PERMISSIBLE ACCOMMODATION OF RELIGION AND THE ALTERNATIVE BURDEN

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PERMISSIBLE ACCOMMODATION OF RELIGION AND
THE ALTERNATIVE BURDEN

by

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LL.B., Seijo University, Japan, 1991
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PERMISSIBLE ACCOMMODATION OF RELIGION AND
THE ALTERNATIVE BURDEN

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CHAPTER I. INTRODUCTION.

How to determine the relation between religion and state is one of main themes in the modern constitutional law. Although the free exercise of religion is protected by most of the constitutional laws in the world, the relation among them differs even in the Western countries.\(^1\) The United Kingdom, for instance, establishes its state church (the Church of England), while in Germany churches are given the official status to serve "an important role in the nation's public life."\(^2\) In the United States, as well as in France and Japan, the Constitution prohibits government from establishing a state church or religion.\(^3\)

In the type of the United States, the separation between religion and state would run afoulf of the free


\(^3\) See U.S. Const. amend. I; Law of Dec. 9, 1905 (France), C.ADM. 787 (1994); KENPO (Japan), art. 20, para. 3.
exercise of religion. To avoid this conflict, some commentators suggested several possible results; that is, to prefer either the free exercise of religion, or the separation of religion and state to the other.\(^5\) The concept of religious accommodation is one of those results, which the Supreme Court of the United States has recognized.\(^6\) According to Professor Michael W. McConnell, who is the strongest advocate of accommodation,

"[a]ccommodation refers to government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person’s or an institution’s religion."\(^7\) In this view, the main parts of religious freedom are "the autonomy of the religious institutions, individual choice in matters of religion,


\(^6\) Walz v. Tax Comm’n, 397 U.S. 664, 669 (1970) ("there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.").

\(^7\) Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685, 686 (1992); see also id. at 717-718 ("This kind of ‘favoritism toward religion,’ however, is inherent in the very text of the First Amendment. [If] the Establishment Clause prohibits the advancement of religion, and if extending special constitutional protection to free exercise advances religion, then the Religion Clauses are contradictory.").
and the freedom to put a chosen faith (if any) into practice."^8 Moreover, the separation of religion and state is seen in this view as "subsidiary, instrumental, values in ... religious liberty."^9 Although this position could be against the strict separation of religion and state, it would not sacrifice people’s religious freedom.

What is the difference between accommodating religion and favoring religion? One commentator explains it in particularly clear fashion.

[A] "religious purpose" is not the same as a "purpose of accommodating religious beliefs." If someone does something for a "religious purpose," then ... she does it because her religious beliefs encourage her to do it and because she thinks that those beliefs are valid. Thus, one goes to church or says grace before meals for a religious purpose. Likewise, when a legislature requires schoolchildren to read the Bible, it generally does so for a religious purpose: not simply because it thinks that class discipline will benefit from the practice, but also ... because it thinks that Christianity is the true religion and that children should learn about it for the betterment of their souls. Yet any given accommodation of religion may not have a religious purpose. If someone invites ten people over to dinner and two of them are Hindu, he will probably go out of his way to stock his refrigerator with something besides hamburgers and hot dogs. Yet he does this regardless of, not because of, his own

---

^8 McConnell, supra note 4, at 1 (footnote omitted).

^9 Id. at 2.

Note that the Japanese Supreme Court also recognizes the separation of religion and state as an institutional guarantee of religious liberty, see infra text accompanying note 230.
religious beliefs. He does it not because he thinks that his Hindu friends' religious beliefs are true, but simply because accommodating their religious scruples is a respectful thing to do. [Accommodating religious believers] simply reflects the government's secular respect for their right to choose their way of life.\(^\text{10}\)

I believe that the value of free exercise of religion surpasses the value of the separation of religion and state. However, facilitating the religious value should not exceed the limit of the Religious Clause.\(^\text{11}\) Furthermore, government has discretion whether to take alternative burden on religious beneficiaries to assure not to give religion an excessive favor over non-religion.

In this thesis, I discuss the extent to which government can afford to give accommodation within the limits of the Establishment Clause. In Chapter II, I review the theory of the permissible accommodation referred in the Supreme Court of the United States. In Chapter III, I examine scholarly debates on the accommodation. Then, I discuss German and Japanese law of the accommodation in Chapter IV. There, those cases suggest the possibility of alternative burdens on religious believers. The alternative burdens are


\(^{11}\) The Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. CONST. amend. I. The former is
considered the price of the accommodation. I conclude that government has authority to determine whether to confer accommodation to religion, and discretion to take alternative burden, which is non-religious burden imposed by government to those who receive accommodating benefits. Those government decisions are subject to courts that examine whether the decisions violate the Establishment Clause.

called the Establishment Clause, and the latter is the Free Exercise Clause.
CHAPTER II. ACCOMMODATION TO RELIGION IN THE SUPREME COURT.

As the U.S. Supreme Court stated, "[the] two Religion Clauses ... are cast in absolute terms, and either of [them], if expanded to a logical extreme, would tend to clash with the other."\textsuperscript{12} This might be an inevitable collision. As described above, commentators have suggested several solutions to reconcile it.\textsuperscript{13} Accommodation to religion, which stresses the value of the free exercise of religion preference over non-establishment value,\textsuperscript{14} is useful to resolve the conflict, and is what the Supreme Court has always relied on cases

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{13}] See supra text accompanying note 5.
\item[\textsuperscript{14}] See, e.g., Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brenann, J., dissenting) ("[O]ur cases recognize that, in one important respect, the Constitution is not neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly-held beliefs do not."); Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O’Connor, J., concurring in the judgment) ("The solution to the conflict between the Religion Clauses lies ... in identifying workable limits to the government’s license to promote the free exercise of religion.").
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it needs to confront the conflict. The Court has surely recognized the need of religious accommodations.

Professor Tribe indicates that there are three types of accommodation: required, permissible, and forbidden. The required accommodation is that the Free Exercise Clause requires government to make some accommodations to religious believers, such as excusing them from compulsory program of public education, or including in unemployment compensation those who were fired because of their belief. The permissible accommodation is that the Establishment Clause permits government to accommodate religion while the Free Exercise Clause does not require doing so. This involves cases such as building a church in a public university premise, allowing drug consumption

15 See infra text accompanying notes 71-106.

16 Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-145 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.").

17 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-5, at 1169 (2d ed. 1988).


21 Lupu, supra note 18, at 751.
for religious sacraments,\textsuperscript{22} or exempting conscientious objectors from obligatory military services.\textsuperscript{23} The forbidden accommodation is what the Establishment Clause prohibits government to do, such as a direct subsidy to religion, or tax exemption only for religion.\textsuperscript{24}

In this chapter, I examine permissible accommodation cases in the Supreme Court.

A. Emergence of Accommodation in the Court.

\textit{Zorach v. Clauson}\textsuperscript{25} is the case that "[t]he concept of accommodation ... first appeared in a Supreme Court opinion."\textsuperscript{26} This was the case with respect to the constitutionality of a "released time" program in public schools that allowed students to attend religious classes held outside the school premises during school day. Upholding the program, Justice Douglas said for the Court that the separation of religion and state should not be a

\begin{footnotesize}
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\item See e.g., 21 C.F.R. § 1307.31 (1992); ARIZ. REV. STAT. ANN. §§ 13-3402(B)(1)-(3) (1989); COLO. REV. STAT. § 12-22-317(3) (1985); KAN. STAT. ANN. § 65-4116(c)(8) (1985); N.M. STAT. ANN. § 30-31-6(D) (Supp.1989); UTAH CODE ANN. § 58-37-3(3) (1986).
\item With respect to the history of the religious exemption from military service, see generally United States v. Macintosh, 283 U.S. 605, 632-633 (1931) (Hughes, C.J., dissenting); United States v. Seeger, 380 U.S. 163, 169-173 (1965). See also KOMMERS, supra note 2, 462-466 (German conscientious objection statutes).
\item 343 U.S. 306 (1952).
\item McConnell, supra note 4, at 4.
\end{enumerate}
\end{footnotesize}
rigorous one. Rather, "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

In *Sherbert v. Verner,* the Court denied government exclusion from unemployment compensation of a religious believer who was fired because of her religious observance. It changed its course toward the Free Exercise Clause to mandate government to make some

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27 Zorach, 343 U.S. at 312 ("The First Amendment ... does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other - hostile, suspicious, and even unfriendly.").

28 Id. at 313-314.


In these cases, the Court suggested that the free exercise claim could not be superior to the government interest to keep general applicability of the law which maintained the social order. See also Employment Div., v. Smith, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'." (quoting United States v. Lee, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in judgment))).
exemptions on generally applicable laws against religious claims. Three Justices indicated their approval for permissible legislative accommodation. Saying that when there was conflict between the Establishment Clause and the Free Exercise Clause, the Establishment Clause should yield its way to the Free Exercise Clause, Justice Stewart stated in his concurrence that "our Constitution commands the positive protection by government of religious Freedom - not only for a minority, however small - not only for the majority, however large - but for each of us." Justice Harlan also showed his affirmative position for permissible accommodation in his dissent, which Justice White joined.

Justice Brennan suggested his acceptance of permissible accommodation in School Dist. of Abington v.

31 Id. at 415 (Stewart, J., concurring in the judgment).

32 Id. at 416 (Stewart, J., concurring in the judgment) (emphasis added).

33 Id. at 423 (Harlan, J., dissenting) ("[T]here is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating [religion]."); see also Welsh v. United States, 398 U.S. 333, 359 n.9 (1970) ("My own conclusion, to which I still adhere, is that [a] State could constitutionally create exceptions to its program to accommodate religious scruples. That suggestion must, however, be qualified by the observation that any such exception in order to satisfy the Establishment Clause of the First Amendment, would have to be sufficiently broad to be religiously neutral.")
Schempp,\textsuperscript{34} where the Court invalidated Bible reading in public schools. Six categories of cases "to be treated distinctly with regard to the level of accommodation permissible under the Constitution"\textsuperscript{35} were offered by him. The first category is the conflict between the Establishment Clause and the Free Exercise Clause, where government's strict religious separation policy might infringe individual's right of the free exercise.\textsuperscript{36} Secondly, Justice Brennan discussed religious exercises in legislative bodies, and said that since the member of legislature are all matured, this sort of religious exercise does not cause any Establishment Clause concern.\textsuperscript{37} Third, the Justice permitted non-devotional use of religious matters in the public schools, such as referring to religion or "differences between religious

\textsuperscript{34} 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[N]ot every involvement of religion in public life violates the Establishment Clause.").


\textsuperscript{36} Schempp, 374 U.S. at 296-299 (Brennan, J., concurring).

\textsuperscript{37} Id. at 299-300 (Brennan, J., concurring). But see Marsh v. Chambers, 463 U.S. 783, 795-796 (Brennan, J., dissenting) ("[D]isagreement with the Court requires that I confront the fact that some 20 years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, I came very close to endorsing essentially the result reached by the Court today. Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today." (footnote omitted)).
sects” as social and historical matters. The fourth category is uniform tax exemptions incidentally available to religious institutions, in which “religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups.” Justice Brennan regarded religious considerations in public welfare programs as the fifth category. There are programs in which government could include individuals whose demands are religiously motivated in nondiscriminatory welfare programs, such as unemployment compensation programs. The sixth category

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38 Schempp, 374 U.S. at 300 (Brennan, J., concurring).


40 Schempp, 374 U.S. at 302-303 (Brennan, J., concurring).

consisted of activities which, though religious in origin, have ceased to have religious meaning, such as the motto "In God We Trust" in currency, or the public display of Christmas trees.\footnote{Schempp, 374 U.S. at 303-304 (Brennan, J., concurring).}

He had recognized that the boundary of accommodation should "accord[] with history and faithfully reflect[] the understanding of the Founding Fathers."\footnote{Id. at 294 (Brennan, J., concurring); see also id. at 306 (Goldberg, J., concurring).}

For Justice Brennan, denying religious accommodation such as the refusal of "chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood,"\footnote{Id. at 299 (Brennan, J., concurring).} could be hostility toward religion.\footnote{Id.}

\footnote{Id. at 295. See also Walz v. Tax Comm'n, 397 U.S. 664, 681, 686-687 (1970) (Brennan, J., concurring).}

\footnote{Id. at 299 (Brennan, J., concurring).}

\footnote{Id.}

Nevertheless, Justice Brennan did not intend to suggest that "government must provide chaplains or draft exemptions, or that the courts should intercede if it fails to do so,"\footnote{Id.} It seems he also recognized then
Walz v. Tax Comm' n is another case in which the Court mentioned accommodation. Upholding property tax exemption policy to religious organizations as well as educational and charitable organizations, Chief Justice Burger said in his majority opinion that government accommodation covered much a wider area than that mandated by the Free Exercise Clause through courts. Justice Burger also mentioned tradition and national heritage that could be the limit of permissible accommodation.

In McDaniel v. Paty, although the majority did not say anything about permissible accommodation, Justice Brennan restated his opinion with respect to it. In that case, the Court struck down a State constitutional provision that excluded clergymen from elected public office. In his concurring opinion, Justice Brennan reiterated his reliance on American history, tradition, and heritage that would be the limit of permissible accommodation. There, he perceived that the structure that it was a government's discretion to decide whether it needed to make an exemption for religious believers.


Id. at 673 ("The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.").

Id.


Id. at 638 (Brennan, J., concurring in the judgment) ("[T]he Court's decisions have indicated that the limits of permissible governmental action with respect to religion under the Establishment Clause must reflect an
of the Religious Clauses allows government "to take religion into account when necessary to further secular purposes unrelated to the advancement of religion, and to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish."\textsuperscript{50}

Since the 1980s, the Court has taken further steps to allow permissible government accommodation. In \textit{Lynch v. Donnelly}\textsuperscript{51} where the Court validated a display of the nativity scene (crèche) owned by local government in a park with other Christmas decorations, Chief Justice Burger said for the majority: "[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."\textsuperscript{52} Justice Burger believed that to permit this religious display in holiday seasons was an accommodation appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause." (footnote omitted)).

\textsuperscript{50} \textit{Id.} at 639 (Brennan, J., concurring in the judgment).


\textsuperscript{52} \textit{Id.} at 673 (citation omitted).
to religion justified by history and longstanding traditions.  

Justice Brennan later outlined his new approach toward his six categories of government accommodation in School Dist. of Abington v. Schempp. In refining his theory, Justice Brennan said that there are three principles derived from the Court's precedents that permit government to acknowledge religion under the Establishment Clause. First, government "may, consistently with the

53 Id. at 675-677 ("Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. [Our] history is pervaded by expressions of religious beliefs .... Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none."); see also id. at 686 ("It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so 'taint' the City's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol - the crèche - at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.").

54 See supra text accompanying notes 35-41.

55 Lynch, 465 U.S. at 715 (Brennan, J., dissenting) ("[I]t appears from our prior decisions that at least three principles - tracing the narrow channels which government acknowledgments must follow to satisfy the Establishment Clause - may be identified.").
Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion," even though to do so is not mandated by the Free Exercise Clause. In this principle, government has some latitudes to decide whether or not to give accommodation to religion beyond the Free Exercise Clause. Second, "while a particular governmental practice may have derived from religious motivations and retain certain religious connotations, it is nonetheless permissible for the government to pursue the practice when it is continued today solely for secular reasons." To uphold Sunday closing laws or to cerebrate Thanksgiving Day officially may be justified in this principle. Thirdly, government may recognize "the religious beliefs and practices of the American people as an aspect of our national history and culture" in its official actions without violating the Establishment Clause. According to Justice Brennan, if referring to religion or acknowledging it gives solemnity to a public ceremony and have practiced repeatedly for a long time, those practices

56 Id (citation omitted).
57 Id.
58 Id.
59 Id. at 715-716 (Brennan, J., dissenting).
60 Id. at 716 (Brennan, J., dissenting) (citation omitted).
would have lost religious meaning and serve some cultural functions.  

In the next year, the Court held in Wallace v. Jaffree that a legislature could not amend a school meditation law to install a word “prayer.” In her concurrence, Justice O’Connor showed her agreement to permissible accommodation. She stated that although the Free Exercise Clause does not require government to make an exemption for “persons from some generally applicable government requirements so as to permit those persons to freely exercise their religion,” it is the teaching of the precedents that “the government in some circumstances may voluntarily choose to exempt religious observers without violating the Establishment Clause.” In so saying, Justice O’Connor did not rely on neutrality toward religion to solve the conflict between the Establishment Clause and the Free Exercise Clause. Instead, she said, it would be very important to identify “workable limits to

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61 Id. at 716-717 (Brennan, J., dissenting); see also id. at 717 (Brennan, J., dissenting) ("The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.").


63 Id. at 81 (O’Connor, J., concurring in the judgment) (citation omitted).

64 Id. at 82 (O’Connor, J., concurring in the judgment) (citation omitted).

65 Id. at 83 (O’Connor, J., concurring in the judgment).
the government's license to promote the free exercise of religion." Justice O'Connor developed her "endorsement test" to apply to permissible accommodation cases, and argued that if government policies seem to be accommodation by pursuing "[the] Free Exercise Clause values when [they] lift[] a government-imposed burden on the free exercise of religion," the Free Exercise Clause justifies "the religious purpose of" government policies.

B. The Accommodation Argument in the Current Court.

By the middle of 1982s, the Court has begun to take permissible accommodation issues into account.

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66 Id.

67 The endorsement test is a scrutiny for the Establishment Clause that "examine[s] whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement" in the view of the objective observer, who must know the Religious Clauses and background of the case, Id. at 69 (O'Connor, J., concurring in the judgment); see also Lynch v. Donnelly, 465 U.S. 668, 688-689 (1984) (O'Connor, J., concurring).

68 Wallace, 472 U.S. at 70 (O'Connor, J., concurring in the judgment) ("The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy.").

69 Id. at 83 (O'Connor, J., concurring in the judgment).

70 Id.
Estate of Thornton v. Caldor, Inc.\textsuperscript{71} was the first modern case in which the Court dealt with the government accommodation issue. In this case, the constitutionality of a state law that absolutely mandated an employer to accommodate an employee's designated Sabbath in its working schedule was challenged. Chief Justice Burger concluded for the Court that this obligatory requirement over the employer to accommodate one's religious need could not be seen as permissible government accommodation so that it violated the Establishment Clause. In so doing, the Court said that because "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath,"\textsuperscript{72} "[t]his unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses."\textsuperscript{73} Justice O'Connor, in her concurring opinion, tried to distinguish the statute here from "the religious accommodation provisions of Title VII of the Civil Rights Act of 1964,"\textsuperscript{74} stating

\begin{itemize}
\item \textsuperscript{71} 472 U.S. 703 (1985).
\item \textsuperscript{72} Id. at 709.
\item \textsuperscript{73} Id. at 710.
\item \textsuperscript{74} Id. at 711 (O'Connor, J., concurring).
\end{itemize}


These provisions prescribe as follows:

It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or
that "[s]ince Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti- discrimination law rather than an endorsement of religion or a particular religious practice."75

In Corporation of Presiding Bishop v. Amos,76 the Court was again concerned with an accommodation statute. It affirmed a provision of Title VII of the Civil Rights Act of 196477 which "exempts religious organizations from privileges of employment, because of such individual's race, color, religion, sex, or national origin.


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


75 Estate of Thornton, 472 U.S. at 712 (O'Connor, J., concurring).


77 The provision at issue prescribes: "[The non-religious discrimination provision (Title VII of the Civil Rights Act of 1964)] 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 (1988 & Supp. IV 1992).
[an anti-discrimination provision] in employment on the basis of religion." 78 For the majority, Justice White said that "there is ample room for accommodation of religion under the Establishment Clause." 79 The Court perceived that "[w]here ... government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." 80 Furthermore, the Court stated that an accommodation statute should not be the subject of strict scrutiny if it passes the Lemon test. 81 Instead, the Court continued, it is sufficient to apply the rational-based scrutiny that inquires into "the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 82 In her concurrence, Justice O'Connor again proposed her "endorsement test" over the Lemon test for the test, evaluating whether an

78 Amos, 483 U.S. at 329.

79 Id. at 338.

80 Id.

81 Id. at 339 ("In cases ... where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the Lemon test."). For the Lemon test, see infra note 134.

82 Id.
accommodation statute is permissible under the Establishment Clause.\textsuperscript{83}

\textit{Texas Monthly, Inc. v. Bullock}\textsuperscript{84} was the case the Court struck down a State sales tax exemption law that only applied to religious periodicals. Justice Brennan articulated a criterion for deciding whether a statute or a government action is permissible accommodation to religion or impermissible preference of religion.\textsuperscript{85} Under his criterion, Justice Brennan said that government can give a benefit based on religion if it (1) "is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end,"\textsuperscript{86} (2) is "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause,"\textsuperscript{87} or (3) "did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs."\textsuperscript{88} This could be a test to evaluate whether statute or government action seems as permissible accommodation. As

\footnotesize
\textsuperscript{83} \textit{Id.}, at 348 (O'Connor, J., concurring in the judgment).

\textsuperscript{84} 489 U.S. 1, 38 (1989).

\textsuperscript{85} \textit{Id.} at 11-15 (plurality opinion); see also McConnell, \textit{supra} note 7, at 698-705.

\textsuperscript{86} \textit{Texas Monthly}, 489 U.S. at 14 (plurality opinion) (footnote omitted).

\textsuperscript{87} \textit{Id.} at 18 n.8 (plurality opinion).

\textsuperscript{88} \textit{Id.}.
one commentator has stated, this test "repudiates the position ... that the political branches have no discretion to institute accommodations that are not constitutionally compelled by the Free Exercise Clause."\textsuperscript{89} However, the first prong of Justice Brennan's test is "not easy to reconcile with"\textsuperscript{90} the precedents since the Court did decide in Amos that religious accommodation should not be "packaged with benefits to secular entities."\textsuperscript{91} Note also that Justice Brennan finally dropped his reliance on the history, tradition, and heritage of America as the limit of permissible accommodation.

Justice Kennedy proposed his own standard to decide the limits of permissible accommodation in County of Allegheny v. American Civil Liberties Union,\textsuperscript{92} where the Court struck down a crèche, standing alone in a courthouse and approved a large Chanukah menorah placed outside a government building with a Christmas tree. In his concurring opinion in which Chief Justice Rehnquist and Justice Scalia joined, Justice Kennedy said that there are two limits to permissible accommodation:

\begin{quote}
\[\text{[G]overnment may not coerce anyone to support or participate in any religion or its}\]
\end{quote}

\textsuperscript{89} McConnell, supra note 7, at 709.

\textsuperscript{90} Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 Sup. Ct. Rev. 373, 388.

\textsuperscript{91} Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

\textsuperscript{92} 492 U.S. 573, 659 (1989).
exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."^3

In his noncoercive theory, Justice Kennedy relied heavily on American history, traditions, and national heritage as the elements to judge whether a government action seems to violate the Establishment Clause.^4

In Lee v. Weisman,^5 where the Court invalidated school prayer in a graduation ceremony of a public school, Justice Souter stated that religious accommodation must be evaluated by government neutrality toward religion.^6 He

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^3 Id. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

^4 See id. at 662-663 (Kennedy, J., concurring in judgment in part and dissenting in part) ("Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."); id. at 679 (Kennedy, J., concurring in judgment in part and dissenting in part) ("[T]he principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects.").


^6 Id. at 627-628 (Souter, J., concurring) ("That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. [Such]
also emphasized that "accommodation must lift a discernible burden on the free exercise of religion," and concluded that government could release religious believers from situations in which they needed to take "sides between God and government." \(^{98}\)

*Board of Educ. of Kiryas Joel v. Grumet*\(^{99}\) is the case the Court struck down an accommodation law which gave religious believers belonging to one sect the power to operate a school district. Justice Souter, writing for the majority, repeatedly discussed that government could offer accommodation to religion if it secured religious neutrality.\(^{100}\) He concluded the case using his argument for accommodation that "the statute ... fails the test of neutrality [since] [i]t delegates a power ... to an electorate defined by common religious belief and practice, in a manner that fails to forecast religious accommodation does not necessarily signify an official endorsement of religious observance over disbelief." (citation omitted)).

\(^{97}\) Id. at 629 (Souter, J., concurring).

\(^{98}\) Id. at 628 (Souter, J., concurring); see also Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").


\(^{100}\) Id. at 706-707 ("[W]hatever the limits of permissible legislative accommodations may be, ... it is clear that neutrality as among religions must be honored." (citation omitted)).
favoritism. Justice O’Connor also agreed in her concurring opinion that neutrality is the main element to evaluate permissible accommodation. Stating that the Religious Clauses require that one’s legal status not be influenced by one’s religious belief, she emphasized:

What makes accommodation permissible ... is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect.

In his concurrence, Justice Kennedy stressed that “when the accommodation requires the government to draw political or electoral boundaries,” it will violate the Establishment Clause. For him, the crucial limits for the accommodation is that “government may not use religion as a criterion to draw political or electoral lines.”

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1. Id. at 709-710.

2. Id. at 714 (O’Connor, J., concurring in part and concurring in the judgment) (“Religious needs can be accommodated through laws that are neutral with regard to religion.”).

3. Id.

4. Id.

5. Id. at 728 (Kennedy, J., concurring in the judgment).

6. Id.
C. Analysis.

The United States Supreme Court has consistently sustained the need for permissible accommodation. It appears clear that "the government has some latitude to accommodate religion beyond the requirements of the Free Exercise Clause," though the Court has not made persuasive arguments on the limits of permissibility.\(^\text{107}\) At the outset, it seems established law in the Court that government may confer a benefit to religious believers as well as secular persons based on religiously neutral policies.\(^\text{108}\) Probably, all the Justices in the Court would agree with this sort of accommodation.\(^\text{109}\) The problem is

\(^{107}\) McConnell, supra note 7, at 709; see also JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1288 (5th ed. 1995) ("The Supreme Court has never explained the precise limits that the establishment clause may place on the ability of government to accommodate religion.").


\(^{109}\) See e.g., Rosenberger, 115 S.Ct. at 2532 (Thomas, J., concurring) ("[T]here is] one basic principle that has enjoyed an uncharacteristic degree of consensus: The
whether an accommodation that gives religious believers some advantages over nonbelievers because of their religion is permissible. In other words, can government voluntarily offer religion special treatment in order to implement the Free Exercise Clause? With this aspect, all the Justices but Justice Stevens\(^\text{110}\) approve the right of government to make accommodations that lift burdens on the right of the free exercise of religion.

However, there are some differences among Justices with respect to the grounds and limits of the accommodation. I should be emphasized that Justice Brennan had underscored American history, traditions, and heritage in order to determine whether a government action seems as a permissible accommodation. This view has been taken over by Justice Kennedy, and perhaps Chief Justice

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\(^{110}\) See e.g., City of Boerne v. Flores, 117 S.Ct. 2157, 2172 (1997) (Stevens, J., concurring) ("Whether the Church would actually prevail under [Religious Freedom Resolution Act of 1993] or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion ... is forbidden by the First Amendment."); United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring) ("It is the overriding interest in keeping the government - whether it be the legislature or the courts - out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."); see also Kent Greenawalt, Quo Vadis: The Status and Prospects of "Tests" under the Religion Clause, 1995 Sup. Ct. Rev. 323, 338 n.67.
Rehnquist, Justice Scalia, and Justice Thomas. To emphasize American history, traditions, and heritage in justifying accommodation might be reasonable and, in some cases, persuasive. They could be a reason why such accommodations are needed. However, those accommodations could have a tendency to confer a benefit only on the majority's religions or at least religions accepted by the majority. The government's discretion to determine whether it alleviates its burdens on religion is the underlying factor of permissible accommodations; furthermore, the extension of accommodation benefits to minor or unpopular and not-welcome religions would not be expected by following American history, traditions, and heritage. Consequently, accommodation based on American traditions may be utterly unfair to those religions.

Moreover, relying solely on the past could maintain unwelcome traditions of American society, such as racial and gender discriminations.

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111 See Rosenberger, 115 S.Ct. at 2528 (Thomas, J., concurring) ("[O]ur Nation’s long tradition [allows] religious adherents to participate on equal terms in neutral government programs.").

112 See also Tushnet, supra note 90, at 387 ("[R]elaying on the historical record of community acceptance of permissible accommodations [is] a distinctly anticonstitutional stance, for constitutional limitations are designed precisely because we cannot rely on majorities to restrain themselves.").

Other Justices also adopted the principle of religious neutrality. As one commentator indicates, "[b]oth Justice Souter's majority opinion and Justice O'Connor's concurrence [in Board of Educ. of Kiryas Joel v. Grumet] suggested ways that the legislature could accomplish its desire to accommodate [religious adherents] while the same time remaining faithful to the requirement of the First Amendment."\(^{114}\) Neutrality toward religion is the requirement.\(^{115}\) Although a specific standard for neutrality has not been articulated by the Court,\(^{116}\) the Court decided in Kiryas Joel that an accommodating law or policy that confers a benefit on only one religion and inclines not to give it to others fails the requirement of the religious neutrality, and thus, it is unconstitutional.

It is true that the principle of neutrality gives us a more objective concept to justify accommodation than to follow American history, traditions, and heritage. However, the rigid application of this principle may cause serious problems to religious liberty. For example, under the neutrality principle, government would have to exempt from the criminal code peyote consumption for religious ritual to many suspect religious groups other than native

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\(^{115}\) Engstrom, supra note 35, at 133.

\(^{116}\) NOWAK AND ROTUNDA, supra note 107, at 1218-1219.
Americans. Likewise, it would have to exempt from compulsory education children other than the Amish. In other words, the principle could permit people to abuse their rights in the name of religious liberty. This is what the Constitution does not allow. Thus, one cannot agree with the assessment advanced by one commentator that "Justice Souter’s opinion ultimately provided ... more guidance to government concerning the full range of steps it could take to accommodate religion without violating the Constitution."\textsuperscript{117}

\textsuperscript{117} Tsingos, supra note 114, at 888.
CHAPTER III. SCHOLARLY DEBATE.

Commentators hold widely disparate views on the principle of accommodation. Generally, there are three sets of opinions. The first block is that accommodation should be allowed; government should be able to take religion into account when it engages in policy-making.\(^{118}\) The second set of opinion holds that no accommodation is acceptable, because secular policy of government must be superior to religious needs.\(^{119}\) The third view advocates a certain kind of the accommodation; however, the decision as to whether accommodation is needed belongs to the judiciary, not to the legislature or executive branch.\(^{120}\)

In this chapter, I review these three sets of views, focusing on the opinions of Professors Michael W. McConnell, Laurence H. Tribe, Mark Tushnet, Ira C. Lupu, and Kent Greenawalt.

A. Michael W. McConnell.

At the outset, Professor McConnell assigns the primary value and purpose of the Religion Clause to the promotion of religious liberty,\(^{121}\) and writes that "[t]he

\(^{118}\) See infra text accompanying notes 121-149.

\(^{119}\) See infra text accompanying notes 150-170.

\(^{120}\) See infra text accompanying notes 171-181.

\(^{121}\) McConnell, supra note 4, at 1.
main components of religious liberty are the autonomy of the religious institutions, individual choice in matters of religion, and the freedom to put a chosen faith (if any) into practice."\textsuperscript{122} According to him, religious liberty means "the freedom to choose whether to engage in religious practice and which (if any) to adopt, without government coercion or interference."\textsuperscript{123} Professor McConnell believes that the value of the free exercise of religion should be preferred over the value of the separation of religion and state in relation to the both First Amendment clauses on religion.\textsuperscript{124}

Based on his perception, Professor McConnell considers that permissible government accommodation fosters religious liberty.\textsuperscript{125} For him, "an interpretation of the Religious Clauses based on religious liberty"\textsuperscript{126} makes a clear line between permissible accommodations and impermissible establishment, which is "an understanding of the role of religion under the Constitution, within a framework that acknowledges the legitimacy of encouraging

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 37.

\textsuperscript{124} Id. at 1 ("[S]ometimes separation diminishes religious liberty."); id. at 2 ("[The separation of church and state is] subsidiary, instrumental, values in ... religious liberty.").

\textsuperscript{125} Id. at 3 ("[T]here exists a class of permissible government action toward religion, which have as their purpose and effect the facilitation of religious liberty.").

\textsuperscript{126} Id.
and facilitating religious liberty."\textsuperscript{127} Professor McConnell argues that accommodation is needed especially when individual believers are faced to choose between "religious duties and obligations" and "the demands of society,"\textsuperscript{128} which creating a serious conflict. In this circumstance, a religious accommodation purports to ease those believers of the conflict between a religious belief and the social order "without sacrificing significant civic or social interests."\textsuperscript{129} He explains the reason why accommodation should not be restricted by the requirement of the Free Exercise Clause that "the government is in a better position than the courts to evaluate the strength of its own interest in governing without religious exceptions."\textsuperscript{130} As to this sort of accommodation, a court can examine it only when otherwise "the constitutional rights of other persons"\textsuperscript{131} are seriously infringed.

Professor McConnell suggests that the crucial distinction between permissible accommodation and prohibited establishment is that the accommodation just relieves religious believers from burdens on their free exercise of religion, while the establishment is to induce

\textsuperscript{127} Id. at 6.

\textsuperscript{128} Id. at 26.

\textsuperscript{129} Id; see also id. at 35 ("The purpose of an accommodation is to enable a person to practice his faith, usually by removing social or governmental obstacle.").

\textsuperscript{130} Id. at 31.

\textsuperscript{131} Id.
or solicit to practice religions government favors.\textsuperscript{132} For this distinction, Professor McConnell indicates a three-prong scrutiny:

(1) A law or policy is unconstitutional if its purpose or likely effect is to increase religious uniformity either by inhibiting the religious practice of the person or group challenging the law (free-exercise clause) or by forcing or inducing a contrary religious practice (establishment clause); (2) a law or policy is unconstitutional if its enforcement interferes with the independence of a religious body in matters of religious significance to that body; (3) violation of either of those principles will be permitted only if it is the least restrictive means for (a) protecting the private rights of others, or (b) ensuring that the benefits and burdens of public life are equitably shared.\textsuperscript{133}

Based on this understanding, Professor McConnell criticizes the Lemon test,\textsuperscript{134} which has been a single test to scrutinize the Establishment Clause cases for the past twenty years. He argues that the Lemon test could not

\textsuperscript{132} McConnell, supra note 7, at 686 ("The key difference between legitimate accommodation and impermissible 'establishment' is that the former merely removes obstacles to the exercise of a religious conviction adopted for reasons independent of the government's action, while the latter creates an incentive or inducement ... to adopt that practice or conviction.").


\textsuperscript{134} The Lemon test is a scrutiny that requires a law or policy to have "a secular legislative purpose," not to "advances nor inhibits religion," and not to "foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).
affirm any kind of accommodation, because the purpose and
effect of an accommodation are clearly to promote
religion, which is entirely opposite to the Lemon test. Government, in some cases, "necessarily advances religion
to accommodate the secular dictates of public policy to
the spiritual needs and concerns of religious
minorities." Therefore, it can be said that the
facilitation of religious liberty do not coexist with and
the Lemon test.

B. Laurence H. Tribe.

Professor Tribe also recognizes the validity of
religious accommodation. Like Professor McConnell,
Professor Tribe agrees with permissible government

\[\text{\textsuperscript{135}}\] McConnell, supra note 4, at 44 ("[U]nder the
Lemon test, taken literally, no accommodation to religion
could ever be upheld. The 'purpose' of an accommodation i
splainly to facilitate religion, and that will be its
'effect' as well.").

\[\text{\textsuperscript{136}}\] McConnell, supra note 133, at 502. See also
Note, Tithing in Chapter 13—A Divine Creditor Exception to
Section 1325?, 110 HARV. L. REV. 1125, 1135-1136 (1997) ("A
literal application of Lemon would automatically render
any type of accommodation unconstitutional.").

\[\text{\textsuperscript{137}}\] McConnell, supra note 4, at 3 ("[T]he interest of
religious liberty and the rigors of the Lemon test are
most strikingly at cross-purposes.").

\[\text{\textsuperscript{138}}\] Tribe, supra note 17, § 14-4, at 1169 (2d ed. 1988) ("[T]he
concept [of accommodation] at least serves to highlight the way in
which the two religion clauses interact: cases within the area of
interaction are difficult precisely because different results are
arguably mandated by the two religion clauses."); see also id. § 1414, at 1276 ("[Accommodation] is ... essential to reconciling the
establishment clause with the free exercise clause and with other
freedom." (footnote omitted)).
accommodation, and also argues that the free exercise of religion prevails over the separation of religion and state when both the Free Exercise Clause and the Establishment Clause run afoul of each other. He realizes, too, that although there are some risks in emasculating the Establishment Clause when government has the unlimited authority to accommodate religion, government act is more efficient than are the courts in rendering accommodation.

In so doing, Professor Tribe suggests three factors which make clear limits of permissible accommodation. The first factor is whether an accommodation is given to a particular sect of religion or religion at large. If it passes "an evenhandedness requirement," the accommodation is valid. The second element is that if the

139 Id. § 14-4, at 1168 n.11 ("Legislature as well as courts may be free to make such accommodations." (citation omitted)).

140 Id. § 14-8, at 1201 ("[T]here is] the conclusion that the free exercise principle should be dominant when it conflicts with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment.").

141 Id. § 14-7, at 1195 ("Leaving room for legislatures to craft religious accommodations recognizes that they may be in a better position than courts to decide [whether they should offer the accommodations]. But unbounded tolerance of governmental accommodation in the name of free exercise neutrality could eviscerate the establishment clause." (footnote omitted)).

142 Id. § 14-7, at 1198.

143 Id.

144 Id.
accommodation decreases "regulatory entanglement between church and state," it is seen as legitimate. The third factor is whether the accommodation lifts government-imposed burden on religion. If the accommodation aims to reduce "privately imposed" burden, it can not be seen as permissible.

Professor Tribe focuses here on costs that are raised from the exemption of government burden on religion. He understands that some unrelated and innocent people have to answer those costs. Even so, however, there is an underlying boundary that government should not ask the public to accept in the name of religious accommodation, such as allowing murder, stealing, and fraud. Finally, for the price of accommodation, Professor Tribe implies that government could offer alternatives to those who seek religious exemption, which do not burden their religion.

145 Id. Although Professor Tribe does not mention, this factor may validate the property tax exemption upheld in Walz v. Tax Comm’n, 397 U.S. 664 (1970).
146 Id.
147 Id. § 14-7, at 1199 (footnote omitted).
148 Id. § 14-13, at 1258 ("Certain widely recognized harms - such as physical injury - can be prevented even at the cost of infringing religious freedom.").
149 Id. § 14-13, at 1266 ("The use of conscientious objectors in paramedical or other non-military role could meet both the personal argument and the morale argument." (footnote omitted)).
C. Mark Tushnet.

In following Professor Philip Kurland's strict neutrality theory,\(^{150}\) Professor Tushnet stands in a position that refuses any kind of accommodation to religion.\(^{151}\) He insists that accommodation is against the Establishment Clause,\(^{152}\) because it is, in fact, government endorsement of religion.\(^{153}\)

Professor Tushnet shows his skepticism by arguing that accommodation or exemption from generally applicable laws may well be administered "in a troublingly discriminatory manner."\(^{154}\) Government tends to preserve major religions "by enacting exemptions under the doctrine of permissible accommodation of religion or by avoiding enactments that have a troublesome impact on"\(^{155}\) those religions. "[R]eligious on the close-in borders of the

\(^{150}\) It is to summarize Kurland's theory that government cannot take religion into account when it makes policies, see Philip Kurland, Of Church and State and the Supreme Court, 29 U. CHI. L. Rev. 1 (1961).

\(^{151}\) Tushnet, supra note 90, at 376-377, 384 (saying that, according to Professor Kurland, both required and permissible accommodations are not acceptable under the Religious Clause.).

\(^{152}\) Id. at 384.

\(^{153}\) Id. at 390 ("[A]n exemption confined to religion must signal government endorsement of religion as such.").


\(^{155}\) Id.
mainstream"\textsuperscript{156} can easily get a protection from courts. However, odd religions are outside of their protection.\textsuperscript{157}

Professor Tushnet raises the difficulties created by the Court's criteria that limit the boundary of permissible accommodation. As to Justice Kennedy's noncoercive test,\textsuperscript{158} he criticizes it in two points. First, this test may "deprive the Establishment Clause of meaning independent of the Free Exercise Clause, which standing alone would seem to ban government coercion of religious belief or observance."\textsuperscript{159} Secondly, Justice Kennedy's dependence to American history, traditions, and heritage, and reference to communities\textsuperscript{160} as justifications of accommodation, allows "a majority of the citizens of a community ... [to do] what they want to do."\textsuperscript{161} It may have some tendency to accommodate only religions that they prefer, and to discriminate against those eccentric religions.\textsuperscript{162} Professor Tushnet writes that this is exactly what the Establishment Clause prohibits.\textsuperscript{163}

\textsuperscript{156} Id.

\textsuperscript{157} Id ("[N]either the courts nor the legislature protect[s] exotic religions.").

\textsuperscript{158} See supra text accompanying note 93.

\textsuperscript{159} Tushnet, supra note 90, at 386.

\textsuperscript{160} See supra note 94 and accompanying text.

\textsuperscript{161} Tushnet, supra note 90, at 386.

\textsuperscript{162} Id ("[T]hey are simply reflecting their own religious preference on matters of specifically religious concern.").

\textsuperscript{163} Id. at 386-387 ("'[T]his kind of government affiliation with particular religious messages is precisely what the
Professor Tushnet divides Justice Brennan's standard for permissible accommodation in to two parts:

"Accommodations of religion are permissible if they (a) 'remove burdens on the free exercise of religion,' which can be imposed by governments ..., and (b) are sufficiently broad [enough to other non-religious activities]." Although Professor Tushnet concedes that Justice Brennan's standard "... is undeniably attractive," he finds there are "some doctrinal difficulties." According to Professor Tushnet, the standard may not accord with accommodation provisions of Title VII of Civil Rights Act of 1964, since this provision alleviates employees from burdens imposed by their employer, and not by government.

Establishment Clause precludes.'" (quoting County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 601 n.51 (1989))).

164 See supra text accompanying with note 85.

165 Id. at 391 (quoting County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 601 n.51 (1989))).

166 Tushnet, supra note 90, at 391.

167 Id.


169 Tushnet, supra note 90, at 392 ("A statutory requirement of reasonable accommodation would ... relieve that burden, though surely the burden Congress really had in mind was the one placed on the employee by an employer's failure to accommodate.").

170 Id. at 393 n.69 ("It may be ... that the 'reasonable accommodation' requirement is inconsistent
D. Ira C. Lupu.

Defining that required accommodations concern free exercise issues and permissive accommodations always bring about Establishment Clause cases, Professor Lupu asserts that there are "important institutional differences ... between mandatory and permissive accommodations." The authority to offer required accommodation belongs to courts, and on the other hand, the other branches of government may confer permissible accommodation.

Professor Lupu suggests that it is unavoidable to confront permissible accommodation with the Establishment Clause "because of the extent to which it unleashes politics in the service of religion." He indicates difficulties inherent in the accommodation that a policy of permissible accommodation usually contains "religion-specific" factors. Thus, the accommodating policy tends with Justice Brennan's theory of permissible accommodation.

171 Lupu, supra note 18, at 751 ("Claims to mandatory accommodations always present free exercise questions, because their underlying theory is that the Free Exercise Clause is violated if the accommodation is not provided. Claims to permissive accommodations always raise Establishment Clause questions, because their underlying theory is that government is free to respond beneficially to religion-specific concerns.").

172 Id. at 753.

173 Id.

174 Id. at 754.

175 Id. at 768.
to favor religion over non-religion. In saying so, Professor Lupu states that permissible accommodation is unconstitutional. He shows several dangers in permissible accommodation. First, the accommodation could "be overbroad, [because] it will encompass relief for both those who are entitled to it and those who are not." Second, it may cause religious favoritism. The third danger is that it is likely "to discriminate against non-religious association." Instead, Professor Lupu believes that required accommodation is the only way to lift burdens from religion, which is regulated by the judicial branch.

E. Kent Greenawalt.

Professor Greenawalt agrees with that the words of Religious Clauses and those histories justify a certain kind of religious accommodation. He thinks that it is

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176 Id. ("Such policies always prefer religion to their non-religious counterparts." (footnote omitted)).

177 Id. at 771 ("[P]ermissive accommodations should be eliminated.").

178 Id. at 776 n.166 (citation omitted).

179 Id. at 776-778.

180 Id. at 778.

181 Id. at 780 ("Courts would have maximum authority to police the boundaries of state-religion interaction."). But see Employment Div., v. Smith, 494 U.S. 872 (1990) (The Court denied a religious claim seeking accommodation in the courts).

182 Greenawalt, supra note 110, at 340.
not an endorsement of religion to accommodate whose belief and practices are likely to clash with the social order.\textsuperscript{183} Like as Professor McConnell,\textsuperscript{184} Professor Greenawalt conceives that an accommodation or exemption that induces nonbelievers to convert to a religion is unconstitutional.\textsuperscript{185}

Professor Greenawalt also suggests the possibility of imposing alternative burdens on religious believers for the price of benefited accommodations.\textsuperscript{186} According to him, the alternative burdens could reduce the concern of not favoring religion over non-religion caused by conferring accommodations solely to religion.\textsuperscript{187} The alternative burdens also prevent false accommodation claims of which government needs to remove from accommodation policies. Therefore, "few would choose [the

\textsuperscript{183} \textit{Id.} at 340-341.

\textsuperscript{184} \textit{See supra text accompanying note} 132.

\textsuperscript{185} Greenawalt, \textit{supra} note 110, at 358 ("[I]t need not grant an exemption that would strongly induce others to practice a religion, since such inducements violate the Establishment Clause." (footnote omitted)).

\textsuperscript{186} \textit{Id.} at 357 n.132 ("One important avenue of investigation is whether some alternative burden, like alternative civilian service for conscientious objectors, may be placed upon religious claimants, so that overall burdens are not too disproportionate." (citation omitted)).

\textsuperscript{187} \textit{Id} ("Exemptions for religious claimants alone do raise serious equal protection concern. These can be mitigated by alternative burdens." (citation omitted)).
accommodation] unless they were deeply opposed to."^{188} Generally applicable laws.^{189}

Unlike Professor McConnell, Professor Greenawalt asserts that permissible accommodation corresponds with the Lemon test, though he repeatedly states that the test "has ... been abandoned."^{190} Despite having a non-secular purpose and an effect advancing religion, such accommodations are "understood as secular or acceptable religious accommodation."^{191} Under the Lemon test, "the Court can simply say that a law that works an appropriate accommodation is permissible, without having to 'explain' either that accommodation is not a purpose and primary effect that advances religion or that some purposes and primary effects that advance religion are really all right."^{192}

Professor Greenawalt insists that the Establishment Clause should articulate the clear limitation of any sort of accommodations.^{193} He characterizes that "[t]he

^{188} Id.

^{189} See also Jesse Choper, The Rise and Decline of the Constitutional Protection of Religious Liberty, 70 Neb. L. Rev. 651, 680 (1991) ("This would minimize any incentive to file fraudulent claims, and reduce the likelihood that government exemption would induce people to adopt certain beliefs, thus avoiding establishment clause problems." (footnote omitted)).

^{190} Greenawalt, supra note 110, at 361-362.

^{191} Id. at 367.

^{192} Id.

^{193} Id. at 381 ("Whether an accommodation is claimed to be constitutionally required or is chosen by a
distinction between lifting burdens and promoting religion is partly one of conceptual differentiation."^{194} However, he leaves this question for further analysis.^{195}

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^{194} Id. at 386.

^{195} Id. at 387 ("[No] easy categorization of impermissible promotion versus permissible compensation resolves this problem; a deeper analysis is required." (footnote omitted)).
CHAPTER IV. LAW OF RELIGIOUS ACCOMMODATION IN GERMANY AND JAPAN.

In this chapter, I want to make reference to statutes and cases in both Germany and Japan that address religious accommodation. Although the relationship of the German government to religion is quite different from that of in the United States,\(^{196}\) and religious atmosphere in Japan is also different from that in America,\(^ {197}\) it is sufficiently useful to know how these two countries adopt statutory accommodations or decide judicial accommodations. Furthermore, it appears that both countries make good examples with respect to "alternative burden" on religious believers as the price of the accommodation.\(^ {198}\)

\(^{196}\) Germany has adopted "a concordant system which clearly separates the area managed by religious organization from area managed by the government." Yokota, supra note 1, at 205. See also KOMMERS, supra note 2, at 444 ("The multiplicity of the Basic Law's provisions on church-state relations contrasts sharply with the simple command of the U.S. Constitution.").

\(^{197}\) See Yokota, supra note 1, at 206 ("The religious consciousness of Japanese people is different from that of ... Americans .... Most Japanese do not have a single faith, such as Christianity .... [T]he attitude [of Japanese people] toward religion is best demonstrated by the fact that most Japanese take a newly born baby to [a] Shinto shrine, visit a Shinto shrine to celebrate the New Year, have a Christian or Shinto wedding, and are buried in a Buddhist funeral." (citation omitted)).

\(^{198}\) See supra text accompanying notes 149, 186-189.
A. Germany.

As to religious liberty, the Basic Law (Grundgesetz), which is, in effect, the German constitution, provides in Article 4:

(1) Freedom of faith, of conscience, and freedom of creed, religious or ideological (weltanschaulich), shall be inviolable.
(2) The undisturbed practice of religion is guaranteed.
(3) No one may be compelled against his conscience to render war service involving the use of arms. Details shall be regulated by a federal law.¹⁹⁹

Discrimination based on religion,²⁰⁰ involuntary disclosure of religious conviction,²⁰¹ and coercion to participate or practice religion,²⁰² are also banned by other provisions. Autonomy for religious groups is also protected by Basic Law.²⁰³ In contrast with other constitutional liberties, religious liberty is not restrained by the reservation clause of the Basic Law.²⁰⁴

¹⁹⁹ §4 GG (Germany), translated in KOMMERS, supra note 2, at 444.
²⁰⁰ §§ 3 (3), 33 (3) GG.
²⁰¹ § 136 (2) Weimar Constitution of 1919, incorporated by § 140 GG.
²⁰² Id.
²⁰³ § 137 (2) Weimar Constitution of 1919, incorporated by § 140 GG.
²⁰⁴ KOMMERS, supra note 2, at 444.
The reservation clause prescribes:

(1) Insofar as under this Basic Law a basic right may be restricted by or pursuant to a law, the law must apply generally and not
On the relationship between religion and the state, German practice differs greatly from the American approach. Although Basic Law prohibits having a state religion, and government is required to be neutral toward religion, the Law allows religious instructions in public schools, and gives corporate religious

solely to an individual case. Furthermore the law must name the basic right, indicating the Article.

(2) In no case may a basic right be infringed upon in its essential content.

(3) The basic rights apply also to corporations established under German Public law to the extent that the nature of such rights permits.

(4) Should any person's right be violated by public authority, recourse to the court shall be open to him. If no other court has jurisdiction, recourse shall be to the ordinary courts.

§ 19 GG, translated in General Electric's Germany & Europe Round Table, BASIC LAW for the Federal Republic of Germany (17 Aug. 1993)
<gopher://wiretap.spies.com:70/00/Gov/World/germany.con>.

KOMMERS, supra note 2, at 445 ("The meaning of nonestablishment in Germany differs significantly from its meaning in the United States." (footnote omitted)).

§ 137 (1) Weimar Constitution of 1919, incorporated by § 140 GG, translated in General Electric's Germany & Europe Round Table, supra note 204.

KOMMERS, supra note 2, at 445. In Germany, religious neutrality means nonintervention, nonidentification, equality, and cooperation with religion by government, see id. at 472.

§ 7 (3) GG, translated in General Electric's Germany & Europe Round Table, supra note 204. It provides:

Religious instruction forms part of the ordinary curriculum in state and municipal
organizations power to impose taxes.\textsuperscript{209} As the German constitutional law recognizes a significant character of religion "in the nation's public life,"\textsuperscript{210} it permits religion to get into public places, such as military bases, hospital, and prisons, for religious practice.\textsuperscript{211}

When one's religious liberty conflicts with social order regulated by generally applicable laws, it is the court's task balance of "the interests of both the

\begin{quote}

schools, excepting secular schools. Without prejudice to the state's right of supervision, religious instruction is given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.

\textsuperscript{209} § 137 (2) Weimar Constitution of 1919, incorporated by § 140 GG, translated in General Electric's Germany & Europe Round Table, supra note 204. It provides:

Religious bodies forming corporations with public rights are entitled to levy taxes on the basis of the civil tax rolls, in accordance with the provisions of Land law.

\textsuperscript{210} KOMMERS, supra note 2, at 445.

\textsuperscript{211} § 141 Weimar Constitution of 1919, incorporated by § 140 GG, translated in General Electric's Germany & Europe Round Table, supra note 204. It provides:

Religious bodies shall have the right of entry for religious purposes into the army, hospitals, prisons, or other public institutions, so far as is necessary for the arrangement of public worship or the exercise of pastoral offices, but every form of compulsion must be avoided.
[religious] individual and society.\textsuperscript{212} Religious liberty can be always supported as long as it does not harm "the good order of the community."\textsuperscript{213}

As to permissible accommodation, the Basic Law provides a conscientious objector provision.\textsuperscript{214} In 1956, when German government started compulsory military service,\textsuperscript{215} it exempted the service from conscientious objectors because of the constitutional provision. However, the government imposed an alternative burden on conscientious objectors,\textsuperscript{216} such as to work at hospitals. In 1968, this alternative burden for civilian service\textsuperscript{217} as

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\textsuperscript{212} Kommers, supra note 2, at 451.
\textsuperscript{213} Id; see also Blood Transfusion case, BVerGE 32 (1971), 98. For English summary of this case, see Kommers, supra note 2, at 451-455.
\textsuperscript{214} § 4 (3) GG; see supra text accompanying notes 199.
\textsuperscript{215} Kommers, supra note 2, at 462.
\textsuperscript{216} Id.
\textsuperscript{217} § 12a (2) GG, incorporated by § 140 GG, translated in General Electric's Germany & Europe Round Table, supra note 204.
\end{flushright}

A person who refuses, on grounds of conscience, to render war service involving the use of arms may be required to render a substitute service. The duration of such substitute service shall not exceed the duration of military service. Details shall be regulated by a statute which shall not interfere with freedom to take a decision based on conscience and shall also provide for the possibility of a substitute service not connected with units of the Armed Forces or of the Federal Border Guard.
well as the military service was written into the Basic Law. German Constitutional Court considered the alternative burden as security for the neutrality to religion over non-religion.

Article 12 (2) of Basic Law states “[t]he duration of such substitute service shall not exceed the duration of military service.” Therefore, the period of “substitutive service” had been regarded as the same term as that of military service. In 1983, the government enacted a law “which extended the period of compulsory civilian service to twenty months, five months longer than the fifteen months required of military conscripts.” It supposed that only good faith objectors would agree to spend substituting service for a period a third more than

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218 $12a (1)$ GG, incorporated by $140$ GG, translated in General Electric’s Germany & Europe Round Table, supra note 204. It provides:

Men who have attained the age of 18 years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a civil defense organization.

219 KOMMERS, supra note 2, at 462-463.

220 See Objector Notification case, BVerGE 48 (1978), 127. For English summary of this case, see KOMMERS, supra note 2, at 464.

221 See supra note 217.

222 KOMMERS, supra note 2, at 465. In addition to fifteen months of military duty, they need to spend nine months of reserve duty, in which they “may be called up for” national crisis, Id.
the usual term of military service.\textsuperscript{223} However, because this enactment literally contradicted the words of Article 12a (2), the Constitutional Court reviewed the constitutionality of the law.\textsuperscript{224} The Constitutional Court upheld the act,\textsuperscript{225} saying that it was substantially equal between military service and substituting service, even though conscientious objectors had to go through the duty five months longer. Moreover, it permitted the government authority “to ... lay down durational requirements that seek to balance the burden of military and nonmilitary service,”\textsuperscript{226} unless the total period for substituting service was less than “twenty-four months (fifteen in basic training and nine on reserve duty).”\textsuperscript{227}

B. Japan.

Japanese Constitutional Law provides provisions with respect to both the free exercise of religion and separation of religion and state. Article 20 states:

(1) Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.

\begin{itemize}
  \item \textsuperscript{223} \textit{Id.}
  \item \textsuperscript{224} \textit{Id.}
  \item \textsuperscript{225} Extended Alternative Service case, BVerGE 69 (1985), 1. For English summary of this case, see KOMMERS, supra note 2, at 465.
  \item \textsuperscript{226} KOMMERS, supra note 2, at 465.
  \item \textsuperscript{227} \textit{Id.}
\end{itemize}
(2) No person shall be compelled to take part in any religious acts, celebration, rite or practice.
(3) The State and its organs shall refrain from religious education or any other religious activity.\textsuperscript{228}

Moreover, Article 89 prohibits government from conferring financial aid on religious organizations.\textsuperscript{229}

As a matter of fact, the issue of religious accommodation had not been seen as an important judicial matter, since the Japanese people are not observant generally and easily accept government policies that accommodate religion.\textsuperscript{230} Furthermore, the Japanese sometimes compromise their religious belief to comply with in the social order. For those reasons, it was hardly likely for religious accommodation to become an issue in the courts.\textsuperscript{231}

\footnotesize
\begin{itemize}
\item \textsuperscript{228} Kenpo (Japan), art. 20, para. 3, \textit{translated in} Japanese Constitutional Law 321 (Percy R. Luney, Jr. \& Kazuyuki Takahashi eds., 1993).
\item \textsuperscript{229} Kenpo, art. 89. It proscribes:

No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association .... \textit{translated in} Japanese Constitutional Law, supra note 228, at 327-328.
\item \textsuperscript{230} See supra note 197.
\item \textsuperscript{231} Until the Japanese Supreme Court held Matsumoto v. Kobayashi (Kobe City College of Technology Case), 906 Hanrei Taimuzu 77 (Sup. Ct., Mar. 8, 1996), there were only two cases in lower courts that dealt with religious accommodation, see Ito Masami, Kenpo 270 (3d ed. 1995).
\end{itemize}
There is other feature in Japanese establishment cases, that is, a historical factor. In the early twentieth century, the then largely military government ruling Japan, adopted Shinto\textsuperscript{232} as an ideology to unify and control the people in the name of Ten'no, the Japanese Emperor (Kokka Shinto). Since many Japanese people suffered from the government policy unifying their minds into one, the establishment cases tend to reflect people's fear against the connection between Shinto and the government.\textsuperscript{233}

In 1996, the Japanese Supreme Court for the first time decided an accommodation case in Matsumoto v. Kobayashi (Kobe City College of Technology Case).\textsuperscript{234} Before discussing this case, it is necessary to examine the establishment case law in Japan.

\textsuperscript{232} Shinto is Japanese native religion, which worships one's ancestors, a historical person, a certain tree, stone, mirror, and sword, etc.

I want to emphasize that believing in Shinto does not necessarily connect with worship to Japanese Emperor. Some Shinto shrine, such as Izumo Taisha, in Shimane Prefecture, was established by the Emperor at that time to comfort the spirit of his enemy. In this sense, the description of one commentator is wrong, Eric N. Weeks, A Widow's Might: Nakaya v. Japan and Japan's Current State of Religious Freedom, 1995 BYU L. Rev. 691, 693-695. I am disappointed that some of Japanese historical and cultural features are still misunderstood among American people in the light of exoticism.

\textsuperscript{233} See infra cases accompanying notes 235-256.

\textsuperscript{234} 906 HANREI TAIMUZU 77 (Sup. Ct., Mar. 8, 1996).
(1) The establishment clause test: Tsu City case and The Serviceman Enshrinement case.

The Supreme Court of Japan has considered that the relationship between religion and the state can not be a rigid one. The leading case for this view is Kakunaga v. Sekiguchi (Tsu City case).\(^\text{235}\) This case involved whether Tsu City, Mie Prefecture, which held a religious groundbreaking ceremony (jichinsai) and paid 7,663 yen as the cost of the ceremony when it began to construct its gymnasium,\(^\text{236}\) violated the establishment clause of the Japanese Constitution.\(^\text{237}\) The district court concluded that the city did not violate the clause "on the ground that the ceremony was secular and customary," and "the expenditures were not for the purpose of assisting any particular religious organization."\(^\text{238}\) The high court (the court of appeal) reversed the district court's ruling, saying, "[s]ince the Constitution provides the strict separation of religion and state, the ceremony falls into the religious activity which is prohibited by Article 20, paragraph 3."\(^\text{239}\) The Supreme Court finally upheld the

\(^{235}\) 31 Minshu 533 (Sup. Ct., Jul. 13, 1977).


The religious ceremony was held in the way of Shinto.

\(^{237}\) See Kenpo, art. 20, para. 3.

\(^{238}\) Kakunaga, 31 Minshu at 537, translated in Beer and Itoh, supra note 236, at 479.

\(^{239}\) Id.
ceremony, explaining that it was not the activity the Constitution proscribed.

In so deciding, the Supreme Court described its standpoint for the interpretation of the establishment clause:

The principle of separation of religion and ... [s]tate has been understood [as the secularism and religious neutrality of the government which] mean that [issues] of religion and belief have been considered matters of individual conscience that transcend the dimension of politics and are separated from [government], which, as the holder of secular authority, is not to interfere with religion.240

The Constitution [must] be interpreted as striving for a secular and religiously neutral [government] by taking as its ideal the total separation of religion and ... [s]tate.241

The separation of religion and ... [s]tate, however, is only [an institutional] guarantee of religious freedom. It does not directly guarantee freedom of religion pre se, it attempts to guarantee it indirectly by securing a system that separates religion and ... [s]tate.242

It is inevitable to say that there is a certain inherent limit in the separation of religion and state. When the principle of the separation of religion and state would be embodied as an actual national institution,

240 Id. at 538, translated in BEER AND ITOH, supra note 236, at 479.

241 Id. at 539, translated in BEER AND ITOH, supra note 236, at 480 (emphasis added).

242 Id. at 539-540, translated in BEER AND ITOH, supra note 236, at 480 (first emphasis added).
the issue is that in what case and to what extent the relationship would not be permitted, ... premising that a certain relationship between religion and state is in fact inevitable, in the light of its own social and cultural characteristics.\footnote{243} The principle does not prohibit all the relationship between religion and state, while it requires the religious neutrality of the government. It prohibits the relationship which would be seen as to exceed reasonable boundary in the light of those [social and cultural] characteristics, taking into consideration the purpose and effect of the government activities which entail the relationship.\footnote{244}

Religious activity which Article 3, paragraph 3 prescribes should be defined ... as the activity whose purpose has religious meaning and whose effect supports, promotes, and fosters, or oppresses and interferes with religion.\footnote{245}

In determining whether a certain activity consists with a religious activity, it is not enough to focus only the fact in appearance, such as whether the master of the activity is a clergy, or whether the content of it belongs religion. Rather, the issue must be decided objectively, based on a common sense of the society (syakai tsuunen), taking into account all the circumstances, such as the place the activity was held, people's evaluation on the activity, the purpose, intent, and religious recognition of the government which held the activity, and the effect and influence of the activity with people.\footnote{246}

\footnote{243} Id. at 540-541.

\footnote{244} Id. at 541.

\footnote{245} Id.

\footnote{246} Id. at 541-542.
The standard that the Supreme Court announced in this case was that the prohibited religious activity is "the activity whose purpose has religious meaning and whose effect supports, promotes, and fosters, or oppresses and interferes with religion."\textsuperscript{247} It has become the standard for the establishment cases.

The Supreme Court of Japan affirmed this purpose-and-effect test (mokuteki kouka kijun) in Japan v. Nakaya (The Serviceman Enshrinement Case).\textsuperscript{248} In this case, the appellee, a Japanese Christian whose husband "was killed in a traffic accident while on his duty,"\textsuperscript{249} brought a suit against the Self Defense Force (SDF), the Japanese military, for which her husband worked. The appellee asked for the damages because of the injury of her right to live in a religiously peaceful atmosphere caused by an application made by others to the Gokoku Shrine\textsuperscript{250} for his enshrinement, which "is the conferring ... of the status of

\textsuperscript{247} See supra text accompanying note 245.

\textsuperscript{248} 42 MINSHU 277 (Sup. Ct., Jun. 1, 1988).

Some American commentators addressed this case, see e.g., STONE ET AL., supra note 5, at 1570; Weeks, supra note 232; Mark J. Osiel, Ever Again: Legal Rememberance of Administrative Massacre, 144 U. Pa. L. Rev. 463, 607 (1995).

\textsuperscript{249} Nakaya, 42 MINSHU at 279, translated in BEER AND ITOH, supra note 236, at 496.

\textsuperscript{250} Gokoku Shrine is a regional branch of Yasukuni Shrine, which used to be a symbolic place for Kokka Shinto.
[a] god upon a mortal person." This sort of enshrinement happens occasionally in Shinto religion. She also alleged that both a regional office of the SDF and its veterans' association arranged the application. The district court and the high court gave her damages finding that the application had been made by the SDF and the association and that her right had been infringed. However, the Supreme Court reversed, partly because there was no state action in this case, and partly because "[t]he interest of living one's religious life in a peaceful religious atmosphere, [which the appellee

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252 Nakaya, 42 Minshu at 283 ("The actions actually taken by the [SDF] staff were only the following: [a SDF staff] asked [other regional offices of the SDF] about the status of joint enshrinement of dead SDF members in their area, and shared their answers with [the association; an other staff did a favor for the association to draft a guidance for the enshrinement (Hosei Junsoku)] and letters from [the association] asking for donation, [to distribute those letters, to keep] custody of donated funds, [to collect] the certified copies [necessary for the enshrinement]. No facts show that [the regional office] or its staff directly approached Gokoku Shrine for the joint enshrinement. [Therefore,] although it is true that [the regional office] cooperated with [the association] by performing clerical work, the application under the name of [the association] was [the independent action held by the association substantively. Thus, it] cannot be regarded as a joint action of [the regional office] staff and [the association, and as the application the staff also made]." (translated in Beer and Itoh, supra note 236, at 499)).
asserted, was] of such a nature that it cannot be recognized [necessarily] as a legal right."253

In evaluating whether the SDF engaged in the religious activity, the Supreme Court adopted the same analysis described in the Tsu City case:

Religious activity under [Article 20, paragraph 3 of the Constitution] should not be construed to include any acts related to religion, but to mean only those acts whose purpose has religious meaning and whose effect is to [support, promote, and foster, or oppresses and interferes] with religion. When we examine whether a certain action constitutes religious activity, we should decide objectively, [based on common sense of the society, taking into account all the circumstances, such as the place the activity was held, people's evaluation on the activity, the purpose, intent, and religious recognition of the government which held the activity, the effect and influence of the activity on people].254

Joint enshrinement [is] conducted by the independent decisions of [Gokoku Shrine]; so an application is not a prerequisite. [Though] it related to religion, the application in this case [should] not be regarded as a legal prerequisite for enshrinement. The actual actions of the [SDF] staff in cooperation with [the association had] an indirect relationship with religion and their purpose and intention were assumed to be to raise the social status and morale of SDF members. Hence, they had little religious consciousness, [and we cannot conclude that people would observe the manners of their

253 Id. at 288, translated in Beer and Itoh, supra note 236, at 501.

254 Id. at 285 (citing Kakunaga v. Sekiguchi (Tsu City case), 31 Minshu 533, 541-542 (Sup. Ct., Jul. 13, 1977)), translated in Beer and Itoh, supra note 236, at 499-500.
actions as those which has the effect as a government activity to attract attention to a particular religion, or to support, promote, and foster, or oppresses and interferes with religion]. Thus, though they had a relationship to religion, the acts of the [SDF] staff cannot be considered religious activity.\textsuperscript{255}

Article 20, paragraph 3 of the Constitution provides for separation of religion and ... [s]tate; it is known as providing a systemic guarantee, and does not guarantee religious freedom itself directly to individual persons. Rather, it attempts indirectly to assure freedom of religion by setting forth [limits] of the acts in which the [government] may not engage and guaranteeing the separation as a system. Therefore, religious acts of the [government] which violate this provision should not necessarily be considered unlawful in relation to individual persons unless they directly infringe upon their religious freedom as guaranteed by the Constitution.\textsuperscript{256}

It might seem that the purpose-and-effect test is similar to the Lemon test,\textsuperscript{257} which was used by the U.S. Supreme Court.\textsuperscript{258} There are, however, several differences between the two tests. At first, the test in Japan did

\textsuperscript{255} Id. at 286, translated in Beer and Itoh, supra note 236, at 500.

\textsuperscript{256} Id. at 286-287(citing Kakunaga (Tsu City case), 31 Minshu at 539-540), translated in Beer and Itoh, supra note 236, at 500.

\textsuperscript{257} As to the Lemon test, see supra note 134.

\textsuperscript{258} See Yokota, supra note 1, at 216.
not adopt the entanglement prong of the Lemon test.\footnote{259}{See \textit{id} ("The Japanese Supreme Court standard differs from the American three-prong test in [the excessive entanglement prong]."). One commentator believes that the "purpose-and-effect" test also requires government not to entangle in religion, Weeks, \textit{supra} note 232, at 713, but it is wrong.}

Second, a government activity could be invalid under the Lemon test (or even under the test articulated in \textit{School Dist. of Abington v. Schempp}\footnote{260}{374 U.S. 203 (1963).}) if it has either purpose or effect to promote or inhibit religion. By contrast, the activity would not be invalid under the Japanese test even if it has both purpose and effect to promote religion unless it "exceed[s] reasonable boundary in the light of social and cultural characteristics."\footnote{261}{\textit{Kakunaga v. Sekiguchi} (Tsu City case), 31 \textit{Minshu} 533, 540 (Sup. Ct., Jul. 13, 1977). One commentator analyzes the "purpose-and-effect" test in the same way as to do for the Lemon test, Weeks, \textit{supra} note 235, at 709-713. I think that his analysis and the comparison do not make any sense, because the Japanese test is significantly different in this point from the Lemon test.} In this sense, the Japanese test seems to be less strict than the Lemon test. Finally, the Japanese test takes into account "common sense of the society."\footnote{262}{\textit{Id.} at 542.} This means that if the majority of the society does not, in fact, perceive the activity as a religious, the activity may be considered to
be valid even though it has the purpose and effect to promote or inhibit religion.\(^{263}\)

(2) *Matsumoto v. Kobayashi* (Kobe City College of Technology Case).\(^{264}\)

As mentioned above, this is the first case in which the Supreme Court of Japan dealt with religious accommodation.

The appellee was a student of Kobe City College of Technology, a public college. He was a serious believer in the Jehovah's Witness faith. Kobe City College required its students to take physical training. In fact, since 1990, the college has adopted *Kendo*\(^{265}\) as a mandatory program of training for the first year students. Before the whole physical training class started, the appellee, who believed that it was against his religious tenet to practice *Kendo*, asked teachers of the college to submit papers instead of participating classes of *Kendo* training. The teachers denied his request, however, and said that his lack of participation would be counted as absence from the class if the appellee did not practice *Kendo*. The appellant, the principal of the college, finally made a decision not to accommodate him. The appellee did not

\(^{263}\) See Yokota, *supra* note 1, at 217 ("[taking into account 'common sense of the society'] supports the views of the majority [of society] over those of the minority.").

\(^{264}\) 906 HANREI TAIMUZU 77 (Sup. Ct., Mar. 8, 1996).

\(^{265}\) *Kendo* is Japanese style of fencing, or swordsmanship.
oversteps the limits of the discretion, or is an abuse of the discretion. However, a decision of dismissal of a student from the college is a crucial disposition which deprives status of a student. [Thus,] the principal may choose the decision of dismissal only when the exclusion of the student is educationally compelling, and more careful consideration is required. [The] decision at issue is invalid as clearly inappropriate as in light of the common sense of society, and has gone beyond the limits of the discretion.\textsuperscript{269}

In a college, practicing Kendo is not said to be a requirement. It is possible to substitute to practice other sport to accomplish the aim of physical training. [It] is obvious that the appellee's disadvantage was extreme, because he was dismissed as a result of his refusal to practice Kendo based on his religious belief, though he had good grades in other courses. Moreover, the decision in this case surely was of a character which obliged the appellee to practice Kendo, against his religious tenet in order to avoid his extreme disadvantage. The decision itself did not mandate to do what is against his religion and did not directly restrict his free exercise of religion. [Since] the decision had such features, the appellant had to accommodate the appellee when the appellant made decision as an exercise of discretion. [Given] the characters of the decision, the appellant should consider the proprieties, manners, and conditions of substituting measures for Kendo practicing, until it finally gave the decision. Nevertheless, we can not say that the appellant took such measures into account here.\textsuperscript{270}

The appellant alleges that to take the substituting measures would violate Article

\textsuperscript{269} Matsumoto, 906 HANREI TAIMUZU, at 80 (citation omitted).

\textsuperscript{270} Id. at 80-81.
20, paragraph 3 of the Constitution. However, to give a grade in a physical training course to a student who can not participate in Kendo practice because of religious reasons, asking, for instance, to take another course of the physical training instead of Kendo or to submit papers about Kendo as substituting measures is not regarded as the activity whose purpose has religious meaning and whose effect supports, promotes, and fosters a certain religion, or oppresses and interferes with other religious believers or non-believers. To take a substituting measure in any manner and condition can not evidently be said to violate Article 20, paragraph 3. It is not permitted in public schools to investigate or look into students’ belief, or to treat religions unequally. However, it does not violate the requirement of religious neutrality in public education to investigate whether a student’s refusal of to practice Kendo is a pretext of indolence or has a reasonable relation to serious religious tenet.^[271]

The Supreme Court correctly understood that a religious student was compelled to either to obey his own religious teaching and thus be dismissed from the college, or to participate in Kendo practice and violate his belief. As Justice Souter and Professor McConnell have suggested, this is a circumstance in which religious accommodation is needed,^[272] though the Japanese Supreme Court did not say that making people to confront with this circumstance per se violates the Constitution. The Supreme Court compared the interest of the College in requiring its students to practice Kendo with the student

^[271] Id. at 81.

^[272] See supra text accompanying notes 98, 128-129.
interest in not participating in the class, as an exercise of his constitutional right. The Supreme Court stated that since Kendo practice was not indispensable for the purpose of physical training, denying the appellee's religious right subjected him to an unreasonable disadvantage. In so declaring, the Supreme Court held that the principal of the College would have had to accommodate the student in this situation.

Furthermore, the Supreme Court said that such an accommodation did not violate the Constitution under the "purpose-and-effect" test. It is true that, given the alternative burden, that is, to submit papers, the Supreme Court permitted the accommodation. As to the alternative burden, the Supreme Court left it to the principal's discretion whether or not to take a substituting measure. This seems to imply that the Supreme Court asked, or at least recommended the government to take an alternative burden in a case of accommodation to dilute its benefit to religion over non-religion.

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273 See Tomatsu Hodenori, Shiho Shinsa no Kijun (Shuu no Kenri no Hoshou, 191 Houkaku Kyousitsu 26, 27 (1996)).

274 No Japanese commentator mentions the relationship between religious accommodation and the alternative burden, see e.g., Munesue Yasuyuki, Kendo Jutsugi no Kyousei to Shinkyou no Jiyuu, 192 Houkaku Kyousitsu 94 (1996).
C. Analysis.

As we saw, both Germany and Japan have adopted the religious accommodation approach to some extent. Both countries permit religious believers to avoid serious confrontation of their belief with the social order. Interestingly, the two countries acknowledge that government can impose alternative burden on the believers for the price of the accommodation.

The German case\textsuperscript{275} tells us that even if the exemption of conscientious objectors from military service is required by the Basic law, government has discretion to place an alternative burden on the objectors in order to balance religion with non-religion. It also teach us that government may make the alternative burden much heavier than the original burden unless the former burden suppresses the free exercise of religion.

The Japanese case\textsuperscript{276} indicates that government can use the alternative burden not only for conscientious objectors, but also for other religious exemptions. The Japanese Supreme Court implied that government, or at least a public college, should seek the possibility to accommodate a religious student before it implements its law or policy that imposes a serious burden on him.

\textsuperscript{275} See supra text accompanying notes 214-220.

\textsuperscript{276} See supra text accompanying notes 264-271.
CHAPTER V. DISCUSSION AND CONCLUSION.

Religious accommodation is used to alleviate government-imposed burdens on religion. One supposes that the Free Exercise Clause requires government not to restrain religious practices. As the United States Supreme Court stated, government "has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."277 This means that government also has authority to interpret the Constitution though the final word must belong to the Court. Permissible accommodation may be understood as a government interpretation of the Free Exercise Clause. In this sense, no reason can be found to draw a line between an accommodation ordered by courts and that offered by government. This distinction makes no sense because any accommodation must be reviewed under the limits of the Establishment Clause. In other words, all of the accommodations are required by the Constitution unless they do not go beyond the limit.278 Thus, government may


278 NOWAK AND ROTUNDA, supra note 107, at 1220 ("[T]he judicial examination of that legislative action will involve a determination of whether the legislature's promotion of free exercise values aided religion in a manner that violated the establishment clause.").
expressly make an accommodation to religion and courts can examine whether it violates the Establishment Clause.

As to the principle of reviewing accommodation, the Justices of the United States Supreme Court seem divided in two positions: the first follows American history, tradition, and heritage; the second requires religious neutrality. 279 Neither principle is predominant in the Court, and both have their shortcoming, as discussed in Chapter II. The former principle could be unfair to minor and unpopular religion, while the latter asks government to offer accommodation to even false claims in the name of religion. Since it seems impossible to settle on a single principle to scrutinize the constitutionality of the accommodation, the Court has to treat the problem on a case-by-case basis. For instance, the Court may evaluate accommodation under American history, tradition, and heritage in a drug consumption exemption case. However, a case of tax exemption may well be considered under religious neutrality. It may be better for the Court not to select only one principle, and to adopt either of them depending on the character of the accommodation.

Based on this understanding, I want to suggest four types of religious accommodation. First, government is permitted to offer a chaplain or a worship place in a prison, a military base, or a public hospital and nursing home. Second, government may confer accommodating benefits on religious groups as well as secular organizations. A property tax exemption which was upheld

279 See supra text accompanying notes 111-117.
in *Walz v. Tax Comm't*\(^\text{280}\) falls in this category. Third, government can exempt, from a generally applicable requirement, religious believers who claim that the requirement is an obstacle to their religious practice. To exempt wearing Jewish headgear from a military uniform code is this type of accommodation.\(^\text{281}\) Students-initiated prayer in a public school premise will be permitted in this category if there is no peer pressure on those who do not want to participate the prayer.\(^\text{282}\) Finally, government can also exempt from the requirement, a religious claim of certain believers against what the government requires its people to do. The conscientious objector exemption from military service or exemption of religious children from compulsory education falls into this category.

In the fourth category, government has discretion to impose an alternative burden on the believers for the price of the accommodation. As we saw in the cases in Germany and Japan, government may require those who receive the accommodating benefit to do substituting service, which does not interfere with their religious practice. I strongly suggest that government in the United States should learn those lessons of Germany and Japan to adopt the alternative burden in order to balance religion over non-religion and to exclude false claimants


\(^{281}\) See e.g., 10 U.S.C. § 774 (1988).

\(^{282}\) See Lee v. Weisman, 505 U.S. 577, 593 (1992) ("This [peer] pressure, though subtle and indirect, can be as real as any overt compulsion.").
of religious accommodation. One would argue that because the United States is religiously more complicated society than Germany and Japan, the examples of the alternative burden can not be applied easily to America. My answer is that the alternative burden reduces disproportion not only between religion and non-religion, but among religions. Other religious believers will see that only Amish (Wisconsin v. Yoder) or Jehovah’s Witness (Japanese Kobe City College of Technology Case) can receive an accommodative exemption. This sort of frustration would be bigger in a religiously complicated society. Since the alternative burden may solve this problem, it will be more useful in a religiously complicated society.

Since government cannot charge fees for the free exercise of religion, it is impossible to impose the alternative burden in the other categories. There, especially in the third category, those who seek the accommodation engage in their religious practice which has a priceless meaning in itself. Unlike the freedom of speech, they do not have any alternative means to express their beliefs other than the practice. The alternative burden fits only the case the believers do not want to do

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283 Some commentators have already suggested the possibility of the alternative burden on the latter reason, see supra note 149, 186-189.

284 Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) ("Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.").
what the government requires. The decision on whether the alternative burden is proportional to the accommodation belongs to the judiciary. Courts can assure that the burden is substantially the same as that the believers want to be exempted from.

Even though countries examined may differ in attitude, the accommodation to religion seems to be a common phenomenon in facilitating religious liberty. Truly, the history of religious persecutions has made freedom of religion one of the important reason for the modern constitutional law to secularize government. However, rigid secularization of state may diminish religious liberty. There should be a middle ground where government can accommodate religious liberty while it remains secular. One can say that giving accommodation only to religion may lose the balance between religion and non-religion. To ensure the equality of benefit and burden in a society, government can take the alternative burden on religion as the price of the accommodation.\textsuperscript{285}

\textsuperscript{285} See supra text accompanying note 133.
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