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Free Exercise and Dress Codes: Toward More Consistent Protection of a Fundamental Right

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INTRODUCTION

The United States Constitution explicitly protects individuals' free exercise of religion.[1] This protection extends to both religiously motivated conduct and religious beliefs.[2] Religious beliefs are guaranteed absolutely;[3] resulting religiously motivated conduct, however, may be regulated by the government to safeguard society.[4]

Many religions regulate the attire adherents may wear; some also regulate the cutting of hair and beards.[5] State[6] and federal agencies often promulgate dress codes which conflict with these religious tenets. This conflict raises a constitutional question: Courts must determine when enforcement interests of a governmental agency are sufficient to override first amendment protections provided to religiously motivated conduct. In making this determination, courts have inconsistently protected this fundamental religious

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1. "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." U.S. CONST. amend. I (emphasis added) (emphasized portion hereinafter referred to as the "free exercise clause").

2. *See infra* notes 3-4 and accompanying text.

3. McCollom v. Board of Educ., 333 U.S. 203, 210 (1948) (any punishment for religious beliefs is prohibited) (citing Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947)); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (state may not regulate the individual's conscience or freedom to adhere to a religious organization or a religious belief).

4. The Supreme Court has consistently differentiated between religious belief and religious conduct. The state cannot interfere with religious belief, but the state may legitimately regulate religiously motivated conduct. *See, e.g.,* Reynolds v. United States, 98 U.S. 145 (1878) (federal law making bigamy a crime was upheld although bigamy was a tenet of Mormonism).

In *Cantwell,* Justice Roberts stated that although "[the freedom to believe] is absolute, . . . in the nature of things, the [freedom to act] cannot be. Conduct remains subject to regulation for the protection of society." 310 U.S. at 303-04.

In *Sherbert v. Verner,* Justice Brennan stated for the Court that "even when [an] action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." 374 U.S. 398, 403 (1963) (citations omitted).

5. Some examples include the wearing of yarmulkes by orthodox Jews, the wearing of plain clothing by Old Order Amish, the wearing of turbans by Sikhs, the wearing of prayer caps and robes by Muslims, the wearing of clerical collars by Catholic Priests, the proscription against cutting hair by Cherokee Indians, the wearing of beards by The Assembly of Yahweh, and the wearing of dredlocks by Rastafarians.

6. The Supreme Court declared the free exercise clause applicable to the states in *Cantwell.* 310 U.S. at 303. Throughout this note the term "state" will be used in its generic sense referencing any governmental agency.

right. Some courts have employed assorted tests,[7] while others have applied the same test unevenly.[8]

When constitutionally analyzing the conflict between state imposed dress codes and religiously motivated dress, courts should consistently apply one test. That test should consider both the government's interests in enforcing its dress code and the individual's fundamental right to practice the tenets of a sincerely held religion. Because freedom of religion is a fundamental right, the government should be required to satisfy a considerable burden before it can abridge this freedom.[9] "Strict scrutiny analysis,"[10] as articulated by the Supreme Court in *Sherbert v. Verner,*[11] *Wisconsin v. Yoder,*[12] and *Thomas v. Review Board of Indiana Employment Security Division,*[13] is the appropriate criterion.[14]

Section I of this Note examines the Supreme Court's strict scrutiny analyses in free exercise cases. Section II analyzes free exercise-dress code cases and the failure of courts to implement the appropriate test as defined by the

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7. *See, e.g.,* Goldman v. Weinberger, 106 S. Ct. 1310 (1986) (great deference to professional judgment of military authorities—free exercise not protected); Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982) (false conflict theory employed rather than using constitutional analysis—free exercise not protected); Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (compelling state interest-least restrictive means test used—free exercise protected); Cupit v. Baton Rouge Police Dep't, 277 So. 2d 454 (La. App. 1973) (rational basis test used—free exercise not protected).

8. *Compare* People v. Rodriguez, 424 N.Y.S.2d 600 (1979) *with* LaRocca v. Lane, 37 N.Y.2d 575, 376 N.Y.S.2d 93, 338 N.E.2d 606 (1975), *cert. denied,* 424 U.S. 968 (1976) (compelling state interest-least restrictive means test used in both cases; identical fact patterns but opposite results).

9. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (The first amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); McGowan v. Maryland, 366 U.S. 420, 562 (1960) (Douglas, J., dissenting) ("The institutions of our society are founded on the belief that there is an authority higher than the authority of the state; that there is a moral law which the state is powerless to alter; that the individual possesses rights, conferred by the creator, which government must respect."); United States v. C.I.O., 335 U.S. 106, 140 (1948) ("The presumption is against rather than in favor of the validity of legislation which on its face or in its application restricts the rights of conscience, expression, and assembly, protected by the First Amendment."); Sheffer, *The U.S. Supreme Court and the Free Exercise Clause: Are Standards of Adjudication Possible?,* 23 J. CHURCH ST., 533, 543-48 (1981).

> The fact is that without an excessive toleration of religious individuality (and its corresponding protection) all other substantive guarantees become less meaningful. In essence . . . the one "intention" of the Founding Fathers over which there is little dispute [is]: that the struggle for religious freedom was (and continues to be) the crux in the struggle for freedom in general.

Id. at 544.

See generally McConnell, *Accommodation of Religion,* 1985 SUP. CT. REV. 1 (stating that accommodation of religion is consistent with the political theory underlying the Constitution).

10. *See infra* note 17.

11. 374 U.S. 398.

12. 406 U.S. 205 (1972).

13. 450 U.S. 707 (1981).

14. The logic and holdings of *Sherbert* and *Thomas* were recently affirmed in Hobie v. Unemployment Appeals Comm'n of Fla., 107 S. Ct. 1046 (1987).

Supreme Court, a failure which often results in the inadequate protection of a fundamental religious right. This Note concludes that such a right can and should be protected in a more consistent fashion.

I. THE SUPREME COURT'S CURRENT STANDARD OF REVIEW IN FREE EXERCISE CASES

A. Case Law

The Supreme Court has held that free exercise of religion is a fundamental right.[15] Thus infringements on that right must be closely scrutinized.[16] In protecting other fundamental rights, the Court has utilized strict scrutiny analysis.[17] The landmark case adapting strict scrutiny to free exercise cases is *Sherbert v. Verner.*[18]

In *Sherbert,* South Carolina denied unemployment compensation to a claimant who had refused—in accordance with her religious beliefs—to work on Saturday. The Court held that such a denial violated the claimant's free exercise rights. In so determining, the Court adopted the "compelling state interest-least restrictive means" standard utilized for protecting other fundamental individual rights found in the first and fourteenth amendments.[19]

Nine years later, in *Wisconsin v. Yoder,*[20] the free exercise rights of Amish parents were found to outweigh the State's interests in enforcing compulsory education laws that would require Amish children who had graduated from the eighth grade to attend formal high school until age sixteen. The Court

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15. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (free exercise of religion is a fundamental right); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("[f]reedom of press, freedom of speech, and freedom of religion are in a preferred position" and must be protected to a greater degree than other rights).

16. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (more exacting scrutiny required for legislation that is within specific prohibitions of the Constitution, such as the first ten amendments). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2 (1978) (stating that due process clause protects the free exercise of religion).

17. Strict scrutiny analysis is usually a two-step process. The first step requires governmental regulations that burden fundamental rights to be found unconstitutional absent a compelling governmental interest in enforcement. The second step requires the regulation to be the least restrictive means of achieving the governments compelling interest.

Strict scrutiny analysis was developed in the context of equal protection controversies involving either suspect classifications or fundamental liberties. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Virginia Bd. of Educ., 383 U.S. 663 (1966).

In addition to equal protection cases, the Court has applied strict scrutiny analysis in substantive due process controversies involving fundamental rights other than those specifically listed in the Constitution. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973).

18. 374 U.S. 398 (1963).

19. *See supra* note 17.

20. 406 U.S. 205 (1972).

spoke of free exercise analysis in terms of a "balancing process"[21] without specific reference to the "compelling state interest" test. Although the Court used different language, the analysis was essentially the same.[22]

The Court used this same analysis in adjudicating a free exercise challenge in *Thomas v. Review Board of Indiana Employment Security Division.*[23] Thomas quit his job because his religious beliefs forbade him from directly participating in the production of military weapons. The Court held that Indiana's denial of unemployment compensation benefits to Thomas violated his first amendment right to the free exercise of religion. In delineating the standard by which the government can constitutionally burden practices protected by the free exercise clause, the Court used both the "compelling state interest" language of *Sherbert,* and the balancing language of *Yoder.*[24]

B. The Analysis

Under *Sherbert, Yoder,* and *Thomas,* free-exercise analysis requires three steps. First, the claimant must demonstrate that the state has burdened his religiously motivated conduct.[25] Implicit in this requirement is that the claimant must show his conduct is based on *sincere* religious beliefs.[26] Such

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21. *Id.* at 214.

22. The Court in *Yoder* satisfied the "compelling state interest" requirement by looking for "*a state interest of sufficient magnitude* to override the interest claiming protection under the Free Exercise Clause." *Id.* at 214 (emphasis added). As to the second half of the strict scrutiny analysis (least restrictive alternative), the Court stated that "only those interests of the highest order *and those not otherwise served* can overbalance legitimate claims to the free exercise of religion." *Id.* at 215 (emphasis added).

23. 450 U.S. 707 (1981).

24. "The state may justify an inroad on religious liberty by showing that it is the *least restrictive means of achieving some compelling state interest.* However, it is still true that the essence of all that has been said and written on the subject is that *only those interests of the highest order can overbalance legitimate claims to the free exercise of religion.*" *Id.* at 718 (citations omitted) (emphasis added). *See also* Goldman v. Weinberger, 106 S. Ct. 1310, 1325 (1986) (O'Connor, J., dissenting).

25. *See Thomas,* 450 U.S. at 713 ("Only beliefs rooted in religion are protected by the Free Exercise Clause . . . ."); Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.").

26. *Thomas,* 450 U.S. at 716 ("The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that Petitioner terminated his work because of an honest conviction that such work was forbidden by his religion."); *Yoder,* 406 U.S. at 215-16 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claim must be rooted in religious belief."). The Court did qualify acceptance of beliefs based on sincerity by stating that "[o]ne can . . . imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as to not be entitled to protection under the free exercise clause." *Id.* at 715-16. *See, e.g.,* State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) (conviction upheld for possession of marijuana and peyote, even though claimed to be sacramental substances), *cert. denied,* 386 U.S. 917 (1967). *See generally* L. TRIBE, *supra* note 16, § 14-11, at 862-64 (discussing what indicia of sincerity sufficient).

religious beliefs are not restricted to tenets central to a religious organization, nor need they be shared by all members of the claimant's faith.[27] The state's burden on the religious conduct is neither negated by characterizing it as "indirect" or "incidental,"[28] nor is it diminished by describing the burden as the loss of a "benefit" rather than the loss of a "right."[29]

Second, the government must demonstrate a "compelling state interest" in enforcing the challenged regulation. Historically, the government has satisfied the compelling state interest element only when religious conduct has "posed some substantial threat to public safety, peace, or order."[30] Recent cases, however, seem to recognize compelling interests in other areas[31] such as maintaining a sound tax system. To satisfy this requirement, the state must prove the importance of its interest with factual evidence; speculative assertions are not sufficient.[32]

Finally, the free exercise-strict scrutiny analysis requires the state "to demonstrate that no alternative form of regulation would [serve the state's interest] without infringing First Amendment rights."[33] This "least restrictive means" element allows the state to infringe upon religiously motivated conduct only if the state is able to demonstrate that the challenged regulation is the least restrictive alternative for accomplishing the state's compelling interest.[34] If there is an alternative method of serving the state's interest that

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27. *Thomas,* 450 U.S. at 715-16 ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."). In *Thomas,* the plaintiff, who was a Jehovah's Witness, found it violated his religious beliefs to contribute to the production of military arms, even though a fellow Jehovah's Witness, and co-employee, assured him that working on weapons was not unscriptural. *Id.* at 711.

28. *Yoder,* 406 U.S. at 221-29, 235; *Sherbert,* 374 U.S. at 404.

29. *Sherbert,* 374 U.S. at 407.

30. *Id.* at 403. For examples of state interests that override free exercise claims, see Jacobson v. Massachusetts, 197 U.S. 11 (1905) (state compulsory vaccination requirement upheld); People v. Handzik, 410 Ill. 295, 102 N.E.2d 340 (1951) (criminal prosecution of faith healer practicing medicine without a licence upheld), *cert. denied,* 343 U.S. 927 (1952); *Bullard,* 267 N.C. 599, 148 S.E.2d 565 (conviction upheld for possession of marijuana and peyote, although they were claimed to be sacramental substances). *But see* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813 (1964) (California Supreme Court found unconstitutional the conviction of American Indians for the religious use of peyote).

31. *See Goldman,* 106 S. Ct. 1310 (courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest); United States v. Lee, 455 U.S. 252 (1982) (broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with payment of taxes affords no basis for resisting the tax).

32. *See Thomas,* 450 U.S. at 719 (an exemption was required because there was no evidence in the record to support the state's alleged interests); *Sherbert,* 374 U.S. at 406-07.

33. *Sherbert,* 374 U.S. at 407. The Court in *Yoder* put it this way: "only those interests . . . not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. In *Thomas,* the Court phrased the requirement as "the least restrictive means of achieving a compelling state interest." 450 U.S. at 718. *See also* L. TRIBE, *supra* note 16, § 14-10.

34. *See Lee,* 455 U.S. 252 (holding that a statute requiring all employers to pay social

would not burden, or would lessen the burden on the claimant's free exercise of religion, the regulation is unconstitutional as applied to that claimant.[35]

II. EXAMINATION OF FREE EXERCISE-DRESS CODE CASES

A. Deference Granted in Military Context

To date, the only dress code case to reach the Supreme Court by way of the free exercise clause[36] is *Goldman v. Weinberger*.[37] Goldman, an Orthodox Jew, ordained Rabbi, and commissioned officer in the United States Air Force, brought suit against the Secretary of Defense and others. He asserted that Air Force dress-code regulations prevented him from wearing his yarmulke,[38] and thereby infringed upon his free exercise of religion in violation of the first amendment.[39] A divided Supreme Court[40] held that the first amendment permits the Air Force to regulate Goldman's attire, even though the effect is to prohibit him from the wearing a yarmulke as his religious beliefs require.[41]

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security taxes is constitutional as applied to Amish people despite Amish beliefs proscribing such payments, because after evaluating the goals and requirements of the Social Security system, the Court determined that there was no room for a less restrictive exemption that would not cripple the system); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (permitting state to require members of Krishna religion to confine distribution, sales, and solicitation activities to fixed location at state fair because limitation served substantial state interest in crowd control and there was no less intrusive means of accomplishing that interest).

35. *See, e.g.*, Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (holding that the state failed to achieve its interest in the physical development of children in the public schools in a manner least restrictive to the plaintiffs' rights when the plaintiffs objected to the wearing of "immodest apparel" in co-ed gym class).

36. For examples of dress code cases reaching the Court on other than free exercise grounds, see Kelly v. Johnson, 425 U.S. 238 (1976) (county hair grooming regulation held sufficiently rational to defeat a claim based on the liberty guarantee of the fourteenth amendment), and Tinker v. Johnson, 393 U.S. 503 (1969) (school regulation prohibiting the wearing of black armbands to protest the Viet Nam war held violative of first amendment free speech guarantee).

37. 106 S. Ct. 1310 (1986).

38. A yarmulke is a small skull cap worn by Orthodox and Conservative Jewish males.

39. The district court granted injunctive relief, Goldman v. Secretary of Defense, 530 F. Supp. 12 (D.D.C. 1981), and the defendant appealed. The court of appeals reversed, Goldman v. Secretary of Defense, 734 F.2d 1531 (D.C. Cir. 1984), and certiorari was granted, *sub nom.* Goldman v. Weinberger, 472 U.S. 1016 (1985).

For further analysis of the court of appeals decision, see Note, *Constitutional Law—The Clash Between the Free Exercise of Religion and the Military's Uniform Regulations*, 58 TEMP. L.Q. 195 (1985); Note, Goldman v. Secretary of Defense*: Restricting the Religious Rights of Military Servicemembers*, 34 AM. U.L. REV. 881 (1985).

40. Justice Rehnquist delivered the opinion of the Court, joined by Chief Justice Burger and Justices White, Powell, and Stevens. Justice Stevens filed a concurring opinion, joined by Justices White and Powell. Justice Brennan filed a dissenting opinion, joined by Justice Marshall. Justice Blackmun filed a dissenting opinion, and Justice O'Connor filed a dissenting opinion, joined by Justice Marshall.

41. *Goldman*, 106 S. Ct. at 1314.

The Court began its analysis by limiting its holding to military settings.[42] The majority opinion, however, failed to articulate or apply any test for free exercise claims in the military context. Writing for the Court, Justice Rehnquist simply granted "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[43] The Court deemed it sufficient that the regulations "reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity."[44] The danger of such deference is that the concept of military necessity is "seductively broad" and courts are often tempted to invoke military security to justify restrictions on constitutional rights.[45] One is left to speculate when military regulations become unreasonable or discriminatory, a point that was not lost on Justice O'Connor.

In her cogent dissent, Justice O'Connor took the Court to task for failing to apply the free exercise test that has evolved in Supreme Court case law over the past twenty-five years.[46] While conceding that the language used in the cases to define the test was not always identical, she recognized the common theme of the cases comprised the essential ingredients of strict scrutiny analysis:

> First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by

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42. *Id.* at 1313 ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").

43. *Id.* Courts increasingly are deferring to military "judgments" that restrict fundamental rights. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 354 (1980) (military requirement that Air Force member obtain approval from commander before circulating petition on Air Force base does not violate first amendment); Parker v. Levy, 417 U.S. 758, 760 (1974) (factors differentiating military from civilian society permit Congress to legislate with greater breadth and flexibility in first amendment free speech area); Carlson v. Schlesinger, 511 F.2d 1327, 1331-32 (D.C. Cir. 1975) (deference to military greatest in combat setting); Bitterman v. Secretary of Defense, 553 F. Supp. 719, 726 (D.D.C. 1982) (military regulation prohibiting variance in uniform does not violate free exercise of religion). *But see* Zillman & Imwinkelreid, *Constitutional Rights and Military Necessity: Reflections on the Society Apart,* 51 NOTRE DAME LAW. 396, 435 (1976) (easy deference to arguments of military uniqueness is not a satisfactory judicial policy).

44. *Goldman,* 106 S. Ct. at 1314.

Requiring regulations to be "reasonable and evenhanded" might be viewed as a form of rational basis test. *See infra* notes 54, 70.

45. *Glines,* 444 U.S. at 369 (Brennan, J., dissenting).

46. *Goldman,* 106 S. Ct. at 1342 (O'Connor, J., dissenting). In the discussion, Justice O'Connor cited the following cases: United States v. Lee, 455 U.S. 252 (1982); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); and Sherbert v. Verner, 374 U.S. 398 (1963).

> showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served."[47]

She then justified applying strict scrutiny analysis to free exercise claims. She reasoned that "because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail."[48] Furthermore, she stressed, "since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual."[49]

There is no reason why these same principles should not apply in a military context: deference for the special role of the military can be a factor in determining whether the government has a "compelling interest."[50] If strict scrutiny analysis—as articulated by Justice O'Connor—had been applied to the facts of this case, relief would have been granted to Goldman.[51]

Unfortunately for Goldman, it is doubtful that his case was decided on its own facts, as evidenced by the following statement from Justice Stevens' concurring opinion: "I believe we must test the validity of the Air Force's rule not merely as it applies to Captain Goldman but also as it applies to all service personnel who have sincere religious beliefs that may conflict with one or more military commands."[52] It is likely that the Court did not want to subject the military establishment to the multitude of regulatory challenges that could easily follow a less deferential opinion.

The majority opinion in *Goldman,* contrasted with Justice O'Connor's dissent, illustrates the divergent outcomes which can result when different standards are applied to the same set of facts. Using the compelling state interest-least restrictive means standard would protect Goldman's free exercise rights. Applying a lesser standard abridged those rights. Unfortunately, the lower courts have seldom chosen to apply the strict scrutiny test, even in non-military dress-code cases.[53]

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47. *Goldman,* 106 S. Ct. at 1325 (O'Connor, J., dissenting).
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1326.
52. *Id.* at 1315. Does Justice Stevens' comment indicate a belief that servicemen have no *individual* rights?

It is interesting to note that legislation has been passed in both houses of Congress which would allow members of the armed forces to wear "neat and conservative" religious apparel. The legislation would effectively overturn *Goldman. See* 100th Cong., 1st Sess., 133 CONG. REC. 12,791-801 (1987).

53. For examples of military cases with similar fact patterns as *Goldman* where strict scrutiny analysis was applied, see *Bitterman,* 553 F. Supp. 719 (AFR 35-10—the Air Force's dress code—is the least intrusive means of achieving an important governmental interest); Sherwood v.

B. *Strict Scrutiny as Applied and Misapplied to Free Exercise-Dress Code Cases in a Civilian Context*

1. Application Versus Substitution

When faced with free exercise-dress code cases, some courts use analyses less demanding than strict scrutiny, such as the rational basis test.[54] Other courts substitute legal concepts from other branches of law to circumvent constitutional analysis.[55] Either practice is likely to result in less than adequate protection of free-exercise conduct. *Menora v. Illinois High School Association* is illustrative.[56]

Menora was a class action suit brought on behalf of male members of the Jewish faith to challenge the Illinois High School Association's (IHSA) rule prohibiting the wearing of headwear, including yarmulkes, during basketball games. The District Court for the Northern District of Illinois found that the plaintiffs had a sincere religious belief that they must wear headcoverings, even while playing basketball. The court also found that this

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Brown, 619 F.2d 47 (9th Cir. 1980) (Sikh sailor not allowed to wear turban, Navy's interest in safety was sufficient to meet the compelling need requirement and no less restrictive alternative exists).

The Supreme Court also has indicated a willingness to grant prison officials the same type of deference as was granted the military in *Goldman*. *See* Bell v. Wolfish, 441 U.S. 520 (1979) (federal courts must give great deference to prison administrators in matters essential to maintaining prison security, discipline, and operation). To find out how *Bell* has been applied to free exercise-prison dress code cases, see Rogers v. Scurr, 676 F.2d 1211 (8th Cir. 1982) (deference given to judgment of prison administrators in weighing the security interests of prison administrators against the free exercise rights of prisoners). *But cf.* Weaver v. Jago, 675 F.2d 116 (6th Cir. 1982) (state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or safety in order to establish that its interests are of the highest order).

54. For examples of how application of the rational basis test rather than strict scrutiny analysis affects the protection of free exercise rights, see Cupit v. Baton Rouge Police Dep't, 277 So. 2d 454 (La. App. 1973) (held that prohibition against wearing beards by police officers bore a rational relationship to the efficient operation of police department, and dismissal of officers who would not comply with the regulation because wearing beards was required by Assembly of Yahweh—their religious faith—did not result in deprivation of constitutional right to free exercise of religion). The problem with a rational basis test in a free exercise context is that it requires no proof that the rule actually furthers the state's interest, and fails to provide the high degree of protection from governmental interference which an individual's consitutional right to the free exercise of religion deserves. *See infra* note 70.

55. *See* Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir.), *cert. denied,* 459 U.S. 1156 (1983).

56. *Id.*

For further analysis of this case, see Note, *Inconsistent Judicial Protection of Religious Conduct: The Seventh Circuit Contributes to the Confusion in* Menora v. Illinois State High School Association, 32 DE PAUL L. REV. 433 (1983); Note, Menora v. Illinois High School Association*: Basketball Players' Free Exercise Rights Compromised—Technical Foul,* 1983 WIS. L. REV. 1487 (1983).

religious practice was burdened by the IHSA no-headwear rule because the rule forced students to choose between either observing their religious beliefs or playing interscholastic basketball.[57] In addition, it noted that for a number of years yarmulkes had been worn, secured with bobbypins, without any evidence of safety-related incidents.[58] Relying on the balancing principles set out in *Sherbert v. Verner*,[59] *Wisconsin v. Yoder*,[60] and *Thomas v. Review Board of Indiana Employment Security Division*,[61] the court stated as a matter of law that the safety risks posed by yarmulkes were totally speculative: the IHSA rule did not serve a compelling safety interest sufficient to overcome first amendment rights.[62] The court then granted the requested relief.[63]

The Seventh Circuit Court of Appeals vacated the judgment of the district court and remanded the case.[64] Judge Posner, writing for the majority of the court, concluded that the case should not be decided on constitutional grounds. Rather, Posner employed the concept of "false conflict."[65] Posner assumed that the "conflict" could be avoided by requiring the plaintiffs to devise a more secure method for attaching yarmulkes to their heads.[66] If the plaintiffs could alleviate the safety concerns which allegedly required the no-headwear rule, then the "indisputably sincere beliefs" of the plaintiffs should be accommodated. But, Posner stressed, if the IHSA refused the accommodation after its safety concerns had been relieved, the no-headwear rule would be "standing on constitutional quicksand,"[67] indicating the application of the balancing test would come out in favor of the plaintiffs.

Posner's "solution" has multiple flaws. Primary among them is that Posner fails to deal with the facts of the case as they came to the court.

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57. Menora v. Illinois High School Ass'n, 527 F. Supp. 637, 638-40 (N.D. Ill. 1981).
58. *Id.* at 642.
59. 374 U.S. 398.
60. 406 U.S. 205.
61. 450 U.S. 707.
62. *Menora*, 527 F. Supp. at 644-46.
63. *Id.* at 646-47.
64. *Menora*, 683 F.2d at 1036.
65. *Id.* at 1033. "False conflict" is a conflict of laws concept developed by Professor Brainard Currie. *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178. *See also* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). The function of the false conflict concept is to help courts determine which law to apply when multiple conflicting laws from competing jurisdictions could be equally applicable. This concept seeks to eliminate the perceived conflict by carefully and precisely defining the competing interests of each jurisdiction so as to reconcile the conflict. The "false conflict" is reconciled by demonstrating that only one jurisdiction is actually "interested," or by demonstrating that the two competing laws would reach similar results. In *Menora*, there was only one law applicable—the First Amendment to the Constitution—and there was no choice of law to be made. Therefore, resort to this conflict of laws doctrine was inappropriate.
66. *Menora*, 683 F.2d at 1035. Relying on the precedent of *Sherbert*, 374 U.S. at 407, it would appear that the *Menora* court erred by placing the burden of proposing an alternative method of promoting safety on the plaintiffs.
67. *Menora*, 683 F.2d at 1034.

The most significant fact ignored is that a conflict between the exercise of the plaintiff's religious beliefs and the IHSA no-headwear rule already existed.[68] The governing board of the IHSA already had made it clear that "the method of attachment [was] not a concern" and that "all headwear, other than headbands, is illegal regardless of the method of attachment."[69] In addition, Posner downplays the obvious burden the IHSA rule placed on the plaintiffs by misidentifying it as an exclusion from interscholastic basketball, rather than abridgement of the right to wear yarmulkes while playing basketball. As a result, the court is able to conclude: (1) that the rule "does not actually prohibit a religious observance but merely makes it more costly,"[70] and (2) that plaintiffs failed to prove that their rights were infringed.[71]

As Posner's "quicksand" comment indicates, the court would have reached a different result had it followed the Supreme Court's balancing mandate. *Menora* is analogous to *Sherbert.*[72] In *Sherbert,* the Court maintained that the interpretation given an unemployment statute by the Supreme Court of South Carolina "force[d] [the plaintiff] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [the plaintiff's] religion in order to accept work, on the other hand."[73] The Court found that such a choice placed an unconstitutional burden on the plaintiff's free exercise of religion.

Similarly, in *Menora,* the no-headwear rule forced the plaintiffs to choose between either following the precepts of their religion and forfeiting interscholastic basketball, or abandoning one of the precepts of their religion and participating in interscholastic basketball. Because such a choice directly interfered with the plaintiffs' free exercise rights, the Seventh Circuit should have considered whether a compelling state interest justified the burden

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68. "By putting the plaintiffs to a choice between 'the exercise of a first amendment right and participation in an otherwise public program,' IHSA's no-headwear rule has imposed a significant, albeit indirect, burden on religion." *Id.* at 1037 (Cudahy, J., dissenting) (quoting, in part, *Thomas,* 450 U.S. at 716).

69. *Id.* Assuming that the plaintiffs were able to devise a secure method of attaching their yarmulkes, Judge Posner's opinion effectively forbade the IHSA from continued adherence to the view that "all headwear, other than headbands, is illegal regardless of the method of attachment." *See supra* note 62 and accompanying text.

70. *Menora,* 683 F.2d at 1032.

Chief Justice Burger and Justices Powell and Rehnquist would probably agree with Judge Posner's conclusion, based on their plurality opinion in Bowen v. Roy, 106 S. Ct. 2147, 2155-56 (1986) (arguing that uniformly-applied neutral government regulations, that indirectly call for a choice between securing a governmental benefit and adherence to religious beliefs should be governed by a lesser standard (rational basis test) than governmental action that criminalizes religious conduct or compels conduct found objectionable for religious reasons). The rational basis test was rejected by a majority of the Court in *Bowen,* and again in Hobie v. Unemployment Appeals Comm'n of Fla., 107 S. Ct. 1046, 1049 (1987).

71. *Menora,* 683 F.2d at 1035.

72. 374 U.S. 398 (1963).

73. *Id.* at 404.

placed on the plaintiffs' religious rights.[74] Even though losing the opportunity to play high school basketball might be deemed a minimal burden on the plaintiffs, the state's alleged safety interests were, in reality, non-existent.[75] Thus, any balancing of interests favors the plaintiffs.

Even if the purported safety interests behind the IHSA's no-headwear rule could legitimately be deemed "compelling," the rule as written and applied was not narrowly drawn; it was not the least restrictive means to serve the "safety interests" of IHSA. For example, the rule could have prohibited only insecurely fastened headwear rather than all headwear, or it could have proscribed all headwear except for securely fastened religious headwear. Thus, the Seventh Circuit should have affirmed the relief granted the plaintiffs by the District Court.

The District Court's treatment of *Menora* again demonstrates how applying the Supreme Court's free exercise-strict scrutiny analysis increased the protections afforded free exercise rights. And, as evidenced by the Posner opinion, failure to apply the test diminishes that protection.

2. Partial Application Versus Full Application

Incomplete application of strict scrutiny analysis can deprive free exercise claimants of their constitutional rights. Sometimes courts stop the analysis after determining that the state agency involved has a "compelling interest" in enforcing its rule. When courts fail to consider whether a less restrictive alternative would adequately serve the states compelling interest, free-exercise claimants' rights can be needlessly abridged. *LaRocca v. Lane*[76] illustrates this problem.

In *LaRocca,* an attorney, who was also a Roman Catholic priest, brought a proceeding to prohibit a judge from requiring him to remove his clerical collar before appearing as defense counsel in a criminal jury trial. The lower court granted the petition,[77] but the appellate division reversed and dismissed the petition on the merits.[78] On appeal, the New York Court of Appeals held that the state's interest in according the criminal defendant and the state a fair trial outweighed any limitation on the priest's free exercise of religion.[79] In reaching this conclusion, the court allowed the plaintiff to demonstrate the sincerity of his belief. It recognized that requiring the priest

74. *Id.* at 403. *But see Bowen,* 106 S. Ct. at 2155-56 (plurality opinion of Burger, C.J., Powell, and Rehnquist, JJ.) (advocating the use of a rational basis test in situations like *Menora*). *See also supra* note 70.

75. *See supra* text accompanying notes 62, 69.

76. 37 N.Y.2d 575, 376 N.Y.S.2d 93, 338 N.E.2d 606 (1975), *cert. denied,* 424 U.S. 968 (1976).

77. LaRocca v. Lane, 77 Misc. 2d 123, 353 N.Y.S.2d 867 (1974).

78. LaRocca v. Lane, 47 A.D.2d 243, 366 N.Y.S.2d 456 (1975).

79. *LaRocca,* 37 N.Y.2d at 577-84, 376 N.Y.S.2d at 95-102, 338 N.E.2d at 608-13.

to remove his clerical collar necessarily limited his right to free exercise of religion.[80] The priest, therefore, satisfied the first element of the Supreme Court's three part free exercise test.[81]

With respect to the second element of the test—demonstrating a compelling state interest—[82] the court determined that the state had a "paramount duty to insure a fair and impartial trial."[83] The state feared that a clerical collar might stimulate religious prejudice which could taint a jury's objectivity to the extent that an unfair trial would result.[84] The state's interest in insuring a fair, impartial trial is sufficiently compelling to satisfy the second element.

The problem with *LaRocca* is that the court ceased its inquiry after determining that the state had a compelling interest. It failed to inquire whether forcing a priest to remove his clerical collar was the least restrictive means to achieve the state's compelling interest in preventing religious prejudice from tainting the jury.[85] The court's failure to apply the third segment of the test[86] resulted in the unnecessary abridgment of the plaintiff's free exercise rights. This is evidenced by *People v. Rodriguez,*[87] a case in which Reverend LaRocca continued the quest to practice law with clerical collar intact.

In *Rodriguez,* Reverend LaRocca sought a ruling *de novo* on the issue whether his wearing clerical garb would prevent a fair trial.[88] Following a discussion of stare decisis and an examination of recent Supreme Court case law,[89] the court determined a new hearing was appropriate.

Quoting from *Wisconsin v. Yoder,*[90] the court stressed that: "[T]he essence of all that has been said and written on the subject is that only those interests of the highest order and *those not otherwise served* can overbalance legitimate claims to the free exercise of religion."[91] The court determined that a properly conducted voir dire of a jury, to eliminate juror bias and insure a fair trial,

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80. *LaRocca,* 37 N.Y.2d at 584, 376 N.Y.S.2d at 102, 338 N.E.2d at 613.

81. *See supra* notes 25-29 and accompanying text.

82. *See supra* notes 30-32 and accompanying text.

83. *LaRocca,* 37 N.Y.2d at 584, 376 N.Y.S.2d at 102, 338 N.E.2d at 612-13.

84. One might argue that such speculative assertions were insufficient to demonstrate the importance of the state's interest in light of the Supreme Court's requirement of factual evidence. *See supra* note 32 and accompanying text.

85. *Cf.* Close-it Enters., Inc. v. Weinberger, 64 A.D.2d 686, 407 N.Y.S.2d 587 (1978) (potential jury prejudice can be taken care of through voir dire and court instructions to jury).

86. *See supra* notes 33-35 and accompanying text.

87. 101 Misc. 2d 536, 424 N.Y.S.2d 600 (1979).

88. *Rodriguez,* 101 Misc. 2d at 539, 424 N.Y.S.2d at 602.

89. The court discussed McDaniel v. Paty, 435 U.S. 618 (1978) (free exercise rights unconstitutionally burdened by Tennessee law barring ministers or priests from serving as delegates to state constitution conventions).

90. 406 U.S. at 215.

91. *Rodriguez,* 101 Misc. 2d at 540, 424 N.Y.S.2d at 603 (emphasis added).

was a sufficient and viable alternative to the forced removal of the clerical collar.[92] Therefore, prohibiting Reverend LaRocca from wearing his clerical collar in court violated the priest's constitutional right to the free exercise of religion.[93] The manifest lesson from these two cases is that courts must completely apply strict scrutiny analysis to fully protect free exercise rights.

3. Application Versus Disregard

Free exercise rights can go unprotected when courts choose to ignore completely the tests mandated by the United States Supreme Court. *Cooper v. Eugene School District No. 4J* demonstrates this problem.[94] Cooper was a tenured special education teacher in the Eugene, Oregon Public Schools. She married a Sikh, took his religion, and changed her name to Karta Kaur Khalsa. As required by her new faith, Cooper donned a white turban and, at times, wore white clothing while teaching her sixth and eighth grade classes. She explained these changes to her students and the school staff.

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92. *Rodriguez*, 101 Misc. 2d at 541-48, 424 N.Y.S.2d at 603-08.

93. Unfortunately, on further appeal the appellate division overturned *Rodriguez*, and in a conclusory statement wrote that the court of appeals decision in *LaRocca* was dispositive of the issue. Gold v. McShane, 74 A.D.2d 860, 426 N.Y.S.2d 504 (1980). *But cf. Closit*, 64 A.D.2d 686, 407 N.Y.S.2d 587 (defendant's free exercise right to wear a yarmulke in court was not outweighed by right of all parties to a fair trial where potential jury prejudice could be taken care of through voir dire and court instructions to the jury).

94. 301 Or. 358, 723 P.2d 298 (1986), *appeal dismissed*, 107 S. Ct. 1597 (1987). The Supreme Court, without written opinion, dismissed Cooper's appeal "for want of a substantial federal question." Justices Brennan, Marshall, and O'Connor dissented on the grounds that the Court should have heard full arguments.

In a well reasoned brief to the Supreme Court, Appellant presented the following questions:

> 1. Whether the Oregon statutes impermissibly infringe on appellant's right to the free exercise of her religious belief in violation of the First Amendment of the Constitution of the United States, or is the statutory proscription against the wearing of religious dress mandated by the establishment clause of the First Amendment.
>
> 2. Whether the statutes in question are invalid because impermissibly vague or overly broad.
>
> 3. Whether the application of the statutes to appellant deny her the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.
>
> 4. Whether the statutes in question violate Title VII of the Civil Rights Act of 1964 and are thus invalid.

Brief for Appellant, Cooper v. Eugene School Dist. No. 4J, 107 S. Ct. 1597 (1987). With reference to question number four, the United States Department of Justice has filed suit in district court in Philadelphia seeking to enjoin the State of Pennsylvania and the Philadelphia Board of Education from enforcing a state statute that proscribes the wearing of religious garb by teachers. Delores Reardon, a former teacher in the Philadelphia Public School System, says she was denied teaching assignments in 1984 because she wore a headpiece which she believed was required by her Islamic faith. The Justice Department contends that the Pennsylvania state law conflicts with Title VII of the Civil Rights Act of 1964, which requires employers to make reasonable accommodations to workers on the basis of religion. Indiana Daily Student, May 5, 1987, at 4, col. 1.

Though warned that she faced suspension if she continued to violate an Oregon statute[95] proscribing the wearing of religious garb while teaching in the public schools, she continued to dress as the tenets of her faith required. Pursuant to statute,[96] Cooper was suspended from teaching and, after a hearing, her teaching certificate was revoked.

Cooper challenged the order on constitutional grounds.[97] The Oregon Court of Appeals assumed, "without deciding," that the establishment clause required a school district to prevent a teacher from teaching in religious dress.[98] It went on to determine, however, that revoking a teacher's certification was not the least restrictive means of preserving the state's religious neutrality, and set aside the revocation as an excessive sanction.[99] The court noted that the only other offenses which require revoking a teaching certificate were certain sex crimes involving minors.[100] The Superintendent appealed this decision to the Oregon Supreme Court. Judge Linde, writing for a unanimous court, reversed, concluding that the law, when properly interpreted, did not violate Oregon's guarantees of religions freedom.[101] The court also expressed a belief that the law, as interpreted, did not violate the federal first amendment.[102] It is imperative to note that the Oregon Supreme Court tested the constitutionality of the statute against the religious guarantees of the Oregon Constitution, not the first amendment of the Federal Constitution.[103] The court also maintained that formulas developed by the United States Supreme Court to deal with first amendment challenges did not apply to Oregon's comparable clauses,[104] and that the Oregon Supreme Court had "in fact . . . interpreted the meaning of [Oregon's religious guarantees] independently, sometimes with results contrary to those reached by the U.S. Supreme Court."[105]

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95. OR. REV. STAT. § 342.650 (1965) ("No teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher.").

96. *Id.* § 342.655 ("Any teacher violating [these] provisions . . . shall be suspended from employment by the district school board. The board shall report its action to the Superintendent of Public Instruction who shall revoke the teacher's teaching certificate.").

97. Cooper v. Eugene School Dist. No. 4J, 76 Or. App. 146, 708 P.2d 1161 (1985). Cooper maintained that the Oregon statutes were unconstitutional for overbreadth, for being impermissibly vague, and for infringing upon the free exercise of religion.

98. *Cooper*, 76 Or. App. at 152, 708 P.2d at 1166.

99. *Cooper*, 76 Or. App. at 153-55, 708 P.2d at 1166-68.

100. *Cooper*, 76 Or. App. at 155 n.7, 708 P.2d at 1167 n.7.

101. *Cooper*, 301 Or. at 381, 723 P.2d at 313.

102. *Id.*

103. *Cooper*, 301 Or. at 369-70, 723 P.2d at 306.

The Oregon court's decision not to apply federal constitutional analysis appears contrary to the dictates of the supremacy clause of the United States Constitution. U.S. CONST., art. VI, § 2. Even if the statute in question was found to satisfy Oregon's constitutional requirements, the inquiry cannot end there. Oregon and its courts are bound to uphold the federal constitution; if the Oregon statute fails to pass federal constitutional muster, it is irrelevant that the statute satisfies Oregon's constitution.

104. *Cooper*, 301 Or. at 369-70, 723 P.2d at 306.

105. *Cooper*, 301 Or. at 369-70, 723 P.2d at 307.

Judge Linde's opinion first recognizes that the statute at issue was "not a general regulation, neutral toward religion . . . . On the contrary, the religious significance of the teacher's dress [was] the specific target of [the] law."[106] The court stated the issue as one to be decided on free exercise grounds:[107]

> [W]hether [this] law infringes the right guaranteed to "all men" by Article I, Section 2, of the Oregon Constitution "to worship Almighty God according to the dictates of their own consciences," or "control[s] the free exercise, and enjoyment of religeous [sic] opinions, or interfere[s] with the rights of conscience" contrary to Article I, Section 3.[108]

Next the court announced the criterion to assess the validity of a law that specifically restricts religious dress: "If such a law is to be valid, it must be justified by a determination that religious dress necessarily contravenes the wearer's role or function at the time and place beyond any realistic means of accommodation."[109] Subsequently the opinion cites and discusses numerous cases dealing with public schools and state laws proscribing religious garb being worn by teachers. The court concluded that the cases, taken as a whole, support the proposition that "more than a teacher's religious dress is needed to show a forbidden sectarian influence in the classroom,"[110] but that a rule forbidding religious dress was "permissible to *avoid the appearance* of sectarian influence, favoritism, or official approval in the public school."[111]

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106. *Cooper*, 301 Or. at 368-69, 723 P.2d at 305-06.

107. The court's holding, however, was justified on establishment clause grounds.

108. *Cooper*, 301 Or. at 370-71, 723 P.2d at 306 (footnote omitted). The guarantees of religious freedom contained in Article I of the Oregon Constitution provide:

> Section 2. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> Section 3. No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions or interfere with the rights of conscience.
>
> Section 4. No religeous [sic] test shall be required as a qualification for any office of trust or profit.
>
> Section 5. No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution,nor shall any money be appropriate for the payment of any religeous [sic] services in either house of the Legislative Assembly.
>
> Section 6. No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religeon [sic]; nor be questioned in any Court of Justice touching his religeous [sic] belief to affect the weight of his testimony.
>
> Section 7. The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered.

OR. CONST. art. I, §§ 2-7.

109. *Cooper*, 301 Or. at 372, 723 P.2d at 307.

110. *Cooper*, 301 Or. at 373, 723 P.2d at 308.

111. *Id.* (emphasis added).

The court stated that the choice to implement such a law was one of policy and thus for the legislature to make. It said there was "no reason to believe"[112] that the legislature had any aims other than to "maintain the religious neutrality of the public schools,"[113] and to avoid "giving children or their parents the impression that the school, through its teacher, approves and shares the religious commitment of one group . . . ."[114]

The opinion goes on to discuss Oregon's constitutional responsibility to provide education "without imposing on the religious freedom . . . of the children who attend those schools."[115] The court ruled that "[the statute] does not impose an impermissible requirement for teaching in the public schools if it is properly limited to actual incompatibility with the teaching function."[116] The court proceeded to narrow the permissible reach of the law. It defined religious dress as "dress which is worn by reason of its religious importance to the teacher"[117] but which did not include common decorations "such as a necklace with a small cross or Star of David."[118] The restriction on the wearing of religious garb in the classroom was limited to times when the teacher is "dealing directly with children in a teaching or counseling role."[119] The court made exception for an "occasional appearance," with only the "frequently repeated practice" being "grounds for disqualification."[120]

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112. *Id.* Neither did the court have any evidence or any reason to believe that the aim of the legislature *was* religious neutrality. History would indicate that religious hostility rather than religious neutrality was at the root of the Oregon statutes. In 1922, the State of Oregon adopted a statute that required compulsory public school attendance of all children under sixteen years of age. This law had the effect of prohibiting parochial schools. The following year, Oregon adopted the predecessor to the current religious garb statute. It had the effect of barring nuns from teaching in the public schools, thus giving vent to an anti-Catholic bias. The Supreme Court, in Pierce v. Society of Sisters, 286 U.S. 510 (1925), held the 1922 statute requiring public school attendance invalid. With Catholic schools again free to operate, the religious garb statute was never challenged. Brief for Appellant, Cross Petition for Judicial Review of the Final Order of the Superintendent of Public Instruction for the State of Oregon, at 26-27, *Cooper,* 76 Or. App. 146, 708 P.2d 1161 (No. A31423).

113. Rather than maintaining "religious neutrality" in the schools, the law at issue generates religious hostility toward teachers whose religious beliefs require some distinctive dress. This law insures that students will be exposed only to non-religious teachers, or teachers who follow "main stream" religious beliefs that require no distinctive dress. Such a result does not comport with the concept of neutrality.

114. *Cooper,* 301 Or. at 373, 723 P.2d at 308. If one accepts the court's statement that more than a teacher's dress is required to show a forbidden sectarian influence, the only interest the state has left is avoiding the appearance of sectarian influence, favoritism, or official approval.

115. *Cooper,* 301 Or. at 375, 723 P.2d at 309.

116. *Cooper,* 301 Or. at 378, 723 P.2d at 311.

117. *Cooper,* 301 Or. at 380, 723 P.2d at 312. Such a definition could lead to the absurd result of allowing a non-religious teacher to consistently wear an article of clothing that would be forbidden to a teacher whose religious beliefs compelled the wearing of the garment.

118. *Id.* It is curious that the "paraphernalia" of main stream religions were exempted. These exemptions prompt the suspicion that the statutes in question would not exist if Oregon's main stream religions required some distinctive dress.

119. *Cooper,* 301 Or. at 380, 723 P.2d at 312-13.

120. *Id.*

This ruling failed to apply the only test articulated by the court itself.[121] Nowhere in the decision is there any discussion of alternative means of avoiding the *appearance* of sectarian influence that might be created by a teacher's religious dress. One such realistic means of accommodation would simply be to inform the students and their parents of the facts concerning a teacher's religious clothes. Neither junior high school students nor their parents are likely to be as incapable of independent, rational thought as this opinion would have one believe. As the Oregon Supreme Court acknowledged, "[a school] program hermetically sealed to exclude all controversy and potentially offensive ideas can hardly be defended as education for the world beyond the classroom."[122] The great irony here is that a discriminatory law is being justified by its noble ends—maintaining an atmosphere of religious neutrality for students. In this case, however, that noble goal is reached by repressing teachers' free exercise rights, which can only teach children intolerance and bigotry.

Had the Oregon Supreme Court applied the strict scrutiny formula developed by the Supreme Court for protecting the free exercise of religion, it would have preserved Cooper's rights, and found the Oregon statute unconstitutional as applied.[123] As seen earlier, the first step of the test determines whether state actions burden a sincere religious practice.[124] In *Cooper,* the sincerity of Ms. Cooper's religious beliefs was not questioned, and the statute clearly burdened the exercise of those beliefs.

The second step of the test looks for an unusually important or compelling interest of the state in enforcing its rule.[125] The purported rationale for the Oregon law was that it would help maintain the religious neutrality of the public schools and avoid giving children or their parents the impression of sectarian influence.[126] This preemptive, "anti-endorsement" policy can only be rationalized as protecting non-establishment principles.

Even though the state does have a legitimate interest in preventing a school's endorsement of a particular religion, or religion in general,[127] *Cooper*

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121. *See supra* text accompanying note 108.

122. *Cooper,* 301 Or. at 379, 723 P.2d at 312.

123. *See also* Braunfeld v. Brown, 366 U.S. 599, 607 (1961). In *Braunfeld,* the Supreme Court stated: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Id.* Applying this passage to the Oregon statutes at issue in *Cooper* would most likely prove dispositive.

124. *See supra* notes 25-29 and accompanying text.

125. *See supra* notes 30-32 and accompanying text.

126. *Cooper,* 301 Or. at 373, 723 P.2d at 308.

127. *See* Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring). The author recognizes the perceived "tensions" between the free exercise clause and the establishment clause. The full development of this issue is beyond the scope of this Note. For suggested approaches, see L. TRIBE, *supra* note 16, § 14; McConnell, *supra* note 9; Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment,* 45 U. CHI. L. REV. 805 (1978); Smith, *The Special Place of Religion in the Constitution,* 1983 SUP. CT. REV. 83.

does not, in fact, involve state endorsement of religion. Rather, *Cooper* involves the highly speculative contention that "children or their parents [might get] the impression that the school, through its teacher, approves and shares the religious commitment of one group,"[128] in this case Sikhs. The State offered no evidence to support this contention, but merely speculation.[129] As Chief Justice Burger stated in *Bender v. Williamsport Area School District,* "utterly unproven, subjective impressions of some hypothetical students [or parents] should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion."[130]

Even if Oregon's anti-endorsement policy must be concerned with mere speculative appearances of sectarian influence,[131] "strict scrutiny" analysis requires the "endorsement concern" to be balanced against the teacher's free exercise rights. On one side of the scale, the Oregon statute infringes the free exercise rights of Cooper; she is forced to choose between her job and adherence to her religious beliefs. On the other side is the mere potential that students or their parents will falsely perceive that the school endorses the Sikh religion: an "endorsement problem" that cannot be taken seriously. The purported beneficiary of the state's endorsement is a minority religion. No "objective observer"[132] could possibly perceive the State of Oregon as endorsing the Sikh religion.[133] Balancing these competing interests requires a conclusion opposite to the Oregon court's. Justice Brennan, in *McDaniel v. Paty,* wrote:

> [G]overnment may not as a goal promote "safe thinking" with respect to religion .... The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion ... [and] [i]t may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.[134]

If Oregon could successfully establish its interest in avoiding the appearance of sectarian bias as sufficiently "compelling" to outweigh Cooper's free exercise rights, it still must meet the least restrictive means element of

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128. *Cooper,* 301 Or. at 373, 723 P.2d at 308.

129. *See supra* note 32 and accompanying text.

130. 106 S. Ct. 1326, 1337 (1986) (Burger, C.J., dissenting).

131. *See, e.g., Lynch,* 465 U.S. at 687-94 (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 67-84 (1985) (O'Connor, J., concurring) (what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion).

132. *See Wallace,* 472 U.S. at 76 (O'Connor, J., concurring) ("The relevant issue is whether an objective observer, acquainted with the [issues], ... would perceive a ... state endorsement.").

133. The concern over government endorsement of religion is that non-adherents will perceive that they are "outsiders, not full members of the political community." *See Lynch,* 465 U.S. at 687-89. In *Cooper,* there can be no such concern because it is the Sikhs who are on the fringes of American society.

134. 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

"strict scrutiny."[135] Since, as has already been established, a viable, less restrictive alternative exists,[136] the Oregon statute would again fail to pass constitutional muster.

Cooper demonstrates how free exercise rights can be abridged when courts choose to ignore the Supreme Court's test. Had the court applied strict scrutiny it would have found the Oregon statute to be unconstitutional, and Cooper's rights would have been protected.

Why are courts not applying the strict scrutiny analysis that would better protect free exercise rights? One can only speculate. Perhaps it is because most dress code cases are brought on behalf of minority or cult religions that judges do not feel obligated to protect. It may be that some judges feel compelled to grant leeway to administrators in the institutional settings which spawn dress codes; some judges might even harbour a misunderstanding of the interaction between the religion clauses of the Constitution. Others might just be hostile toward religion or toward granting exemptions for religious reasons. Regardless of the reasons why, the failures to apply the Court's test have resulted in less than adequate protection of constitutionally-guaranteed free exercise rights.

CONCLUSION

The free exercise of religion is a fundamental right deserving maximum constitutional protection by the courts. The United States Supreme Court has developed a three-part test for analyzing free exercise cases that incorporates the strict scrutiny analysis used to protect other fundamental rights. First, the test requires a claimant to demonstrate a burden on religiously motivated conduct. Second, to justify the burden placed on the claimant, the state must demonstrate a compelling interest in enforcing the challenged rule. And third, the state must also show that its interest can not be served in a less restrictive manner.

Many courts are not applying the Supreme Court's test in the context of free exercise-dress code conflicts. Some courts have substituted a rational basis test, or a false conflict theory. Some have simply granted deference to administrators in institutional settings. Other courts have only partially applied the Court's test, while still others have opted to ignore the Court completely. The reasons why courts are not using strict scrutiny analysis in free exercise-dress code cases are open to speculation.

Nevertheless, the failures to apply the Court's test have resulted in less than adequate protection of constitutionally guaranteed, free exercise rights. The solution is simple: apply the test correctly. While application of the test

135. *See supra* notes 33-35 and accompanying text.
136. *See supra* text accompanying note 116.

does not in any way insure that free exercise rights will always be found superior to the interests of the state, failure to apply the test seems to insure that those rights will not be adequately protected.

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