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# Faithfully Enforcing the Religious Liberty Guarantees of the Northwest Territory States

*Allan W. Vestal\**

## I. INTRODUCTION

In 2001, the State of Wisconsin hired a new chaplain for its maximum-security prison.<sup>1</sup> The appointment was controversial because the new chaplain, the Reverend Jamyi Witch, was a Wiccan priestess.<sup>2</sup>

The chair of the General Assembly's Corrections and Courts Committee, future Wisconsin Governor and Republican presidential aspirant Scott Walker, objected to the appointment of a Wiccan chaplain.<sup>3</sup> One of his primary objections was based on his belief that Wicca is an "offensive" religion: "Witch's hiring raises both personal and political concerns. Not only does she practice a different religion than most of the inmates, she practices a religion that actually offends people of many other faiths, including Christians, Muslims and Jews."<sup>4</sup>

The leadership of the Wisconsin corrections system defended the appointment.<sup>5</sup> As the system's spokesperson observed: "Times have

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1. Doug Newhoff, *Wiccan Named Witch is New Chaplain of Wisconsin Prison*, MILWAUKEE J. SENTINEL (Dec. 9, 2001), [https://wcfcourier.com/b-wiccan-named-witch-is-new-chaplain-of-wisconsin-prison/article\\_c85229cd-90e4-57bb-a930-e74e74dcca41.html](https://wcfcourier.com/b-wiccan-named-witch-is-new-chaplain-of-wisconsin-prison/article_c85229cd-90e4-57bb-a930-e74e74dcca41.html).

2. *Id.*

3. Assemblyman Walker threatened an investigation: "I can't imagine that most of the inmates would feel particularly comfortable going to that individual . . . I would think, in some ways from a religious standpoint, it might actually put inmates in a position that talking to (a Wiccan) is contrary to what some of their own religious beliefs might be." Josh Israel, *Meet the 'Wiccan Witch' Who Took on Scott Walker*, THINKPROGRESS (Mar. 20, 2015), <https://thinkprogress.org/meet-the-wiccan-witch-who-took-on-scott-walker-e31240236b39/>.

4. *Id.*

5. Gary McCaughtry, the warden of the maximum-security prison to which Reverend Witch was appointed, defended the selection: "Basically, a lot of it has to do with the duties and character of the individual, and Jamyi is an outstandingly approachable person—somebody that

changed. It's not just Catholic and Protestant anymore."<sup>6</sup> In the end, perhaps unintentionally following the Wiccan precept "an it harm none, do what ye will,"<sup>7</sup> the controversy subsided.<sup>8</sup> Reverend Witch assumed her pastoral duties at the prison and served for a dozen years, although her tenure was not without controversy.<sup>9</sup>

Curiously, for one who advocated firing a state-employee prison chaplain based on her "offensive" religious beliefs, Assemblyman Walker cast himself as a champion of religious freedom: "I believe protecting religious freedom is inherent in our state constitution," he declared, "Heck, it's inherent in our U.S. Constitution."<sup>10</sup>

But of course, religious liberty is not merely "inherent" in the Wisconsin Constitution. As Assemblyman Walker might have learned by reading the document, firing Reverend Witch because of her Wiccan beliefs would arguably have violated at least three guarantees of the Wisconsin Constitution's Declaration of Rights. Section 18 guarantees "[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed."<sup>11</sup> It also guarantees, "nor shall . . . any preference be given by law to any religious establishments or modes of worship."<sup>12</sup> As to the employment of Reverend Witch as a state-employee prison chap-

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I wouldn't mind approaching on spiritual matters myself. If biases are present, it's a matter for us to work through those biases." Newhoff, *supra* note 1.

6. *Id.*

7. Translated as "as long as it doesn't hurt anybody, do whatever you want," the Wiccan Rede has been described as the only real rule in Wicca. Lisa Chamberlain, *Core Wiccan Beliefs: The Wiccan Rede*, WICCA LIVING, <http://wiccaliving.com/wiccan-rede/> (last visited Mar. 1, 2020).

8. Assemblyman Walker's witch hunt did not bear fruit: "Walker was unsuccessful in getting Witch removed from the position—his planned legislation never materialized and he left the legislature in early 2002." Israel, *supra* note 3.

9. In 2011, Reverend Witch was involved in what has been termed "a bizarre faux hostage scheme that involved allegations of sex with a prisoner behind a barricaded office door." Joe Watson, *Sex Assault Charges against Wiccan Ex-Prison Chaplain Dismissed*, PRISON LEGAL NEWS (Sept. 25, 2015), <https://www.prisonlegalnews.org/news/2015/sep/25/sex-assault-charges-against-wiccan-ex-prison-chaplain-dismissed/>. She was charged criminally, but the charges were eventually dropped. *Id.* Reverend Witch was dismissed from state employment in 2013 based in part on an allegation that she supplied opioids to the prisoner in the faux hostage situation. *Witch v. Dep't of Corr.*, Dec. No. 33855-A (Wis. Emp't Relations Comm'n, March 30, 2015), [http://werc.wi.gov/personnel\\_appeals/werc\\_2003\\_on/pa33855-A.pdf](http://werc.wi.gov/personnel_appeals/werc_2003_on/pa33855-A.pdf). She grieved the dismissal, but her claim was dismissed. *Id.*

10. *Walker's 'God' Flip Flop*, FITZWALKERSTAN (Apr. 6, 2015), <https://fitzwalkerstan.wordpress.com/tag/rev-jamyi-witch/> (last visited Jan. 29, 2020).

11. WIS. CONST. art. I, § 18.

12. *Id.*

lain, Section 19 provides “[n]o religious tests shall ever be required as a qualification for any office of public trust under the state.”<sup>13</sup>

Had Assemblyman Walker read the Wisconsin Constitution, he might have made another discovery, one that would have given him *legitimate* grounds for opposing the appointment of the Wiccan prison chaplain. For Wisconsin’s Constitution, like the constitutions of many states, contains religious liberty guarantees which are violated by the practice of having state-employee prison chaplains. Thus, although Reverend Witch’s hiring was not controversial at the time because of her status as a state employee (she became one of thirty-six chaplains employed by the Wisconsin corrections system),<sup>14</sup> it should have been.

Three provisions of the Wisconsin Constitution Declaration of Rights are potentially violated by the use of state funds to hire prison chaplains. The first is the compulsion guarantee, which forbids the use of state funds to support religious ministries. Wisconsin’s compulsion guarantee provides: “[N]or shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent.”<sup>15</sup>

The second provision potentially violated by having state-employee prison chaplains is the preference guarantee, which forbids the state from discrimination in the treatment of religions. Wisconsin’s preference guarantee provides: “[N]or shall . . . any preference be given by law to any religious establishments or modes of worship.”<sup>16</sup>

The third provision violated by state-employee prison chaplains is the Blaine amendment, which forbids the use of state funds to benefit religions. Wisconsin’s Blaine Amendment provides: “[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”<sup>17</sup>

Wisconsin is not alone in this conflict between state constitutional religious liberty guarantees and the practice of having state-employee prison chaplains. The Badger State was formed out of the Northwest Territory and shares a religious liberty heritage with the

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13. *Id.* at art. I, § 19.

14. Newhoff, *supra* note 1.

15. WIS. CONST. art. I, § 18.

16. *Id.*

17. *Id.*

eight other states—Illinois, Indiana, Iowa, Michigan, Minnesota, North Dakota, Ohio, and South Dakota—that were similarly created.<sup>18</sup> Eight of the nine Northwest Territory states have compulsion guarantees,<sup>19</sup> seven have preference guarantees,<sup>20</sup> and seven have Blaine amendments.<sup>21</sup> And all but one of the Northwest Territory states have state-employee prison chaplains.<sup>22</sup>

And, although this discussion focuses on the nine Northwest Territory states, the contradiction between state constitution religious liberty clauses and the practice of having state-employee prison chaplains is not limited to those states. Across the nation, the norm is to have state-employee prison chaplains. A 2012 study indicated that over 80% of prison chaplains are directly employed by states, while an additional 8% are employed by states as contractors.<sup>23</sup> At the same time, a substantial number of the forty-one non-Northwest-Territory states have religious liberty provisions that could ground a challenge to the practice of having state-employee chaplains. Nineteen of the forty-one states have compulsion clauses in their current constitutions.<sup>24</sup> Twenty-one of the forty-one states have preference clauses in their current constitutions.<sup>25</sup> Twenty-five of the forty-one states have

18. Allan W. Vestal, *"No person . . . Shall ever be Molested on Account of his Mode of Worship or Religious Sentiments . . .": The Northwest Ordinance of 1787 and Strader v. Graham*, 102 MARQ. L. REV. 1087 (2019).

19. ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; IOWA CONST. art. I, § 3; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; OHIO CONST. art. I, § 7; S.D. CONST. art. VI, § 3; and WIS. CONST. art. I, § 18.

20. ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; MINN. CONST. art. I, § 16; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; S.D. CONST. art. VI, § 3; and WIS. CONST. art. I, § 18.

21. ILL. CONST. art. X, § 3; IND. CONST. art. I, § 6; MICH. CONST. art. VIII, § 2; MINN. CONST. art. I, § 16, art. XIII, § 2; N.D. CONST. art. VIII, § 5; S.D. CONST. art. VI, § 3; and WIS. CONST. art. I, § 18.

22. *See infra* notes 70-78.

23. *Religion in Prisons - A 50-State Survey of Prison Chaplains; Profile of State Prison Chaplains*, PEW RES. CTR. (March 22, 2012), [www.pewforum.org/2012/03/22/prison-chaplains-profile/](http://www.pewforum.org/2012/03/22/prison-chaplains-profile/) ("About eight-in-ten report that they are employed directly by a state correctional system (81%). Other arrangements include working as a contractor (8%), working for a private prison management firm (5%) or working through a religious organization (5%).").

24. ALA. CONST. art. I, § 3; ARK. CONST. art. 2, § 24; COLO. CONST. art. II, § 4; DEL. CONST. art. I, § 1; IDAHO CONST. art. I, § 4; KAN. CONST. BILL OF RIGHTS, § 7; KY. CONST. BILL OF RIGHTS, § 5; MD. CONST. DECLARATION OF RIGHTS, art. 36; MO. CONST. art. I, § 6; NEB. CONST. art. I, § 4; N.J. CONST. art. I, § 4; N.M. CONST. art. III, § 11; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; VT. CONST. ch. I, art. 3; VA. CONST. art. I, § 16; and W.VA. CONST. art. III, § 15.

25. ALA. CONST. art. I, § 3; ARK. CONST. art. 2, § 24; CAL. CONST. art. I, § 4; COLO.

Blaine amendments in their current constitutions.<sup>26</sup> I focus on the nine Northwest Territory states simply to illustrate the larger situation.

The following discussion first traces how—and why—the religious liberty guarantees of the Northwest Territory states differ from the Establishment Clause of the Federal Constitution. Next, the discussion turns to the compulsion guarantees of the Northwest Territory states. I argue that these provisions are incompatible with having state-employee prison chaplains. I then turn to the preference guarantees of the Northwest Territory states. I argue that these provisions as well are incompatible with having state-employee prison chaplains. The discussion then briefly looks at the Blaine amendments. Whether these provisions are incompatible with having state-employee prison chaplains depends on the precise wording of the provisions. I then review the single case from the courts of the Northwest Territory states addressing whether the practice of having state-employee prison chaplains can be reconciled with the religious liberty guarantees of the applicable state constitutions. The discussion then turns to the one Northwest Territory state, South Dakota, which provides prison pastoral services without violating its religious liberty provisions. I conclude with several observations as to what is really at issue in this situation, and a suggestion as to how the courts could faithfully interpret these state constitution religious liberty guarantees.

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CONST. art. II, § 4; DEL. CONST. art. I, § 1; IDAHO CONST. art. I, § 4; KAN. CONST. BILL OF RIGHTS, § 7; KY. CONST. BILL OF RIGHTS, § 5; ME. CONST. art. I, § 3; MISS. CONST. art. 3, § 18; MO. CONST. art. I, § 7; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.J. CONST. art. I, § 4; N.M. CONST. art. II, § 11; PA. CONST. art. I, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; VA. CONST. art. I, § 16; W.VA. CONST. art. III, § 15; and WYO. CONST. art. I, § 18.

26. Some twenty-five non-Northwest Territory states have Blaine amendments, although the number is approximate and subject to classification differences. Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 123 n.32 (2000). ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. II, § 12; CAL. CONST. art. IX, § 8; COLO. CONST. art. V, § 34, art. IX, 7; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 2, para. VII; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; KY. CONST. § 189; MASS. CONST. art. XVIII, § 2 (as amended by Article XLVI of the Amendments, November 6, 1917); MO. CONST. art. IX, § 8; MONT. CONST. art. X, § 6; NEB. CONST. art. VII, § 11; N.H. CONST. pt. 2d, art. 83; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; OKLA. CONST. art. II, § 5; OR. CONST. art. I, § 5; PA. CONST. art. III, §§ 15, 29; S.C. CONST. art. XI, § 4; TEX. CONST. art. I, § 7; UTAH CONST. arts. I, § 4, X, § 9; WASH. CONST. art. I, § 11; and WYO. CONST. art. I, § 19.

## II. THE ESTABLISHMENT ROAD NOT TAKEN: HOW AND WHY STATES ADOPTED COMPULSION CLAUSES, PREFERENCE CLAUSES, AND BLAINE AMENDMENTS IN LIEU OF COPYING THE FEDERAL ESTABLISHMENT CLAUSE

Although the Northwest Territory was created under the Articles of Confederation by passage of the Northwest Ordinance of 1787,<sup>27</sup> the nine Northwest Territory states were admitted to the Union following ratification of the Federal Constitution.<sup>28</sup> In writing the religious liberty provisions of their state constitutions, one might have expected the drafters to model the religious liberty provisions of those state constitutions on the First Amendment of the Federal Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>29</sup> But they did not. While all nine Northwest Territory states included a free-exercise guarantee in their initial constitutions,<sup>30</sup> only one—Iowa—copied the establishment guarantee, and then with a significant addition.<sup>31</sup>

The reason the Northwest Territory states did not follow the establishment formulation of the First Amendment is understandable. When the citizens assembled to write the initial constitutions of the Northwest Territory states, the religious landscape of the nation was very different than it had been at the time the Establishment Clause was drafted. And it was different in ways that made the establishment of a single state church inconceivable.

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27. Ordinance of 1787: The Northwest Territorial Government, *reprinted in* 1 U.S.C. at LV (2006), <https://perma.cc/QFU9-6Q5G>.

28. The ninth state to ratify the Constitution was New Hampshire on June 21, 1788. The first Northwest Territory state to be admitted to the Union was Ohio in 1803. An Act to Enable the People of the Eastern Division of the Territory Northwest of the River Ohio to form a Constitution and State Government, and for the Admission of Such into the Union, on Equal Footing with the Original States, and for Other Purposes, ch. 40, 1802 Stat. 173. An omission in the original congressional action was corrected 150 years later. Joint Resolution for Admitting the State of Ohio into the Union, Pub. L. 83-204, 67 Stat. 407 (1953).

29. U.S. CONST. amend. I.

30. ILL. CONST. of 1818, art. VIII, § 3; IND. CONST. of 1816, art. I, § 3; IOWA CONST. of 1844, art. II, § 3; MICH. CONST. of 1835, art. I, § 4; MINN. CONST. of 1857, art. I, § 16; N.D. CONST. of 1889, art. I, § 3; OHIO CONST. of 1802, art. VIII, § 3; S.D. CONST. of 1889, art. VI, § 3; and WIS. CONST. of 1848, art. I, § 18.

31. IOWA CONST. of 1846, art. I, § 3 (“The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry.”).

When the Northwest Territory states were drafting their initial constitutions—from Ohio in 1803 to the Dakotas in 1889—the nation was in a period of great religious change. The United States was in the Second Great Awakening, the Protestant religious revival which began in 1790 and lasted for the next sixty years.<sup>32</sup> The movement represented a romantic counter to the rationalism of the Age of Reason and saw a dramatic increase in church attendance—especially among denominations that had not been the beneficiaries of establishment under the old regime—and an explosion in the number of religious sects.<sup>33</sup> Religion was no longer narrow and hierarchical: it had become individual and democratic.<sup>34</sup> Charles Eliot Norton, editor of the *North American Review* explained,

The relation between God and the soul is original for every man. His religion must be his own. No two men think of God alike. No man or men can tell me what I must think of him. If I am pure of heart, I see him, and know him;—& creeds are but fictions that have nothing to do with the truth.<sup>35</sup>

As a result of the Second Great Awakening, religion in the United States became voluntary and democratic. If every American could speak with God and know his or her own religious truth, if each person's understanding was as valid as every other person's, then there was no basis upon which any civil authority could legitimately discriminate among them. Nor could any civil authority legitimately force a citizen to participate in, or give support to, any religious program. This democratization of religion was a sea change from just a few years before.

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32. Allan W. Vestal, *"In the Name of Heaven, Don't Force Men to Hear Prayers": Religious Liberty and the Constitutions of Iowa*, 66 *DRAKE L. REV.* 355, 371-77 (2018).

33. *Id.* at 374.

34. *Id.* at 372-75.

35. JAMES TURNER, *WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA* 133 (1985) (quoting Charles Eliot Norton, "editor of the nation's most respected magazine, the *North American Review*," as he "spelled out his basic principle of belief for a Midwestern minister" in 1865).

A pamphleteer wrote at the time of the trial of Abner Kneeland, the last man imprisoned in the United States for blasphemy, describing the spirit of his contemporaries:

[T]he public . . . are a new race of young people, ardent, generous, liberal, moral people; and though we would not say that a majority of them are indifferent to the truths of the christian religion, or unbelievers in its dogmas, we do state it as our decided opinion, that a vast majority are disposed to have perfect freedom of thought and of discussion . . . [W]hen coercion and the power of the law, are called in support or to spread opinions, then will be seen the rising up of the liberal spirit of the age. This is the prevalent, existing feeling . . . .<sup>36</sup>

The voluntary and democratic character of religion in the United States was reflected in an evolution in the status of religious denominations. Early in the period when the Northwest Territory states were writing their constitutions and being admitted to the Union, the disestablishment of state religions was completed.

By the time the first Northwest Territory state was admitted to the Union—Ohio in 1803—only three of the original thirteen colonies had an official state church. Pennsylvania and Rhode Island never had established state churches.<sup>37</sup> Eight of the remaining eleven original colonies disestablished by the time of Ohio's entry into the Union—Delaware (1776), New Jersey (1776), North Carolina (1776), New York (1777), Virginia (1776-1779), Maryland (1785), South Carolina (1790), and Georgia (1798).<sup>38</sup>

The next Northwest Territory states admitted were Indiana in 1816,<sup>39</sup> and Illinois in 1818.<sup>40</sup> By 1819, Connecticut and New Hamp-

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36. A COSMOPOLITE, A REVIEW OF THE PROSECUTION AGAINST ABNER KNEELAND FOR BLASPHEMY 31 (1835).

37. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1457 (2004) ("Pennsylvania and Rhode Island can be put to one side as never having had establishments.").

38. *Id.* at 1457-1458.

39. An Act to Enable the People of Indiana Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States, ch. 57, 1816 Stat. 289.

40. An Act to Enable the People of Illinois Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States, ch. 67, 1818 Stat. 428.

shire had disestablished,<sup>41</sup> leaving only Massachusetts with some form of established religion among the original thirteen states. In Massachusetts, establishment lingered in a greatly weakened form that John Adams described as a “mild and equitable establishment of religion,”<sup>42</sup> until all vestiges of establishment were finally ended just as the next Northwest Territory state, Michigan, was admitted.<sup>43</sup>

As de Tocqueville wrote in 1835, the separation of church and state was complete. The disestablishment of American churches had been accomplished and the establishment issue was dead:

I found that all of these men differed among themselves only on the details, but all attributed the peaceful dominion that religion exercises in their country principally to the complete separation of Church and State. I am not afraid to assert that, during my visit in America, I did not meet a single man, priest or layman, who did not agree on this point.<sup>44</sup>

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41. Connecticut disestablished in 1818; New Hampshire the following year. Esbeck, *supra* note 37, at 1458. Not among the original thirteen colonies, Vermont disestablished in 1807. *Id.* Kentucky and Tennessee preceded Ohio into the Union, in 1792 and 1796 respectively. Both states entered the Union with constitutions which precluded establishment. KY. CONST. of 1792, art. XII, § III (“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship.”), and TENN. CONST. of 1796, art. XI, §3 (“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences’ that no man can of right be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent, that no human authority can in any case whatever Control or interfere with the rights of conscience; and that no preference shall ever be given by Law to any religious Establishments or modes of worship.”).

42. John Witte, Jr., “*A Most Mild and Equitable Establishment of Religion*” *John Adams and the Massachusetts Experiment*, 41 JOURNAL OF CHURCH AND STATE 213, 215 n.6 (1999). A COSMOPOLITE, *supra* note 36, at 19 (tracing history of disestablishment in Massachusetts); DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848 (Oxford University Press, 2007), at 164-165; and SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN (W.W. Norton & Company, 2005), at 188 ([A]fter 1815 “the [Massachusetts] reformers made their greatest gains in proposing expanded religious liberties, recommending an end to the existing religious test for officeholders and equalization of the distribution of local tax monies to Unitarians and Congregationalists.”).

43. An Act to Establish the Northern Boundary Line of the State of Ohio, and to Provide for the Admission of the State of Michigan into the Union upon the Conditions Therein Expressed, ch. 99, 1836 Stat. 49.

44. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA: IN TWO VOLUMES 480 (Eduardo Nolla, ed., 2012).

Thus, when the remaining Northwest Territory states were admitted—Iowa in 1846,<sup>45</sup> Wisconsin in 1848,<sup>46</sup> Minnesota in 1858,<sup>47</sup> and the Dakotas in 1889<sup>48</sup>—it was simply not within the contemplation of state constitution drafters that a state might establish an official church.

The drafters of the initial constitutions of the Northwest Territory states drafted new types of provisions to address the religious liberty problems their new state governments might realistically encounter. Might the state use public funds to support religious activities—not of a single established state church, but of any church or churches? Might the state treat some churches differently than others—not in the sense of establishing a single state church, but rather by treating some churches more favorably than others?

The drafters developed nuanced clauses in response to the situation in which they found themselves in the nineteenth century. Initially, they adopted two types of post-establishment religious liberty guarantees. Compulsion guarantees protected against citizens being compelled to participate in or support religious activities through taxes or otherwise. Preference guarantees protected against the state favoring one religion over another. Later, in the last quarter of the nineteenth century, many states adopted a third type of state constitutional religious provision, the Blaine Amendments. These provisions grew out of anti-Catholic bias and were an attempt to preclude the use of state funds to support Catholic schools.<sup>49</sup>

The compulsion and preference guarantees are not coextensive. A state action might violate the compulsion guarantee but not the preference guarantee. For example, a state could give \$1,000,000 out of the state treasury to every religious sect or denomination. Such an ac-

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45. An Act for the Admission of the State of Iowa into the Union, ch. 1, 1846 Stat. 117.

46. An Act for the Admission of the State of Wisconsin into the Union, ch. 50, 1848 Stat. 233.

47. An Act for the Admission of the State of Minnesota into the Union, ch. 31, 1858 Stat. 285.

48. An Act to Provide for the Division of Dakota into two States and to Enable the People of North Dakota, South Dakota, Montana, and Washington to Form Constitutions and State Governments and to be Admitted into the Union on an Equal Footing with the Original States, and to Make Donations of Public Lands to Such States, ch. 180, 25 Stat. 676, (1889).

49. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 558-65 (2003).

tion would violate the compulsion guarantee by using public funds to support ministries but would not violate the preference guarantee because the state gave money to all religious groups without preference. Or, a state action might violate the preference guarantee but not the compulsion guarantee. A state could enact a law declaring the Southern Baptist Convention to be the official church of the state. Such an action, without more, would not violate the compulsion guarantee because it would not require the expenditure of any state funds. It would violate the preference guarantee by giving a preference to Baptists over Catholics, Muslims, Presbyterians, Wiccans, Satanists, and all the rest. Or, a state action might violate both the compulsion guarantee and also the preference guarantee. For example, if a state provided a subsidy for Catholic schools but not for Muslim schools it would violate both religious liberty guarantees.

Eight of the nine Northwest Territory states—all but North Dakota—have compulsion guarantees in their state constitutions.<sup>50</sup> Seven of the nine—all but Iowa and Michigan—have preference guarantees.<sup>51</sup> Six of the Northwest Territory states—Illinois, Indiana, Minnesota, Ohio, South Dakota, and Wisconsin—have both.<sup>52</sup>

We look first at the compulsion guarantees, to see if having state-employee prison chaplains is permissible under these provisions.

### III. COMPULSION GUARANTEES AND STATE-EMPLOYEE PRISON CHAPLAINS

The nine Northwest Territory states drafted their initial constitutions between 1803 and 1889. Four of the states—Minnesota, North Dakota, South Dakota, and Wisconsin—are still governed by their original constitutions. The nine states have adopted a total of eighteen constitutions, the most recent being the Illinois constitution of 1970. All the Northwest Territory states but North Dakota have

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50. ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; IOWA CONST. art. I, § 3; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; OHIO CONST. art. I, § 7; S.D. CONST. art. VI, § 3; and WIS. CONST. art. I, § 18.

51. ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; MINN. CONST. art. I, § 16; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; S.D. CONST. art. VI, § 3; and WIS. CONST. art. I, § 18.

52. ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; MINN. CONST. art. I, § 16; OHIO CONST. art. I, § 7; S.D. CONST. art. VI, § 3; and WIS. CONST. art. I, § 18.

and always have had compulsion guarantees. Their provisions are remarkably uniform.

Illinois has had four constitutions; compulsion guarantees are found in all of them.<sup>53</sup> The current provision is, “[n]o person shall be required to attend or support any ministry or place of worship against his consent.”<sup>54</sup>

Indiana has had two constitutions; compulsion guarantees are found in both.<sup>55</sup> The current provision is, “no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.”<sup>56</sup>

Iowa has had two constitutions; compulsion guarantees are found in both.<sup>57</sup> The current provision is, “nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.”<sup>58</sup>

Michigan has had four constitutions; compulsion guarantees are found in all of them.<sup>59</sup> The current provision is, “No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion.”<sup>60</sup>

Minnesota has had one constitution; it contains a compulsion guarantee: “[N]or shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent.”<sup>61</sup>

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53. ILL. CONST. art. I, § 3; ILL. CONST. of 1870, art. II, § 3; ILL. CONST. of 1848, art. XIII, § 3; and ILL. CONST. of 1818, art. VIII, § 3. The first listed constitution, adopted in 1970, remains in effect.

54. ILL. CONST. art. I, § 3.

55. IND. CONST. art. I, § 4; and IND. CONST. of 1816, art. I, § 3. The first listed constitution, adopted in 1851, remains in effect.

56. IND. CONST. art. I, § 4.

57. IOWA CONST. art. I, § 3; IOWA CONST. of 1846, art. II, § 3. The first listed constitution, adopted in 1857, remains in effect.

58. IOWA CONST. art. I, § 3.

59. MICH. CONST. art. I, § 4; MICH. CONST. of 1908, art. II, § 3; MICH. CONST. of 1850, art. IV, § 39; and MICH. CONST. of 1835, art. I, § 4. The first listed constitution, adopted in 1963, remains in effect.

60. MICH. CONST. art. I, § 4.

61. MINN. CONST. art. I, § 16. Minnesota's constitution was adopted in 1857.

Ohio has had two constitutions; compulsion guarantees are found in both.<sup>62</sup> The current provision is, “No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent.”<sup>63</sup>

South Dakota has had one constitution; it contains a compulsion guarantee: “No person shall be compelled to attend or support any ministry or place of worship against his consent.”<sup>64</sup>

Wisconsin has had one constitution; it contains a compulsion guarantee: “[N]or shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent.”<sup>65</sup>

Under all of these compulsion guarantees, citizens are promised that they will not be compelled<sup>66</sup> to support<sup>67</sup> any ministry or minister<sup>68</sup> without the citizen’s consent.<sup>69</sup> All but one of the nine Northwest Territory states have state-employee prison chaplains: Illinois,<sup>70</sup> Indiana,<sup>71</sup> Iowa,<sup>72</sup> Michigan,<sup>73</sup> Minnesota,<sup>74</sup> North Dakota,<sup>75</sup> Ohio,<sup>76</sup>

62. OHIO CONST. art. I, § 7; OHIO CONST. of 1802, art. VIII, § 3. The first listed constitution, adopted in 1851, remains in effect.

63. OHIO CONST. art. I, § 7. For purposes of this analysis, it is assumed that compelling an Ohio taxpayer to support a minister or ministry would violate the compulsion guarantee protection against that taxpayer being “compelled to . . . support any place of worship, or maintain any form of worship, against his consent.” *Id.*

64. S.D. CONST. art. VI, § 3. South Dakota’s constitution was adopted in 1889.

65. WIS. CONST. art. I, § 18. Wisconsin’s constitution was adopted in 1848.

66. In place of “compelled,” Illinois substitutes “required.” ILL. CONST. art. I, § 3.

67. In place of “support,” Iowa substitutes “pay tithes, taxes, or other rates” for maintaining. IOWA CONST. art. I, § 3.

68. In place of “support any minister,” Ohio substitutes “support any place of worship, or maintain any form of worship.” OHIO CONST. art. I, § 7.

69. Iowa does not include the possibility of consent. IOWA CONST. art. I, § 3.

70. ILL. DEP’T OF CENT. MGMT. SERVS., *Class Specification, Chaplain I*, [https://www2.illinois.gov/sites/work/Documents/pdfs\\_specs/06901.pdf](https://www2.illinois.gov/sites/work/Documents/pdfs_specs/06901.pdf).

71. IND. ST. PERS. DEP’T, *Job Code Listing*, [https://www.in.gov/spd/files/job\\_titles.pdf](https://www.in.gov/spd/files/job_titles.pdf).

72. IOWA DEP’T OF ADMIN. SERVS., HUMAN RES. ENTERPRISE, 03310, CHAPLAIN (2009), [https://das.iowa.gov/sites/default/files/hr/documents/class\\_and\\_pay/JobClassDescriptions/Chaplain-03310.pdf](https://das.iowa.gov/sites/default/files/hr/documents/class_and_pay/JobClassDescriptions/Chaplain-03310.pdf).

73. MICH. CIVIL SERV. COMM’N, *Job Specification, Institution Chaplain*, [https://www.michigan.gov/documents/InstitutionChaplain\\_12737\\_7.pdf](https://www.michigan.gov/documents/InstitutionChaplain_12737_7.pdf).

74. MINN. DEP’T OF CORR., *Religious Programming*, (2018), [http://www.doc.state.mn.us/DocPolicy2/html/DPW\\_Display\\_TOC.asp?Opt=302.300.htm](http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=302.300.htm) (“Each facility has a trained and qualified facility chaplain available to oversee the reasonable delivery of religious services to all faith traditions.”); MINN. DEP’T OF CORR., *Minnesota Chaplain Position Description* (redacted copy supplied by the Minnesota Department of Corrections on file with the author).

and Wisconsin.<sup>77</sup> Among the Northwest Territory states, only South Dakota does not.<sup>78</sup> The citizens of eight of the nine states are compelled to pay taxes which are used to pay the salaries of state-employee prison chaplains. If prison chaplains are ministers, the practice of having state-employee prison chaplains violates the compulsion guarantees of these states.<sup>79</sup> In the remainder of this section, I argue that prison chaplains are ministers.

### *A. Prison Chaplains Are Ministers Because of How Their Job is Defined*

What did the drafters of these constitutions mean when they used the term “minister”? One indication is the definition of the term in a contemporaneous dictionary. The 1828 dictionary by Noah Webster defines “minister” as: “One who serves at the altar; one who performs sacerdotal duties; the pastor of a church, duly authorized or licensed to preach the gospel and administer the sacraments.”<sup>80</sup> Ministers, then, are individuals who perform sacred<sup>81</sup> or liturgical duties who are

75. N.D. HUMAN RES. MGMT. SERVS., *Class Description: Chaplain*, <https://www.nd.gov/omb/sites/omb/files/documents/state-employee/job-openings-comp/job-class-descriptions/4171.pdf>.

76. OHIO DIV. OF HUMAN RES., *Chaplain*, <https://das.ohio.gov/Divisions/Human-Resources/HRDClassSpec>.

77. WIS. DEP'T OF CORR., *Classification Title, Chaplain*, [https://wisc.jobs/public/print\\_view.asp?jobid=93354&annoid=93840](https://wisc.jobs/public/print_view.asp?jobid=93354&annoid=93840)

78. South Dakota provides pastoral services to prison inmates by relying on volunteers. *See infra* § VII (text accompanying footnotes 142 to 156).

79. It should be noted that all eight of the compulsion clauses are stated in the disjunctive: it violates the constitution to compel a citizen to support *either* a place of worship or a ministry. Thus, it is enough to prove a violation of the compulsion clauses that prison chaplains are ministers; one need not prove that the prisons themselves are places of worship (although one ought not concede the point). ILL. CONST. art. I, § 3 (“[S]upport any ministry or place of worship . . .”); IND. CONST. art. I, § 4 (“[S]upport . . . any place of worship, or to maintain any ministry . . .”); IOWA CONST. art. I, § 3. (“[P]ay . . . taxes . . . for building . . . places of worship, or the maintenance of any minister . . .”); MICH. CONST. art. I, § 4. (“[S]upport of any place of religious worship, or to pay . . . taxes . . . for the support of any minister . . .”); MINN. CONST. art. I, § 16. (“[S]upport any place of worship, or to maintain any religious . . . ministry . . .”); OHIO CONST. art. I, § 7. (“[S]upport any place of worship, or maintain any form of worship . . .”); S.D. CONST. art. VI, § 3. (“[S]upport any ministry or place of worship . . .”); and; WIS. CONST. art. I, § 18. (“[S]upport any place of worship, or to maintain any ministry . . .”).

80. *Minister*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); *see also, Ministry*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). *Sacerdotal*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (“Pertaining to priests or the priesthood; priestly . . .”).

81. *Sacred*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (“Holy;

in some way endorsed by a religious group. That prison chaplains are ministers is confirmed by looking at what they do, how they describe themselves, and how they are selected.

*B. Prison Chaplains Are Ministers Because of What They Do*

That prison chaplains are ministers is confirmed by looking at what they do.

As their duties are described in state regulations, prison chaplains officiate at religious ceremonies, administer religious sacraments, and engage in pastoral counselling. Given those duties, they are ministers by any reasonable definition of the term.

For example, the official Illinois job description for the state-employee prison chaplain position, a “Chaplain I” in that state’s nomenclature, is representative of the group.<sup>82</sup> As to the distinguishing features of the work, the regulations provide:

Under general direction, conducts a program of religious activity at a state institution; counsels with patients, inmates, employees, families and other individuals; coordinates religious program with and participates or cooperates in clinical and rehabilitative programs at a state institution; interprets institutional programs, purposes and problems to the public by addressing interested groups; works and cooperates with representatives of faiths interested in ministering to members of their faith within the institution; conducts educational ministry for the instruction and training of others.<sup>83</sup>

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pertaining to God or to his worship; separated from common secular uses and consecrated to God and his service . . . . Relating to religion or the worship of God; used for religious purposes . . . .”).

82. DEP’T OF CENT. MGMT. SERVS., *supra* note 70.

83. *Id.* at 1.

As “illustrative examples” of the chaplain's work, the regulations provide that the chaplain, among other activities:

Conducts religious services for patients, inmates, residents and employees; administers sacraments and other religious rites; conducts funerals and offers religious instruction. Counsels and advises inmates and patients on spiritual matters. Maintains individual religious records and prepares reports on inmates' and patients' progress . . . . [P]rocur[es] choir and other religious music. Works and cooperates with representatives of other faiths who conduct a religious ministry at the institution . . . .<sup>84</sup>

Thus, in Illinois, state-employee chaplains conduct religious activities, conduct religious services, administer sacraments and religious rites, offer religious instruction, and counsel and advise on spiritual matters. In other words, they are ministers. The activities of state-employee chaplains in the other seven Northwest Territory states that have state-employee prison chaplains are consistent with the Illinois model.

Indiana defines “chaplain” as “[a]n endorsed religious professional employed by the Department of Correction to provide for the delivery of spiritual care and the management of a facility religious services program.”<sup>85</sup>

Iowa's administrative rules stipulate that a chaplain “[p]rovides professional pastoral care to institutional residents through counseling and conducting worship services; performs related work as required.”<sup>86</sup> Under the rules, a chaplain “[p]lans and conducts religious worship services and administers religious rites” and “[p]lans and provides for religious education,” among other tasks.<sup>87</sup>

Michigan's administrative rules read that a state-employee chaplain “[p]rovides and coordinates pastoral care by bringing the resources of religion and spiritual strength to people dealing with meaning and values in living, unresolved grief, guilt and remorse, loss

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84. *Id.* at 1-2.

85. IND. DEP'T OF CORR., 01-03-101, MANUAL OF POLICIES AND PROCEDURES: THE DEVELOPMENT AND DELIVERY OF RELIGIOUS SERVICES 2 (2018), <https://www.in.gov/idoc/files/01-03-101%20Religious%20Services%201-1-2018.pdf>.

86. IOWA DEP'T OF ADMIN. SERVS., *supra* note 72.

87. *Id.*

of will to live, personal worth and hopelessness, etc.” “[p]lans and conducts religious services, including funerals, marriages, and any other services unique to the faith, where appropriate,” “[p]rovides emergency pastoral care at times of serious illness, death or disaster,” and “[m]onitors and coordinates religious education for residents,” among other duties.<sup>88</sup>

In Minnesota, the chaplain “must have a religious commitment,” and “is responsible to the Corrections Program Director and ecclesiastical officials.”<sup>89</sup> The Minnesota chaplain “responds to the spiritual/religious needs of offenders” in that he or she “coordinates and provides religious services,” and provides “pastoral care and counseling.”<sup>90</sup>

In North Dakota prison chaplains “provide pastoral care and counseling,” “[c]onduct worship services,” and “[c]ounsel and/or advise residents concerning spiritual matters.”<sup>91</sup>

The Ohio rule provides that: “[t]he purpose of the chaplain occupation is to provide worship services & religious education programs for inmates, consumers & residents of institutions.”<sup>92</sup> In addition to other tasks, in Ohio the state-employee chaplain: “[c]onducts worship services, sacramental observations & religious educational programs for consumers, inmates or residents of institutions (e.g., mental health, corrections), [and] plans & organizes sermons, bible studies & other chaplaincy programs.”<sup>93</sup>

In Wisconsin, a Department of Corrections chaplain “develops and directs institution religious/spiritual programs including Christian and non-Christian denominations. Provides religious worship services directly or through monitoring volunteer or contracted services of community-based religious leaders. Develops and implements religious counseling programs for the inmates.”<sup>94</sup>

88. MICH. CIVIL SERV. COMM’N, *supra* note 73.

89. MINN. DEP’T OF CORR., *supra* note 74.

90. *Id.*

91. N.D. HUMAN RES. MGMT. SERVS., *supra* note 75; *see also*, N.D. DEP’T OF CORR. & REHAB., INMATE HANDBOOK 55 (2013), <https://www.law.umich.edu/special/policyclearinghouse/Documents/North%20Dakota%20-%20Inmate%20Handbook.pdf> (Chaplains provide “religious services to the inmate population,” “provide spiritual teachings and lectures,” and make “religious studies, spiritual books, papers, and magazines” available to inmates.).

92. *Id.*

93. OHIO DIV. OF HUMAN RES., *supra* note 76.

94. WIS. DEP’T OF CORR., *supra* note 77.

Given the pastoral duties they are assigned, prison chaplains are ministers by any reasonable definition of the term.

*C. Prison Chaplains are Ministers Because of How They Describe Themselves.*

That prison chaplains are ministers is also confirmed by how they describe themselves. According to the American Correctional Chaplains Association (the “ACCA”), “correctional chaplains provide pastoral care to those who are disconnected from the general community by certain circumstances—in this case to those who are imprisoned . . . .”<sup>95</sup> The ACCA specifies that “[e]ach correctional chaplain is . . . a representative of his or her faith community” and that “[c]haplains perform Liturgical Duties for their own religious denominations.”<sup>96</sup> “Pastoral Counseling” is one of the “specific duties of correctional chaplains” identified by the group.<sup>97</sup>

*D. Prison Chaplains are Ministers Because of How They are Selected.*

That prison chaplains are ministers is also forcefully confirmed by how they are selected. To be appointed as a state-employee prison chaplain, an individual has to be authorized, approved, or endorsed by a religious sect. Illinois, for example, “[r]equires ordination or licensing by a recognized communion and [that the applicant] is duly authorized by appropriate authority of this denomination.”<sup>98</sup> All eight of the Northwest Territory states which have state-employee chaplains have such an endorsement requirement.<sup>99</sup> The ACCA provides

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95. *What Are Correctional Chaplains?*, AM. CORR. CHAPLAINS ASS’N, [https://www.correctionalchaplains.org/what\\_is\\_the\\_acca.htm#WHAT](https://www.correctionalchaplains.org/what_is_the_acca.htm#WHAT) (last visited Jan. 30, 2019).

96. *Id.*

97. *Id.*

98. DEP’T OF CENT. MGMT. SERVS., *supra* note 70, at 2.

99. The Illinois Administrative Code defines the position of chaplain in the Department of Corrections to be “an individual who is commissioned, licensed, ordained, or endorsed as required by the individual’s religious faith and with whom the facility has employed or contracted to conduct religious activities within a correctional facility.” ILL. ADMIN. CODE tit. 20, § 425.12 (1996), <http://www.ilga.gov/commission/jcar/admincode/020/020004250000120R.html>. The Indiana Department of Correction rules provide that “[t]he Staff Chaplain shall maintain the endorsement of his/her religious body as a condition for continuing employment as a Chaplain.” IND. DEP’T OF CORR., *supra* note 85, at 7. The Iowa administrative rules pro-

that each chaplain “is required to be endorsed by their denominational body in order to qualify as a chaplain.”<sup>100</sup> In its Code of Ethics, the group explains the relationship between the prison chaplain and his or her faith group:

Chaplains are those members who are ordained or have parallel designation, or otherwise vocationally identified, for correctional chaplaincy by their religious judicatory or its designated endorsing body representing the faith group. Chaplains are thus authorized for religious ministry within jails or prisons as designated representatives of the faith group.<sup>101</sup>

Consistent with the statement that prison chaplains are engaged in a “religious ministry,” the prison chaplain group repeatedly refers to the tasks of its members in terms of them engaging in “ministry.”<sup>102</sup> In other words, the way in which prison chaplains describe

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vide that “candidates for Chaplain positions must provide the appointing authority with demonstrated evidence (ecclesiastical endorsement or comparable verification) that the candidate is authorized by proper authority to perform ministerial functions within h/his religious denomination.” IOWA DEP’T OF ADMIN. SERVS., *supra* note 72. The Michigan rule requires that chaplains possess “[c]ertification or endorsement by the recognized endorsing body of the religious faith,” and further provides that “[c]ertain positions may require that only individuals with credentials in a particular religious faith be considered.” MICH. CIVIL SERV. COMM’N, *supra* note 73. The Minnesota rule requires that “[t]he Chaplain (Religious Coordinator) must have an endorsement by an established religious community.” MINN. DEP’T OF CORR., *supra* note 74. The North Dakota rule “[r]equires ordination, commissioning, licensing, or endorsement by a recognized religious community.” N.D. HUMAN RES. MGMT. SERVS., *supra* note 75. The Ohio rule requires a “[c]urrent ecclesiastical endorsement by denomination &/or ordination . . .” OHIO DIV. OF HUMAN RES., *supra* note 76. Wisconsin also requires an endorsement by a religious body in the form of “[d]ocumentation or a letter of endorsement . . . from an authority representing a faith community . . . [which confirms a prospective chaplain’s] affiliation with the religious organization.” WIS. DEP’T OF CORR., *supra* note 77.

100. AM. CORR. CHAPLAINS ASS’N, *supra* note 95.

101. *Id.* at *Code of Ethics: Principle V*.

102. *Id.* at *What are Correctional Chaplains?* (“[W]e also minister to the families of prisoners.”); *id.* at *Code of Ethics* (“ministry to all prisoners and staff” and “[s]uch ministry and outreach”); *id.* at *Code of Ethics: Principle I* (“All members are spiritual leaders . . . who participate in ministry to the incarcerated.”); *id.* at *Code of Ethics: Principle II* (“All members practice their ministry task as pastoral care providers through various religious activities” and “religious ministry in a correctional setting.”); *id.* at *Code of Ethics: Principle V* (“Chaplains are thus authorized for religious ministry within jails or prisons . . . .”); *id.* at *Code of Ethics: Principle VII* (“Members are responsible for effective ministry,” “[m]embers exercise their ministry,” “[m]embers conduct their ministry,” and “[c]haplains balance administrative duties with direct ministry . . . .”); *id.* at *Code of Ethics: Principle VIII* (“[M]ight discredit their ministry” and “responsible for ministry to prisoners regardless of religious beliefs or affiliation.”). The group also refers to its members as “clergy.” *Id.* at *Specific Duties of Correctional Chaplains*

their own activities confirms that state-employee prison chaplains are ministers.

Requiring that state-employee prison chaplains have an ongoing affiliation with and endorsement from a religious sect is distinguishable from, for example, an educational qualification that prison chaplains have an undergraduate degree in religion or theology. The endorsement requirement means the applicant has a continuing relationship with the religious sect. In other words, the endorsement requirement confirms that state-employee prison chaplains are ministers and that for their states to pay their salaries subsidizes the religious sects with which they are affiliated.

State-employee prison chaplains are ministers: they are part of the particular religious sect with which they are affiliated. Having state-employee prison chaplains violates the compulsion guarantees of Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, and Wisconsin. We turn now to an evaluation of whether having state-employee prison chaplains violates the preference guarantees of the various states.

#### IV. PREFERENCE GUARANTEES AND STATE-EMPLOYEE PRISON CHAPLAINS

The second type of religious liberty provision adopted by states entering the Union after the establishment threat passed guaranteed against the state favoring one religion over another. These are the “preference provisions,” an example of which is another Wisconsin clause: “[N]or shall . . . any preference be given by law to any religious establishments or modes of worship . . . .”<sup>103</sup> Seven of the nine Northwest Territory states—all but Iowa and Michigan—have preference clauses in their current constitutions.<sup>104</sup>

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(“advising other clergy”); *id.* at *Code of Ethics: III* (“clergy or those with parallel designation”).

103. WIS. CONST. art. I, § 18 (1848).

104. ILL. CONST. art. I, § 3 (“nor shall any preference be given by law to any religious denomination or mode of worship”); IND. CONST. art. I, § 4 (“No preference shall be given, by law, to any creed, religious society, or mode of worship . . . .”); MINN. CONST. art. I, § 16 (“nor shall . . . any preference be given by law to any religious establishment or mode of worship”); N.D. CONST. art. I, § 3 (“The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state . . . .”); OHIO CONST. art. I, § 7 (“no preference shall be given, by law, to any religious society”); S.D. CONST. art. VI, § 3 (“nor shall any preference be given by law to any religious establishment or

Having state-employee chaplains puts the states in the precarious position of choosing which religious sects should be favored with the subsidy of having its ministers employed by the state. The practice raises the possibility that states will categorically exclude certain religious sects from participation in the subsidy system. For example, when Wisconsin hired its first Wiccan prison chaplain, the warden of the prison defended the appointment.<sup>105</sup> But at the same time, the warden declared that there are limits on the faiths that could be represented in the ranks of state-employee chaplains: "Satanists" he declared, ". . . wouldn't be allowed to serve."<sup>106</sup> One might imagine that a Satanist inmate, knowing that she has the same free-exercise rights as her Episcopalian cellmate, might think that she should also have equivalent access to state-subsidized pastoral care.

Even if state officials do not as a matter of policy exclude disfavored sects from participating in the subsidy, it is inevitable that the state will not allocate resources to provide state-employee prison chaplains for every sect represented in the prison population. Those that are represented will be preferred over those that are not.

There is an expectation that a state-employee prison chaplain provide pastoral services for inmates from religions other than that with which he or she is affiliated. As Reverend Jamiy Witch, the Wisconsin Wiccan prison chaplain, described it: "My job is to help them connect with the divine however they see the divine."<sup>107</sup> But it must be acknowledged that having a minister of one's own denomination conduct a religious service has to be more fulfilling than having the same service conducted by a minister of a different denomination. For example, having a Satanist chaplain conduct a service for a Southern Baptist inmate cannot be as fulfilling for the inmate as having the same service conducted by a Baptist minister. And having a Catholic priest conduct a Jewish service cannot be as meaningful for the Jewish inmate as having the same service conducted by a rabbi.

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mode of worship"); and WIS. CONST. art. I, § 18 ("nor shall . . . any preference be given by law to any religious establishments or modes of worship").

105. Newhoff, *supra* note 1.

106. *Id.* The warden additionally said that "members of some violent cults, especially those associated with hate groups" also would not be allowed to serve as state-employee prison chaplains. Presumably, ministers from truly violent cults could be excluded from service based on concerns regarding institutional security.

107. Israel, *supra* note 3.

Even if a Catholic priest can go through the motions of leading a Hindu prayer, it evidences an impermissible preference by the state if Hindu inmates do not have a minister of their faith provided by the state while Catholic inmates do. Indeed, having state-employee prison chaplains representing some, but not all, religions is potentially an impermissible state preference in three ways. First, the inmate follower of a disfavored religion suffers from an impermissible preference when the state denies her a state-employee minister of her faith while providing one for her cellmate who is a follower of a favored religion. Second, the minister of a disfavored religion suffers from an impermissible preference when she is denied state employment as a prison chaplain because of her religious beliefs while the minister of a favored religion is hired. Third, the disfavored religious sect suffers from an impermissible preference when it is denied a state subsidy while the favored religious sect is infused with state funds.

#### V. THE BLAINE AMENDMENTS AND STATE-EMPLOYEE PRISON CHAPLAINS

The third way in which having state-employee prison chaplains may violate the constitutions of the Northwest Territory states arises from the Blaine amendments, state constitution provisions adopted starting in the last quarter of the nineteenth century designed to prevent the funding of Catholic schools.<sup>108</sup>

Seven of the nine Northwest Territory states—all but Iowa and Ohio—adopted Blaine amendments and retain them in their current constitutions.<sup>109</sup> Whether the practice of having state-employee prison chaplains violates the various Blaine amendments depends on the exact wording of the state constitution provisions.

Consistent with the objective of the Blaine amendments, three states frame their constitutional provisions in terms of aid to religious institutions or schools. Indiana provides that funds may not be ex-

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108. DeForrest, *supra* note 49, at 558-65.

109. ILL. CONST. art. X, § 3 (*see also*, ILL. CONST. art. VIII, § 3 (1870)); IND. CONST. art. I, § 6; MICH. CONST. art. VIII, § 2 (*see also*, MICH. CONST. art. I, § 5 (1908); MICH. CONST. art. IV, § 40 (1850); MICH. CONST. art. II, § 3 (1835)); MINN. CONST. art. I, § 16; *id.* art. XIII, § 2; N.D. CONST. art. VIII, § 5; S.D. CONST. art. VI, § 3; and WIS. CONST. art. I, § 18.

pendent “for the benefit of any religious or theological institution”<sup>110</sup>; Michigan guarantees against the use of public funds “directly or indirectly to aid or maintain any private denominational . . . school”;<sup>111</sup> and North Dakota prohibits the use of public funds “for the support of any sectarian school.”<sup>112</sup> Although the pastoral duties of prison chaplains are sometimes cast to include religious education,<sup>113</sup> these Blaine amendments would not seem a compelling basis upon which to base a challenge to state-employee prison chaplains.

Minnesota has a parallel provision relating to the use of public funds to support religious schools,<sup>114</sup> but it also has a provision which forbids the use of public funds “for the benefit of any religious societies.”<sup>115</sup> Similar broad-form Blaine amendment language is found in the constitutions of Illinois, which guarantees that the General Assembly shall not “make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose,”<sup>116</sup> South Dakota, which guarantees against the use of public funds “for the benefit of any sectarian or religious society or institution,”<sup>117</sup> and

110. IND. CONST. art. I, § 6 (“No money shall be drawn from the treasury, for the benefit of any religious or theological institution.”).

111. MICH. CONST. art. VIII, § 2 (“No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school.”).

112. N.D. CONST. art. VIII, § 5 (“No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.”).

113. Illinois provides that a prison chaplain “conducts educational ministry for the instruction and training of others.” DEP’T OF CENT. MGMT. SERVS., *supra* note 70, at 1. Iowa provides that a chaplain “[p]lans and provides for religious education.” IOWA DEP’T OF ADMIN. SERVS., *supra* note 72; Michigan stipulates that a chaplain “[m]onitors and coordinates religious education for residents.” MICH. CIVIL SERV. COMM’N, *supra* note 73; Ohio provides that chaplains “provide worship services & religious education programs for inmates, consumers & residents of institutions.” OHIO DEP’T OF ADMIN. SERVS., *supra* note 76.

114. MINN. CONST. art. XIII, § 2 (“In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.”).

115. *Id.* at art. I, § 16 (“[N]or shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.”).

116. ILL. CONST. art. X, § 3 (“Neither the General Assembly nor any county . . . shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatever . . .”).

117. S.D. CONST. art. VI, § 3 (“No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.”).

Wisconsin, which guarantees against the use of public funds “for the benefit of religious societies.”<sup>118</sup>

A credible additional challenge to the practice of providing state-employee prison chaplains could be based upon the Blaine amendment language in the constitutions of Illinois, Minnesota, and Wisconsin.<sup>119</sup>

## VI. JUDICIAL CONSIDERATION OF STATE-EMPLOYEE PRISON CHAPLAINS

It seems perfectly clear that state-employee prison chaplains are ministers, and that the payment of their salaries by their respective states inures to the benefit of their particular religious sects. If this is true, then the practice of having state-employee prison chaplains violates the compulsion guarantees of the seven Northwest Territory states that have such chaplains and such religious liberty guarantees.

Six of the Northwest Territory states have preference guarantees and state-employee prison chaplains. In states where some religious sects have been excluded from participation in the prison chaplain subsidy, there are clear violations of the preference guarantee. Even in states which have avoided such categorical exclusions, the fact that some but not all religious sects have state-employee prison chaplains violates the preference guarantees.

In the three Northwest Territory states where the language of the Blaine Amendment covers having state-employee prison chaplains, the practice apparently violates the state constitution.

Given the straightforward constitutional prohibitions and the clear religious identity of the prison chaplains as ministers, it is perhaps curious that the issue has been litigated only once in the courts of the Northwest Territory states. The Supreme Court of Iowa faced the issue directly in 1976. It simply got the matter wrong.

In the 1976 case *Rudd v. Ray*, the Iowa Supreme Court held that, notwithstanding Iowa’s compulsion guarantee, it is permissible for the State of Iowa to use public funds to provide dedicated chapels and

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118. WIS. CONST. art. I, § 18 (“[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”).

119. The South Dakota Blaine Amendment would permit a credible challenge if the state had state-employee prison chaplains.

state-employee chaplains in the state's prisons.<sup>120</sup> In coming to this conclusion, the *Rudd* majority conflated the compulsion guarantee with the provision of the Iowa Constitution which tracks the Establishment Clause of the Federal Constitution: "The general assembly shall make no law respecting an establishment of religion . . ." <sup>121</sup> The *Rudd* majority observed:

Like similar provisions included in the constitution of all sister states Art. I., §3 has a common origin and parallel history with the First Amendment to the United States Constitution. All such provisions were aimed at disestablishment of state churches or, in cases of later western states such as Iowa, at preventing the establishment of state churches.<sup>122</sup>

The *Rudd* majority did concede that the language of the Iowa Constitution is different than that of the Federal Constitution in that Iowa includes *both* language that tracks the Establishment Clause and the compulsion guarantee. But, the majority asserted, the difference in language did not suggest that the framers of the state constitution intended anything other than a guarantee against a state church:

To the extent our provision differs from the First Amendment to the United States Constitution we think our framers were merely addressing the evils incident to the state church. The framers addressed and provided a defense against the evils incident to a state church, forced taxation to support the same, and the payment of ministers from taxation.<sup>123</sup>

The *Rudd* majority conflated the compulsion guarantee and the Establishment Clause, ignoring the plain meaning of the former and the unambiguous history of the latter. There are two historical threads that are helpful in understanding the error of the *Rudd* majority. One relates to the history of state constitution religious liberty

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120. *Rudd v. Ray*, 248 N.W.2d 125, 133 (Iowa, 1976).

121. IOWA CONST. art. I, § 3.

122. *Rudd*, 248 N.W.2d at 130.

123. *Id.* at 132.

adoptions between 1789 and the drafting of the Iowa compulsion provision in 1844. The other relates to the history of Establishment Clause jurisprudence during the same period.

First, the *Rudd* majority was grossly misleading in its presentation of the history of state constitutional adoptions of provisions paralleling the Federal Establishment Clause. The majority speaks of “provisions . . . aimed at disestablishment of state churches or, in the cases of later western states such as Iowa, at preventing the establishment of state churches.”<sup>124</sup> “[S]imilar provisions,” the *Rudd* majority asserts, were included in the constitution of all the “sister states.”<sup>125</sup> This is simply not true.

Following adoption of the First Amendment, fifteen states were admitted to the Union prior to Iowa in 1846. Fourteen of those fifteen states adopted free-exercise provisions modelled on the Free Exercise Clause of the First Amendment.<sup>126</sup> In contrast, only one—Alabama in 1819—tracked the Establishment Clause of the First Amendment.<sup>127</sup> Consistent with the analysis that establishment had been superseded by issues of compulsion and preference, eleven of the fifteen states admitted between 1789 and 1846 had compulsion provisions,<sup>128</sup> and eleven had preference provisions.<sup>129</sup>

Following the admission of Iowa to the Union in 1846, the admission of the next fifteen states extended to Wyoming in 1890. All

124. *Id.* at 130.

125. *Id.*

126. See ALA. CONST. of 1819, art. I, § 7; ARK. CONST. of 1836, art. 2, § 3; FLA. CONST. of 1838, art. I, § 3; ILL. CONST. of 1818, art. VIII, § 3; IND. CONST. of 1816, art. I, § 3; KY. CONST. of 1792, art. XII, § III; ME. CONST. of 1820, art. I, § 3; MINN. CONST. of 1857, art. I, § 16; MISS. CONST. of 1817, art. I, § 3; MO. CONST. of 1820, art. XIII, § 4; OHIO CONST. of 1802, art. VIII, § 3; TENN. CONST. of 1835, art. I, § 3; TENN. CONST. of 1796, art. 11, § 3; TEX. CONST. of 1845, art. I, § 4; and VT. CONST. of 1793, ch. I, art. 3.

127. ALA. CONST. of 1819, art. I, § 7 (“There shall be no establishment of religion by law.”).

128. See ALA. CONST. of 1819, art. I, § 7; ARK. CONST. of 1836, art. 2, § 3; ILL. CONST. of 1818, art. VIII, § 3; IND. CONST. of 1816, art. I, § 3; KY. CONST. of 1792, art. XII, § III; MINN. CONST. of 1857, art. I, § 16; MO. CONST. of 1820, art. XIII, § 4; OHIO CONST. of 1802, art. VIII, § 3; TENN. CONST. of 1835, art. I, § 3; TENN. CONST. of 1796, art. XI, § 3; TEX. CONST. of 1845, art. I, § 4; and VT. CONST. of 1793, ch. I, art. 3.

129. See ALA. CONST. of 1819, art. I, § 7; ARK. CONST. of 1836, art. II, § 3; FLA. CONST. of 1838, art. I, § 3; ILL. CONST. of 1818, art. VIII, § 3; IND. CONST. of 1816, art. I, § 3; KY. CONST. of 1792, art. XII, § III; ME. CONST. of 1820, art. I, § 3; MISS. CONST. of 1817, art. I, § 3; OHIO CONST. of 1802, art. VIII, § 3; TENN. CONST. of 1835, art. I, § 3; TENN. CONST. of 1796, art. 11, § 3; and TEX. CONST. of 1845, art. I, § 4.

fifteen of those states adopted free-exercise provisions.<sup>130</sup> Not one of the fifteen tracked the Establishment Clause of the First Amendment. But nine of the fifteen had compulsion provisions<sup>131</sup> and thirteen had preference provisions.<sup>132</sup>

The admission of the last six states following Wyoming in 1890 presents a somewhat different picture. Following the earlier states, five of the six states—all but Arizona—adopted free-exercise provisions.<sup>133</sup> In a change from prior practice, three of the six tracked the Establishment Clause of the First Amendment.<sup>134</sup> All three are understandable. Because of its unique history with the Church of Jesus Christ of Latter-day Saints, Utah in 1895 was presumably seen by some as presenting a realistic establishment threat. Admitted in 1959, Alaska and Hawaii became states after the Establishment Clause jurisprudence ceased to be dormant. Among the final six states admitted to the Union only one—New Mexico—had either a compulsion provision or a preference provision, and it had both.<sup>135</sup>

Thus, far from the *Rudd* majority's claim that establishment clauses were included in the constitutions of all the sister states, only four states included an establishment clause as such in their initial constitutions.

130. See CAL. CONST. of 1849, art. I, § 4; COLO. CONST. of 1876, art. II, § 4; IDAHO CONST. of 1890, art. I, § 4; KAN. CONST. of 1861, Bill of Rights, § 7; MINN. CONST. of 1857, art. I, § 16; MONT. CONST. of 1889, art. III, § 4; NEV. CONST. OF 1864, art. I, § 4; NEB. CONST. of 1867, art. I, § 4; N.D. CONST. of 1889, art. I, § 3; OR. CONST. of 1859, art. I, §§ 2, 3; S.D. CONST. of 1889, art. VI, § 3; WASH. CONST. of 1889, art. I, § 11; W. VA. CONST. of 1863, art. I, § 9; WIS. CONST. of 1848, art. I, § 18; and WYO. CONST. of 1889, art. I, § 18.

131. See COLO. CONST. of 1876, art. II, § 4; IDAHO CONST. of 1890, art. I, § 4; KAN. CONST. of 1861, Bill of Rights, § 7; MINN. CONST. of 1857, art. I, § 16; MONT. CONST. of 1889, art. III, § 4; NEB. CONST. of 1867, art. I, § 4; S.D. CONST. of 1889, art. VI, § 3; W. VA. CONST. of 1863, art. I, § 9; and WIS. CONST. of 1848, art. I, § 18.

132. See CAL. CONST. of 1849, art. I, § 4; COLO. CONST. of 1876, art. II, § 4; IDAHO CONST. of 1890, art. I, § 4; KAN. CONST. of 1861, Bill of Rights, § 7; MINN. CONST. of 1857, art. I, § 16; MONT. CONST. of 1889, art. III, § 4; NEB. CONST. of 1867, art. I, § 4; NEV. CONST. of 1864, art. I, § 4; N.D. CONST. of 1889, art. I, § 3; S.D. CONST. of 1889, art. VI, § 3; W. VA. CONST. of 1863, art. I, § 9; WIS. CONST. of 1848, art. I, § 18; and WYO. CONST. of 1889, art. I, § 18.

133. See ALASKA CONST. art. I, § 4 (1959); HAW. CONST. art. I, § 4 (1959); N.M. CONST. art. II, § 11 (1911); OKLA. CONST. art. I, § 2 (1907); and UTAH CONST. art. I, § 4 (1895).

134. See ALASKA CONST. art. I, § 4 (1959) (“No law shall be made respecting an establishment of religion.”); HAW. CONST. art. I, § 4 (1959) (“No law shall be made respecting an establishment of religion.”); and UTAH CONST. art. I, § 4 (1895) (“The State shall make no law respecting an establishment of religion.”).

135. See N.M. CONST. art. II, § 13.

Second, the *Rudd* majority suggests that in 1844 establishment was a significant enough issue to warrant not only inclusion of the language of the Federal Establishment Clause, but also the inclusion of an entirely new provision, the compulsion guarantee, intended as a redundant defense against establishment. This hardly seems likely, as the establishment of a state religion had ceased to be a realistic prospect in the United States some two generations before the Iowa Constitution of 1844 was written. Or, in the alternative, is it possible that the inclusion in 1844 of language tracking the Establishment Clause was merely intended to tap into a rich body of then-existing Supreme Court case law which used establishment nomenclature to address much broader questions of religious liberty? Well, no, because no such body of Supreme Court case law existed at the time. Between the adoption of the First Amendment and the 1844 Iowa constitutional convention, the United States Supreme Court did not issue a single opinion construing the Establishment Clause. Indeed, the first United States Supreme Court case interpreting the Establishment Clause in any depth would not be decided for more than a century *after* the Iowa constitution was adopted: *Everson v. Board of Education of Ewing Township*, decided in 1947, which incorporated the Establishment Clause as to the states.<sup>136</sup>

*Rudd* was in error because the majority opinion was based upon a fundamental misreading of American religious and political history. The Establishment Clause of the Federal Constitution and the compulsion clause of the Iowa Constitution mean very different things because they were drafted in response to very different situations. To treat the compulsion guarantee as mere restatement of the Establishment Clause is to ignore important currents of American history.

The error of the *Rudd* majority was particularly egregious because the Iowa Supreme Court had correctly interpreted that state's compulsion guarantee six decades earlier, in the 1918 Iowa Supreme Court case of *Knowlton v. Baumhover*.<sup>137</sup> In that case, Chief Justice Silas Weaver, writing for the court, correctly and succinctly explained the meaning of Iowa's state constitution compulsion guarantee by noting three things the religious liberty clauses of the Iowa constitution forbids: "In this state the Constitution (article 1, § 3) forbids the

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136. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

137. *Knowlton v. Baumhover*, 166 N.W. 202 (Iowa 1918).

establishment by law of any religion or interference with the free exercise thereof and all taxation for ecclesiastical support.”<sup>138</sup>

## VII. PROVIDING PRISON PASTORAL SERVICES CONSISTENT WITH STATE CONSTITUTION RELIGIOUS LIBERTY GUARANTEES

How might a state provide pastoral services in state prisons without violating its compulsion clause, preference clause, or Blaine amendment? South Dakota models how this can be done.

South Dakota has nine state correction facilities, housing around four thousand inmates.<sup>139</sup> It is a racially and ethnically diverse prison population,<sup>140</sup> in which seven major faith groups are represented: Asatru, Buddhism, Christianity, Islam, Judaism, Native American Spirituality, and Wicca.<sup>141</sup>

South Dakota makes religious resources available to inmates without having any state-employee prison chaplains. Instead, the state relies on volunteers working with the coordination of a state-employee who is not a minister, is not required to be endorsed by a religious body, and does not perform pastoral functions.<sup>142</sup> The state subsumes religious activities within the category of “cultural activi-

138. *Id.* at 207.

139. *Adult Corrections*, S. D. DEP’T OF CORR. (Dec. 31, 2019), <https://doc.sd.gov/documents/AdultPopulationDecember2019.pdf>. South Dakota’s correction facilities are primarily located in the more populous eastern portion of the state. The penitentiary for men and its annex are located in Sioux Falls; the prison for men is located in nearby Springfield. The prison for women is located in Pierre, in the center of the state. Work centers are located in Yankton and Sioux Falls in the east, Pierre in the center, and Rapid City in the west.

140. *Inmates by Race/Ethnicity*, S. D. DEP’T OF CORR. (Dec. 31, 2019), <https://doc.sd.gov/documents/InmatesbyRaceEthnicityDecember312019.pdf>. The Department of Corrections lists seven racial and ethnic categories among the corrections population: White (52.8%), Native American (34.9%), African American (7.5%), Hispanic (3.7%), Asian (<1%), Native Hawaiian/Pacific Isl. (<1%), and other (<1%). *See id.*

141. *Adult Corrections: Cultural Activities*, S. D. DEP’T OF CORR. <https://doc.sd.gov/adult/cultural.aspx> (last visited Jan. 31, 2020). (defining Asatru as “[b]elief in the ancient Norse (Norway) gods – gods of the Vikings”).

142. S. D. DEP’T OF CORR., *Cultural Affairs Coordinator, Job ID: 22461*, <https://www.linkedin.com/jobs/view/cultural-affairs-coordinator-at-state-of-south-dakota-1102984548>. The position announcement states: “The Cultural Affairs Coordinator manages all cultural and religious programming provided to inmates at the Prison.” *Id.* The listed duties are: coordinating the activities and functions of all religious and cultural volunteers; coordinates the scheduling and logistics of activities and functions; represents assigned areas at staff meetings; monitors and prepares reports of operation activities as required; develops, revises and enforces relevant policies and procedures; [and] facilities specific inmate programming.

ties”: “The [South Dakota Department of Corrections] recognizes the importance of cultural activities in the lives of those committed to our care. We offer opportunities for inmates to participate in both spiritual ceremonies and cultural activities . . . .”<sup>143</sup>

Access to religious resources is coordinated in each Department of Corrections facility by a state employee, the Cultural Affairs Coordinator, who “supervises volunteers involved in the various religious . . . programs.”<sup>144</sup> Volunteers are divided into two categories. A Pink Tag Religious Volunteer is “[a] person who provides worship and instruction, pastoral care and administration of religious activities.”<sup>145</sup> An Orange Tag Religious Volunteer is “[a] person who assists the Religious Volunteer.”<sup>146</sup> The training required of Pink Tag Religious Volunteers is more rigorous than that of the Orange Tag Religious Volunteers.<sup>147</sup> Both classes are said to represent their faith group, but none of the volunteers are required to be ordained.<sup>148</sup>

Religious activities are conducted “under the auspices of the institution's Cultural Activities Coordinator. . . .”<sup>149</sup> For example, inmates seeking spiritual counseling send a request to the Cultural Affairs Coordinator, who promptly lets the appropriate religious volunteer know of the request and works with the volunteer to make any required special arrangements.<sup>150</sup> The Cultural Affairs Coordinator also arranges for religious functions within the institution.<sup>151</sup> The administrative rules provide that “each approved group will receive compa-

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143. *Adult Corrections: Cultural Activities*, *supra* note 141.

144. *Policy 1.5.F.4 Inmate Religious and Cultural Activities*, S.D. DEP'T OF CORR. at III (April 8, 2019), <https://doc.sd.gov/documents/Inmate%20Religious%20and%20Cultural%20Activities5302019.pdf> (The applicable administrative rule defines the Cultural Activities Coordinator (CAC) position: “The designee appointed by the Warden to ensure coordination of all religious and cultural functions (activities and programming) offered to inmates. The position supervises volunteers involved in the various religious or cultural activities or program. Each institution shall have one staff member who is responsible to perform the duties of a CAC.”)

145. *Id.*

146. *Id.*

147. *Id.* Pink Tag Religious Volunteers are required to complete a training program and attend annual in-service training. Orange Tag Religious Volunteers need only have “completed requirements specified within the DOC Volunteer Handbook.”

148. *Id.* (The two groups “may or may not include persons who are ordained by the faith group they represent.”)

149. *Id.*

150. *Id.* at IV.2.

151. *Id.* at IV.3.

nable time and space for programming, including one weekly worship opportunity and opportunities to observe religious/cultural holidays/days of significance, as approved . . . .”<sup>152</sup>

Inmates in work release programs may be permitted to attend approved religious activities in the community.<sup>153</sup> To do so, the inmate submits a “Community Activity Attendance Application” to the facility’s Cultural Activities Coordinator, who reviews the requested activity and either approves or rejects the application.<sup>154</sup> There are limits on such community religious activities in terms of location, frequency, and duration.<sup>155</sup> The rules provide that “[a]s a tool to strengthen the re-entry process . . . [a]uthorized inmates may be provided the opportunity to attend approved religious and/or cultural activities and/or events in the community.”<sup>156</sup>

Volunteers from the religious faith communities are actively involved at South Dakota’s correctional facilities. For example, Chaplain Jan Voelzke was cited for her work as a volunteer:

Each Thursday, Voelzke leads a worship service at Mike Durfee State Prison for the Full Gospel Church, an inmate congregation that she founded eight years ago and serves as pastor. She also holds a worship service at the South Dakota Women’s Prison once a month, teaches six different classes for inmates throughout the week and provides Christmas Sacks for inmates at the Yankton Trusty Unit. Voelzke is also the chair of the chaplain advisory board that encourages communication between religious volunteers and the Department of Corrections.<sup>157</sup>

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152. *Id.* at IV.6.

153. *Id.* at IV.6.G.

154. *Id.* at IV.2.A. (stating that the “[r]eview shall include verifying the validity of the activity, location, time, length and level of supervision provided”).

155. *Id.* at IV.2.B., C. Without a waiver, the activities are to be within 25 miles, no longer than three hours, and not more frequently than once a week.

156. *Policy 1.5.F.3 Inmate Community Religious Activity Guidelines*, S.D. DEP’T OF CORR. at II (February 18, 2020), <https://doc.sd.gov/documents/about/policies/Inmate%20Community%20Religious%20Activity%20Guidelines.pdf>.

157. *Volunteer, Staff Members Awarded by DOC*, YANKTON DAILY PRESS & DAKOTAN, (June 21, 2004), [https://www.yankton.net/archive/article\\_c814bb06-ca97-5e65-8bb0-f8f8c0b9c3fe.html](https://www.yankton.net/archive/article_c814bb06-ca97-5e65-8bb0-f8f8c0b9c3fe.html).

At the same time as Chaplain Voelzke was honored, the Department of Corrections honored an additional group of volunteers: Pastor Michelle Bradley of the Church of Hope,<sup>158</sup> Father Bernie Ashfield of the Catholic Church,<sup>159</sup> Pastor Dave Christensen of the Saint Dymas Church,<sup>160</sup> Chaplain Regan Beauchamp of the Prison Lighthouse Fellowship,<sup>161</sup> and Mary Montoya, a Native American spiritual volunteer.<sup>162</sup>

Faith communities in South Dakota have organized to provide religious resources to the inmate population. St. Dymas, an Evangelical Lutheran Church in America congregation, was organized to serve the population of the men's facilities in Sioux Falls and Springfield.<sup>163</sup> The Church of Hope is an American Baptist Church serving the population of the South Dakota Women's Prison at Pierre.<sup>164</sup> The Anchor Prison Ministry was founded by a former state-employee prison chaplain after South Dakota evolved to a volunteer

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158. Press Release, South Dakota Department of Corrections, Volunteers, staff members receive honors from Department of Corrections (May 27, 2004), <https://doc.sd.gov/documents/news/2004/2004-5-27DOC Awards.pdf> ("Pastor Bradley is the pastor of the Church of Hope, an inmate congregation at the South Dakota Women's Prison in Pierre. She conducts church services and bible study groups, counsels inmates and helps maintain the inmate library. She began her volunteer work with the female inmates before the Women's Prison opened in 1997.").

159. *Id.* ("Father Ashfield has served as the Catholic priest at the Penitentiary and Jameson Annex since 1997. He has provided many activities for the Catholic inmates including Mass, bible study, Catholic Inquiry and Stations of the Cross during Lent. He also is the coordinator of the Residents Encounter Christ program, which is held three times a year.").

160. *Id.* ("Pastor Christenson began serving the Saint Dymas Church at the Penitentiary in 2000. He leads bible study, has organized a choir, leads weekly church services for inmates and has implemented Easter sunrise services and Candlelight services at Christmas. He also played a significant role in the re-furbishing of the Penitentiary chapel.").

161. *Id.* ("Beauchamp is the volunteer chaplain for the Prison Lighthouse Fellowship, an inmate congregation associated with the General Baptist Conference at the Jameson Annex of the Penitentiary. He has worked with DOC since 1991. Beauchamp maintains the chapel library at Jameson, leads bible study groups and a choir and also teaches guitar lessons to inmates. He also coordinates the Prison Fellowship program that meets twice a year at the penitentiary.").

162. *Id.* ("Montoya has volunteered her time to work with inmates at the Penitentiary for the past 15 years. She assists Native American inmates arrange Pow Wows, spiritual conferences and visits with medicine men and spiritual advisors. Montoya also works with the Family Connection, which provides a place for inmate family members to stay when they come to Sioux Falls.").

163. ST. DYMAS OF SOUTH DAKOTA, <http://www.stdymas.com> (last visited Jan. 29, 2020).

164. CHURCH OF HOPE, <https://www.churchofhopepierre.org/about> (last visited Jan. 29, 2020).

model.<sup>165</sup> The Cornerstone Prison Church is a Christian Reformed congregation at the men's penitentiary at Sioux Falls.<sup>166</sup> The Living Stone Prison Church is a congregation at the prison in Yankton.<sup>167</sup> The Asatru religious group at the penitentiary practices an ancient pagan religion.<sup>168</sup> South Dakota also has a group for Humanist inmates.<sup>169</sup>

Of course, the South Dakota system faces the challenges inherent in a voluntary model. For example, in the summer of 2018, the Native American inmates at the penitentiary at Sioux Falls ran low on firewood for their sweat lodge purification ceremonies.<sup>170</sup> It takes about a half-pickup truck load for each two-hour ceremony; the penitentiary regularly would schedule six sweat lodge ceremonies each week.<sup>171</sup> The group relies on contributions from the City of Sioux Falls and members of the community for the necessary firewood.<sup>172</sup> The South Dakota Department of Corrections has for a number of years allowed for the establishment of "Inmate Sweat Lodge Accounts" to facilitate private donations to support the operations of

165. The history of the Anchor Prison Ministry involves both the state-employee and volunteer models of prison pastoral services: "Since 1991, Regan and Becky Beauchamp have ministered together behind the walls of the South Dakota State Penitentiary in Sioux Falls, S.D. Regan serves as chaplain and Becky assists by playing the piano for worship services and serves as his administrative assistant. During the first four years of prison chaplaincy, Regan was employed by the State. In August 1995 the Governor cut funding because of a lawsuit filed by an inmate group of Wiccans (neopagans). Since September 1995 Regan and Becky have raised their own support to continue ministry." *Anchor Prison Ministry*, LOCAL PRAYERS, <https://www.localprayers.com/US/Sioux-Falls/1616660305264070/Anchor-Prison-Ministry>.

166. CORNERSTONE PRISON CHURCH, <https://www.cornerstonepcsd.org> (last visited Jan. 29, 2020).

167. LIVING STONE PRISON CHURCH, <https://livingstoneprisonchurch.com> (last visited Jan. 29, 2020).

168. Joe Alquist, *Pagan Worship Group Scrutinized in South Dakota Prison*, CAP. J. (May 17, 2017), [https://www.cajournal.com/news/pagan-worship-group-scrutinized-in-south-dakota-prison/article\\_4b20a2d6-3ea8-11e7-9ad0-d736ce3ac8dd.html](https://www.cajournal.com/news/pagan-worship-group-scrutinized-in-south-dakota-prison/article_4b20a2d6-3ea8-11e7-9ad0-d736ce3ac8dd.html).

169. See *South Dakota Prison Gets Freethought Books*, FREEDOM FROM RELIGION: FREETHOUGHT TODAY (Oct. 2017), <https://ffrf.org/publications/freethought-today/item/30892-south-dakota-prison-gets-freethought-books>; *Secular Groups Demand Equal Treatment for Humanist Prisoners*, FREEDOM FROM RELIGION FOUND (Feb. 27, 2018) <https://ffrf.org/news/news-releases/item/31840-secular-groups-demand-equal-treatment-for-humanist-prisoners>.

170. Danielle Ferguson, *Wood Shortage Could Threaten South Dakota Prison Sweat Lodge Ceremonies*, SIOUX FALLS ARGUS LEADER (Aug. 28, 2018), <https://www.argusleader.com/story/news/2018/08/28/south-dakota-state-penitentiary-inmates-wood-shortage-could-threaten-sweat-lodge-ceremonies/1078491002/>.

171. *Id.*

172. *Id.*

sweat lodges at their prison facilities.<sup>173</sup> But apparently the inmates rely on donations of firewood.<sup>174</sup> Because of slow firewood donations in the summer of 2018, the sweat lodge ceremonies were not held for several weeks. The prison official responsible for coordinating religious activities noted the challenge:

Cultural Activities Program Manager Tammy Mertens-Jones says the sweat lodge ceremonies help reduce tension. When there isn't enough wood, some inmates participate in a pipe ceremony instead. But Montoya compared that to saying the rosary instead of going to a full church service.<sup>175</sup>

In this situation, the voluntary system in South Dakota worked. The day after a newspaper story ran about the shortage of firewood for the sweat lodge ceremonies at the prison, South Dakotans called the prison with offers to donate wood.<sup>176</sup> As of the fall of 2019, volunteers have continued to donate ample supplies of wood for the sweat lodge.<sup>177</sup>

Neither does the volunteer model completely eliminate inmate litigation. For example, the South Dakota Department of Corrections was sued by inmates over a revision to the tobacco use policy.<sup>178</sup> Native American inmates unsuccessfully claimed that a reduction of the tobacco proportion in the tobacco and red willow bark mixture

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173. See *Policy 1.1.A.10: Inmate Sweat Lodge Accounts*, S.D. DEP'T OF CORR. (Feb. 27, 2019), <https://doc.sd.gov/documents/Inmate%20Sweat%20Lodge%20Accounts3222019.pdf>.

174. Anthony Wright, *Wood Shortage Hampers State Prison Sweat Lodge Ceremonies*, KSOO (Aug. 29, 2018), <https://ksoo.com/wood-shortage-hampers-state-prison-sweat-lodge-ceremonies/>.

175. *Id.*

176. E-mail from Danielle Ferguson, Sioux Falls Argus Leader, to Allan W. Vestal, Professor of Law, Drake University Law School (September 13, 2019, 10:57 CDT) (on file with author). Ms. Ferguson reported that the day after her article ran she received a note from a cultural volunteer at the penitentiary: "A load of wood is being delivered right now thanks to your article! I think we have received 6 phone calls this morning with offers of wood."

177. *Id.* Ms. Ferguson reported that she spoke with one of the inmates involved in the sweat lodge "a few weeks after that story ran, and then again a few months later . . . and both times he said they had received a good supply of wood and hadn't had to worry about it." Ms. Ferguson also noted that a volunteer at the prison who has been involved in the wood supply for the sweat lodge "said they are still in good shape as of [mid-September, 2019]. They have a pile of wood waiting to be cut."

178. *Native Am. Council of Tribes v. Weber*, 750 F.3d 742 (8th Cir. 2014).

allowed for their religious ceremonies substantially burdened their free exercise rights.<sup>179</sup>

It appears that South Dakota provides a thoughtful, well-managed, and responsive volunteer program to facilitate its inmates' free-exercise rights without violating the compulsion and preference guarantees of its constitution. It could be a model for other states.

### VIII. CONCLUSION

In the latter part of the nineteenth century, Reverend W.C. Gunn, a Baptist clergyman, was a state-employee "Chaplain and Teacher" at the Iowa State Penitentiary in Fort Madison.<sup>180</sup> In 1879, Reverend Gunn wrote a report to the warden of the prison in which he characterized his work as that of a minister: "In my labors here I have done just as I would do were I to take charge of a parish."<sup>181</sup> Thus, the employment of Reverend Gunn by the State of Iowa violated that state constitution's compulsion guarantee.

One of the successes upon which Reverend Gunn reported was the prison's Sunday school program. Reverend Gunn used Joseph M. Beck, a lay volunteer from Fort Madison, to oversee the Sunday school program at the prison.<sup>182</sup> Because Beck was a volunteer and not a state employee, the Sunday school program comported with the state constitution. It was fortuitous that the Sunday school program comported with the state constitution, because in addition to volunteering as head of the prison's Sunday school program, Beck was the Chief Justice of the Supreme Court of Iowa.<sup>183</sup>

In determining whether it violates the constitutions of the Northwest Territory states for them to have state-employee prison

179. *See id.*

180. Chaplain's Report (Oct. 1, 1879), 4 IOWA GENERAL ASSEMBLY, LEGISLATIVE DOCUMENTS SUBMITTED TO THE EIGHTEENTH GENERAL ASSEMBLY OF THE STATE OF IOWA 53 (1880). Reverend Gunn signed the report to the Legislature as: "W.C. Gunn, Chaplain and Teacher." *Id.* at 57. Editorial, *Church Leader is Dead*, SPOKESMAN REVIEW, April 16, 1937, <https://content.libraries.wsu.edu/digital/collection/p16866coll10/id/1335/rec/1>. Reverend Gunn served as the warden of the penitentiary from 1883 to 1885. Beulah White Walker, *History and Development of Fort Madison Penitentiary, 1839-1933* (June 1934) (unpublished M.A. thesis, University of Iowa) (on file with University of Iowa).

181. Chaplain's Report, *supra* note 180 at 53.

182. *Id.* at 54.

183. *Id.* Of course, not every aspect of the prison religious program evidenced constitutional sensitivity. Reverend Gunn proudly reported that "The rules of the prison require that a copy of the Holy Scriptures be placed in every cell." *Id.* at 54.

chaplains, it is helpful to be clear about what is at issue and what is not. Whether prison chaplains provide valuable pastoral services to inmates is not the question. I am perfectly willing to stipulate that some prisoners in some situations benefit from having access to pastoral services provided by prison chaplains.

Nor is the question at issue whether prison inmates have a free exercise right to pastoral services. Subject to reasonable institutional security concerns, inmates have a right to access pastoral services. Of course, it should be noted that inmates have that right to access prison chaplains precisely because the chaplains provide religious services that implicate the free-exercise rights of the inmates under the federal and state constitutions. That inmates have a free-exercise right to the services of prison chaplains confirms that the prison chaplains are indeed ministers.

What is at issue here is whether taxpayers should be required to subsidize religious sects by *paying* for access to such pastoral services with public funds.

In the end, whether the practice of having state-employee prison chaplains comports with state constitution compulsion and preference guarantees is not a difficult judgment if approached in good faith. The compulsion guarantees prohibit the states from collecting taxes to fund ministers. Prison chaplains are ministers. Ergo, the practice is unconstitutional. The preference guarantees prohibit the states from preferring one belief system on matters of religion over another. Either by explicitly excluding certain disfavored religions from participating in the state subsidies inherent in the system of state-employee prison chaplains, or by favoring some religions over others in allocating the subsidies, the practice of having state-employee prison chaplains violates the preference guarantees. Again, the practice is unconstitutional.<sup>184</sup>

It violates the compulsion and preference guarantees of the Northwest Territory states to have state-employee prison chaplains. We should follow the path advocated by Iowa Supreme Court Justice Harvey Uhlenhopp in his *Rudd* dissent: "Why not assume that the

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184. The Blaine Amendments present a third possible challenge to the practice of having state-employee prison chaplains, but this judgment is dependent on the precise wording of the clauses.

framers of the constitution, and the people who voted it into existence, meant exactly what it says?”<sup>185</sup>

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185. *Rudd v. Ray*, 248 N.W.2d 125, 136 (Iowa 1976) (Uhlenhopp, J., dissenting) (quoting *Lake County v. Rollins*, 130 U.S. 662, 670 (1889)).