

**RELIGIOUS ACCOMMODATIONS IN EDUCATION:
A COMPARISON OF NON-ESTABLISHMENT IN THE
UNITED STATES AND ESTABLISHED RELIGION
IN ENGLAND AND WALES**

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I. INTRODUCTION

Education is necessary for individuals to participate intelligently and effectively in society and to become self-sufficient citizens. When children attend government-funded public schools, the government acts as an educator.¹ Although the government has assumed the responsibility of inculcating young, impressionable people with knowledge and values, the Supreme Court of the United States has not provided insight into which values should be taught beyond those “necessary to the maintenance of a democratic political system.”² Furthermore, judicial interpretations of the Establishment Clause³ of the First Amendment have created a separation between church and state, which precludes American public schools from teaching or promoting any religious values.⁴ The Court has reserved that right for parents.⁵

Conversely, England has had an established church since the sixteenth century.⁶ Under the Education Act of 1944, religious instruc-

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¹ Bd. of Educ. v. Pico, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting).

² Tyll van Geel, *Citizenship Education and the Free Exercise of Religion*, 34 AKRON L. REV. 293, 300 (2000).

³ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

⁴ See Lee v. Weisman, 505 U.S. 577 (1992); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Everson v. Bd. of Educ., 330 U.S. 1 (1947); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

⁵ See Pierce v. Soc’y of Sisters, 268 U.S. 510, 534•35 (1925).

⁶ See Act of Uniformity, 1559, 1 Eliz., c. 2 (Eng.), available at <http://history.hanover.edu/texts/engref/er80.html>.

tion was mandatory in any primary or secondary school that received government funds.⁷ Although the Act referred to “religion” generally, it inherently encouraged Christianity and demonstrated a new desire to teach children religious values in post-war England.⁸ The inclusion of religion in the Act represented two ideas: first, people needed to regain faith in the aftermath of World War II; and second, most religions teach some type of moral code, which, if followed, might prevent the horrors of a world war from reoccurring.⁹ Although religion continues to be a part of the national curriculum, a majority of schools no longer complies with daily prayer requirements, demonstrating that religious practice, though still statutorily embedded in British education, has less importance in present-day England.¹⁰

Although the United States and England diverge regarding religion’s place in government, the two countries are aligned in their desire to protect an individual’s right to freedom of religion.¹¹ That right is frequently invoked in a school setting because some students require special religious accommodations.¹² In the United States, such accommodations or exemptions are permitted only when there is no “state interest of sufficient magnitude” overriding the student’s interest being asserted under the Free Exercise Clause.¹³ Similarly, England uses a proportionality test created by the European Court of Human Rights, whereby courts determine the proportionality of the government aim as it relates to the limitation on an individual’s

⁷ A. BRADNEY, RELIGIONS, RIGHTS AND LAWS 61 (1993).

⁸ *Id.* For example, the Act required local conferences to create the curricula for compulsory religious education, and the Act also mandated that conference membership include representatives from the Church of England. *Id.*

⁹ *See id.*

¹⁰ *See* VERA G. MCEWAN, EDUCATION LAW 131 (2d ed. 1999) (“A survey in 1985 found that only 6% of maintained secondary schools” engaged in statutorily mandated collective worship.).

¹¹ *Compare* U.S. CONST. amend. I, with Act of Uniformity, 1559, 1 Eliz., c. 2 (Eng.), available at <http://history.hanover.edu/texts/engref/er80.html>. *See also* Council of Europe, European Convention on Human Rights § 1, art. 9, Nov. 4, 1950, available at <http://www.hri.org/docs/ECHR50.html> [hereinafter European Convention].

¹² *See infra* Part IV.

¹³ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). In *Employment Division v. Smith*, the Supreme Court held that an individual is not exempt from a law of general applicability unless more than one constitutional right, or a *hybrid* of rights, is affected. 494 U.S. 872, 881 (1992). Thus, religious exemptions in the public school setting are still permissible because they involve the right to free exercise, along with the right of parents to direct the upbringing of their children. *See infra* Part II.C.

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right.¹⁴ Because religion is incorporated in the British government, one might infer that the demand for a religious accommodation in a public school would present less of a conflict than in the United States. Yet, curiously, courts in the United States, which are bound by the rigidity of the U.S. Constitution, are more likely to grant a religious accommodation than courts in England. This Comment attempts to show that because religious freedom has existed in the United States since its creation, U.S. courts are more sympathetic to claims for religious accommodation in public schools.

Part II of this Comment explains the separation of church and state in the United States and the resulting absence of religion from American public schools. Part II also explains the test courts use to determine whether an individual is eligible for an exemption. Part III describes the enactments implemented in England which promote the protection of an individual's human rights. Part III also explains how religion and education are intertwined in England. Finally, Part IV compares recent cases from the United States and England to show how England, which does not have a Bill of Rights, has the flexibility to allow more religious freedom in an educational setting but nonetheless enforces democratic ideals at the expense of an individual's rights.

II. SEPARATION OF CHURCH AND STATE IN THE UNITED STATES

A. *Neutrality in American Public Schools*

Unlike England, which openly endorses and funds religious education for different religions, the Supreme Court of the United States has struggled over the years to interpret the First Amendment's requirement that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"¹⁵ especially in the context of public education.¹⁶ This amendment was intended to promote religious freedom while also creating a religiously neutral government that neither preferred any religious sect nor

¹⁴ Christina Kitterman, Comment, *The United Kingdom's Human Rights Act of 1998: Will the Parliament Relinquish Its Sovereignty to Ensure Human Rights Protection in Domestic Courts?*, 7 ILSA J. INT'L & COMP. L. 583, 587 (2001) (citing *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737, (1976)).

¹⁵ U.S. CONST. amend. I.

¹⁶ See *Lee v. Weisman*, 505 U.S. 577 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962); *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Minersville Sch. Dist. v. Gobotis*, 310 U.S. 586 (1940).

supported religion over irreligion.¹⁷ The Supreme Court has explained that the Establishment Clause prohibits federal and state governments from setting up churches, forcing people to participate in religious practices, punishing people based on their religious beliefs, using taxes to fund religious programs or institutions, and participating in religious organizations.¹⁸

Because both the federal and state governments fund and operate public schools, school policies and programs cannot represent religious establishment. The Establishment Clause therefore prohibits public schools from providing students with religious instruction. For example, public school programs that allow students to receive religious instruction at their parents' option once a week during the regular school day are unconstitutional if the program is held on school property and takes time away from secular studies.¹⁹ These programs are not religiously neutral because they are implemented by tax-supported public school systems and utilize tax-supported property.²⁰ Conversely, a program that releases students early so that they may pursue religious instruction elsewhere is constitutional because such a policy makes no use of public resources and merely accommodates individuals' religious needs by rearranging their school schedules.²¹

The Court has further held that public schools would violate the Establishment Clause if they were to coerce students to support or participate in any form of religious exercise.²² In *School District v. Schempp*, the Supreme Court held statutes from Pennsylvania and Maryland as unconstitutional because they required that students recite portions of the Bible at the beginning of each school day.²³ Similarly, the Supreme Court struck down a New York statute that mandated all public school students to recite daily a nondenominational prayer written by the State Board of Regents.²⁴ Although these stat-

¹⁷ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring).

¹⁸ *Everson*, 330 U.S. at 15•16.

¹⁹ *McCullum*, 333 U.S. at 207, 210.

²⁰ *Id.* at 210.

²¹ *Zorach v. Clauson*, 343 U.S. 306, 314•15 (1952).

²² See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (prohibiting invocation and benediction prayers as part of formal public school graduation ceremony); *Sch. Dist. v. Schempp*, 374 U.S. 203, 225–26 (1963) (holding unconstitutional statutes that require students to read from the Bible during the school day); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (invalidating rule requiring recitation of a morning prayer that was created by state officials).

²³ *Schempp*, 374 U.S. at 223.

²⁴ *Engel*, 370 U.S. at 424.

utes permitted students to abstain from participating in the exercise, the use and endorsement of any type of prayer in a public school system nonetheless violated the separation of church and state required by the Establishment Clause.²⁵ By prohibiting the school-sponsored recitation of prayers during the school day, the Establishment Clause furthers the constitutional goal of protecting religious freedom by disallowing the preference of one religious belief over another.²⁶

In an effort to further isolate public schools from religion, the Supreme Court of the United States has held that religious prayers are also prohibited at school-sponsored events outside of the classroom. In *Lee v. Weisman*, the Court held that state officials could not direct a religious prayer at graduation ceremonies.²⁷ The reasons the Court held that the school's involvement violated the Establishment Clause were that (1) a school official decided that an opening invocation and closing benediction should be given; (2) the school chose a clergyman to lead the prayer; and, most importantly, (3) the school directed the content of the prayer that would be recited at a mandatory school ceremony.²⁸ Once again, the Supreme Court was concerned that the state-sponsored ceremony violated students' right to free exercise by pressuring nonbelievers to participate in a religious activity contrary to their own beliefs.²⁹

The Court ultimately opined on the outer boundaries of the Establishment Clause when it upheld the Equal Access Act of 1984, a law which created an exception to the neutrality requirement in public schools.³⁰ This Act prohibits federally funded, public secondary

²⁵ *Id.* at 425; *see also Schempp*, 374 U.S. at 224•25.

²⁶ *See Engel*, 370 U.S. at 431•32.

²⁷ *Lee*, 505 U.S. at 586–87.

²⁸ *Id.* at 587•89.

²⁹ *Id.* at 593.

³⁰ The Equal Access Act, 20 U.S.C. § 4071 (2000).

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech context prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

schools from discriminating against students who wish to conduct a religious, political, or philosophical meeting on school property during non-instructional hours.³¹ Although faculty may not participate in such meetings, their attendance is required.³² In *Board of Education of Westside Community School v. Mergens*,³³ the Supreme Court of the United States held that the Equal Access Act did not violate the Establishment Clause because it was more consistent with an “equal access” policy than a state system of sponsored religion.³⁴ Additionally, since the Act requires that meetings occur during non-instructional time and that faculty be present merely to supervise, the Court held that it did not create an excessive entanglement of government and religion.³⁵

B. Funding of Religious Education in the United States

The United States’s approach to religion in schools further deviates from England’s approach because the Establishment Clause typically forbids states from providing any type of funding to church-related schools.³⁶ In England, by contrast, religiously affiliated schools receive government funding. However, case law has gradually evolved such that states currently are permitted to disburse funds to religious schools under certain circumstances.³⁷ In *Everson v. Board of*

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

Id. § 4071(a), (b), (c).

³¹ *Id.* § 4071(a), (b).

³² *Id.* § 4071(c)(3).

³³ 496 U.S. 226 (1990).

³⁴ *Id.* at 250•53.

³⁵ *Id.* at 253.

³⁶ See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 668 (1970)).

³⁷ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (no violation of the Establishment Clause where states provide parents with funding to send their children to public or private schools and parents privately choose where their children will attend school); *Mitchell v. Helms*, 530 U.S. 793 (2000) (allowing federal government

Education,³⁸ the Supreme Court addressed the constitutionality of a New Jersey local school board policy of reimbursing parents for using public transportation buses to send their children to school.³⁹ Pursuant to this policy, parents received funds irrespective of whether their children attended public or Catholic parochial schools.⁴⁰ While acknowledging the wall of separation between church and state, the Supreme Court upheld the policy because it applied to all people generally, regardless of their religious beliefs.⁴¹ It was, therefore, “neutral in its relations with groups of religious believers and non-believers.”⁴²

In *Lemon v. Kurtzman*,⁴³ the Supreme Court developed a three-pronged test to determine whether statutes granting funding for education in religiously affiliated schools violate the Establishment Clause.⁴⁴ To survive constitutional scrutiny, a “statute must have a secular legislative purpose . . . , its principal or primary effect must be one that neither advances nor inhibits religion . . . , [and it] must not foster ‘an excessive government entanglement with religion.’”⁴⁵ A finding of excessive entanglement is based on “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”⁴⁶ The statutes at issue in *Lemon*, however, did not survive constitutional scrutiny because the Supreme Court concluded that the funding programs constituted an “excessive entanglement between government and religion.”⁴⁷

To help low-achieving children meet state performance standards, Congress enacted Title I of the Elementary and Secondary Education Act of 1965 (“Title I”), which provides additional funding

to provide religiously affiliated schools with aid where such aid is used to purchase educational materials and equipment); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding that school board could reimburse parents for transportation expenses incurred when sending children to school regardless of whether children attended public or private parochial schools because statute applied generally regardless of religious belief).

³⁸ 330 U.S. 1.

³⁹ *Id.* at 3.

⁴⁰ *Id.*

⁴¹ *Id.* at 18.

⁴² *Id.*

⁴³ 403 U.S. 602 (1971).

⁴⁴ *Id.* at 612–13.

⁴⁵ *Id.* (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970)).

⁴⁶ *Id.* at 615.

⁴⁷ *Id.* at 614.

to local educational agencies (LEAs).⁴⁸ Student eligibility does not depend on whether the child goes to a public or a private school, but rather on the character of the benefits provided by the funding: to qualify, the benefits must be “secular, neutral, and nonideological.”⁴⁹

The use of this aid has raised various Establishment Clause issues.⁵⁰ In *Agostini v. Felton*,⁵¹ the Board of Education of the City of New York, along with a group of parents, sought relief from an injunction preventing Title I teachers from providing aid to students in religious private schools.⁵² After concluding that Title I teachers could work in religious private schools because their presence neither promoted nor inhibited religion, the Supreme Court also held that the “excessive entanglement” analysis and the “impermissible effect” analysis were essentially the same.⁵³ Thus, the Supreme Court eliminated the entanglement factor of the *Lemon* test,⁵⁴ making only the first two *Lemon* factors relevant to the school aid question.⁵⁵ Notably, the Supreme Court acknowledged that some interaction or entanglement between the church and the state is inevitable.⁵⁶ By allowing children to receive necessary aid for secular subjects in religious schools, the Supreme Court promoted the right to free exercise be-

⁴⁸ 20 U.S.C. § 6312(a)–(b) (2000). The LEA must apply to its state education agency for federal funds. *Id.* § 6312(e). The LEA must create a plan describing the programs it will implement to meet the special education needs of children from low-income families. *Id.* The state education agency must approve the plan before the LEA receives any funding. *Id.* § 6312(e)(2).

⁴⁹ *Id.* § 6320(a)(2).

⁵⁰ *Aguilar v. Felton* established an automatic presumption of excessive entanglement of government and religion when federally funded services are provided inside a parochial school. 473 U.S. 402, 412•14 (1985). As a result of the Supreme Court’s decision in *Aguilar*, the New York Legislature enacted a statute creating a separate school district for a small orthodox Jewish village. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 692•93 (1994). Because village residents did not want their children attending schools outside of the community, the creation of a separate school district allowed them to open a publicly funded special education school inside the village. *Id.* at 694. Eligible children could then receive benefits. *Id.* While acknowledging the state’s right to accommodate religious needs, the Supreme Court found that this statute conferred benefits on a religious sect in a non-neutral manner and was therefore unconstitutional. *Id.* at 704•05.

⁵¹ 521 U.S. 203 (1997).

⁵² *Id.* at 212–14. After the Supreme Court held in *Aguilar* that the Board’s Title I program violated the Establishment Clause, the U.S. District Court for the Eastern District of New York ordered an injunction, which remained in effect until the Supreme Court handed down its opinion in *Agostini* twelve years later. *Id.* at 208•09.

⁵³ *Id.* at 232.

⁵⁴ *Id.* at 233.

⁵⁵ *Mitchell v. Helms*, 530 U.S. 793, 807 (2000).

⁵⁶ *Agostini*, 521 U.S. at 233.

cause parents were able to send their children to any school without worrying that their children would be denied these benefits.⁵⁷

In *Mitchell v. Helms*,⁵⁸ which involved a program similar to that in *Agostini*, the Supreme Court focused its decision on neutrality and private choice.⁵⁹ The Court held that as long as the state offers aid “to a broad range of groups or persons without regard to their religion,” then the program is neutral and religious indoctrination is not attributable to the state.⁶⁰ The Court further held that an individual who qualifies for aid through a neutral program has the private right to choose where he or she wants to go to school.⁶¹ Such a decision cannot be attributed to the state.⁶² Similarly, in *Zelman v. Simmons-Harris*,⁶³ the Supreme Court upheld an Ohio voucher program that provided parents with monetary grants to send their children to any school, public or private—even religious—within the Cleveland City School District.⁶⁴ Because the program was one of true private choice, the Supreme Court held that it was entirely neutral toward religion.⁶⁵

Claims regarding violations of the Establishment Clause based on the distribution of aid often occur in impoverished areas where a large number of students attend religiously affiliated private schools which offer a better education than local public schools.⁶⁶ To enjoy fully the freedoms guaranteed by the U.S. Constitution, children from these underprivileged areas need the best education possible.⁶⁷ Without education, these children would never be able to participate effectively in democratic society.⁶⁸ Opponents of programs that provide aid equally to both public and private schools focus on the formal concerns of the Establishment Clause.⁶⁹ They ignore the fact that education provided in these failing school districts is not really comparable to public education elsewhere and deny these students

⁵⁷ *Id.* at 213. Due to the increased costs associated with modifying the Title I program to comply with the terms of the injunction, fewer students were receiving benefits from Title I funding. *Id.*

⁵⁸ 530 U.S. at 793.

⁵⁹ *Id.* at 810–11.

⁶⁰ *Id.* at 809.

⁶¹ *Id.* at 811.

⁶² *Id.*

⁶³ 536 U.S. 639 (2002).

⁶⁴ *Id.* at 645•46, 653.

⁶⁵ *Id.* at 653.

⁶⁶ *See id.* at 681•82 (Thomas, J., concurring); *Mitchell*, 530 U.S. at 830.

⁶⁷ *Zelman*, 536 U.S. at 681•82 (Thomas, J., concurring).

⁶⁸ *Id.*

⁶⁹ *Id.*

the equal protection guaranteed by the Fourteenth Amendment.⁷⁰ Although the opinions in *Mitchell* and *Zelman* focus on the need to educate children in impoverished areas, these decisions nonetheless promote the right to free exercise because children will not be denied an education based on their choice of a religious school.

C. *Exemptions for Free Exercise from Generally Applicable Rules*

Sometimes laws that apply to the general population conflict with an individual's religious beliefs, infringing on his or her right to free exercise, and courts are subsequently required to resolve the dispute, either ruling in favor of an orderly society or affirming the individual's fundamental rights. In *Wisconsin v. Yoder*, the Supreme Court of the United States upheld the First Amendment rights of Amish children whose religious beliefs conflicted with a state statute requiring them to attend public or private school until the age of sixteen.⁷¹ The parents of several children were convicted of violating the statute when they refused to send their children to school after the children completed the eighth grade.⁷² The parents argued that the statute infringed upon their First and Fourteenth Amendment rights because sending their children to high school directly conflicted with the Amish religion and lifestyle.⁷³

The Supreme Court held that Wisconsin could not compel school attendance against a claim of religious interference unless the requirement on its face did not impede the free exercise of religion or the state's interest was compelling enough to exceed protection of the individual's First Amendment right.⁷⁴ The Supreme Court agreed that Wisconsin had an undeniable interest in educating children but said that the state's interest in education was not automatically superior to other interests because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁷⁵

When balancing the importance of the various interests, the Supreme Court considered the genuineness of the parents' claims and emphasized the difference between mere personal preference and sincere religious belief, concluding that the parents' claims in *Yoder*

⁷⁰ *Id.*

⁷¹ *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

⁷² *Id.*

⁷³ *Id.* at 208•09.

⁷⁴ *Id.* at 214.

⁷⁵ *Id.* at 214•15.

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were religiously grounded.⁷⁶ The Supreme Court found that the Wisconsin statute severely impeded the Amish children's free exercise of religion because their religion, which has existed for centuries, is founded upon a simple lifestyle that ignores advances in technology, along with current societal norms, and instead focuses on devotion to God, family, and community.⁷⁷ Forcing Amish children to attend public high school would compromise their religious beliefs by exposing them to values contrary to their own and to excessive pressure from their peers to conform.⁷⁸

The Supreme Court then noted that certain religiously motivated behavior could be subject to regulations of general applicability intended "to promote the health, safety, and general welfare" of the public.⁷⁹ The state argued that it had a strong interest in creating self-sufficient individuals capable of intelligently participating in society, but the Supreme Court did not agree that this interest was compelling enough to infringe upon the Amish beliefs.⁸⁰ The Amish people were already a self-sufficient community that had existed for hundreds of years; one or two extra years of education would have little beneficial effect on their lives.⁸¹ Because the Amish parents did not jeopardize the health or well-being of their children, the Supreme Court further explained that the right of the parents to direct the upbringing of their children, in conjunction with their First Amendment right to exercise religion freely, outweighed the state's "compelling" interest.⁸² The Supreme Court concluded that the First and Fourteenth Amendments prevented the state from requiring the Amish to send their children to public high schools, essentially exempting the Amish people from the rule.⁸³

In *Employment Division v. Smith*,⁸⁴ the Supreme Court distinguished its rule regarding laws of general applicability from the balancing test established in *Yoder*. In *Smith*, two individuals were discharged from their jobs after they ingested peyote during a Native

⁷⁶ *Id.* at 215•16.

⁷⁷ *Yoder*, 406 U.S. at 210.

⁷⁸ *Id.* at 217•18.

⁷⁹ *Id.* at 220.

⁸⁰ *Id.* at 221.

⁸¹ *Id.* at 222.

⁸² *Id.* at 233•34.

⁸³ *Yoder*, 406 U.S. at 234•35.

⁸⁴ 494 U.S. 872 (1992). Although *Smith* did not involve a claim for an exemption arising from a student in a public school setting, the holding still affects students requiring religious accommodations.

American religious ceremony.⁸⁵ The use of the peyote violated an Oregon law which prohibited the possession of certain controlled substances.⁸⁶ The Supreme Court considered whether the prohibition of the religious use of peyote violated the Free Exercise Clause.⁸⁷

The Supreme Court refused to exempt the individuals from the Oregon law because it was a neutral, generally applicable law not intended to promote or oppress any religious beliefs.⁸⁸ To maintain an orderly, democratic society, states must be permitted to regulate and citizens must abide by certain laws.⁸⁹ The Supreme Court explained that the holding in *Yoder*, which allows the court to use a compelling interest test, applied only because that case involved a “hybrid” or a combination of constitutional rights—the right to free exercise and the right to direct the upbringing of one’s children.⁹⁰ This conclusion supports the idea that two claims involving infringements of constitutional rights, which would fail if alleged separately, have the potential to succeed when they are asserted as a combination because the hybrid of constitutional rights triggers the compelling interest test.⁹¹

⁸⁵ *Id.* at 874.

⁸⁶ *Id.*

⁸⁷ *Id.* at 876. After the two individuals lost their jobs, they applied for unemployment, and the Employment Division denied their request for benefits because they were discharged for misconduct. *Id.* at 874. The Oregon Court of Appeals reversed that decision, holding that it violated the employees’ right to free exercise of religion. *Id.* The Supreme Court of Oregon reversed again. *Id.* at 875. The Supreme Court of the United States remanded the case so that the Supreme Court of Oregon could decide whether peyote was included within the Oregon statute as a controlled substance. *Id.* The Supreme Court of Oregon held that peyote was included in the statute but that the employees’ First Amendment rights were violated. *Id.* at 876. The Employment Division appealed. *Id.*

⁸⁸ *Id.* at 879 (citing *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594•95 (1940)).

⁸⁹ *Id.* at 879.

⁹⁰ *Smith*, 494 U.S. at 881.

⁹¹ William L. Esser, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smokescreen?*, 74 NOTRE DAME L. REV. 211, 218•19 (1998). *But see* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring):

[T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what

III. ESTABLISHED RELIGION IN ENGLAND

A. *History of Religious Freedom in England*

The 1559 Act of Uniformity established the Church of England as the national religion.⁹² Despite the Anglican establishment, England has worked vigorously to protect religious freedom for all religions.⁹³ While the Church of England may appear to be the preferred religion, today England tolerates all minority faiths and guarantees them freedom of worship and the freedom to practice their religion in public.⁹⁴ Additionally, the functions of the Church do not coincide with the functions of public government.⁹⁵ The House of Lords recently held that, under the Human Rights Act of 1998, the Church of England is not a “public authority.”⁹⁶

England does not have a written constitution or a bill of rights like the United States, but the common law and statutes tend to protect civil liberties.⁹⁷ Additionally, England adheres to the European Convention on Human Rights of 1950 (“Convention”).⁹⁸ The European Council, which was formed after the conclusion of World War II, enacted the Convention to protect various fundamental freedoms and rights.⁹⁹ Article 9 of the Convention states:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the

Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Id.

⁹² Act of Uniformity, 1559, 1 Eliz., c. 2 (Eng.), available at <http://history.hanover.edu/texts/engref/er80.html>.

⁹³ Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 917 (2005).

⁹⁴ *Id.*

⁹⁵ Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 49 MCGILL L.J. 635, 639 (2004).

⁹⁶ *Id.*

⁹⁷ Albert, *supra* note 93, at 918.

⁹⁸ European Convention, *supra* note 11.

⁹⁹ Kitterman, *supra* note 14, at 584•85.

protection of public order, health or morals, or the protection of the rights and freedoms of others.¹⁰⁰

Another relevant provision of the Convention is Article 2 of Protocol I, which states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.¹⁰¹

The United Kingdom incorporated the Convention into its domestic law when it enacted the Human Rights Act of 1998.¹⁰² The Human Rights Act allows British citizens to bring claims of human rights violations directly before British courts.¹⁰³ British courts interpret current legislation so that it conforms to the Convention.¹⁰⁴ Opinions from the European Court of Human Rights in Strasbourg help guide British decisions, but they are not binding.¹⁰⁵

B. *Education in England*

Religious schools in England and Wales are found in both the private sector and a predominant part of the public sector.¹⁰⁶ England funds both types of schools.¹⁰⁷ In contrast to American schools, which are governed by state and local rules, educational standards in England are governed by Parliamentary legislation.¹⁰⁸

Modern education law in England and Wales was developed through various legislative acts beginning with the Education Act

¹⁰⁰ European Convention, *supra* note 11.

¹⁰¹ Council of Europe, Protocol 1 to the European Convention on Human Rights art. 2, Mar. 20, 1952, available at <http://www.hri.org/docs/ECHR50.html>.

¹⁰² Ariel Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model*, 17 AM. U. INT'L L. REV. 683, 685 (2002).

¹⁰³ Kitterman, *supra* note 14, at 589.

¹⁰⁴ *Id.* at 592.

¹⁰⁵ *Id.* at 591. Individuals who reside in countries that adhere to the Convention can bring claims of human rights violations directly to the European Court of Human Rights, whose decisions are binding on member countries. *Id.* at 585•86. If a British court cannot provide an adequate remedy, then individuals still can bring their claims before the European Court of Human Rights. *Id.* at 594.

¹⁰⁶ C.M.A. McCauliff, *Distant Mirror or Preview of Our Future: Does Locke v. Davey Prevent American Use of Creative English Financing for Religious Schools?*, 29 VT. L. REV. 365, 375 (2005).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 380•81.

1944.¹⁰⁹ The 1944 Act created a new system of education in post-war England.¹¹⁰ A frequently litigated provision of the 1944 Act, which will be demonstrated in one of the cases below,¹¹¹ requires an LEA to provide students with transportation to and from school.¹¹² This provision created many conflicts because the 1944 Act also granted parents the right to choose which school their children would attend, and sometimes a preferred school was located far away.¹¹³

Under the 1944 Act, an LEA “w[as] obliged . . . to have regard to parental preference,” but the Education Act 1980 made it a mandatory requirement for an LEA to comply with a parent’s request.¹¹⁴ The Education Reform Act 1988 further advanced parental rights and preferences by giving them greater choices regarding where their children would attend school, influence over the governing bodies, and control of certain types of schools.¹¹⁵ A parent will usually prefer one school over another for religious reasons.¹¹⁶ The Education Act 1996 repealed the earlier Acts to consolidate all of the modern law, and the Education Act 1998 established the current structure of schools.¹¹⁷

There are five main types of schools in England: maintained, community, voluntary, independent, and foundation schools.¹¹⁸ Under the 1944 Act, an LEA was required to provide “a variety of education for children of compulsory school age.”¹¹⁹ LEAs own both maintained and community schools.¹²⁰ Voluntary schools, which are only assisted rather than owned by LEAs, receive various amounts of government funding and usually serve a particular religious persuasion.¹²¹ These schools are often started by groups who believe that the government’s educational guidelines are inconsistent with their own religious beliefs but who cannot afford to finance a private

¹⁰⁹ MCEWAN, *supra* note 10, at 3–5. This Comment does not discuss the majority of these acts because most of them focused on a specific aspect of the education system in England not relevant to the topic of this Comment. *Id.*

¹¹⁰ *Id.* at 3.

¹¹¹ *See infra* Part IV.E.

¹¹² MCEWAN, *supra* note 10, at 4.

¹¹³ *Id.*

¹¹⁴ *Id.* at 5.

¹¹⁵ *Id.*

¹¹⁶ BRADNEY, *supra* note 7, at 65.

¹¹⁷ MCEWAN, *supra* note 10, at 6•7.

¹¹⁸ *Id.* at 16•22.

¹¹⁹ *Id.* at 16.

¹²⁰ *Id.* at 16•17.

¹²¹ *Id.* at 19.

school independently.¹²² Although any religious school can apply for voluntary-aided status, it has been argued that the system inherently discriminates, as Muslim applications have consistently been turned down on procedural or technical grounds.¹²³

Independent schools are the equivalent of American private schools.¹²⁴ Independent schools maintain private contracts with students and are therefore not subject to judicial review.¹²⁵ A significant number of independent schools serve religious traditions that have only recently arrived in Great Britain, such as Islam and Judaism.¹²⁶ Criticism of the curricula and teachers at independent schools, however, has made it difficult for religious groups to set up such schools in their communities.¹²⁷

Curricula in England and Wales are mostly secular.¹²⁸ With the exception of independent schools, the government requires all schools in England and Wales to implement a national curriculum.¹²⁹ Under the 1998 Act, a daily act of worship is still required in all schools (with an exception again for independent schools), but reports have shown that less than seventy percent of schools comply with the requirement.¹³⁰ Religious education, however, continues to be a part of the basic curriculum.¹³¹

The British government intentionally wove Christianity into education law.¹³² Since the enactment of the 1944 Act, people have gradually drifted away from religion.¹³³ When the British government enacted the 1988 Act, Parliament consciously placed Christian education at the center of all religious education.¹³⁴ In fact, the 1988 Act was the first time Parliament explicitly mentioned "Christianity" in a provision of education legislation.¹³⁵ British law, however, does not

¹²² BRADNEY, *supra* note 7, at 67.

¹²³ *Id.* at 68. One Muslim school was not large enough for voluntary status. *Id.*

¹²⁴ See MCEWAN, *supra* note 10, at 20.

¹²⁵ *Id.* (citing R v. Headmaster of Fernhill Manor Sch., ex parte Brown [1993] 1 FLR 620. (1992)).

¹²⁶ BRADNEY, *supra* note 7, at 69.

¹²⁷ *Id.* at 70.

¹²⁸ See MCEWAN, *supra* note 10, at 123•24. In the national curriculum, the three core subjects are English, math, and science. *Id.* Other subjects include "history, geography, technology, music, art, physical education, and a modern language." *Id.*

¹²⁹ *Id.* at 124.

¹³⁰ *Id.* at 131.

¹³¹ *Id.*

¹³² BRADNEY, *supra* note 7, at 60.

¹³³ *Id.* at 65.

¹³⁴ *Id.*

¹³⁵ *Id.*

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specifically limit religious schools to Christianity; currently there are a small number of Jewish and Muslim schools as well.¹³⁶ Although the educational trend in Great Britain is toward freedom of religion and individual autonomy, modern legislation, particularly the 1988 Act, indoctrinates children with Christian beliefs because such legislation teaches children that Christianity represents community values.¹³⁷

Thus, the predominant absence of religion from American public schools, which is the result of the First Amendment's prohibition of establishment, tends to promote more religious freedom than the British system.¹³⁸ In contrast to British education, which has legislatively and in practice endorsed Christianity as the core faith, American education, which supports no religious beliefs, effectively treats all religions equally from the beginning. As religious exceptions or accommodations are necessary, courts have the ability to grant them to protect the individual's right to free exercise.¹³⁹

IV. RECENT CASES

England continues to have an established religion. After America won its freedom from England, its founders did not want to create a nation that fostered the same type of religious establishment. Thus, the Establishment Clause was included in the Bill of Rights, formally prohibiting established religion. "Establishment[, however,] is, in fact, consistent with religious freedom Even if a state does not have an established church, it will have an established position on religion. A secular, liberal state is not 'neutral'. It tolerates religions on its own terms."¹⁴⁰ Although England still has an established church, the United States and England both encourage religious freedom. The Bill of Rights automatically grants American citizens the right to free exercise of religion, and the courts then decide at what point that right should be curtailed for the sake of maintaining a civilized society. Conversely, British courts, which are not bound by a Bill of Rights, have the liberty to grant additional rights as they are requested. As in the United States, however, rights can be denied for the sake of maintaining order.

As the following cases will show, the United States tends to be slightly more tolerant in the classroom because the American method

¹³⁶ *Id.* at 67.

¹³⁷ *Id.* at 71. This is the opposite of the American goal to prevent religious indoctrination in public schools.

¹³⁸ See *supra* Part II.A.

¹³⁹ See *supra* Part II.C.

¹⁴⁰ Ahdar & Leigh, *supra* note 95, at 637.

focuses on the rights of the individual, while England's focus is the availability or lack of alternatives to the circumstances creating the problem. Because all of the British cases involve parents enforcing religious rights in a school setting, this Comment compares them using the *Yoder* analysis, which requires a court to examine a combination of rights. Yet in either country accommodation will sometimes be denied for the sake of some compelling government interest.

A. *Hicks v. Halifax County Board of Education*¹⁴¹

In this U.S. case, the plaintiff sued the defendant school district, claiming that the district's mandatory uniform policy was unconstitutional because the policy did not contain any provisions permitting students to "opt-out" for religious reasons.¹⁴² The plaintiff filed a complaint after her great-grandson was suspended from school for not complying with a new uniform policy.¹⁴³ The great-grandmother stated that the policy infringed upon her right to free exercise and her right, as her great-grandson's legal guardian, to direct his upbringing.¹⁴⁴ More specifically, the grandmother believed that compelling students to wear uniforms eliminates an individual's free will and is "characteristic of the 'last days' and required by the anti-Christ."¹⁴⁵ As such, her religion required her to oppose the anti-Christ and prevent her children from becoming indoctrinated with his orders and his mark.¹⁴⁶

The district court explained that the circumstances of this case could fall under the hybrid-rights exemption demonstrated by *Yoder*, and that the plaintiff was therefore entitled to strict scrutiny review of the uniform policy.¹⁴⁷ Notably, this opinion denied only the defendant's motion for summary judgment; the court did not resolve the issue on its merits.¹⁴⁸ In its reasoning, the court emphasized the already established right of parents to direct the upbringing of their children¹⁴⁹ and stated that the Supreme Court of the United States has protected religious beliefs under the First Amendment even

¹⁴¹ 93 F. Supp. 2d 649 (E.D.N.C. 1999).

¹⁴² *Id.* at 652.

¹⁴³ *Id.* at 654.

¹⁴⁴ *Id.* at 657.

¹⁴⁵ *Id.* at 653.

¹⁴⁶ *Id.* at 653•54.

¹⁴⁷ *Hicks*, 93 F. Supp. 2d at 663.

¹⁴⁸ *Id.* at 663.

¹⁴⁹ *Id.* at 658 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

when such beliefs are not “acceptable, logical, consistent, or comprehensible to others.”¹⁵⁰

However, applying the balancing test from *Yoder*, a court would have to compare the sincerity of the religious beliefs with the government interest. In *Yoder*, the court partially based this determination on the established history of the Amish religion and its traditions.¹⁵¹ While there is no subsequent history to *Hicks*, one can predict that it would likely lose on its merits. Although the uniform policy may have imposed some burden on the grandmother’s rights, a court could easily conclude that the Board of Education had a compelling interest in creating a uniform policy. Specifically, the Board stated that the policy had the following benefits: “1) improved student behavior, 2) increased safety in schools, 3) increased sense of belonging and school pride among students, 4) increased emphasis on individual personality and achievement rather than outward appearance among students, and 5) elimination of negative distinctions between wealthy and needy children.”¹⁵² Moreover, the Board spoke to local parents with various religious affiliations who all stated that a uniform policy would not violate their religious beliefs.¹⁵³ The Board knew that the plaintiff was opposed to the policy, but the Board could not understand how its policy offended the plaintiff’s religion,¹⁵⁴ indicating that the burden on the plaintiff’s religious beliefs may not have been substantial enough to permit a religious exemption.

B. *Cheema v. Thompson*¹⁵⁵

In *Cheema*, another U.S. case, three Khalsa Sikh children brought suit against the defendant school district because a policy banning students from bringing weapons to school infringed upon the students’ right to free exercise of religion under the Religious Freedom Restoration Act (RFRA).¹⁵⁶ One of the tenets of the Sikh religion re-

¹⁵⁰ *Id.* at 657 (citing *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981)).

¹⁵¹ See *supra* Part II.C.

¹⁵² *Hicks*, 93 F. Supp. 2d at 652.

¹⁵³ *Id.* at 653.

¹⁵⁴ *Id.*

¹⁵⁵ 67 F.3d 883 (9th Cir. 1995).

¹⁵⁶ *Id.* at 884•85. RFRA states in relevant part:

(a) In general. Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

quired the students to carry a “kirpan,” or ceremonial knife on their person at all times.¹⁵⁷ Because the children demonstrated that carrying a kirpan was part of a sincerely held religious belief and that the school policy substantially burdened their religious beliefs, the burden then shifted to the school board to demonstrate that the prohibition of the kirpans served a compelling state interest.¹⁵⁸ After the school board failed to establish its burden, the U.S. Court of Appeals for the Ninth Circuit upheld a preliminary injunction granted by the district court allowing the students to continue wearing their knives to school.¹⁵⁹

Notably, the court of appeals, like the district court in *Hicks*, did not rule on the merits; rather, the court held that the plaintiffs have demonstrated a likelihood of success on the merits.¹⁶⁰ The court seemed to punish the school district for not pleading enough facts and refrained from deciding whether the government interest outweighed the children’s First Amendment rights. In this respect, the dissenting opinion, which opposed the terms of the injunction,¹⁶¹ is more persuasive because it emphasized the danger in allowing students to carry knives to school and the importance of maintaining a safe environment in schools.¹⁶² The dissent explained that, although the kirpan may have spiritual meaning to the Sikhs, it is still a knife and the Sikh religion dictates that it be used for self-defense purposes.¹⁶³ The evidence also showed that on several occasions the plaintiff children removed their knives from the sheaths; should we therefore assume that young Sikh children understand the purpose of the kirpan or are capable of assessing the type of situation that

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- (1) is in furtherance of a compelling governmental interest; and
 - (2) is the least restrictive means of furthering that compelling governmental interest.

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2006). The dissent in *Cheema* notes that Congress enacted these provisions as a response to the Supreme Court decision in *Smith*, which refused to grant individuals exemptions to laws of general applicability. *Cheema*, 67 F.3d at 888•89. The Supreme Court of the United States invalidated the statute several years later in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁵⁷ *Cheema*, 67 F.3d at 884. The knife has a steel blade, approximately seven inches long and more than three inches wide. *Id.*

¹⁵⁸ *Id.* at 885.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ The dissent expressed concern about the fact that the injunction only required the kirpan be sewn, instead of riveted, to the sheath, which would still enable Sikh children to remove the kirpan from the sheath. *Id.* at 888.

¹⁶² *Cheema*, 67 F.3d at 889•90.

¹⁶³ *Id.* at 890.

warrants self-defense?¹⁶⁴ *Cheema* provides a good example of circumstances where there are foreseeable risks associated with accommodating a student's religious beliefs, but a *Yoder* analysis nonetheless would likely protect those religious beliefs.

C. *Sherr v. Northport–East Northport Union Free School District*¹⁶⁵

In *Sherr*, the U.S. District Court for the Eastern District of New York considered the validity of a school policy requiring certain immunizations unless the students were “bona fide members of a recognized religious organization.”¹⁶⁶ Two families objected to the immunization of their children for religious reasons and were denied an exemption because they did not belong to a recognized religious organization.¹⁶⁷ The district court recognized the compelling government interest in mandatory inoculations but ultimately held that by limiting the exemption to members of a recognized religion the provision was unconstitutional because it preferred some religions over others and prevented individuals from the free exercise of religion, violating the Establishment Clause and the Free Exercise Clause respectively.¹⁶⁸ The district court then concluded that both plaintiffs offered religious reasons for requesting an exemption.¹⁶⁹ The court held, however, that only one of the two plaintiffs held sincere religious beliefs and, therefore, only one plaintiff was entitled to an exemption from the vaccination rule.¹⁷⁰

One should note that *Hicks*, *Cheema*, and *Sherr* all involve individuals who identify with religions represented by a small percentage of the American population. Clearly laws are less likely to conflict with the religious beliefs of individuals who are represented by a majority. For example, if a majority of American people were required to carry knives for religious reasons, such a practice would likely be the societal norm and students would not need an exception to the rule. As the following cases show, the circumstances are similar in England; however, England will not grant exemptions unless there is no viable alternative.

¹⁶⁴ *Id.* at 890•91.

¹⁶⁵ 672 F. Supp. 81 (E.D.N.Y. 1987).

¹⁶⁶ *Id.* at 87.

¹⁶⁷ *Id.* at 88.

¹⁶⁸ *Id.* at 89•91.

¹⁶⁹ *Id.* at 93•94.

¹⁷⁰ *Id.* at 96•97. One of the plaintiffs admitted to joining a religious group with the sole purpose of obtaining an exemption. *Id.*

*D. R v. Head Teacher & Governors of Denbigh High School*¹⁷¹

Denbigh High School is in a “maintained secondary community school” that educates students aged eleven through sixteen.¹⁷² The school has students from twenty-one different ethnic groups, but the majority of students is Muslim.¹⁷³ The majority of the school officials is also Muslim, including the head teacher, Yasmin Bevan.¹⁷⁴

“The head teacher believes that school uniform plays an integral part in securing high and improving standards, serving the needs of a diverse community, promoting a positive sense of communal identity and avoiding manifest disparities of wealth and style.”¹⁷⁵ One of the uniform options, the shalwar kameeze, was approved by imams from local mosques as an appropriate form of modest dress for Muslim girls.¹⁷⁶ The school governors also approved certain headscarves.¹⁷⁷

Shabina was a Muslim girl and her family chose this particular school even though it was outside of her school district.¹⁷⁸ She knew about the dress code prior to entering the school, and she wore the uniform for two years before asking if she could wear a long coat-like garment called a jilbab, which covered “the contours of the female body.”¹⁷⁹ The assistant head teacher refused the request and sent Shabina home.¹⁸⁰ After that incident, the head teacher sent a letter home stating that the student was required to attend school in the appropriate uniform and that the Education Welfare Services (EWS) would be notified if she failed to attend school.¹⁸¹

The student claimed that the head teacher, the governors, and the LEA violated her human rights under the United Kingdom and European human rights law discussed above.¹⁸² Opinions were then gathered from various imams regarding the appropriate dress for Muslim girls.¹⁸³ Some stated that the shalwar kameeze did not provide the appropriate amount of coverage and others said that it was

¹⁷¹ (2006) UKHL 15, (2006) All ER 487.

¹⁷² *Id.* ¶ 3.

¹⁷³ *Id.*

¹⁷⁴ *Id.* ¶ 5.

¹⁷⁵ *Id.* ¶ 6.

¹⁷⁶ *Id.* ¶ 7.

¹⁷⁷ *Denbigh High School*, ¶ 7.

¹⁷⁸ *Id.* ¶ 9•10.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* ¶ 10.

¹⁸¹ *Id.* ¶ 11.

¹⁸² *Id.* ¶ 12.

¹⁸³ *Denbigh High School*, ¶ 13.

acceptable.¹⁸⁴ The head teacher “felt that adherence to the school uniform policy was necessary to promote inclusion and social cohesion, fearing that new variants would encourage the formation of groups or cliques identified by their clothing The school uniform had been designed to avoid the development of sub-groups identified by dress.”¹⁸⁵

The student further claimed that Denbigh High School limited her right to her religion or her beliefs under Article 9 of the European Convention for the Protection of Human Rights of 1950, and denied her the right to education under Article 2 of the First Protocol of the Convention.¹⁸⁶ Judge Bennett rejected Shabina’s claims at the first trial.¹⁸⁷ The Court of Appeal reversed the decision and the head teacher and the governors of Denbigh High School appealed.¹⁸⁸ Lord Bingham of Cornhill stated that Article 9 “protects both the right to hold a belief, which is absolute, and a right to manifest belief, which is qualified.”¹⁸⁹ The student in this case had a sincere religious belief, even if that belief changed as she matured.¹⁹⁰

Not all acts motivated by religious belief will be protected by Article 9. Such a determination depends on the circumstances of the case. In an employment context, the European Court of Human Rights will not find an interference with one’s right to manifest religious beliefs when a person voluntarily accepts employment that does not accommodate a specific religious practice and there are alternative options that do not present undue hardship or inconvenience.¹⁹¹ One case from Greece stated that Article 9 did not grant a Jehovah’s Witness an exemption from a disciplinary rule that required students to participate in a National Parade, when the rule was applied generally and in a neutral manner.¹⁹² Because the student in Denbigh chose a school that was outside of her district, she knew about the uniform policy before she started attending, and there were three other schools in the area which permitted the wearing of the jilbab,

¹⁸⁴ *Id.* ¶ 17.

¹⁸⁵ *Id.* ¶ 18.

¹⁸⁶ *Id.* ¶ 1.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Denbigh High School*, ¶ 36 (citing *Christian Educ. S. Afr. v. Minister of Educ.*, (2000) 9 BHRC 53 at 70).

¹⁹⁰ *Id.* ¶ 36.

¹⁹¹ *Id.* ¶ 23.

¹⁹² *Id.*

Lord Bingham concluded that there was *no* interference with the right to manifest religious beliefs.¹⁹³

To be justified, an interference must be prescribed by law and necessary for a specific democratic purpose.¹⁹⁴ A school uniform policy is not necessarily law, but it is prescribed by the school for a specific purpose.¹⁹⁵ Therefore, the school was justified in its actions and did not need to change its uniform policy.¹⁹⁶

Additionally, “Article 9 does not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing.”¹⁹⁷ Lord Hoffmann stated that the student could have gone to another school even though there would have been some inconvenience and, consequently, there was no infringement on the student’s rights under Article 9.¹⁹⁸ There is a statutory duty to provide education, but not at any school the individual chooses.¹⁹⁹ Parliament gave schools the right to impose regulations regarding uniforms because local government can better determine what is appropriate considering all of the circumstances.²⁰⁰ The manner in which the school created the regulations was not important because the substance of the regulations is more important than procedure.²⁰¹ Some additional policy considerations include “promot[ing] the ability of people of diverse races, religions, and cultures to live together in harmony.”²⁰²

*E. R v. Leeds City Council Education*²⁰³

In *Leeds*, nine students brought claims against their local education authority because the LEA refused to provide the students with transportation to the school of their choice.²⁰⁴ The claims were brought under the European Convention for Human Rights of 1950 and the Race Relations Act of 1976.²⁰⁵ All of the students were members of a Jewish community in Leeds, England, but were attending

¹⁹³ *Id.* ¶ 25.

¹⁹⁴ *Id.* ¶ 34.

¹⁹⁵ *Denbigh High School*, ¶ 34.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* ¶ 50.

¹⁹⁸ *Id.* ¶ 51.

¹⁹⁹ *Id.* ¶ 57.

²⁰⁰ *Id.* ¶ 62•63.

²⁰¹ *Denbigh High School*, ¶ 68.

²⁰² *Id.* ¶ 97.

²⁰³ [2005] EWHC 2495 (Admin.).

²⁰⁴ *Id.* ¶ 1.

²⁰⁵ *Id.* ¶ 3.

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schools in Manchester because their parents wanted them to receive a Jewish education.²⁰⁶

A Rabbi who testified on the students' behalf explained that, although Jewish law does not require the children to attend an orthodox Jewish school, he recommended that they attend such a school if possible because Jewish education would ensure that Jewish children remained within the faith and would also promote better citizenship.²⁰⁷ The Rabbi added that the city council did not provide a Jewish high school in Leeds, and although a Jewish studies center was created at the local high school, it had evolved into a multi-cultural center.²⁰⁸ As a result, parents who wanted their children to receive an orthodox Jewish education were forced to pay for transportation to the high school in Manchester.²⁰⁹

A provision in the free transportation policy states that students are eligible for free transportation if the school is outside of the Leeds area, a diocese designates the nearest appropriate school, and the school is more than three miles away from the student's home.²¹⁰ All of the other students who chose schools outside of Leeds travel between 3.4 and 5.9 miles, but the Jewish students wished to attend a school located 45 miles away.²¹¹ As in the American cases, students who live in Leeds and wish to attend a school elsewhere are likely to be motivated by sincere religious convictions.²¹² Furthermore, the district estimates that on average it spends approximately £363 per year for each student who is provided with free transportation, but it would have to pay an estimated £1554 per student to transport the Jewish students to Manchester.²¹³ Although only nine students are parties to this case, there are currently thirty-three students who travel to Manchester to receive an orthodox Jewish education.²¹⁴

The parties alleged that under the Education Act 1996, the LEA was required to provide such transportation.²¹⁵ The Queen's Bench

²⁰⁶ *Id.* ¶ 1, 4.

²⁰⁷ *Id.* ¶ 4.

²⁰⁸ *Id.*

²⁰⁹ *Leeds*, ¶ 4.

²¹⁰ *Id.* ¶ 9.

²¹¹ *Id.* ¶ 10.

²¹² *Id.* ¶ 11.

²¹³ *Id.* ¶ 13.

²¹⁴ *Id.*

²¹⁵ *Leeds*, ¶ 16. In England, parents are required to send children of compulsory school age to school. Education Act, 1996, c. 56, §7. The Education Act further provides that

[a] child shall not be taken to have failed to attend regularly at the school if the parent proves- (a) that the school at which the child is a

Division considered the following factors: the underlying reasons for the parental preference, the suitability of the chosen school, the suitability of an alternate school, various financial considerations, and other policy considerations enacted by the LEA.²¹⁶ Additionally, an LEA's decision not to provide free transportation to a student will not be reversed unless it is irrational.²¹⁷ Due to the cost associated with providing the students with free transportation to Manchester and the existence of a high school in Leeds which offered some Hebrew studies, the Queen's Bench Division refused to provide free transportation to the students.²¹⁸

One persuasive argument offered by the parents is that the transportation system is inherently discriminatory.²¹⁹ For Christian children, the LEA will consult with a local diocese, who specifies the closest suitable school.²²⁰ However, the LEA determined on its own that the closest suitable school for the Jewish children is a non-faith school in Leeds, "which offers Hebrew studies in years seven and eight, some Jewish assemblies, and Hebrew as a modern language."²²¹ The court agreed with the LEA that the free transportation program was not discriminatory because if a Jewish high school was located within a reasonable distance, then the LEA would have authorized the free transportation.²²² However, the court did not consider that there are many more Christian schools in England, so that Christian children are more likely to find a suitable school within a relatively close distance. Although the requested transportation services would cost the LEA a significant amount of money, the court should have considered that all of the Christian students were able to locate a suitable school within six miles of Leeds, but the closest Jewish high school was forty-five miles away.

Finally, the parents also asserted several claims under various provisions of the European Convention of Human Rights.²²³ The

registered pupil is not within walking distance of the child's home, and (b) that no suitable arrangements have been made by the local education authority . . . for any of the following- (i) his transport to and from the school.

Education Act, 1996, c. 444, § 4.

²¹⁶ *Leeds*, ¶ 18 (citing *R v. Dyfed County Council ex parte S*, [1944] ELR 320).

²¹⁷ *Id.* ¶ 17 (citing *R (Jones) v. Ceredigion County Council*, [2004] EWHC 1376 (Admin), [2004] ELR 506).

²¹⁸ *Id.* ¶ 19.

²¹⁹ *Id.* ¶ 21.

²²⁰ *Id.*

²²¹ *Id.* ¶ 26 (internal quotations omitted).

²²² *Leeds*, ¶ 28–29.

²²³ *Id.* ¶ 37.

most relevant claim was a violation of the right to practice one's religion asserted under Article 9 of the Convention.²²⁴ The court also rejected this argument stating that "Article 9 does not protect every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief."²²⁵ Further, the court held that there must be a material infringement on religious rights rather than a mere inconvenience on the manifestation of one's religious beliefs.²²⁶ Such a conclusion is clearly contrary to the delicate tone American courts use when analyzing Free Exercise cases.

One should notice that the claimants in this case asserted several claims under both the Education Act and the European Convention for Human Rights.²²⁷ However, neither one of these enactments appeared to trump the other, at least not within the judge's opinion. This is significantly different from the United States, where plaintiffs usually assert that one piece of legislation violates the supreme law of the land—the Constitution. Although England wishes to guarantee all of its citizens certain freedoms, judges can refuse to accommodate individuals simply based on prior precedent. Therefore, fewer exemptions seem to be granted in England because the plaintiffs have a harder time defining the right and demonstrating that there was a material violation.

V. CONCLUSION

The United States will grant students more exemptions for religious reasons than England because it is generally easier for an individual to assert his or her fundamental freedoms under the U.S. Constitution. Although the British system professes equality and freedom, it discriminates against minority religions because their needs are not inherently accommodated. Furthermore, as long as there are viable alternatives, British courts will not grant exemptions to students. However, most of the time, the alternatives do not entirely satisfy the student's needs.

²²⁴ *Id.* ¶ 37; *see supra* Part III.A.

²²⁵ *Id.* ¶ 39 (citing *Sahin v. Turkey*, [2004] ELR 520 (Eur. Ct. H.R.)).

²²⁶ *Id.* ¶ 40.

²²⁷ *Id.* ¶ 37.