E.g.*, *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975).

71. *See United States v. Toscanino*, 500 F.2d 267, 280-81 (2d Cir. 1974). In *Toscanino*, the court decided that the holdings of *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), allowing prosecution, had been eroded. *Id.* at 275. *But see* Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, in *INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY* 61 (R. Lillich ed. 1981) (asserting that *Ker-Frisbie* is still good law).

72. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65-66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). *But see* *Di Lorenzo v. United States*, 496 F. Supp. 79, 82 (S.D.N.Y. 1980) (although this may be required to dismiss an indictment, in an action for damages against United States agents, it may be enough that there was a "forcible abduction").

73. *See, e.g.*, *United States v. Marzano*, 537 F.2d 257, 269-71 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Morrow*, 537 F.2d 120, 139-40 (5th Cir. 1976); *United States v. Jordan*, 1 M.J. 334, 24 C.M.A. 156 (1976). The court in *Morrow*, however, stated that if the methods used by the agents of the foreign government "shocked the judicial conscience," the evidence ought to be excluded by a federal court in an exercise of its supervisory power. 537 F.2d at 139.

74. *Powell v. Zuckert*, 366 F.2d 634, 639-40 (D.C. Cir. 1966). For a discussion of what sort of participation by American agents will result in exclusion, see Note, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries*, 16 COLUM. J. TRANSNAT'L L. 495, 502-10 (1977).

75. 344 U.S. 94 (1952). *See also* *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960).

and held that the free exercise clause of the first amendment required New York to uphold the Patriarch's appointee's right to control the cathedral. The Court said that in a hierarchical church, including one of an international character, deference must be paid to the decisions of the highest ecclesiastical authority. The Court's ruling in favor of the Patriarch's appointee was all the more striking because it came at the height of the Cold War.

One way of stating the question presented by the *Kedroff* case is what relations between the Russian Orthodox Church and the Soviet government would have been acceptable to the donors who contributed money to build St. Nicholas Cathedral. A possible implication of the Supreme Court's decision is that the donors would not have objected to the relations that existed between the church and the Soviet government after World War II, even though they involved substantial domination by the government, at least when the alternatives to allowing the property to be enjoyed by a church thus dominated were to give it to an American group that disclaimed all allegiance to the Patriarch or to have the trust entirely fail. Since the donors would not have disapproved of domination of the church by the Soviet government, New York was bound by the first amendment to enforce their wishes and uphold the right of the Patriarch's appointee to control the cathedral, and not to give the trust property to those who held a different view of the proper relations between a Christian church and the state. The *Kedroff* decision seems to mean that the free exercise clause entitles donors in the United States to spend their money to support a religion, one of whose characteristics is that it permits a foreign government to perform a function in regard to religion that no American government is allowed to perform—except possibly an Indian tribal government. An American Anglican has a right under the first amendment to give his property to support the Anglican Church in the United States, even though the Queen is the Supreme Governor of that church and Parliament regulates it extensively. An American Catholic has a right to give his property to support the Catholic Church in the United States, even though the Holy See is recognized as a person under general international law, and the Pope is the ruler of the State of the City of the Vatican.<sup>76</sup>

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76. See Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308 (1952).

In *Noe v. FCC*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959), it was contended that the award of a television license to Loyola University in New Orleans violated the Federal Communications Act because the University, although a Louisiana corporation, was controlled by the Society of Jesus, an organization that had its headquarters in Rome and whose highest governing authorities were aliens. The court held that the provisions relied on in the Act did not cover Loyola's case, but were directed at situations in which there was a threat to national security and the actuality of alien control, not its mere possibility. The court also rejected an argument that since Loyola was an "instrumentality of the Holy Roman Pontificate," a foreign sovereign, it was against the public policy and adverse to the sovereignty of the United States to award it a television license. *Id.* at 743. Possible constitutional objections to



In the course of the *Kedroff* litigation, the New York Court of Appeals stated, somewhat petulantly:

The First Amendment would nullify identification of a church with the Government of the United States or a State. We do not understand on what principle it is supposed to sanctify the identification of a church with a foreign State . . . . There can hardly be a constitutional mandate requiring that foreign States shall be allowed to administer churches in the United States . . . . It would be strange if our fundamental law, while ordering the separation of church and State, were so awkward an instrument that in functioning it has to produce an opposite result from that at which it aims.<sup>77</sup>

The error of the New York court was in supposing that because the Constitution requires American governments not to interfere in religious affairs, it lays down the same rule for foreign governments.<sup>78</sup> To the contrary, the Supreme Court held in *Kedroff*, not only is this not so, but the free exercise clause obligates New York, through its law of trusts, to aid American donors who do not believe in the separation of church and state to give expression to their beliefs through the dedication of property in the United States. Of course, if an American donor wants his money to be used to support a church connected with an American government, he cannot have that.

In *Kedroff*, the donors were probably residents of the United States who gave money to support a religion of a particular sort by a decision that was free from coercion by any government. Suppose, however, that the funds used to build St. Nicholas Cathedral came from the Soviet Union, and indeed indirectly from the Soviet government. In fact, in the *Kedroff* case it is stated that the Russian Orthodox Church did receive subsidies from the Soviet government.<sup>79</sup> Or suppose the Iranian government taxes all residents of Iran for the support of Shiite Islam, and some of the proceeds of this tax are sent to New York for the construction of a mosque there. Must New York protect the religious dedication of this property in the same way that it must protect trusts created by the free choice of domestic donors? Religious

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prohibiting foreign influence on the means of communication in the United States were not discussed. *Cf. Kotohira Jinsha v. McGrath*, 90 F. Supp. 892 (D. Hawaii 1950) (first amendment violated by vesting in Custodian of Enemy Property a Shinto shrine in Hawaii owned by Hawaiian corporation, a majority of whose members were aliens, when corporation not controlled by or acting for Japan).

77. *St. Nicholas Cathedral v. Kreshik*, 7 N.Y.2d 191, 217-18, 164 N.E.2d 687, 701 (1959).

78. *Cf. Lamont v. Postmaster Gen.*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring), a decision holding it violative of a United States addressee's first amendment rights to require him, in order to receive mail classified by the Post Office as "communist political propaganda," to request it in writing: "That the governments which originate this propaganda themselves have no equivalent guarantee only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency." *Id.* at 310.

79. *St. Nicholas Cathedral v. Kreshik*, 7 N.Y.2d 191, 212, 164 N.E.2d 687, 698 (1959).

organizations in the United States will complain that they are unfairly competed against by religious organizations supported by foreign governments. But the complaining organizations are free to seek the support of foreign governments for themselves. The judgment of the Constitution on the use of foreign taxes to support religion in the United States, however, may be different from its judgment on more severe burdens on religious liberty imposed by foreign governments.

#### IV. THE RELIGION CLAUSES AND IMMIGRATION

New York must recognize the right of the Patriarch's appointee to control St. Nicholas Cathedral and perhaps allow tax funds raised abroad to be used to support his activities in New York. Nevertheless, these obligations can be rendered meaningless if the United States may keep the Patriarch's appointee from getting to New York in the first place, or prohibit him from bringing assets into the country to support his work here, because it disapproves of the Patriarch's relations with the Soviet government. The importance of this aspect of the problem can hardly be overstated. Some religions are limited mainly to a particular country, and to cut them off from international contact will not significantly impair their ability to fulfill their missions. Other religions—Catholicism is an example—hold that an important part of their religious meaning lies in their international character. Local branches receive support and direction from abroad and in turn send forth their own influences. The United Nations has announced a right of international religious contact.<sup>80</sup> Nevertheless, numerous examples can be given, both historical and contemporary, of governments' efforts to cut religions off from international contact and make them exclusively agencies of national policy.<sup>81</sup> In his concurring opinion in the *Kedroff* case, Justice Frankfurter cited the example of Bismark's *Kulturkampf* in the nineteenth century.<sup>82</sup>

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80. "[Subject to certain provisions] . . . the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms: . . . to establish and maintain communications with individuals and communities in matters of religion or belief at national and international levels." GENERAL ASSEMBLY DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF, G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/51 (1982). For the discussions preceding the adoption of this provision, see Neff, *An Evolving International Norm of Religious Freedom*, 7 CAL. W. INT'L L.J. 543, 565-70 (1977).

A decision of the European Commission of Human Rights implies that Article 9 of the European Convention of Human Rights, which provides protection for "freedom of thought, conscience and religion," would be violated if a state expelled an alien who was the leader of a religious group if the purpose was to "stifle the spreading of a religion" or "remove the source of an unwanted faith and dismantle the group of his followers." Application No. 8118/77, Dec. and Rep. Eur. Comm'n on Hum. Rts. 105-18 (1981).

81. See N.Y. Times, Feb. 26, 1984, § 1, at 20, col. 1 (Chinese Catholics may only worship in "Patriotic Church" run by priests who have rejected papal authority).

82. 344 U.S. at 124 (Frankfurter, J., concurring).

Third World countries are sometimes unhappy with international religious contacts, because they find them an obstacle to "nation building."

There is no clear authority on the question of the government's power to exclude people from this country on the ground of religion or to exclude them when the result would be a serious burden on religion. At the end of the last century the government sought to enforce a statutory penalty against a New York Presbyterian church for entering into a contract with a minister in Scotland to come to New York to serve as the church's pastor. But the Supreme Court interpreted the statute, which forbade making contracts with aliens who were abroad for employment in the United States, not to extend to contracts for what the Court called "toil . . . of the brain."<sup>83</sup> The Court said it could not believe that Congress intended to exclude from the country ministers of religion in view of the Christian or at least religious character of the country.<sup>84</sup>

In a concurring opinion in a deportation case,<sup>85</sup> Justice Frankfurter shocked some by saying that the political branches of the government were free to keep people out of the country on any ground they liked, including anti-Semitism and anti-Catholicism. In another case,<sup>86</sup> Justice Douglas asked, in reaction to broad assertions of Congress's power over immigration, whether it really could be the case that Congress may exclude someone from the country because he holds a certain belief about Christ. In *Kedroff*, the State Department in fact had excluded the Patriarch's appointee, at least for a time.<sup>87</sup>

It is clear from Supreme Court decisions that the political branches of the government may exclude aliens from the country or deport them for reasons that would be unacceptable as a basis for other governmental actions. Long ago the Court said that Congress could exclude people because of their race or national origin.<sup>88</sup> In 1977, the Court upheld a provision of the immigration law that facilitates the reunion of illegitimate children with their mothers

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83. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892).

84. *Id.* at 464-72.

85. *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

86. *Kleindienst v. Mandel*, 408 U.S. 753, 772 (1972) (Douglas, J., dissenting). *See also* Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987); Comment, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889, 1922 (1985).

87. 344 U.S. at 97.

88. *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893); *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889). *But see* *Jean v. Nelson*, 105 S. Ct. 2992, 3012 (1985) (Holding that since statutes and regulations prohibit discrimination on grounds of race or national origin in granting or denying parole to aliens pending decision whether to admit them into the United States, the court of appeals should not have reached the question whether such discrimination violates the fifth amendment. But Justice Marshall, dissenting, joined by Justice Brennan, reached the constitutional question and concluded that the government could not discriminate on grounds of race or national origin, at least in the absence of "reasons closely related to immigration concerns."').

but not with their fathers,<sup>89</sup> a distinction that the equal protection clause would not permit in regard to other matters.

The United States is a sovereign nation and, it is said, sovereignty carries with it an absolute right to exclude.<sup>90</sup> The question is clouded, however, by the fact that judicial pronouncements sometimes do not make clear whether there are few or no limits on Congress's power to exclude, or only that there is no judicial power, or almost no judicial power, to enforce whatever limits there may be.

In 1972, in *Kleindienst v. Mandel*,<sup>91</sup> the Supreme Court upheld the government's right to deny a visitor's visa to a Belgian Marxist sociologist who had been invited to lecture in the United States by various scholars and academic institutions. The Court said that the Attorney General had given a "facially legitimate and bona fide" reason for denying the visa, namely, that on an earlier visit the sociologist had violated the terms of his visa.<sup>92</sup> The implication of the Court's holding was that there could be illegitimate reasons for denying a visa, although judicial power to go behind proffered reasons might be limited.<sup>93</sup> Whatever first amendment rights needed consideration, the Court emphasized, they were not the sociologist's but those of people in the United States who wanted to hear him. It should be added, however, that the fact that an alien outside the United States has no right to enter, if it is a fact,<sup>94</sup> does not mean necessarily that he has no rights at all under the Constitution. The question of whether he has rights under the Constitution, including rights under the religion clauses, will be discussed shortly.

In contrast to immigration, there are no judicial statements about an unlimited governmental power to exclude information that originates outside the country, such as mail or electronic transmissions, including information important to religion. To the contrary, such decisions as there are emphasize

89. *Fiallo v. Bell*, 430 U.S. 787 (1977). One authority in discussing this decision observes: "The apparent thrust of the Court's suggestion is that the 'limited judicial review' might be invoked at the behest of an appropriate party to challenge the most blatant type of discrimination, for example, exclusions based solely on religion or race." I C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* 2-18 (Supp. April 1986).

90. For a description of this point of view, see Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 6 (1984).

91. 408 U.S. 753 (1972).

92. *Id.* at 770.

93. See also *NGO Committee on Disarmament v. Haig*, No. 82 Civ. 3636 (S.D.N.Y. June 10, 1982) (court stated that under the *Mandel* decision, it is limited to deciding whether the reasons furnished by the government are facially legitimate and bona fide), *aff'd*, 697 F.2d 294 (2d Cir. 1982); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (remanding to district court for development of evidence and reconsideration of statutory questions; constitutional issues not reached), *aff'd by an equally divided Court* 108 S. Ct. 252 (1987); Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987).

94. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953).

a protected first amendment right to receive information.<sup>95</sup> At the same time, it may be constitutionally permissible indirectly to burden the importation and distribution of information from abroad under statutes like the Foreign Agents Registration Act<sup>96</sup> and the Trading with the Enemy Act.<sup>97</sup>

#### V. THE RELIGION CLAUSES IN THE TERRITORIES

The issue of whether the Bill of Rights applies to the territories and other areas having a special political connection with the United States has long been a challenging topic in our constitutional law. Here, as with the Indian tribes, we have a situation somewhere between purely domestic cases and purely foreign cases. The issue arose early in our national history, as the United States expanded across the continent and acquired areas formerly under the jurisdiction of France, Spain and Mexico.<sup>98</sup> But it was the territorial acquisitions of the Spanish-American War—the Philippines and Puerto Rico—that thrust the problem forward in such a manner that it was widely understood to involve a great issue of national meaning. Extending our rule beyond the North American continent gave us power over large numbers of people who were formed into distinct communities with their own religion,

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95. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *Williams v. Blount*, 314 F. Supp. 1356 (D.D.C. 1970) (summary procedure for determining whether material sent from abroad unmailable violated fifth amendment's due process requirement). See also *United States v. Ramsey*, 431 U.S. 606, 623-24 (1977) (scope of first amendment right regarding incoming international mail not decided).

96. 22 U.S.C. §§ 611-621 (1982). The Foreign Agents Registration Act requires an agent of a foreign principal who distributes "political propaganda" in the United States to register with the Department of Justice, provide a copy of the material he intends to distribute and information concerning its distribution, and attach to the material he distributes information identifying its source. "Political propaganda" is defined by the Act to include any material designed to influence people regarding specified subjects, such as the foreign policy of the United States. In *Meese v. Keene*, 107 S.Ct. 1862 (1987), the Court held that the use in the Act of the term "political propaganda" did not violate the first amendment rights of a California legislator who wished to exhibit certain Canadian films found by the Justice Department to be "political propaganda." In reaching this result, the Court relied upon the broad, nonpejorative definition of "political propaganda" contained in the Act, the lack of a sufficient showing that public perceptions concerning the meaning of the word "propaganda" have had an adverse impact on the distribution of materials covered by the Act, and the opportunity those who distribute such materials have to counteract the effect of registration under the Act by explaining to their audiences the integrity and persuasiveness of the materials they distribute. See also *Block v. Meese*, 793 F.2d 1313 (D.C. Cir.), cert. denied, 106 S.Ct. 3335 (1986). There is a pending prosecution of a Michigan newspaper publisher for failing to register under the Foreign Agents Registration Act. He is claimed to have acted as an agent of the South African government. *United States v. McGoff*, N.Y. Times, Nov. 1, 1986, at 7, col. 1; N.Y. Times, May 19, 1987, at A28, col. 1.

97. 50 U.S.C. app. §§ 1-44 (1982). See also 31 C.F.R. §§ 500.201, 500.204, 500.536 appendix, 500.550, 500.562 (1985).

98. See *Downes v. Bidwell*, 182 U.S. 244, 251-57 (1901).

laws and customs. The Indians could be ignored, perhaps, because their numbers were small and their culture considered primitive, but this was not possible with the new possessions. The path that history had given to the peoples of these areas was not ours, but it commanded respect nevertheless.

In what are called the *Insular Cases*,<sup>99</sup> the Supreme Court came to grips with this great question of national meaning. The struggle was between two sharply contrasting views. One view was that the extension of American rule beyond the North American continent was a valuable achievement, and that to require that all constitutional provisions applicable in the United States should also apply in the new possessions would impede this process and at the same time do an injustice to the peoples of these areas. Only if a constitutional provision was in some sense fundamental should it apply.<sup>100</sup> The other view was that although the elimination of traditional practices in the newly acquired territories might from a certain point of view be unfortunate, this evil was far outweighed by the evil of our exercising power over people who were not full members of our political community with the same rights as other members. If we were unwilling to extend equal rights to the peoples of the new territories, we should not enter into a political relationship with them at all, but forego imperial dreams.<sup>101</sup> The first Justice Harlan held this view so strongly that he was willing to see the people of Mindanao starve if that was the consequence of holding that the Philippines were part of the United States for the purpose of the clause in the Constitution which requires that duties be "uniform throughout the United States."<sup>102</sup> Speaking generally, the first view I have just described prevailed in the *Insular Cases*: all the provisions of the Bill of Rights do not necessarily apply to the territories.<sup>103</sup>

I have referred broadly to "the territories," but of course there are a variety of legal relations to take into account. There are "incorporated" and "unincorporated" territories: Alaska was an incorporated territory;<sup>104</sup> American Samoa is an unincorporated territory.<sup>105</sup> Micronesia is a United

99. Among which are *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dorr v. United States*, 195 U.S. 138 (1904). See generally Leibowitz, *United States Federalism: The States and the Territories*, 28 AM. U.L. REV. 449 (1979).

100. See generally the opinions of Justices Brown and White in *Downes v. Bidwell*, 182 U.S. 244 (1901). On the matter of fundamentals, see *id.* at 268, 294-96. See also *Balzac v. Porto Rico*, 258 U.S. 298, 313 (1922).

101. See generally *Downes v. Bidwell*, 182 U.S. 244 (1901) (Fuller and Harlan, J.J., dissenting).

For a description of the two points of view, see Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAWAII L. REV. 337, 345 (1980-81).

102. *Downes v. Bidwell*, 182 U.S. 244, 385 (1901) (Harlan, J., dissenting). The clause referred to is U.S. CONST. art. I, § 8, cl. 1.

103. See *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922).

104. See *Rasmussen v. United States*, 197 U.S. 516 (1905).

105. See Laughlin, *supra* note 101, at 362.

Nations Trust Territory. It has been subdivided into four entities: the Northern Marianas, which are presently being transformed into a commonwealth in political union with the United States, the Republic of the Marshall Islands and the Federated States of Micronesia, with both of which Compacts of Free Association with the United States have been initialed, and the Republic of Palau, with which a Compact of Free Association has been signed.<sup>106</sup> Puerto Rico is a self-governing commonwealth under United States sovereignty, an arrangement set forth in a compact between Puerto Rico and the United States.<sup>107</sup> Our presence in Berlin has been described as a "'protective occupation' of a friendly and allied people."<sup>108</sup> It is correct to infer, especially from the Berlin example, that there is not a sharp line between the present topic and the question of the Bill of Rights in foreign countries. Considerations relevant to the application of the Bill of Rights in areas with which we have some special political connection may also be present when the United States acts in foreign countries.

Once it was accepted that the Bill of Rights did not necessarily apply to the new territories in the same way that it did at home, difficult questions arose. First of all, should different importance be attached to different provisions of the Bill of Rights? Did the same importance attach to jury trial as to the search and seizure provision of the fourth amendment? To the religion clauses as to the guarantee of free speech? It seemed odd that certain guarantees of the Bill of Rights might be required in the territories, but not even the rudiments of self-government.<sup>109</sup> Secondly, how great a value did the Constitution place upon allowing the peoples of the new territories to live in accordance with their own ways? This question, as we have seen in the case of the Indian tribes, led to other questions: Did the Constitution find value in tradition or simply in whatever another people happened from time to time to choose for their way? If it was simply self-determination that was valued, what procedure for self-determination would be respected?

The question of the right to jury trial in the territories has been the subject of considerable litigation. Jury trial was held not required in Puerto Rico,<sup>110</sup> the Philippines,<sup>111</sup> and recently in the Marianas.<sup>112</sup> It was required, however,

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106. For a statement of the status of these areas, see *Juda v. United States*, 6 Cl. Ct. 441, 444 (1984). As to the Northern Marianas, see *Commonwealth of N. Mar. I. v. Atalig*, 723 F.2d 682 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984). As to Micronesia, see *Ralpo v. Bell*, 569 F.2d 607 (D.C. Cir. 1977).

107. The status of Puerto Rico is described in *Examining Board v. Flores de Otero*, 426 U.S. 572, 593 (1976).

108. *United States v. Tiede*, 86 F.R.D. 227, 245 (U.S. Ct. Berlin 1979).

109. See *Downes v. Bidwell*, 182 U.S. 244, 299 (1901) (White, J., concurring).

110. *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

111. *Dorr v. United States*, 195 U.S. 138 (1904).

112. *Commonwealth of N. Mar. I. v. Atalig*, 723 F.2d 682 (9th Cir.), *cert. denied*, 647 U.S. 1244 (1984).

in Alaska when Alaska was a territory.<sup>113</sup> Under certain circumstances, jury trial can be a vehicle for upholding local ways. But in other circumstances it is a means for their destruction, because it is inconsistent with traditional authority and traditional methods of settling disputes. Whether jury trial is required in American Samoa has been the subject of interesting litigation. The Court of Appeals for the District of Columbia held that jury trial was required in Samoa unless "impractical or anomalous."<sup>114</sup> After investigation, the district court concluded that traditional Samoan culture had so broken down under the impact of modern values—possibly beginning with the introduction by the United States during World War II of a wage economy—that jury trial would no longer be anomalous or in conflict with Samoan values. There really was nothing much left of the Samoan tradition to protect.<sup>115</sup>

Each provision of the Bill of Rights needs to be considered both from the point of view of the importance of the right and from the point of view of conflict with local customs. The Supreme Court has said that the free speech provision applies to Puerto Rico.<sup>116</sup> It has not decided whether the search and seizure provision of the fourth amendment does.<sup>117</sup> The equal protection clause has been held applicable to Puerto Rico in certain respects.<sup>118</sup> It may be permissible, however, for Puerto Rico to support certain traditional values—for instance those regarding the role of women—that a state would not be permitted to support. The United States Claims Court has recently held that the taking clause of the fifth amendment is applicable to Bikini in the Marshall Islands, though the inhabitants, who were removed from the atoll for the testing of atomic bombs, are not United States citizens.<sup>119</sup>

Let us now consider the applicability of the religion clauses to the territories. In the 1879 Mormon polygamy case of *Reynolds v. United States*,<sup>120</sup> the Supreme Court stated that the free exercise clause was applicable to the territories.<sup>121</sup> In another case a few years later, the Court said in dictum that whenever there is a cession of territory to the United States, the laws of the territory that are in conflict with the political character and institutions of the new government are displaced. The Court mentioned as among those that would be displaced laws supporting an established religion.<sup>122</sup> Of course,

113. *Rasmussen v. United States*, 197 U.S. 516 (1905).

114. *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

115. *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977).

116. *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 106 S. Ct. 2968 (1986). *See also Balzac v. Porto Rico*, 258 U.S. 298, 314 (1922).

117. *See Torres v. Porto Rico*, 442 U.S. 465 (1979).

118. *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976).

119. *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984).

120. 98 U.S. 145 (1879).

121. *Id.* at 162.

122. *Chicago, R.I. & P.R. Co. v. McGlinn*, 114 U.S. 542, 546 (1885), *quoted in Downes v. Bidwell*, 182 U.S. 244, 298 (1901) (White, J., concurring).



at the time of these statements, the Court had before it only instances of territories in the continental United States.

When President McKinley gave instructions to a commission that was sent out to set up a government for the Philippines, he said that although the customs of the people should be respected, they must be made to understand that "certain great principles of government which have been made the basis of our governmental system, and which we deem essential to the rule of law and the maintenance of individual freedom" must be established and maintained in their islands. He included among those principles that must be maintained both the free exercise of religion and the nonestablishment of religion.<sup>123</sup> The President's instructions became the basis for a bill of rights for the Philippines that was adopted by Congress and that included both free exercise and nonestablishment provisions.<sup>124</sup>

In some United States territories, religion is or was the basis for the people's way of life, just as it is for the Indians and the Amish. Samoa, perhaps, is an example.<sup>125</sup> Is it permissible in these territories for a local government, operating along traditional lines or otherwise, to promote a particular religion, possibly to the disadvantage of minorities? May people and influences not properly excluded from the United States on religious grounds<sup>126</sup> nevertheless be excluded from these territories by local governments in order to protect the traditional religious culture? Here questions of the sort addressed by the Indian Civil Rights Act, discussed earlier,<sup>127</sup> are presented. How should the federal government act in regard to the religious element in the local culture? May it promote and protect it? These are questions of the sort presented by the Indian Religious Freedom Act.<sup>128</sup>

Perhaps the free exercise clause applies to the territories, but not the establishment clause, a suggestion that used to be made in regard to the states before *Everson v. Board of Education*<sup>129</sup> applied the establishment clause to them. Underlying this suggestion would be the notion that there is a value of religious liberty protected by the first amendment that must not under any circumstances be impaired. Beyond this core, accommodation in the territories to particular cultures is permissible. However, it needs to be determined how this suggestion would work out in concrete cases, and the effort to work it out might show that the distinction we seek is not neatly matched with the two religion clauses.

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123. Public Laws and Resolutions of Philippine Com. 6-9 (April 7, 1900). See *Kepner v. United States*, 195 U.S. 100, 122-23 (1904).

124. 32 Stat. 691, 693 (1901). See *Kepner v. United States*, 195 U.S. 100, 122-24 (1904).

125. See generally Laughlin, *supra* note 101.

126. See *supra* notes 80-94 and accompanying text.

127. See *supra* notes 39-45 and accompanying text.

128. See *supra* notes 46-53 and accompanying text.

129. 330 U.S. 1 (1947).

## VI. THE RELIGION CLAUSES IN FOREIGN COUNTRIES

I turn now to the question of the religion clauses in foreign countries. From our inquiries so far we must be prepared to find this a difficult question. It seems clear that we should not approach it either as unrestrained zealots for "human rights" or as thorough-going cultural relativists. The problem is too complicated and the competing values too closely balanced for these attitudes to be useful.

In earlier parts of the discussion I have suggested that in measuring the actions of government against the requirements of the first amendment, respect should be shown to the ways of others. In purely domestic cases this value has weight and, as we have seen, it also has weight when the government deals with the Indian tribes and with areas of the world having a special political connection with the United States.

The argument that respect is due to the ways of others is especially strong in the case of foreign nations. The Constitution recognizes the existence of foreign nations and, implicitly, their right to be different from the United States. An argument can be based on this recognition that when the United States acts abroad, the constitutionality of its actions should be judged differently than when it acts at home. Not that the Constitution is inapplicable abroad, but that in its application abroad, in part because of the exigencies of the foreign situation and in part because of respect for the right of foreign nations to follow their own ways, a different judgment on the government's conduct may result than when the government acts at home.

Ordinarily the law of a foreign nation will express the way of another people to which, under the Constitution, respect should be given. It follows that if the actions of the United States in a foreign nation are proper under the laws of that nation, this may be relevant to whether they are proper under the Constitution of the United States. In one of the abduction cases referred to earlier, in which a person was seized abroad and brought to the United States for trial, the court suggested that the status of the seizure under foreign law might be relevant to the constitutionality of prosecuting the person in the United States.<sup>130</sup> In a recent case involving the seizure by the United States Army of a ranch owned by an American in Honduras, the court touched upon the question whether the legality of the seizure under Honduran law was relevant to its validity under the fifth amendment.<sup>131</sup> Decisions in nonconstitutional areas of law point in the same direction: in the antitrust field, for instance, whether conduct violated the law of the

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130. *United States v. Toscanino*, 500 F.2d 267, 280-81 (2d Cir. 1974). *But see United States v. Lira*, 515 F.2d 68, 71-72 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (United States government has no obligation to enforce an asserted right under Chilean law).

131. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1542 (D.C. Cir. 1984) (en banc), 105 S. Ct. 2353 (1985) (case remanded for reconsideration in light of events occurring since court of appeals' decision), *aff'd*, 788 F.2d 762 (D.C. Cir. 1986) (dismissal of complaint affirmed on ground controversy too attenuated to justify equitable relief).

country in which it took place is one consideration in deciding whether it violated United States law.<sup>132</sup>

There are limits, however, to the extent to which the laws of a foreign country will determine the constitutionality of the actions of the United States abroad. The laws of a particular foreign country may reflect sheer power and not rest upon any tradition or process that from the point of view of the Constitution is capable of achieving human good. In these circumstances United States actions abroad should find no shelter under foreign law. Furthermore, the laws of a foreign country may so totally disregard the rights of internal minorities to their own culture that participation by the United States in the policy of the foreign government should be constitutionally condemned.

When the United States has acted in a foreign country not out of respect for the ways of that country, but for its own purposes alone, perhaps it should not be able to invoke the value of such respect in justification of its departure from domestically applicable standards. An example is *Reid v. Covert*.<sup>133</sup> The question in that case was whether an American military dependent who allegedly had murdered her husband on a United States base in Great Britain could be court-martialed or was entitled to a jury trial. The military authorities wanted to court-martial her: not out of respect for the laws and customs of Great Britain, but to satisfy perceived American military needs in a foreign setting. The choice was between two American systems of justice, not between an American system and a foreign one. The Supreme Court held that the defendant was entitled to a jury.

The remarkable Berlin hijackers case<sup>134</sup> has something in common with *Reid*. In that case an American judge sitting as the United States Court for Berlin ruled that Polish nationals who were being prosecuted for hijacking an airplane to the United States zone of Berlin were constitutionally entitled to a jury trial. A jury of Berliners was in fact empanelled and convicted the defendants.<sup>135</sup> The alternative that the American occupation authorities proposed—trial to the judge—was not based upon foreign law or custom, but upon the perceived military and foreign relations needs of the United States. The underlying justification for the court's decision that the sixth amendment

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132. See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612 (9th Cir. 1977); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-98 (3d Cir. 1979). See also *Banco Nat'l de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (interpreting the Act of State Doctrine, which prohibits review by American courts of governmental acts of a foreign sovereign committed in the sovereign's own territory); Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-611 (1982); Note, *Foreign Sovereign Compulsion in American Anti-Trust Law*, 33 STAN. L. REV. 131 (1980-81) (discussing the defense of foreign sovereign compulsion, which gives private persons and entities a defense to liability under United States laws when unlawful conduct is compelled by a foreign sovereign).

133. 354 U.S. 1 (1957).

134. *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

135. See *Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981).

applied was that when the alternatives are two American systems of justice, unless there are imperative needs, the one with deep roots in our history and democratic values should be employed.

The court in the Berlin hijackers case noted that jury trial might not have been required if the United States had not asserted jurisdiction, but had turned the defendants over to the local German authorities for prosecution.<sup>136</sup> This suggestion accords with a Supreme Court decision that it did not violate the Constitution to turn an American serviceman over to Japanese authorities for trial under Japanese procedure for killing a Japanese civilian.<sup>137</sup>

There is another general question that needs to be discussed. It has to do with the relative status under the Constitution of aliens outside the United States and United States citizens outside the United States. It has sometimes been said that aliens outside the United States have no rights under the Constitution, and various reasons have been given why this should be so. One reason given is that the Constitution is a compact among a particular people and aliens are not parties to that compact.<sup>138</sup> However, there is substantial and growing support for the view that aliens outside the United States do have rights under the Constitution. In the first place, there is no language in the Bill of Rights restricting its protection to citizens. The fifth amendment, for instance, provides simply that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." The first amendment is framed as a set of prohibitions on what Congress may do: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>139</sup> Aliens in the United States have constitutional rights, and the number of such rights receiving judicial recognition has steadily grown.<sup>140</sup> As noted earlier, nonresident aliens brought to the United States for prosecution sometimes succeed in having their prosecutions dismissed or evidence against them excluded because of what was done to them abroad by United States agents.<sup>141</sup> It has long been recognized that aliens outside the United States have constitutional protection for their property located in the United States.<sup>142</sup>

In a recent case, an alien whose bank account in Switzerland had been seized as the result of a letter written to Swiss authorities by the Attorney

136. 86 F.R.D. at 249.

137. *Wilson v. Girard*, 354 U.S. 524 (1957).

138. See Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 31 (1985); Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, in INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 43, 45, 52 (R. Lillich ed. 1981); Comment, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889, 1913 (1985).

139. See Henkin, *supra* note 138, at 14-15.

140. See Henkin, *supra* note 138, at 13-19. See also Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 54-58, 66 (1984).

141. *E.g.*, *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

142. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (compensation to aliens for vessels requisitioned by federal government).

General of the United States sued the Attorney General and other federal officials.<sup>143</sup> The alien apparently had no connection with the United States other than that created by the incident in question. The court held that the lower court erred in dismissing the complaint because, depending on the contents of the Attorney General's letter, the alien might have had standing to obtain damages for a violation of rights under the fourth and fifth amendments. In another case, a court refused to grant summary judgment for the defendants, United States agents, in an action for damages in which it was alleged that the agents had forcibly abducted the plaintiff in Panama.<sup>144</sup>

As mentioned earlier, even if an alien has no constitutional right to enter the United States or to resist deportation from it, this does not mean that he has no rights at all under the Constitution, especially when the United States reaches into his homeland and injures him there. Assuming that aliens abroad have rights under the Constitution, so that, for example, they may complain that the United States has violated their rights under the first amendment by some action taken in their country, are their rights the same as those of United States citizens travelling or residing in that foreign country?

It may be that in certain circumstances aliens will have more protection under the Bill of Rights than United States citizens. A United States citizen can commit treason abroad.<sup>145</sup> His treason may consist simply of speaking, and the first amendment will give him no protection.<sup>146</sup> The alien abroad, on the other hand, at least if he is not a resident of the United States and has no special connection with it,<sup>147</sup> cannot commit treason against the United States because he owes no allegiance to it. He would therefore be protected

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143. *Cardenas v. Smith*, 733 F.2d 909, 914-17 (D.C. Cir. 1984).

144. *Di Lorenzo v. United States*, 496 F. Supp. 79, 81-82 (S.D.N.Y. 1980). It is not stated in the opinion whether the plaintiff was a United States citizen or an alien, but in finding that the complaint stated a cause of action, the court did not rely on any allegation of citizenship. See also *In re Air Crash in Bali, Indonesia*, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982) (nonresident plaintiffs in wrongful death action had standing to raise question whether limitations on liability in Warsaw Convention violated fifth amendment). But see *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152-53 (D.D.C. 1976) (no standing for nonresident alien to sue in United States courts for violation of fourth amendment abroad). See also cases cited in Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649, 670 n.131 (1986). In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that habeas corpus petitions of Germans held in an American military prison in Germany who had been convicted by an American military commission of war crimes for aiding the Japanese against the United States should be dismissed. The case has sometimes been explained on the ground that the defendants were enemy aliens and the events took place during war or in its immediate aftermath.

145. *Gillars v. United States*, 182 F.2d 962, 979 (D.C. Cir. 1950).

146. *Id.* at 971; *Chandler v. United States*, 171 F.2d 921, 937-39 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949).

147. *Carlisle v. United States*, 83 U.S. (16 Wall.) 147 (1872) (alien in United States can commit treason); *Joyce v. Director of Public Prosecutions*, (1946) App. Cas. 347 (H.L.) (British prosecution for treason by American citizen who did propaganda broadcasts from Germany; defendant had long resided in Britain and held a British passport).

by the first amendment, assuming he does have rights under the first amendment. Furthermore, a citizen's freedom abroad may be indirectly burdened in ways that would not be permissible in the case of an alien, at least one who is not a resident of the United States: for instance, by the obligation of military service<sup>148</sup> and by the government's right to tax his property and his income.<sup>149</sup>

Are there situations other than treason in which a citizen abroad will have less protection than an alien against the direct burdening of constitutional rights? It might be contended that the status of citizen justifies further limitations and that it is proper to compel a United States citizen to support United States policy to an extent that would not be permissible in the case of an alien. The controls may be directed either to the citizen's leaving the United States or to his conduct abroad.

Two contrasting hypotheticals having to do with religion bring into focus this claim of governmental power over citizens. Suppose evangelists who are United States citizens want to leave the United States and go to Indonesia to convert people from Islam, Hinduism and other religions existing in that country to fundamentalist Protestantism. The Indonesian government is unhappy at this prospect, seeing it as a neocolonialist attack on the culture of its country and a threat to the political and religious status quo there.<sup>150</sup> The United States is concerned too, because it thinks that religious unrest in Indonesia will have political repercussions, which in turn may cause international complications. As a result, it denies passports to the evangelists and even goes so far as to make it illegal for United States citizens to go to Indonesia for the purpose of making religious conversions.<sup>151</sup> Here we have a square conflict between a strong tradition of religious liberty—the right and duty to carry the Gospel to foreign lands—and respect for the wishes of the government of another country.

An argument by the evangelists that they have a constitutional right to leave the United States to spread the Gospel to Indonesia runs up against formidable although perhaps not insurmountable authority to the contrary.

148. 50 U.S.C. app. § 453(a) (1981). *See also* *Blackmer v. United States*, 284 U.S. 421 (1932) (not violative of fifth amendment to require citizen resident abroad to return to United States to testify in criminal proceeding and to punish him for contempt for failure to respond to subpoena).

149. *See* *Cook v. Tait*, 265 U.S. 47 (1924). *See also* *United States v. Bowman*, 260 U.S. 94, 102 (1922).

150. In some parts of the world attempts at religious conversion, at least by certain means, are illegal. *See, e.g.*, *Stanislaus v. State of Madhya Pradesh*, 1977 A.I.R. (S.C.) 908 (India).

151. Even without the latter provision, 8 U.S.C. § 1185(b) (1982) makes it unlawful for a citizen to leave the United States without a passport except as permitted by the President.

During the 1950s, Mrs. Ruth B. Shipley, Chief of the Passport Division of the State Department, exercised wide powers over the issuance of passports. On one occasion, without giving a reason, she denied a passport to a Presbyterian clergyman for travel to Japan. *N.Y. Times*, May 19, 1952, at 3, col. 1. Bishop C. Bromley Oxnam voiced concern over this action from the standpoint of the work of the church. *N.Y. Times*, May 24, 1952, at 20, col. 6.

In *Kent v. Dulles*,<sup>152</sup> decided in 1958, the due process clause of the fifth amendment was construed to include a right of international travel. Since the announcement of this right, however, it has been subjected to considerable limitation. The Supreme Court has stated that the right to foreign travel is weaker than the right to domestic travel<sup>153</sup> and that it may be curtailed if there is reasonable justification.<sup>154</sup>

The decisions that stand most strongly against the evangelists are *Zemel v. Rusk*<sup>155</sup> and *Haig v. Agee*.<sup>156</sup> In *Zemel*, the Court upheld the Secretary of State's right to refuse to issue passports for travel to Cuba. The Court stressed the importance of foreign policy considerations where Cuba was concerned. Travel of United States citizens to Cuba, the Court thought, might involve the United States in dangerous incidents and also facilitate the export of the Cuban Revolution.<sup>157</sup> However, in *Zemel*, the Secretary denied passports to citizens generally, not to particular persons or groups because of their beliefs and associations and the ideas they might spread.<sup>158</sup> The Court held that no first amendment right of speech was involved, either because it thought that travel to Cuba was action not speech, or because, as it said, the first amendment does not include an "unrestrained right to gather information."<sup>159</sup>

In *Haig v. Agee*,<sup>160</sup> the Court sustained the Secretary of State's revocation of the passport of a former CIA agent residing abroad who had published intelligence information, including the names of CIA agents, for the purpose of disrupting United States intelligence operations. The Court emphasized the importance of the national security and foreign policy interests involved.<sup>161</sup> Again, as in *Zemel*, the Court held either that the former agent was engaged in action, not speech, or that the weight of the national security and foreign policy interests the government asserted justified a restriction on speech.<sup>162</sup>

If the assertion of any foreign policy or national security interest is enough to justify a prohibition on travel outside the United States, the right announced in *Kent* has little significance. If attention is to be paid to the

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152. 357 U.S. 116 (1958).

153. *Califano v. Aznavorian*, 439 U.S. 170, 176-77 (1978). See also *Haig v. Agee*, 453 U.S. 280, 306 (1981).

154. *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978); *Haig v. Agee*, 453 U.S. 280, 306 (1981).

155. 381 U.S. 1 (1965).

156. 453 U.S. 280 (1981).

157. 381 U.S. at 14-15.

158. *Id.* at 13.

159. *Id.* at 16-17. See also *Regan v. Wald*, 468 U.S. 222 (1984) (regulations under Trading With the Enemy Act, 50 U.S.C. app. §§ 1-44 (1982), which prohibited spending money for travel to Cuba, not violative of fifth amendment).

160. 453 U.S. 280 (1981).

161. *Id.* at 306.

162. *Id.* at 310.

weight of the foreign policy and national security interests asserted, then those put forward in the evangelists' case are perhaps less impressive than those put forward in *Zemel* and *Agee*. Furthermore, whereas in *Zemel* passports were not denied because of the beliefs of the applicants, in the evangelists' case it would be precisely their beliefs and their determination to spread them in Indonesia that would lead the government to seek to prevent the evangelists from going there. But in *Agee*,<sup>163</sup> the Court noted that it was the content of the former CIA agent's speech that caused the trouble. The evangelists invoke the free exercise clause as well as the free speech clause and the fifth amendment. Thus, their case raises the question whether religious speech is more protected than nonreligious speech under the first amendment,<sup>164</sup> and, since the free exercise clause is not limited to speech, it sidesteps the argument that travel is action rather than speech.

I suggest that the right to spread a religious message is so close to the heart of what the free exercise clause was intended to protect that only foreign policy considerations of the gravest sort could justify prohibiting the evangelists from setting out on their mission, and that an idea of citizenship that requires conformity to national policy in the absence of such considerations would be in conflict with the first amendment.<sup>165</sup>

The second hypothetical is the reverse of the first. In this case an American citizen wishes to go to a foreign country not to change the religion of that country but to participate in it. He may wish to participate in the religious culture of the foreign country precisely because it is so different from what he finds in the United States.<sup>166</sup> For instance, an American Moslem may wish to go to an Islamic country to participate in a way of life there that includes some discrimination on the ground of religion and a church-state system that would be prohibited in the United States. The United States denies this Moslem citizen a passport and goes on to make it illegal for any American to engage in religiously discriminatory conduct of certain kinds in

163. *Id.*

164. Left undecided in *Widmar v. Vincent*, 454 U.S. 263 (1981).

165. *Cf. Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984) (executive order requiring loyalty check of citizen, including whether he had advocated sedition, as a condition for his holding a position with the World Health Organization of the United Nations, violates the first amendment).

In 1953, Paul Blanshard sought the revocation of the citizenship of Archbishop Gerald P. O'Hara, papal nuncio to the Irish Republic, on the ground that the Archbishop was serving a foreign state in a capacity that required an oath of allegiance to its ruler. *See* Blanchard, *The Case of Archbishop O'Hara*, 70 CHRISTIAN CENTURY 539 (1953). *Cf. Afroyim v. Rusk*, 387 U.S. 292 (1967) (unconstitutional to deprive of citizenship for voting in foreign election even though such voting may embarrass United States in its foreign relations).

166. *See* Alford, *Voluntary Foreign Aid and American Foreign Policy: The Element of State Control*, 46 VA. L. REV. 477, 489 (1960) (suggesting that gifts made by persons in the United States, often by will, to persons and entities in foreign countries sometimes conflict with American governmental policy because the gifts express the donors' dissatisfaction with conditions in the United States).



that foreign country. The United States does so because it thinks that the Islamic country's favoring of Islam creates hostility among other religious groups, which in turn will have international political consequences, and also because it wishes to promote "human rights," including religious freedom and the separation of church and state. In this case it is the citizen who is on the side of the foreign culture and the United States that attacks it and seeks to prevent the citizen from supporting and participating in it.<sup>167</sup> There is an analogy with the Foreign Corrupt Practices Act,<sup>168</sup> under which American companies are forbidden to bribe foreign officials even though such conduct may not violate the laws or customs of the foreign country.

Again I suggest that what the hypothetical American Moslem wishes to do is close to the central concern of the free exercise clause and that his freedom to act in this way should not be overridden except for the gravest foreign policy considerations. Essentially, the government disagrees with the religious beliefs that the Moslem citizen has and wishes to put into practice in the foreign country. The case may seem an appealing one for government control because the values sought to be enforced are firmly established at home, but if the ways of the foreign country are not implicitly absolutely condemned by the Constitution, wherever engaged in—as would be the case with slavery or torture—but instead are among those ways of other peoples to which respect is due, there seems no justification for distinguishing between the alien and the citizen, and while affirming the alien's right in the foreign country to live in accordance with these customs, prohibiting the citizen from participating in them as well. In this matter, to compel a citizen to be a representative of domestic United States values no matter where he goes is to espouse an idea of citizenship at odds with the emphasis on freedom in the first and fifth amendments.

If my hypothetical American Moslem has a constitutional right to leave the United States to participate in a foreign religious system that would be forbidden at home, does he also have a right to take things of value with him to support that system, or to send things of value to the foreign country whether or not he goes himself? Cases have come before American courts involving gifts by American donors to persons and entities, some of them religious, in Iron Curtain countries.<sup>169</sup> In these cases, one of the questions that arose was whether the gift would be intercepted by the foreign government and not reach the intended donee. There was a danger that a court's answer to this question might be influenced by its attitude toward the foreign

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167. *Cf.* General MacArthur's order in 1945 in occupied Japan divesting the Japanese government of control of Shintoism and decreeing that henceforth Shintoism would only be recognized by the Supreme Commander of the Allied Powers as a religion for those who wished to accept it. *Kotohira Jinsha v. McGrath*, 90 F. Supp. 892, 896 (1950).

168. 15 U.S.C. §§ 78dd-1 to 78dd-2 (1982).

169. *See, e.g., Zschernig v. Miller*, 389 U.S. 429 (1968); *Brizgys v. County Treasurer*, 84 N.J. Super. 485, 202 A.2d 709 (N.J. Super. Ct. App. Div. 1964).

government and the degree of control it exercised over private individuals and entities. In none of these cases, however, was there brought into the foreground and subjected to constitutional evaluation the question of the donor's right to support a foreign system that could not legally exist in the United States. In *Kedroff v. Saint Nicholas Cathedral*,<sup>170</sup> it will be recalled, the Court held that it violated the free exercise clause to prevent the application of trust property for the support of the Patriarch's appointee in New York, even though the Patriarch was dominated to a significant extent by the Soviet government. Would the reasoning of *Kedroff* also lead to the conclusion that an American donor must be allowed to support the Patriarch himself in Moscow, notwithstanding the Patriarch's subordination to the Soviet government? If there is such a constitutional right, the application of the Export Administration Act<sup>171</sup> to religious donations might in certain circumstances be invalid.<sup>172</sup>

In the hypotheticals just discussed, attention has been focused on the comparative rights of United States citizens and aliens abroad. Now, without emphasizing this particular question, I wish to examine some additional cases involving the application of the religion clauses abroad. The first to be considered has to do with funding by the United States of education in a foreign country. The second involves employment discrimination based on religion in a foreign country. My aim is, through an examination of these cases, to come to a clearer understanding of what should be taken into account in applying the religion clauses abroad and to lay the foundation

170. 344 U.S. 94 (1952). See *supra* notes 75-79 and accompanying text.

171. 50 U.S.C. app. §§ 2401-20 (1982).

172. Efforts to project American values abroad through enforcement of the Export Administration Act have led to severe conflicts with foreign governments. See, e.g., Note, *Extraterrestrial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355, 364-66 (1984) (discussing the Soviet pipeline controversy). See also Harris & Bialos, *The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act*, 18 VAND. J. TRANSNAT'L L. 71 (1985).

In *United States v. Elder Indus., Inc.*, 579 F.2d 516 (9th Cir. 1978), the Export Administration Act was narrowly construed to prohibit only the export of technical information, and as thus construed found not to violate the free speech provision of the first amendment. *But see* *Welch v. Kennedy*, 319 F. Supp. 945 (D.D.C. 1970) (prohibition under Trading With the Enemy Act of Quaker contributing funds to Canadian organization for purpose of sending medical supplies to noncombatants in North and South Vietnam not violative of free exercise clause).

In *Bullfrog Films, Inc. v. Wick*, 646 F. Supp. 492 (C.D. Cal. 1986), the court held that United States Information Agency regulations laying down requirements for obtaining certification of films as "educational, scientific or cultural" violated the right to free speech protected by the first amendment because they discriminated on the basis of content without being justified by a sufficiently strong governmental interest. The effect of USIA certification is to make it possible to obtain exemption from customs duties on importation into foreign countries. Under a treaty that the USIA regulations seek to implement, signatory foreign countries are required to give "due consideration" to an exporting country's determination that materials are educational, scientific or cultural.

for some concluding general remarks about the matters we have been considering.

The first case, a hypothetical one, involves United States aid to science education in Malaysia. Assume that the United States provides salary supplements to science teachers in Malaysian secondary schools on condition that the education provided meets certain standards. The rationale for the program, so far as the United States is concerned, is that improved science education will promote economic development, which in turn will contribute to political and social stability in Malaysia, and stability in Malaysia will help maintain peace in Southeast Asia. As it happens, the only schools in Malaysia that meet the standards of the program are schools run by the government, and these are schools in which the Islamic religion is favored. There are other schools in Malaysia, some affiliated with religions other than Islam, but they have poor science programs, partly because of lack of resources and other disadvantages deriving from the overall social and political situation. In the government schools, there is instruction in the Islamic religion and an effort is made to have it permeate the curriculum. Moslems are preferred in teaching appointments. Non-Moslems are admitted to the schools; they are not required to take Islamic religious instruction.

Under *Lemon v. Kurtzman* and its companion cases,<sup>173</sup> and subsequent cases applying the rules set forth in these decisions,<sup>174</sup> United States government assistance in the United States to science education in schools of the sort described would be unconstitutional.<sup>175</sup> I suggest, however, that it should not be held unconstitutional for schools of the sort described in Malaysia. The strength of the United States' foreign policy interest in the stability of Southeast Asia is great. The aid accords with what the Malaysian government wants in government schools—a blending of the secular and the religious—and so is supported by the value I have referred to of respect for the ways of other nations. Although there is a burden on minority religions and those of no religion in Malaysia, and also on persons in the United States, whose taxes will be used to support the program, it is not of such severity as to invalidate the core freedom protected by the first amendment. It is in this last aspect that the case differs from the one discussed above involving the evangelists who want to spread the Gospel in Indonesia.

One can imagine variations on the facts that would argue for a different result. Suppose the United States supports not science education, but the teaching of a moderate version of Islam, on the theory that it will provide a bulwark against both Communism and Iranian-style Islamic fundamentalism. For the United States directly to embrace the doctrines of a particular

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173. 403 U.S. 602 (1971).

174. *E.g.*, *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973).

175. The salary supplements would violate the establishment clause because their "primary effect" would be to aid religion or because they would involve an "excessive entanglement" of government and religion.

religion, albeit for political ends, might conflict with the values of the religion clauses to an extent that cannot be outweighed by foreign policy considerations or the importance of respect for other cultures.

The second situation I offer for consideration involves religious discrimination in employment abroad. Here we have a number of litigated cases. In thinking about these cases, it is interesting to recall those discussed earlier involving foreign companies discriminating in employment in the United States.

Suppose the United States operates a facility in Saudi Arabia. The Saudi Arabian government insists that only Moslems be employed at this facility and the United States has acquiesced in this requirement. The United States justifies its acquiescence on the ground that the facility is vital to the defense of Saudi Arabia and the United States, and also on the ground that it is right thus to accommodate to a foreign religious culture. Difficult problems of classification are avoided because the Saudis are satisfied with a simple written statement by each employee that he is a Moslem. Assume the United States hires both United States citizens and aliens for work at the facility, and it enters into contracts of employment both in the United States and abroad. The aim is to get qualified people for the job who are also Moslems.<sup>176</sup>

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176. In 1956, Secretary of State Dulles revealed to the Senate Foreign Relations Committee that Saudi Arabia did not allow servicemen of the Jewish faith to be stationed at the United States Air Force base in Dhahran. *N.Y. Times*, Feb. 25, 1956, at 3, col. 4, and Feb. 26, 1956, at 33, col. 4. Controversy over this matter continued until 1962, when Saudi Arabia refused to renew the lease for the base and it was closed. *N.Y. Times*, April 23, 1962, at 28, col. 5. The controversy over the base at Dhahran recalled an earlier controversy between the United States and Russia. In the 1880s, Russian consular officials in New York were instructed not to issue visas to Jews, or at least certain categories of Jews, for visits to Russia. In spite of repeated protests from the United States, the Russian government refused to change its policy. Finally, in 1911, as a result of the controversy, the United States terminated its treaty of commerce and navigation with Russia. 37 Stat. 627 (1911). During the course of the controversy, our minister in St. Petersburg wrote to a Russian official:

Thus, you see [from the first amendment], my Government is prohibited in the most positive manner possible by the very law of its existence from even attempting to put any form of limitation upon any of its citizens by reason of his religious belief. How, then, can we permit this to be done by others? To say that they can thereby be discriminated against by foreign governments, and are only safeguarded against their own, would be a remarkable position for us to occupy.

Papers Relating to the Foreign Relations of the United States. Transmitted to Congress Dec. 2, 1895. Pt. II, p. 1064 (1896).

Prince Lobanow, the Russian foreign minister, responded:

As to the American Constitution, I must confess that it seems to me to be here beside the question. The article of the Constitution which you are good enough to mention, and which prescribes that no religion is prohibited in the United States, is, by the very nature of things, placed outside of all prejudice by the consular authority. He has neither to prohibit nor authorize the exercise in America of any cult; and the fact of his visé being accorded or refused does not encroach upon the article in question. The refusal of the visé is not at all an attack upon any established

The program is objected to by non-Moslems in the United States and abroad who feel humiliated by the religious restriction and angry at being excluded from profitable employment, and by United States taxpayers who object to their money being spent to support a religiously discriminatory program. In response to pressure, the United States government modifies the program so that only aliens not residing in the United States are hired, and all contracts of employment are made abroad. The result is that the program is deprived of a number of qualified personnel. The program as modified is in accord with Title VII of the Civil Rights Act, which excepts out of its general prohibition against religious discrimination in government employment "aliens employed outside the limits of the United States."<sup>177</sup>

I suggest that even as unmodified the program is constitutional. The national security interest is great, and the value of respect for another culture is present. This latter value includes the interest of Moslems who live in the United States who may wish to go to Saudi Arabia to participate in its Islamic way of life. The sparse information provided does not show that the consequences to those of other religions or of none, either in the United States or in Saudi Arabia, are of such severity as to implicate the core value of religious freedom in the first amendment. The program as modified should certainly not be struck down.

Discrimination on religious grounds in private employment abroad is the subject of interesting recent cases. The Constitution, of course, imposes no prohibition against religious discrimination in private employment. There can be no doubt, however, of Congress's power to prohibit such discrimination to some extent. But at a certain point the exercise of this power conflicts with a right to live in accordance with one's own beliefs, even if they are out of step with the tolerant spirit that generally prevails in the United States.<sup>178</sup> When the employment in question is in a foreign country, the argument in favor of this right is especially strong.

In *Kern v. Dynalelectron*,<sup>179</sup> a company incorporated in Delaware hired the plaintiff in Fort Worth to fly helicopters in Saudi Arabia. The job was to fly over a pilgrimage route to Mecca and drop down when necessary to disembark personnel who would fight fires and suppress disorder among the

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religion; it is the consequence of a foreign law of an administrative character, which only has its effect outside of the territory of the Union.

*Id.* at 1065. For an account of the controversy, see *N.Y. Times*, July 2, 1911, § 5, at 1, col. 1. 177. 42 U.S.C. § 2000e-16 (1982).

178. See the opinion of Chief Justice Burger in *Bowen v. Roy*, 106 S. Ct. 2147, 2155 n.16 (1986), observing that although in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), it was decided that it did not violate the free exercise clause to withdraw tax exemption from a private university that, on the basis of religious belief, practiced racial discrimination in admissions, the case did not decide whether a criminal penalty could be imposed, and that, quoting *Norwood v. Harrison*, 413 U.S. 455, 463 (1973), "the Constitution may compel toleration of private discrimination in some circumstances."

179. 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (1984).

pilgrims. Saudi Arabian law made the presence of a non-Moslem in the region of Mecca a crime: the punishment—beheading. The company made it clear to the plaintiff that a condition of employment was that he be a Moslem, and it provided a course in Tokyo in the Islamic religion to help him meet this condition. The plaintiff, a Baptist, accepted the offer and went to Tokyo. He took the course, chose an Islamic name and signed a certificate of conversion. Then, apparently, he had second thoughts, and instead of going on to Mecca returned to Texas and filed suit under Title VII of the Civil Rights Act.<sup>180</sup> The district court held that the company had not violated Title VII because being a Moslem was a “bona fide occupational qualification” for the job, an exception provided in the statute.<sup>181</sup> The court stressed the risk to the company’s business and to its pilots of using non-Moslem pilots.<sup>182</sup> But of course its decision implicitly attached importance to the company’s continuing to do business in Saudi Arabia. Arguably, if the court had reached the opposite result under the statute and found it prohibited requiring the pilots to be Moslems, the statute would conflict with the first amendment. At stake would be the religious interest of the Saudis, which I have suggested ought to receive constitutional recognition, and the interest of those Americans who want to participate in the religious culture of Saudi Arabia.

Suppose a pilgrimage similar to that in *Kern* took place in the United States, say to a sacred site in eastern Oregon. The organizers of the pilgrimage also apprehend a danger of disorder among the pilgrims and decide to deal with it in the same way as the Saudis—by patrolling with helicopters. And, like the Saudis, they want the helicopter pilots to be of their own faith, in order to safeguard the religious character of the pilgrimage. Possibly the courts will hold that the organizers of the Oregon pilgrimage may not require the helicopter pilots to be of their faith, on the ground that Title VII forbids it and the Constitution does not invalidate the prohibition. This result may be supported by the argument that the importance of preserving the religious character of the pilgrimage is outweighed by the importance of not excluding

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180. 42 U.S.C. § 2000e-2 (1982).

181. Under 42 U.S.C. § 2000e-2(e) (1982), it is not an unlawful employment practice to discriminate on the basis of religion, sex, or national origin when religion, sex, or national origin is “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”

It may also be noted that 42 U.S.C. § 2000e-1 (1982) makes the prohibitions of Title VII inapplicable to an employer “with respect to the employment of aliens outside any state.” For a discussion of whether Title VII should be interpreted to apply abroad to employees who are United States citizens, see Kirschner, *The Extraterritorial Applications of Title VII of the Civil Rights Act*, 34 LAB. L.J. 394 (1983). For a survey of the extraterritorial application of numerous other United States laws relating to labor, including the Fair Labor Standards Act, see Goldberg, *Labor Relations and Labor Standards for Employees of United States Enterprises Working in Foreign Areas*, 48 N.D.L. REV. 23 (1971-72).

182. 577 F. Supp. at 1200.

from jobs of this sort, which from one point of view at least are secular, those of other faiths or of no faith.<sup>183</sup> I suggest, however, that the result may be different in Saudi Arabia. The foreign location of the pilgrimage adds strength to the claim of respect for another culture. If the pilgrimage in Oregon is an American Indian pilgrimage, on the other hand, rather than one organized, say, by Hindus, an interesting middle case is presented, because, as we know, an Indian tribe is a nation, albeit a domestic, dependent nation.

In another foreign private employment case,<sup>184</sup> the result was the opposite of that in *Kern*. The Baylor College of Medicine in Houston had a contract with the Saudi Arabian government to send cardiac surgical teams to the King Faisal Hospital in Riyadh. This was an extremely lucrative assignment for the doctors involved, and it also gave them medical experience not available in the United States. Those designated for the program were provided with visa forms that asked for their religious preference and they were required to state a preference. Baylor administrators in charge of the program excluded Jews. They did so not because of any express agreement with the Saudis, but because they had formed the view that the Saudis did not want Jews. The court held that Title VII had been violated because "Baylor has not established any bona fide justification for excluding Jews from the . . . program."<sup>185</sup>

The *Baylor* case perhaps can be distinguished from *Kern*. In *Baylor*, the Saudi attitude was not clear. If when pressed the Saudis would not have insisted on the exclusion of Jews, that would have eliminated the argument about respecting the ways of a foreign country. Furthermore, the *Baylor* case perhaps did not involve religious discrimination: the Saudi objection might not have been religious, but racial or political, and so arguably entitled to less respect under Title VII and the Constitution.<sup>186</sup> On the other hand,

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183. Title VII contains an exemption for the activities of religious organizations from the prohibition against religious discrimination in employment. The statute provides: "This subchapter shall not apply . . . to a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1 (1982). In *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987), the Court held that the exemption covers the secular as well as the religious activities of religious organizations and that, at least as applied to the nonprofit activities of these organizations, it does not violate the establishment clause. The plaintiff in the *Amos* case was a building engineer in a gymnasium owned and operated by corporations associated with the Mormon Church. He was discharged from his position because he failed to qualify for a "temple recommend," a status awarded only to those who meet certain church standards.

184. *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986).

185. *Id.* at 535.

186. *Cf.* *St. Francis College v. Majid Ghaiden Al-Khazraji*, 107 S. Ct. 2022 (1987); *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987) (discrimination against a person because he is a Jew or Arab is discrimination on the ground of ancestry or ethnic characteristics, which is racial discrimination within the meaning of 42 U.S.C. §§ 1981, 1982).

it is not possible to distinguish the *Baylor* case from *Kern* on the ground that it is less important to maintain an atmosphere of faith in a hospital than on a pilgrimage route. Such a distinction would have the courts deciding what ought to be important in religion. From a secular point of view, there is no more value in keeping open to those of all faiths or of none the job of a cardiac surgeon than the job of a helicopter pilot.<sup>187</sup>

#### CONCLUSION

Clearly we need to explore further this question of the religion clauses in foreign countries. I have made here only a beginning. Additional cases will be helpful in bringing the relevant considerations more clearly into view, and in time we will have them. Still, I may have said enough to justify a tentative general statement. In fact, I have already intimated a theory at several points in the discussion. Essentially my suggestion is this: there should be found implicit in the Constitution recognition of the importance of respect for the ways of foreign nations. What is a rule for government in the United States with its special history and present circumstances is not necessarily a rule for the government of the United States acting in other places, which have their own histories and conditions. The distinction is not arbitrary, but derives from the philosophy of the Constitution itself and its ideas about human nature and the good for man. What is the good for man is conditioned to some extent by the history and circumstances of peoples. Efforts to apply the religion clauses especially compel recognition of this truth, for it is when we confront the religious element in another culture that we are most likely to see the importance of allowing others to follow their own ways. The rhetoric of human rights, at least as applied to the religious issue, tends to obscure this truth. Still, within the first amendment there is an irreducible core that will not accommodate, that claims universal validity. This irreducible core is as much a product of the philosophy of the Constitution as is a generous tolerance of other cultures. It is based upon the belief that if ideological expression through political institutions is carried beyond a certain point, it will eliminate processes in individuals and groups that are indispensable for achieving the human good. That we are not exactly clear what is universal and what is relative in the first amendment is due to the fact that we are not clear about the philosophy that underlies it. But this can come as no surprise since we are constantly confronted with the same uncertainty in domestic church-state cases as we attempt to determine what government must maintain without qualification and how much room it must leave for the expression of beliefs in conflict with constitutional truths.

I have stressed the possibility of finding within the first amendment

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187. See also *In re American Jewish Congress v. Carter*, 9 N.Y.2d 223, 173 N.E.2d 788 (1961) (finding erroneous a determination by the New York Commission Against Discrimination that there was not probable cause to process a complaint against an oil company doing business in Saudi Arabia which alleged that the company was violating a state statute by inquiring into the religion of job applicants in New York).



recognition of the value of respect for the ways of others, especially of foreign nations. I have stressed this because it seems to me not sufficiently noticed. But this emphasis may have left the impression that the reason for believing that the religion clauses have a different application in different cultural settings is simply so that others may be free to follow their own ways. I would conclude, however, on a more affirmative note: It is possibly to our interest that societies with ideas quite different from our own, including ideas about the proper relation between government and religion, should exist. For the answers we have for ourselves are not so certainly correct that we can afford to be without the light that comes from other very different ways.