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I. INTRODUCTION

Cases arising under the United States Constitution's religion clauses[1] fall into four general categories.[2] In the first category are establishment clause controversies involving the provision of government services or aid. For example, when the government seeks to provide educational assistance to all private schools, financial aid to parochial schools is usually challenged on establishment clause grounds.[3]

In the second category are controversies involving governmental discrimination in favor of religion. These cases consist of challenges to special exemptions voluntarily provided by the government only to religious practitioners and institutions.[4] Such special treatment might be perceived as an endorsement or improper advancement of religion.

The third category of cases involves governmental discrimination

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1. The first amendment reads in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The prohibition against governmental abridgment of religious liberties was extended to the states when the Court in Cantwell v. Connecticut, 310 U.S. 296 (1940), held that the free exercise clause was "a fundamental concept of liberty" embodied in the due process clause of the fourteenth amendment. *Id.* at 303.

2. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 7.

3. *Id.*; *see, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975).

4. For example, schools operated and supported by churches and not separately incorporated are exempt from unemployment compensation taxes under the Federal Unemployment Tax Act, I.R.C. § 3309(b)(1)(A) (1978), and complementary state statutes. St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981). The Court often construes statutes favorably to the litigant seeking a special exemption on religious grounds. *See, e.g.*, NLRB v. Catholic Bishops, 440 U.S. 490 (1979). Courts often use techniques of statutory construction in order to avoid the necessity of deciding the free exercise of religion issue. In some cases, exempting religious institutions avoids entanglements between government and religion, which can become excessive and violate the establishment clause. *Id.* at 501-02.

against religion. Typically these cases are characterized by governmentally imposed burdens on certain religious groups, or, in some instances, the governmental exclusion of some but not all religious groups from benefits generally available. Such discrimination against religious institutions and practitioners may be challenged because of establishment clause principles and free exercise clause guarantees.[5] The fourth category involves claims made by religious practitioners or institutions who seek judicially imposed exemptions from generally applicable laws.[6] These cases present a double-barrelled issue; the litigant's claim rests on the free exercise clause while the government's opposition to the claim rests in part on establishment clause principles.

This article focuses on the fourth category.[7] *Goldman v. Weinberger*,[8] brought by a rabbi seeking an exemption from Air Force dress code regulations, belongs to this line of precedent. Another example is *Mozert v. Hawkins County Public Schools*,[9] brought on behalf of fundamentalist Christian children who sought to be excused from their public school's required course in reading instruction.[10] The rabbi and the fundamentalists are caught on the horns

5. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (state university may not exclude a student religious group from access to limited public forum that is open to comparable student groups of a secular nature). Similarly, the establishment clause usually prevents the government from preferring one religious group over another. Therefore, a burden imposed by the government on some but not all religious organizations engaged in charitable solicitations was held unconstitutional. Larson v. Valente, 456 U.S. 228 (1982).

6. *See also* cases brought pursuant to § 701(j) of the Civil Rights Act of 1964 as amended in 1972 and codified at 42 U.S.C. § 2000e(j). Section 701(j) obligates certain employers to depart from standard operating procedures and provide employees with a reasonable accommodation when employees with religious beliefs request special treatment. There is a violation of the statutory mandate "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). In Ansonia Bd. of Educ. v. Philbrook, 107 S. Ct. 367 (1986), the court did not expressly equate its approach in free exercise clause cases with its test to determine if employers have violated the statutory mandate of the Civil Rights Act of 1964.

7. There is some overlap among the categories. For example, it has been argued that a judicially imposed exemption that excuses a religious sect from compliance with generally applicable law presents establishment clause issues.

8. 106 S. Ct. 1310 (1986).

9. 647 F. Supp. 1194 (E.D. Tenn. 1986).

10. Rabbi S. Simcha Goldman and Bob Mozert, a fundamentalist Christian, both have religious convictions that are incompatible with laws that govern their activities. Both plaintiffs obtained injunctive relief exempting their respective religious observances from applicable regulations. In *Goldman*, the Supreme Court held that injunctive relief was improper. 106 S. Ct. 1310, 1314. Since *Mozert* is presently on appeal in the United States Court of Appeals for the Sixth Circuit, the outcome of that case is uncertain. *Goldman* is discussed in sections II and IV *infra*, and *Mozert* is discussed in sections II and VII *infra*.

of a dilemma because their religious scruples are incompatible with state or federal law. Without helpful judicial intervention, they must choose to suffer either legal sanctions or the condemnations of conscience.[11] The individual's choice between two unsatisfactory alternatives[12] places him under severe stress.

Courts are sympathetic to persons faced with this Hobson's Choice. Even Justice Stanley Reed, not the staunchest defender of religious freedom, once admitted that there are "personal liberties which are beyond the power of government to impair."[13] Justice Reed recognized that some of these liberties belong to the spiritual realm.[14] Justices Black, Douglas, and Murphy added that "our democratic form of government . . . has a high responsiblity to accommodate itself to the religious views of minorities, however un-

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11. The threshold question in the typical free exercise case is whether the dictates of an individual's conscience are sincerely rooted in religion. *See* United States v. Ballard, 322 U.S. 78 (1944) (the trier of fact was forbidden to determine whether an individual's religious beliefs were true). The Supreme Court, however, has never clearly distinguished religious beliefs from other conscientious beliefs. In many cases, however, courts have adopted the Supreme Court's psychological approach, utilized in Dettmer v. Landon, 799 F.2d 929 (4th Cir. 1986). Dettmer is a member of the Church of Wicca—a cult that is based partly on the belief in witchcraft and occult rituals. Excerpts from Judge Butzner's opinion follow:

> In determining whether the Church of Wicca is a religion protected by the free exercise clause of the first amendment, the district court properly considered whether the Church occupies a place in the lives of its members "parallel to that filled by the orthodox belief in God" in religions more widely accepted in the United States. United States v. Seeger, 380 U.S. 163, 166 (1964). The district court found that members of the Church of Wicca "adhere to a fairly complex set of doctrines relating to the spiritual aspect of their lives." These doctrines concern ultimate questions of human life, as do the doctrines of recognized religions. *See* Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1982); International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 440 (2d Cir. 1981); Malnak v. Yogi, 592 F.2d 197, 208 (3d Cir. 1979) (Adams, J., concurring).

Id. at 931.

In free exercise cases since *Ballard*, the trier of fact is forbidden to determine whether an individual's religious beliefs are true. Individuals may believe what they cannot prove. Moreover, "religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd., 450 U.S. 714 (1981). A person may survive the Court's threshold test even if he is struggling with his beliefs and is unable to articulate them "with the clarity and precision that a more sophisticated person might employ." *Id.* at 715; *see also* Alston, *Religion*, in 7 ENCYCLOPEDIA OF PHILOSOPHY 140 (P. Edwards ed. 1967). *See generally* Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984).

12. The fear of supernatural sanctions and the loss of moral self-respect that ensues when an individual obeys a law that violates his religious scruples are generally severe. Further, disobedience of the law carries with it the loss of entitlements, and often the threat of criminal sanctions.

13. Jones v. Opelika, 316 U.S. 584, 593 (1942), *vacated and state courts' judgments rev'd*, 319 U.S. 103 (1943).

14. *Id.*

popular and unorthodox those views may be."[15]

Justice Reed's rhetoric was impressive, but his opinion for the Supreme Court went on to uphold the constitutionality of an ordinance that required an evangelist to pay a fee and obtain a license before he engaged in religious activity. *Jones v. Opelika*[16] illustrates that rhetoric alone cannot secure the free exercise of religion.[17]

Precious though it is, religious freedom is not an absolute right[18] to be exercised without regard for other important interests protected by the Constitution.[19] It is impossible for judges to immunize religious activity from all governmental regulations that protect the health, safety, morals, and the general welfare. Individuals lack the right to engage in religious activities that seriously interfere with the legally protected rights of others. For example, as the Supreme Court noted in *Prince v. Massachusetts*,[20] "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease."[21] Courts have also upheld laws that prevent devout individuals from doing harm to themselves.[22]

"Exercise of this 'police power' has frequently created conflict between governmental authority and avowed religious rights of individuals and groups."[23] In such situations, courts try to reconcile

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15. *Id.* at 624 (Black, Douglas, Murphy, JJ., dissenting).

16. 316 U.S. 584.

17. Subsequently, the Court reversed itself, and vacated its judgment and the judgment of the state court in favor of the government. *Jones*, 319 U.S. 103 (1943).

18. The free exercise of religion would be an absolute right if the Court immunized religious activity, regardless of context, from any governmental restrictions. Freedom of religion, however, is not absolutely sheltered.

19. Freedom of religion has a double aspect which includes the freedom to believe and the freedom to act. In theory, "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion). Thus, the freedom to hold religious convictions is an absolute right but freedom to act is not. *Cantwell*, 310 U.S. at 303-04. In practice, however, "a sharp distinction cannot be made between religious belief and religiously motivated action." *McDaniel*, 435 U.S. at 631 n.2. (Brennan, J., concurring). "[T]here can be no doubt that this freedom to act is not absolute but qualified, being subject to regulation in the public interest which does not unduly infringe the right." *Opelika*, 316 U.S. at 618 (Murphy, J., dissenting).

20. 321 U.S. 158 (1943).

21. *Id.* at 166-67.

22. Hill v. State, 38 Ala. App. 404, 88 So. 2d 880, *cert. denied*, 264 Ala. 697, 88 So. 2d 887 (1956); *see* State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975) (prohibitions against snake handling sustained).

23. R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE AND THE

the competing interests of the individual and the government. Frequently, governmental interests are deemed more compelling than a particular litigant's interest in religious freedom. The Supreme Court, however, does not condone burdensome government regulation of religious activities merely because rules are rules, or because the challenged regulation is rational and nondiscriminatory. "The First Amendment is not confined to safeguarding freedom of . . . religion against discriminatory attempts to wipe them out."[24] Justice Douglas noted that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position."[25] When the government unnecessarily imposes severe burdens on preferred rights, in most instances the burdensome law is presumptively unconstitutional.[26]

In some cases, the presumption of unconstitutionality is easily rebutted—even though the challenged law curtails the religious freedom of an individual seeking a personal exemption.[27] Moreover, courts do not consistently place the entire burden of persuasion on the government when litigants request the courts to compel the government to carve out a religious exemption from a burdensome law.[28] In free exercise cases, the Supreme Court obviously does not follow an inflexible, highly formalistic approach.

The hornbook generalization that the free exercise clause requires "the government [to] make some accommodation for the practice of religious beliefs when it pursues ends which incidentally burden religious practices"[29] is the product of an ad hoc balancing test.[30] There are many problems associated with ad hoc balancing which, by its very nature, produces some case rulings that favor the government because of demonstrable administrative necessities. In some cases, the Supreme Court itself has shown a prefer-

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SUPREME COURT 57 (1982).

24. *Opelika*, 316 U.S. at 608 (Stone, C.J., dissenting).

25. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

26. *Id.* ("[E]quality in treatment does not save the [governmental regulation] . . . .").

27. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (Since imposition of social security taxes was not unconstitutional, the Court said that the state may justify a limitation on religious liberty by showing that it is essential to accomplishing an overriding governmental objective.).

28. Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983) (denial of parent's claim that his religious beliefs were infringed by North Carolina's compulsory school attendance law), *cert. denied*, 465 U.S. 1006 (1984).

29. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1067 (3d ed. 1986).

30. Section III *infra* describes the standards utilized in ad hoc balancing and indentifies the factors to be balanced.

ence for a moral principle weightier than demands for religious freedom.[31]

Many Justices are understandably concerned about the increasing number of claims for exemptions. Given the numerous instances of conflict between faith and government, "the Free Exercise Clause would become a serious infringement on the government's ability to perform its functions if the Clause did not take into account the government's legitimate interests in denying religious exemptions and exceptions."[32]

Courts are vulnerable to criticism from libertarians when they find, in the absence of substantial evidence, that a religiously based exemption causes the government undue hardship. For example, in *Goldman,* the government successfully convinced the Supreme Court to speculate about problems of military discipline that would arise if a rabbi wore a yarmulke (skull cap).[33] Indeed, it appears "there is a growing discomfort on the part of the Court with the Free Exercise Clause doctrine—that has now flowered, albeit in a limited number of cases—that permits people to get exemptions [that no one else is entitled to] because of their religious beliefs."[34]

II. A Recent Cause Celebre

The modern Supreme Court's "free exercise" guarantee, as Rabbi Goldman learned, is in the nature of a limited warranty with many disclaimers. The Court held that he must face the ignominy of an Air Force court martial if he continued to wear his yarmulke.[35] Thus far, Bob Mozert, a fundamentalist Christian, has been more successful in court than the rabbi.

In *Mozert v. Hawkins County Public Schools,*[36] seven fundamentalist families argued that they have a religious duty to protect their children from the state when public school authorities engage in a program of instructional reading that systematically contra-

31. *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (claims of religious freedom subordinated by constitutionalized moral principle that desegregation in education is an imperative).

32. McConnell, *supra* note 2, at 30.

33. *Goldman,* 106 S. Ct. at 1313.

34. Choper, *The Free Exercise of Religion,* 1981-82 The Supreme Court: Trends and Developments 61 (1983).

35. Goldman v. Weinberger, 106 S. Ct. 1310 (1986).

36. 647 F. Supp. 1194 (E.D. Tenn. 1986).

dicts the Bible. Litigation became necessary because public school regulations required children to leave school when they refused to read from required secular books that violated their religious faith. The district court issued an injunction that permitted the fundamentalists to withdraw their children from the required course in instructional reading. The children are still entitled to take all the other courses offered in the public schools.[37]

As the *Los Angeles Times* described the decision:

> A federal judge ruled . . . that a rural eastern Tennessee school district violated the constitutional rights of seven fundamentalist Christian families by forcing their children to read textbooks with selections from works offensive to their religious beliefs—among them, Shakespeare's "Macbeth," "The Diary of Anne Frank" and Hans Christian Andersen's fairy tales.[38]

Mozert troubles Anthony Podesta, president of People for the American Way,[39] who claims that the decision is a "recipe for disaster for the public schools."[40] He predicts that "[t]he schoolhouse door will have to be converted into a revolving door as different sects [either opt out of public education completely or] participate in the public school curriculum in differing degrees."[41] Many school officials and professional educators agree with Podesta. Even, William Bennett, the conservative Secretary of Education, disapproves of the district court's ruling.[42]

James J. Kilpatrick predicts dire consequences will ensue if *Mozert* is affirmed. "If [the district court's] decision survives appeal to the 6th U.S. Circuit and ultimately to the U.S. Supreme Court, we can look for something approaching chaos in both elementary and secondary education. School boards would find it just about impossible to accommodate the complaints and demands of different religious and anti-religious groups."[43] Kilpatrick adds:

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37. *Id.* at 1203.

38. L.A. Times, Oct. 25, 1986, at 1, col. 2.

39. Podesta's organization is paying for some of the legal services provided to the authorities who oppose the fundmentalist's challenge to Hawkins County's instructional reading course.

40. L.A. Times, Oct. 25, 1986, at 1, col. 2.

41. *Id.*

42. Richmond News Leader, Oct. 31, 1986, at B2, col. 2.

43. Richmond News Leader, Nov. 3, 1986, at 17, col. 4. To further stoke the raging furor, in December 1986, the district court awarded the seven fundamentalist families that were plaintiffs in *Mozert* a judgment in the amount of $51,531.00 to reimburse the families for

> [N]o one really gains in this situation. It is patently absurd to expel *The Wizard of Oz* from a child's reading list because the Oz book deals with a witch. Farewell Cinderella! Goodbye to the *Diary of Anne Frank*. Let us close the windows lest a fresh idea blow in. A greater disservice to children scarcely could be imagined.[44]

Journalists and press reports singled out just a few books to make the fundamentalists' objections appear bizarre. The parents actually submitted a list of 300 objections to the readings mandated by Hawkins County authorities. Surely Kilpatrick is not arguing that impressionable children are not affected by the materials they read. But is he arguing that the local board of education knows better than a parent whether a particular child's spiritual growth will be adversely affected by viewpoints which are, in the parents' views, false and damning? For unreceptive students and parents, the ideological discipline of fresh ideas in the name of pluralism is no less coercive than other ideological disciplines. Nevertheless, there are many professional educators who reject, as outmoded and narrow-minded, parental objections to any approved school texts, notwithstanding their profound theological implications.

The district court opinion in *Mozert* points out that the parents were not seeking to have any textbooks "banned from the classroom."[45] Instead, the "plaintiffs simply claim[ed] that they should not be forced to choose between reading books that offend their religious beliefs and foregoing a free public education."[46] It remains for the appellate courts to examine the trial record and the rationale offered in support of the district court's injunction.[47]

III. The Supreme Court's Balancing Test

Many devout individuals fear that their very salvation (or integrity as a moral actor) is at stake if they obey the law rather than

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private school tuition and other expenses incurred as a result of the children's repeated suspensions from public school. Brief for Hawkins County Public Schools at 26, Mozert v. Hawkins County Pub. Schools, 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd and remanded*, 765 F.2d 75 (6th Cir. 1985), *reh'g*, 647 F. Supp. 1194 (E.D. Tenn. 1986) [hereinafter Appellant's brief].

44. Richmond News Leader, Nov. 3, 1986, at 17, col. 4.

45. *Mozert*, 647 F. Supp. at 1195.

46. *Id.*

47. In Section VII, I argue that the school authorities failed to introduce substantial evidence demonstrating that the relief requested by the fundamentalists entailed undue hardship.

their conscience.[48] As a result, they lose important government benefits such as unemployment insurance,[49] food stamps,[50] and tax exemptions.[51] Obedience to the Holy Spirit led Mr. Mozert to withdraw his child from the public school's compulsory reading program, even though he knew that his child would be expelled from public school. Similarly, the will to obey God required Rabbi Goldman to wear a skull cap, even though he was threatened with a court martial. The Supreme Court's balancing test is appropriately applied when an individual's compliance with generally applicable laws makes his free exercise of religion very costly. But which religious convictions count when courts balance competing interests, and how much weight should be ascribed to the interests that count? Uncertainties abound, and commentators are "troubled by the absence of any understandable . . . principle that would rein in the discretion of the Justices themselves."[52]

The believer's interest in avoiding the sanction that will be imposed when he disobeys the law is one element that must be weighed. The sanction might be the loss of an important benefit provided by the government, a jail sentence, or a fine. The harsher the sanction, the greater the intensity of the oppression. Thus, expulsion from school is a greater burden than a one-day suspension. Depriving a person of food stamps, or the very means of subsistence is a greater oppression than a ten dollar fine.

There is also a psychological component to the interest to be weighed on the individual's side of the scales. The psychological hardships imposed by generally applicable laws carrying penal sanctions are normally quite severe, but the degree of the pain varies with each individual.[53] Thus, each claim for an exemption has to be evaluated on a case-by-case basis.[54] This kind of piecemeal

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48. Judge Augustus Hand referred to "an inward mentor, call it conscience or God, that is for many persons . . . the equivalent of what has always been thought a religious impulse." United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943) (involving construction of the conscientious objector exemption of the Selective Training and Service Act of 1940).

49. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981) (holding state's denial of unemployment compensation benefits to a Jehovah's Witness who quit work for religious reasons violated his first amendment right to free exercise of religion).

50. Bowen v. Roy, 106 S. Ct. 2147 (1986).

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

52. *See, e.g.*, Tribe, *First Amendment Trends: Ad Hoc Doctrines Do Not A Constitution Make*, 1981-82 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 209, 211 (1983).

53. *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 337 (1969).

54. Some courts might choose to place more weight on the individual's side of the scales when his religious belief is central, rather than peripheral, to his faith.

lawmaking is inevitable when case rulings depend on loosely structured standards designed to balance competing interests.[55]

The elements of the Supreme Court's present balancing test have been described as follows:

> In each case the claimant must first make some demonstration that the regulation which proscribes or prescribes certain activities substantially burdens the practice of the claimant's religion. Second, if such a burden exists, the Court will weigh the governmental interest in the regulation against the burden on free exercise rights. Even though the governmental interest appears to be of a sufficient magnitude to justify some burden on religious activity, it will be held invalid unless it burdens religious freedom no more than *necessary* to promote the overriding secular interest.[56]

The word "necessary," emphasized above, refers to the Court's scrutiny of alternative modes of regulation that might be less burdensome for persons seeking exemptions.[57] "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[58] There is always a latent ambiguity when the Court refers to least restrictive and less restrictive alternatives.[59] Weakly construed, this test requires only an argument "that there . . . [is] no less restrictive alternative capable of serving the state's interest *as efficiently as it is served by the regulation under attack.*"[60] This weak formulation gives the governmental interest in efficiency too much weight.

A more protective approach—when a law provides important societal benefits—is to inquire whether the *incremental benefit* of enforcing the law against those who object, on religious grounds, outweighs the *incremental loss* of religious freedom. For example, one question in *Mozert v. Hawkins County Public Schools*[61] is

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55. When the Supreme Court endeavors to achieve fairness in each individual case, principled decision making suffers as a result.

56. J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 1079 (3rd ed. 1986) (emphasis added).

57. Under the compelling interest test, "the government must establish both a very powerful interest and the absence of any 'less restrictive alternative' to achieve that interest." Greenawalt, *supra* note 11, at 762.

58. *Thomas*, 450 U.S. at 718.

59. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

60. *Id.* at 1484-85.

61. 647 F. Supp. 1194 (E.D. Tenn. 1986).

whether any incremental societal benefit produced by not allowing the parents to withdraw their children from one required course in reading justifies the children's suspension from other courses. Not all courts, however, balance at the margins, and ask whether the marginally greater effectiveness of a uniform policy—when compared to the alternative of granting religiously based exemptions—justifies an incremental burden on religious freedom.

The Supreme Court does not require the government to offer an exemption which is the least restrictive alternative *imaginable*. The exemption requested by a litigant might be, under the circumstances, an impractical alternative—even though it is the least restrictive interference with religious liberty. The Court's less restrictive alternative test, however, is not merely a utilitarian, cost-benefit analysis. If the courts were concerned solely with what "economists call a Pareto-superior transaction,"[62] judges would be inadequately sensitive to the considerations of fairness which are critical in many cases involving a litigant's ultimate concerns. For example, courts rarely subordinate religious liberty to the government's interest in avoiding a little administrative inconvenience. However, "there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.' "[63]

When the Court "inquire[s] whether accommodating the exercise of religion will unduly interfere with fulfillment of governmental objectives,"[64] the importance of the government's highly generalized interests (in public health and safety, public peace and order, education, defense and revenue) is often immaterial. "To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant."[65] In order to avoid this pitfall, courts must consider the more particularized societal interests that arguably justify the government's refusal to grant exemptions to conscientious objectors. In other words, the relevant government interest is usually *not* the

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62. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1431 (1986). A Pareto-superior transaction is a fundamental tenet of classical liberalism which holds that the government generally should not interfere with voluntary transactions (e.g., withdrawing a child from school) that impose no uncompensated costs on others.

63. United States v. Lee, 455 U.S. 252, 259 (1982) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

64. Quaring v. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984), *aff'd sub nom by equally divided Court*, Jensen v. Quaring, 471 U.S. 1091 (1985).

65. Clark, *supra* note 53, at 331.

diffuse societal harm that will occur if the statute were not enforced at all.

A panel of the Court of Appeals for the Eighth Circuit, in *Quaring v. Peterson*,[66] avoided the error of confusing the state's *unimportant* particular interest in denying a religious exemption with its *important* general secular interest in maintaining the underlying system of regulation.[67] Frances J. Quaring had sought a Nebraska driver's license, but she refused to have her photograph taken and affixed to the license as required by Nebraska law. Because of her refusal, she was not permitted to drive a motor vehicle. The court was convinced that her refusal was based on sincerely held religious beliefs.[68] Therefore, the court proceeded to balance Nebraska's interest against the burdens on her religious freedom. But Nebraska's attorneys articulated many interests, including the state's interest in highway safety. Since this general interest is not necessarily frustrated by a limited number of exemptions, the court stated, "To prevail, the Nebraska officials must demonstrate that their refusal to exempt Quaring from the photograph requirement serves a [particularized] compelling state interest."[69] The Eighth Circuit's decision in favor of Quaring was affirmed by an equally divided Supreme Court.[70]

The division of the Supreme Court illustrates the difficulty in predicting how the Court will rule in free exercise cases when the question is whether the governmental objective is a compelling interest. Much of the unpredictability is caused by the difficulty in articulating the government's interest with appropriate precision. For example, the dissenting circuit judge in *Quaring* balanced Nebraska's "legitimate interest in assuring instantaneous identification for all of its regular license holders."[71] This is a tautological state interest, and one that usually is insufficiently compelling. Similarly, the interest in uniform treatment for the sake of uniformity leads to circular reasoning. The government's asserted need to identify all motorists quickly and accurately in order to

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66. 728 F.2d 1121.

67. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 855 (1978) (crucial issue in free exercise cases is state's interest in denying exemption, not in maintaining underlying rule or program).

68. *Quaring*, 728 F.2d at 1125.

69. *Id.* at 1126.

70. *Jensen*, 471 U.S. 1091.

71. *Quaring*, 728 F.2d at 1128 (Fagg, J., dissenting).

ensure that only licensed motorists drive on the roads,[72] and the interest in "avoiding the administratively cumbersome task of considering applications for religious exemptions"[73] were somewhat more particularized. Nevertheless, as noted, the panel decided that "none of the interests [advanced by] the Nebraska officials [were] sufficient[ly compelling] to justify the burden upon Quaring's religious liberty [caused by the failure to exempt her from the photograph requirement]."[74]

The opinion of the Eighth Circuit in *Quaring* demonstrates, as noted above, that the issues should be narrowed down to an evaluation of competing interests. The government's interest must amount to more than just the diffuse societal interests that led to the enactment of the challenged statute (e.g., traffic safety). This is not to say that the general governmental interest is never relevant. It often is. For example, the general interest in traffic safety is relevant if the individual's religious convictions require him to drive seventy-five miles per hour. However, the connection between the general interest in traffic safety and Nebraska's photograph requirement was too tenuous to justify a policy that does not permit selective exemptions based on religious grounds.

In many cases, the government argues that it lacks the resources or ability to determine whether an individual's request for an exemption is based on sincerely held religious convictions. This particularized interest in administrative convenience has more weight when numerous claims for exemptions are anticipated, especially if it is difficult to separate legitimate from spurious claims. On occasion, the claims for exemptions will create a judicial overload. For example, when draft boards are flooded with claims for exemptions for persons who object to a particular war, it is extremely difficult to distinguish religious from political and philosophical objections. Moreover, selective exemptions arguably cause resentment that has a deleterious effect on morale.[75] In one controversial case, the Supreme Court decided that there would be less unfairness generated if no selective exemptions were granted.[76] More than one commentator, however, thinks that a more concrete showing of a threat to morale should have been required by the courts in cases

72. *Id.* at 1126.
73. *Id.* at 1127.
74. *Id.*
75. Gillette v. United States, 401 U.S. 437, 462 (1971).
76. *Id.*

brought by conscientious objectors who objected to unjust wars, but not all wars.[77] The Court apparently was unwilling to take risks because of the magnitude of the interests involved in the war effort, and because of the risk that its own resources would be stretched beyond prudent limits if it reviewed every draft board decision.

In *United States v. Lee*,[78] the government failed to introduce concrete evidence showing an actual threat to its social security program. The Court, however, was concerned with *possible* harm, rather than any demonstrable clear and present danger. The Amish have a religious obligation to provide their older members with the kind of assistance contemplated by the social security system,[79] and Lee argued that his "Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system."[80] His challenge to the government's policy of denying exemptions to Amish employers was weak because the Court did not want to impose the employer's religious beliefs on the employees.[81] Moreover, Lee was engaged in commercial activities,[82] and the distinction between commercial and religious activity is often "vital."[83]

The government successfully convinced the Court of "the risk that a myriad of other claims would be too difficult to process."[84] The Court was also convinced that the soundness of the social security system would be undermined if many persons seeking exemptions from the mandatory system of contributions could opt out of the program.[85] The evidence that supported the government's apprehension was barely substantial. Nevertheless, the Court concluded that "Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system."[86] Lee was held subject to the tax to the

77. *E.g.*, L. TRIBE, *supra* note 67, at 856.

78. 455 U.S. 252 (1982).

79. L. PFEFFER, RELIGION, STATE AND THE BURGER COURT 13-14 (1984).

80. *Lee*, 455 U.S. at 255.

81. *Id.* at 261.

82. Administrative screening difficulties increase when it is hard to discern whether the persons seeking exemptions are motivated by economic self-interest or religious belief.

83. *Cf.* Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).

84. *Lee*, 455 U.S. at 262 (Stevens, J., concurring).

85. *Id.* at 258-61.

86. *Lee*, 455 U.S. at 260. Congress had in fact already provided an exemption for Amish who are self-employed, I.R.C. § 1402(g), but not for employers. *Lee*, 455 U.S. at 260-61.

same extent as other employers.

The Supreme Court, of course, cannot specify in advance, without being arbitrary, how many claims for exemptions the national interest can tolerate.[87] The Court was perhaps rightly concerned with evidence disclosing that the fiscal soundness of the social security system has been questioned by several studies. Obviously, if the Amish are exempt from paying all social security taxes, the likelihood of many other claims for exemptions is high. The Court, in *Lee*, went on to hold that "the broad public interest in maintaining a sound tax system is of such a high order . . . [that] religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[88]

Concerning administrative difficulties, courts respect legislative judgments that a system for processing claims for exemptions would create insurmountable problems.[89] Judicial deference to the legislature, however, is not warranted, regardless of the government's representations, if the legislative record and the trial record both lack probative evidence substantiating the government's representations concerning a parade of horribles that will ensue if any exemptions are granted. If judicial deference becomes routine, legislative speculation about administrative nightmares will suffice instead of substantial evidence.

Lee illustrates that balancing tests are notoriously unreliable, but they are obviously much more protective than approaches that defer to the rational judgments of legislatures and officials. *Goldman v. Weinberger*[90] illustrates what happens when the Supreme Court does not exercise independent judgment, and defers to the balance struck by the bureaucracy.[91] Lower courts have also eschewed balancing when prisoners incarcerated in a penitentiary request certain exemptions from prison regulations.[92] Because

87. Clark, *supra* note 53, at 334. The difficulties of distinguishing between legitimate and spurious claims for religious exemptions, in some situations, imposes a severe hardship on the governments.

88. *Lee*, 455 U.S. at 260.

89. The record in *Lee*, however, indicated that, in addition to the Amish, only one other organization sought an exemption from the challenged social security tax. *Id.* at 257 n.6.

90. 106 S. Ct. 1310 (1986).

91. *See infra* notes 96-179 and accompanying text.

92. The United States Court of Appeals for the Fourth Circuit accorded "wide-ranging deference 'to prison administrators' decisions concerning the proper means to accommodate prisoners' rights to the needs of 'internal order and discipline,' [in the absence of] substantial evidence in the record to indicate that the officials have exaggerated their response to

Goldman may be the harbinger of a trend that will curtail the scope of the Court's seminal holdings in *Sherbert v. Verner*,[93] *Wisconsin v. Yoder*,[94] and *Thomas v. Review Board*,[95] the next section will deal with *Goldman*.[96]

IV. GOLDMAN V. WEINBERGER

Rabbi Goldman was ordered to cease wearing his yarmulke[97] notwithstanding his sincerely held religious objections.[98] After refusing to comply with the order, Goldman was threatened with disciplinary action.[99] "The district court . . . permanently enjoined the Air Force from prohibiting Goldman to wear a yarmulke while in uniform and from punishing him for refusing to remove it."[100]

The Air Force appealed, contending that its dress code fostered teamwork, discipline and espirit de corps. There was not much concrete evidence as to how the headgear regulation, as applied to Goldman, furthered these military objectives.[101] The Air Force cited its own experience, and introduced a report that showed "that laxity in enforcing such [dress code] regulations had contributed to lapses in discipline in other branches of the armed services."[102] Moreover, the Air Force had filed an affidavit of a Major General which "implies that permitting Plaintiff to wear his yarmulke will crush the spirit of uniformity, which in turn will weaken the will and fighting ability of the Air Force."[103] In response,

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these considerations.' " Dettmer v. Landon, 799 F.2d 929, 934 (4th Cir. 1986) (quoting Bell v. Wolfish, 441 U.S. 520, 547-48 (1979)). The Fourth Circuit did not carefully attempt to balance competing interests; instead, it merely deferred to prison authorities.

For a discussion of cases involving prison inmates who claim they are entitled to religious privileges not available to other prisoners, see L. PFEFFER, *supra* note 79, at 159-63.

93. 374 U.S. 398 (1963).

94. 406 U.S. 205 (1972).

95. 450 U.S. 707 (1981).

96. The Court's seminal cases will be analyzed in section V *infra*.

97. Air Force regulation prohibits, with few exceptions, the wearing of headgear indoors. A.F.R. 35-10 (1980).

98. Goldman v. Secretary of Defense, 734 F.2d 1531, 1537 (D.C. Cir. 1984), *aff'd*, 106 S. Ct. 1310 (1986).

99. *Id.*

100. *Id.* at 1535. The district court's holding was consistent with Chief Justice Warren's *ex cathedra* statement that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

101. *Goldman*, 734 F.2d at 1538.

102. *Id.*

103. Goldman v. Secretary of Defense, 530 F. Supp. 12, 16 (D.C. Cir. 1981), *vacated*, 734 F.2d 1531 (D.C. Cir. 1984), *aff'd*, 106 S. Ct. 1310 (1986).

Goldman argued "first that these assertions . . . have not been tested or validated, and second that in any case it is evident that making an exception for him would have no deleterious effect, as shown by the outstanding performance record he compiled during the three and one-half years when his practice of wearing a yarmulke went unchallenged."[104] Although Goldman's response indicated that the government's evidence was thin, the government insisted that "military judgments are entitled to special deference."[105]

The United States Court of Appeals for the District of Columbia attempted to distinguish between the government's arguments "concerning the general validity of uniform requirements,"[106] and the more particularized interests of the Air Force concerning "the feasibility of making exceptions to the regulation."[107] The court upheld the general validity of the regulations because it deferred to the military judgment that "strict compliance with uniform regulations breaks down the barrier of resentment to discipline, possibly more than anything else."[108]

The court of appeals had more difficulty justifying the Air Force's refusal to make a special exemption for the rabbi[109] who had an outstanding performance record. It rejected, as implausible, the argument that unauthorized headgear adversely affects the safety of personnel.[110] Goldman worked in a mental health clinic of an Air Force hospital, and no safety hazards caused by his wearing of a yarmulke could be imagined. The court stated, "We have no doubt that more narrowly drawn regulations, accommodating religious practices to a greater degree, would satisfy such safety concerns."[111]

The Air Force also asserted an interest in having every service member maintain a professional appearance.[112] The dress code in

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104. *Goldman*, 734 F.2d at 1538.

105. *Id.* at 1535.

106. *Id.* at 1538.

107. *Id.* at 1539.

108. *Id.* at 1538-39 (quoting H. SEMMES, PORTRAIT OF PATTON 8 (1955)).

109. The government did not press the claim that the Air Force lacked the administrative resources available to process claims for religiously based exemptions.

110. An Air Force General, who was a government witness during the trial, had testified that "an unauthorized hat worn on a flight line might fly into a jet engine and cause it to explode or malfunction." *Goldman*, 734 F.2d at 1539.

111. *Id.*

112. Goldman v. Weinberger, 106 S. Ct. 1310, 1320 (1986) (Brennan, J., dissenting). Obvi-

force when Goldman was ordered to remove his yarmulke states:

> Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad.[113] AFR 35-10, Par. 1-12.a(2) (1978).[114]

Goldman's service record, during the period in which he wore the yarmulke, disclosed that he had received high marks for his attitude, dress, and appearance.[115] The district court did not find that Goldman presented an image that was unprofessional; in fact, the district court found that his yarmulke was unobtrusive.[116] In view of the trial record, Goldman contended on appeal that an exemption for him would not cause "disruptive aberrations from the uniform requirements."[117]

The Air Force's need for "exceptionless uniformity"[118] was supported only by "a study of religious garb requirements, indicating that various sects require a wide variety of practices, including wearing turbans, robes, . . . jodphurs and symbolic daggers."[119] Supposedly, "the cumulative effect of [the] numerous exceptions"[120] that might be requested "would disrupt . . . efforts to maintain discipline, morale and teamwork."[121] The Air Force insisted "that it cannot reasonably distinguish among various religious practices, but must either allow or disallow all requested exemptions."[122] This argument was weak because "it appears that the Air Force already distinguishes among practices that may be religious."[123] Thus, the Air Force allows Mormons to wear "temple

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ously, an individual who by his dress or grooming conveys a message of defiance of authority or impertinence is unable to maintain an appropriate professional appearance.

113. It is not a fad when an Orthodox Jewish rabbi wears a yarmulke.

114. *Goldman*, 106 S. Ct. at 1326 (O'Connor, J., dissenting).

115. *Goldman*, 734 F.2d at 1533.

116. *Id.* at 1539.

117. *Id.*

118. *Id.* at 1538.

119. *Id.* at 1539.

120. *Id.*

121. *Id.* at 1538. Rabbi Goldman countered by arguing that the record lacked evidence indicating the number of claims that might be filed "making it impossible to reach any conclusion about likely disruption." *Id.* at 1539.

122. *Id.*

123. *Id.* at 1540.

garments" underneath their outer clothing.[124] Moreover, the Army had granted an exception to uniform regulations for Sikhs, allowing them to wear the beard and turban.[125]

The court of appeals finally concluded that the Air Force actually uses the criterion of *visibility* to distinguish between permissible and unauthorized, obtrusive deviations from its dress code. Since the yarmulke is visible, it is an impermissible aberration. The court of appeals conceded that the criterion of visibility is an "arbitrary cut off point."[126] Nevertheless the court was impressed by the Air Force's need to avoid the resentment that would be felt by individuals, religious and nonreligious, who are denied special permission to deviate from the prescribed dress code.[127]

The court of appeals sought to determine "whether legitimate mililtary ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree."[128] The court decided that the regulation could not be more narrowly drawn without causing perceptions of unfairness that would create resentment and adversely affect morale.[129] Therefore, less restrictive alternatives were not feasible. In sum, the court of appeals sided with the Air Force, holding that "the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its [arbitrary] regulation permissible."[130]

The court of appeals' level of scrutiny was hardly strict, but it did not indicate that its test will always be satisfiable. There was precedent for heightened judicial scrutiny of military law[131] that restricts the free exercise of religion,[132] but none of the cases are on

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124. *Id.*

125. "This exception [was] limited to Sikhs who are inducted; those who voluntarily enlist must comply with the regulations in the same manner as other military personnel. A.R. 600-20." C. SHANOR & T. TERRELL, MILITARY LAW 42 (1980).

126. *Goldman*, 734 F.2d at 1540.

127. *Id.*

128. *Id.* at 1536.

129. *Id.*

130. *Id.* at 1540.

131. *See* L. PFEFFER, *supra* note 79, at 150-51, 154-59 and cases cited therein.

132. In Gillette v. United States, 401 U.S. 437 (1971), the Supreme Court gave great deference to the governmental interests in defense and the power to raise armies, and there was not any real weighing of the individual interests. The Court, however, noted that the petitioners had made "no attempt to provide a careful definition of the claim exemption that they ask the courts to carve out and protect." *Id.* at 456. The Court at least gave lip service to a balancing test stating that the purposes behind Congress' unwillingness to exempt selective conscientious objectors is "of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars."

all fours with *Goldman*.[133] For example, in *Anderson v. Laird*,[134] students at the federal military academies challenged mandatory chapel requirements. Thomas Moorer, (later Chairman of the Joint Chiefs of Staff) testified that students were not required to worship, but were required to observe servicemen in prayer in order to gain awareness and respect for the force religion has on the lives of men.[135] This awareness would help them give guidance to those who turn to religion during combat crises.[136] The testimony provided a rational basis for the military to find that chapel attendance furthered secular goals by making the cadets and midshipmen more effective officers. For the Court of Appeals for the District of Columbia, Chief Judge Bazelon stated that "no finding of a secular purpose or effect could justify this form of governmental imposition of religion."[137] The court of appeals noted that "while an individual's freedoms may of necessity be abridged upon his entrance into military life, there is no authority for the point that his right to freedom of religion is abolished."[138]

Anderson involved a requirement that, on its face, restricted religious liberty. On the other hand, the regulation challenged in *Goldman* was religiously neutral on its face. Nevertheless, the technical question before the Supreme Court was whether it would defer to the judgment of the military. The Court deferred, indicating that "[t]he essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.' "[139] The Court affirmed the court of appeals. As a result of the Court's judgment, the rabbi has a "Hobson's Choice": either he fails to fulfill a religious duty,[140] or he faces the possibility of an

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Id. at 461. The Court in *Gillette* also proceeded under the assumption that the balancing test articulated in Sherbert v. Verner, 374 U.S. 398 (1963), was fully applicable. *Gillette*, 401 U.S. at 462. The Court also was influenced by Mr. Clark, who recognized that there is a rebuttable presumption that entitles an individual holding sincere religious beliefs to an exemption. Clark, *supra* note 53, at 345; *see also id.* at 365. The Court in *Goldman*, unlike the Court in *Gillette*, went out of its way to indicate that the balancing test adopted in *Sherbert* was inapplicable in the military context. *Goldman*, 106 S. Ct. at 1312-13.

133. 106 S. Ct. 1310.

134. 466 F.2d 283 (D.C. Cir. 1972), *reh'g* 316 F. Supp. 1081 (D. C. Cir. 1970), *cert. denied*, 409 U.S. 1076 (1972).

135. L. PFEFFER, *supra* note 79, at 143.

136. *Id.*

137. *Anderson*, 466 F.2d at 292.

138. *Id.* at 294.

139. *Goldman*, 106 S. Ct. at 1313 (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).

140. *Goldman*, 106 S. Ct. at 1317 (Brennan, J., dissenting).

imminent court-martial.[141]

The Supreme Court paid homage to the Air Force's general interests in "instinctive obedience, unity, commitment, and esprit de corps",[142] but did not cite any portions of the trial record that indicated that a screening system for granting some exemptions could not be designed or was unworkable.[143] The Court did not distinguish between general and particularized military interests, nor did it require the government to introduce substantial evidence demonstrating that Goldman's religious observance posed any concrete threats to any interest. In short, the Court did not invoke the Court's compelling interest criterion or its balancing test.

Justice (now Chief Justice) Rehnquist stated, with no apparent reservation or qualifications, that the military's perceived need for uniformity justifies a "review of military regulations challenged on First Amendment grounds [that] is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[144] Accordingly, the Court applied "a subrational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities.' "[145] Justice Rehnquist opined that " '[j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.' "[146]

The Court did not require the Air Force to provide a reasoned explanation[147] for not making an exception for the rabbi, and it now appears that the military establishment has no duty to accom-

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141. *Goldman*, 530 F. Supp. at 16.

142. *Goldman*, 106 S. Ct. at 1313.

143. Justice Blackmun dissented because, *inter alia*, the Air Force failed to show "how many are likely to seek religious exemptions from the dress code." *Id.* at 1323.

144. *Id.* at 1313.

145. *Id.* at 1317 (Brennan, J., dissenting) (quoting *id.* at 1313).

146. *Id.* at 1313 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)) (where the Supreme Court upheld Congress' judgment that males but not females were required to register in order to comply with the Military Selective Service Act). The Court also cited Chappell v. Wallace, 462 U.S. 296 (1983), Brown v. Glines, 444 U.S. 348 (1980), Schlessinger v. Councilman, 420 U.S. 738 (1975), Parker v. Levy, 417 U.S. 733 (1974), and *Orloff*, 345 U.S. 83. Although these cases indicate that the military is a specialized society separate and apart from civilian society, none of these cases involved free exercise of religion claims for exemptions.

147. *Goldman*, 106 S. Ct. at 1318 (Brennan, J., dissenting). The "reasoned explanation" test is a word of art and refers to a normal requirement of administrative law. *See* Section of Administrative Law, American Bar Association, *A Restatement of Scope of Review Doctrine*, 38 ADMIN. L. REV. 235-36 (1986).

modate individuals who need exemptions for religious reasons.[148] That is the bad news;[149] the good news is that—if the Court's explanation is taken at face value—*Goldman* has few, if any, implications outside of the military's sphere of influence.[150] On the other hand, Justice Stevens' concurrence advocates the exercise of judicial deference in many other areas of governmental regulation.[151]

Some courts have already held, in effect, that prisons are also institutions where deference to the needs of the prison administrators is appropriate.[152] School authorities in Tennessee argue that the desires and interests of school children and their parents need to be subordinated to their interests in exceptionless uniformity "for all who are enrolled in the public schools."[153] The indications are that Justice Stevens will be receptive to this kind of argument. He wants to discard the balancing test in nearly all cases when there is no evident discrimination in favor of or against religious sects, denominations, and faiths. He believes that the government's need for exceptionless uniformity is consistent with the Court's interest in "complete neutrality toward religion."[154] If *Goldman* is an example of complete neutrality, Stevens stacks the deck against the individual whose religious scruples cry out for a more benevolent approach.

The complete neutrality approach of Justice Stevens advances secularism at the expense of religion.[155] Justice Stevens apparently is concerned about equal treatment of all religious sects more than he is concerned about the burdens suffered by an individual whose religious freedom is unfairly burdened by nondiscriminatory laws. This position exalts equality at the expense of religious liberty. When Christians, Hindus, Moslems and adherents to all other religious faiths are treated exactly alike, it does not ameliorate the dilemma of a rabbi who is ordered not to wear his yarmulke in-

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

149. *See* Michelman, *Foreward: Traces of Self-Government*, 100 HARV. L. REV. 4, 5-17 (1986); Note, *Leading Cases*, 100 HARV. L. REV. 163 (1986).

150. *See Goldman*, 106 S. Ct. at 1313; Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

151. Michelman, *supra* note 149, at 8.

152. Dettmer v. Landon, 799 F.2d 929 (4th Cir. 1986); Elam v. Henderson, 472 F.2d 582 (2d Cir. 1973), *cert. denied*, 414 U.S. 868 (1973). *But see* Cruz v. Beto, 405 U.S. 319 (1972) (reasonable opportunities had to be afforded all prisoners to exercise their religious freedom without fear of penalty).

153. Appellant's brief, *supra* note 43, at 40, 50-52.

154. *Goldman*, 106 S. Ct. at 1316 n.6 (Stevens, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 60 (1985)).

155. McConnell, *supra* note 2, at 14.

doors—if the nondiscriminatory law makes his perceived fulfillment of his religious duty impossible.[156]

The rabbi's religion may not require of him what the deities of the other religions require. Therefore, the rabbi's religious duty to disobey a valid, generally applicable law is not diminished because other individuals who are not Orthodox Jews are within the ambit of the same laws. Several decades ago, Justice Douglas opposed this strict and inflexible neutrality principle. He wrote, "[t]he fact that the ordinance is 'non-discriminatory' is immaterial."[157] Justice Douglas recognized that generally applicable, nondiscriminatory laws can be used as a pretext "for the suppression of religious minorities."[158] Justice Stevens, however, ignores the possibility that lawmakers who aim at religious minorities can now hit their target by (equally) oppressing all religions.

Freedom from discrimination on religious grounds, of course, is only one facet of religious liberty;[159] it is not the whole enchilada. Indeed, the Supreme Court's seminal cases[160] support "the conclusion that religious liberty is an independent liberty [independent from the equal protection guarantee and freedom of speech]."[161] To secure religious liberty from laws that affect some individuals more severely than others, courts in some instances "may either require or permit preferential treatment on religious grounds."[162]

The free exercise clause, as it is usually understood, recognizes that each individual is unique. Thus, even when laws appear to treat everyone alike, each unique individual's integrity as a moral actor is threatened if the law compels him to disavow his religious scruples. It is not necessarily an establishment of religion when a particular individual's religious needs are accommodated.[163] It is

156. In People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), the court emphasized that the consumption of peyote was central to the worship of the Native American Church. Absolute prohibition of its use would make the practice of that religion impossible.

157. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

158. *Id.*

159. P. KAUPER, RELIGION AND THE CONSTITUTION 17 (1964).

160. *See infra* Section V.

161. P. KAUPER, *supra* note 159, at 17.

162. *Id.*

163. Although there is tension between the establishment and free exercise clauses, they complement each other and dictate the same results because "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

often unjust, unfair, and cruel to punish persons who sincerely believe in the necessity of their act. The great Justices do not confuse group rights with the rights of the individual.

Justice Stevens apparently believes that his preference for a completely "neutral principle" absolves the Court of responsibility when its case ruling imposes a hardship on the individual exercising his religious freedom.[164] He fails to realize that the free exercise clause is not so neutral that it diminishes the government's duty to respect each individual's desire for spiritual experiences and development.[165] Justice Murphy wrote that the "right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience [is] a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches."[166]

Justice Stevens wants to abandon the Court's balancing test because the government's interest in exceptionless "uniformity . . . has a dimension that is of still greater importance . . . . It is the interest in uniform treatment for the members of all religious faiths."[167] This "principle of uniformity"[168] is circular, as applied in *Goldman*, and is tantamount to an abdication of the Court's responsibility to immunize the individual from government regulation unless the government shows, in each concrete case, that its refusal to grant an exemption to the litigant is justified by an intelligible imperative.[169] If Justice Stevens' deferential approach is substituted for the Court's ad hoc balancing, the religious freedom of the individual can be seriously burdened whenever the legislature arguably has a rational basis to enact a law [170] designed to

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164. *See* Michelman, *supra* note 149, at 15.

165. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1426 (1967).

166. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

167. *Goldman*, 106 S. Ct. at 1316 (Stevens, J., concurring).

168. *Id.*

169. *But see Gillette*, 401 U.S. 437. The Court in *Gillette* reaffirmed the principle that "even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, [only] when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." *Id.* at 462.

170. During World War II, the Supreme Court noted that governments were not permitted to interfere with religious liberty unless it was necessary to "prevent grave and immediate danger to interests which the state may lawfully protect." *Barnette*, 319 U.S. at 639.

further the majority's interest in public convenience and comfort.[171]

Unlike Justice Stevens, Justice O'Connor believes that the Court should balance competing interests in each free exercise case—whether or not the challenged regulation is based on military expertise, the expertise of prison administrators, or school authorities,

> because [if] 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. [Moreover], 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.[172]

Justice O'Connor dissented in *Goldman* because the district court's findings of fact disclosed that the rabbi's yarmulke had never caused any discontent or breach of discipline.[173] More significantly, she, "*alone among the Justices*, unambiguously affirms the past practice of strict scrutiny,"[174] even in military cases.[175]

Justice Stevens, however, is not willing to place any heavy burden of persuasion on the government when an individual challenges "the application of neutral general laws . . . . In [his] opinion, it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability."[176] If this position is adopted by the Court in nonmilitary cases, the level of strict scrutiny will be substantially diminished from the three sem-

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171. *But see Barnette*, 319 U.S. 624. There the Court declared firmly that "[t]he very purpose of the Bill of Rights was to withdraw certain subjects . . . beyond the reach of legislative majorities and officials." *Id.* at 638.

172. *Goldman*, 106 S. Ct. at 1325 (O'Connor, J., dissenting).

173. *Id.* at 1326.

174. Michelman, *supra* note 149, at 35-36.

175. Justice Brennan's approach in military cases is more ambiguous. At one point he seems to apply the compelling interest test, but "[a]t another point he states that it is not the Court's province to second-guess professional military judgments but rather 'to assure ourselves that there exists a rational foundation for assertions of military necessity when they interfere with the free exercise of religion.'" *Id.* at 36 (quoting *Goldman*, 106 S. Ct. at 1321).

176. United States v. Lee, 455 U.S. 252, 262 (1982) (Stevens, J., concurring).

inal cases: *Thomas v. Review Board*,[177] *Wisconsin v. Yoder*,[178] and *Sherbert v. Verner*.[179]

V. The Seminal Cases

Sherbert v. Verner[180] is a seminal case because the Supreme Court held that a state is constitutionally compelled to carve out a special exemption for individuals whose religious activities disqualify them from receiving unemployment insurance benefits. The challenged state law appeared to be a valid, generally applicable governmental regulation. The burdens imposed upon Mrs. Sherbert were incidental, inadvertent by-products of a law that was not intended to discriminate on the basis of religion. Nevertheless, the Court balanced competing interests and took a significant step beyond prior precedent.

Mrs. Sherbert was discharged by her employer because she would not work on the Sabbath day of her faith. She could not find work elsewhere because of her observance of the Sabbath on Saturday.[181] The South Carolina Unemployment Compensation Act provided that a claimant is ineligible for unemployment insurance benefits "[i]f . . . he [or she] has failed, without good cause . . . to accept available suitable work when offered him [or her]."[182] A religious objection to Saturday work was not considered good cause. Consequently, Sherbert's claim for benefits was denied by the state agency administering the program.

The South Carolina court observed that Sherbert's statutory ineligibility " 'places no restriction upon [her] . . . freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the

177. 450 U.S. 707 (1981) (holding that a state unemployment compensation rule may not be applied to deny benefits to a Jehovah's Witness who quit his job rather than produce weapons for war).

178. 406 U.S. 205 (1972) (holding that a compulsory school-attendance law may not be applied to Amish parents who objected on religious grounds).

179. 374 U.S. 398 (1963) (holding that a Seventh-Day Adventist must be exempted from a state's requirement of availability during her Saturday Sabbath). *Sherbert* was reaffirmed in Hobie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987).

180. 374 U.S. 398 (1963).

181. Had the appellant observed her Sabbath on Sunday, the laws of South Carolina would not have required her to work. *Id.* at 406. Thus the statutory scheme operated to discriminate against persons who observe their Sabbath on days other than Sunday. *Id.* The Court, however, focused its attention not on the discriminatory effect of the law but upon the magnitude of the state's interference with appellant's first amendment rights. *Id.*

182. *Id.* at 401.

dictates of her conscience.' "[183] The state supreme court's observation was accurate in this sense: no criminal statute made the observance of the Sabbath on Saturday an illegal act, and the state was not exacting from Sherbert any tax that inhibited her activities. In fact, Sherbert was seeking financial benefits from the state. Arguably, she wanted the statute to provide her with financial aid to compensate her for losses sustained as a result of her religious convictions.

In the judgment of the Supreme Court, "an indirect result"[184] of the legislation, as applied, forced Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[185] The Court implicitly held that persons who were unavailable for Saturday work for nonreligious, personal reasons were not similarly situated with persons protected by the free exercise clause.[186] The Court held that the statute, although it does not discriminate against religion on its face, has eligibility requirements that condition Sherbert's entitlement upon her "willingness to violate a cardinal principle of her religious faith [which] effectively penalizes the free exercise of her constitutional liberties."[187] In the Court's view, "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[188] This burden on Mrs. Sherbert's religious freedom was not justified by a compelling state interest.[189]

The Court might have been influenced by the fact that some nonreligious, personal reason for not accepting employment might constitute good cause.[190] There was a hint of religious discrimination in the administration of the program,[191] and the suspicion of

183. *Id.* at 401 (quoting Sherbert v. Verner, 240 S.C. 286, 303-04, 125 S.E.2d 737, 746 (1962)).

184. *Sherbert*, 374 U.S. at 403.

185. *Id.* at 404.

186. *See id.* at 409-10; *see also id.* at 401-02 n.4.

187. *Id.* at 406.

188. *Id.* at 404.

189. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). "No . . . words can describe just how weighty a governmental interest must be before it suffices to permit a particular form of regulation or prohibition . . . ." Greenawalt, *All or Nothing At All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 76.

190. *Sherbert*, 374 U.S. at 401-02 n.4.

191. The Court also noted that South Carolina law "expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's

religious discrimination by the state[192] often justifies the strictest scrutiny.[193] Thus, the full significance of *Sherbert* was not clear. *Braunfeld v. Brown*[194] was not overruled. In *Braunfeld*, the Court refused to compel Pennsylvania authorities to exempt Orthodox Jews from a Sunday closing law. According to the Court, Pennsylvania's "strong state interest in providing one uniform day of rest for all workers . . . . could be achieved . . . only by declaring Sunday to be that day of rest. Requiring exceptions for Sabbatarians . . . would have rendered the entire statutory scheme unworkable."[195] In other words, a system for granting religious exemptions appeared "to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme [unmanageable]."[196] In sum, the following guideline governs both *Sherbert* and *Braunfeld*: a paramount overriding interest in uniformity might subordinate the individual's interest in free exercise of religion whenever court-imposed exemptions would render ineffectual a complex and important statutory scheme.

The governmental interest in uniformity, although present in *Braunfeld*, was not compelling in *Sherbert*[197] because South Carolina already had set in place the administrative procedure for processing claims based on good cause.[198] There was no similar procedure set up in Pennsylvania. Moreover, although Pennsylva-

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religious liberty." *Id.* at 406.

192. The Supreme Court majority thought it more appropriate to compare the situation of Saturday worshippers with that of Sunday worshippers who were not disadvantaged by the law. Justice Harlan, who dissented, compared persons like the appellant, who are not entitled by the Constitution to get unemployment benefits because of their religious reasons, with those whose personal reasons are not religious and therefore not within the scope of the exemption to state law carved out by the Court. *See id.* at 422 (Harlan, J., dissenting). Justice Harlan thought that this was favoritism, and Justice Stewart suggested that such favoritism presented an establishment clause problem. *Id.* at 414-17 (Stewart, J., concurring). Thus, the characterization of an exemption for persons with religious convictions can be viewed as a permissibly protective measure that guards against unequal treatment, or as impermissible favoritism, and this depends upon what groups are being compared. *See* Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 825 (1984).

193. The compelling interest test is often used as a method to flush out and expose unconstitutional motivation if the Court suspects that the government is guilty of invidious discrimination against discrete and insular minorities.

194. 366 U.S. 599 (1961).

195. *Sherbert*, 374 U.S. at 408-09.

196. *Id.*

197. *Id.*

198. The Supreme Court was influenced in *Sherbert* by the fact that some personal reasons for refusing work constituted good cause. *See id.* at 401-02 n.4.

nia law imposed a criminal penalty on nearly all businessmen open on Sunday, Jewish businessmen were able to observe their Sabbath. Although the necessity of staying closed on Saturday *and Sunday* was economically disadvantageous, an exemption for Jewish merchants permitting them to stay open on Sunday *might* provide them with a great competitive advantage in their commercial dealings. The Supreme Court does not give much weight to the claim of a person seeking a religiously based exemption for business activities. This is because the purity of the religious claim is diluted, and because exemptions for businessmen often cause uncompensated hardships for other members of society (i.e., competitors).[199]

When religious beliefs overlap with secular self-interest, especially when it is difficult to determine the sincerity of many claimants' religious beliefs, the government's interest in avoiding administrative difficulty becomes more compelling. Thus, the interest in avoiding administrative nightmares can override religion-based rights, even though administrative convenience does not seem as important as national security, the prevention of physical violence, or the prevention of some extraordinary catastrophe. Recently, Justice O'Connor has indicated that she recognizes that usually the prevention of welfare fraud is both "laudable and compelling."[200]

In *Sherbert*, South Carolina's counsel argued that the filing of spurious claims by unscrupulous claimants feigning religious objections to Saturday work might dilute the unemployment compensation fund. But the state did not shoulder its burden of persuasion; it merely suggested the possibility of spurious claims. No evidence was introduced to substantiate the argument; indeed, the argument had never been presented to the South Carolina Supreme

199. In Estate of Thornton v. Caldor, 105 S. Ct. 2914 (1985), an employer was forced by Connecticut law to provide his employees with the absolute and unqualified right not to work on their chosen Sabbath. Conversely, the statute imposed on employers an absolute duty to conform his business practices to the particular religious practices of an employee who unilaterally may designate any day as his Sabbath. The Court held that "[t]his unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . . The statute has a primary effect that impermissibly advances a particular religious practice." *Id.* at 2918. The Court was also concerned about the effect of the statute on other employees who were not only discriminated against, but called upon to make sacrifices. *Id.* at 2918 n.9. Thus, the accommodation for some employees infringed on the rights of others calling for sacrifices that were intolerable. *But see* McConnell, *supra* note 2, at 50-59.

200. Bowen v. Roy, 106 S. Ct. 2147, 2166 (1986) (O'Connor, J., concurring in part, dissenting in part).

Court.[201]

The Supreme Court in *Sherbert* intensified the means-focused element[202] of its balancing test, more so than in earlier cases, by making specific reference to the less restrictive alternative test in the context of a free exercise clause case. The Court stated that "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[203]

Wisconsin v. Yoder[204] was a more difficult case because, unlike *Sherbert*, there was no hint of religious discrimination. Once again the Court balanced competing interests.[205] The trial record in *Yoder* disclosed that the Amish "believed that by sending their children to high school, they would . . . expose themselves to the danger of the censure of the church community . . . [and] endanger their own salvation and that of their children."[206] Therefore, asserting their first amendment rights, the Amish plaintiffs declined to comply with Wisconsin's compulsory attendance law after their children completed the eighth grade. "According to Amish belief, higher learning tended to develop values [which] alienate their children from God."[207] The Court was convinced that "the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs."[208] Therefore, the Court stated that "[i]t must appear . . . there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[209]

The state failed to show that the exemption demanded by Yoder

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

202. The Court does not have to decide that a state's interests are not compelling if the state could have used a different "means" to advance its interests, particularly if less restrictive means are feasible and available.

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

204. 406 U.S. 205 (1972).

205. In order to protect the Amish sect's religious beliefs and activities from the burdens imposed by governmental regulation, the Court carved out an exemption from the state's compulsory school attendance law. *Id.* at 234.

206. *Id.* at 209.

207. L. PFEFFER, *supra* note 79, at 59.

208. *Yoder*, 406 U.S. at 219.

209. *Id.* at 214.

seriously interfered with the educational mission of the state. The burden of persuasion in cases involving exemptions from school laws on religious grounds, however, is not entirely on the state. Indeed, the Court apparently requires litigants seeking exemptions from generally applicable educational requirements to demonstrate that exemptions do not interefere with the state's especially important educational goals. This allocation of the burden of persuasion is justifiable because the plaintiffs usually have sole access to the evidence that discloses whether the child is being instructed outside of the school systems—although some individuals who teach their children at home have religious scruples that prevent them from disclosing their teaching methods. The Amish plaintiffs, however, were willing to introduce evidence that proved that the alternative methods of informal education provided by the Amish to their children adequately furthered the interests "that the State advance[d] in support of its program of compulsory high school education."[210] In view of the impressive evidence introduced by counsel,[211] the Court held that "it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[212]

Although its level of scrutiny was strict, the Court left no doubt that a state's interests in education will, in appropriate cases, justify the denial of exemptions from compulsory attendance laws. Indeed, the state's general interest in "[p]roviding public schools ranks at the very apex of the function of a State."[213] The Court will probably continue to dismiss appeals like those in the companion cases of *Donner v. New York* and *Auster v. Weberman*.[214] In

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210. *Id.* at 235.

211. The trial pratice lesson to be learned is valuable. Counsel seeking exemptions from particular parts of a regulatory program should show that the program can be redesigned to accommodate individuals who have no desire to interfere with the entire program's overall effectiveness. If plaintiff's counsel makes a prima facie showing, and if the ordinary balancing test is applied, the government runs the risk of nonpersuasion, for it must demonstrate that the suggested—allegedly reasonable—alternatives to exceptionless uniformity is unworkable.

In shouldering its burden of proof, the government cannot depend merely on rhetoric that refers to the undifferentiated fears of its officials. Rhetoric that refers to a speculative parade of horribles is not an adequate substitute for proof, and mere apprehensions, standing alone, should never justify any enforceable restriction of religious activity protected by the free exercise clause. Otherwise, the free exercise clause becomes a virtual nullity.

212. *Id.* at 236.

213. *Id.* at 213.

214. 342 U.S. 884 (1951), *dismissing appeal from* 100 N.E.2d 57 (1951).

those cases, the state courts ruled that "the Free Exercise Clause did not protect the right of ultra-Hasidic parents to send their children to a probably unique *yeshivah* (Orthodox Jewish all-day school) in which no secular subjects were taught because all knowledge was to be found in Torah and Talmudic writings."[215]

However, *Yoder* indicates that when school authorities refuse religiously based exemptions, the state's interests in preparing students to become self-reliant, self-sufficient and politically aware citizens[216] are not always compelling. Resolution of the question whether the state's particularized interests are compelling depends on the facts in each individual case. In religious controversies involving challenges to school laws, the Court admits that it is "ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education."[217] Understandably, the Court in *Yoder* admonished lower courts to "move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemptions from generally applicable educational requirements."[218] Nevertheless, the Court held that the interests advanced by the state—although perhaps sufficiently compelling in some cases—emerged "as somewhat less substantial,"[219] given the trial record, which amply supported the argument that the Amish's on-the-farm training in practical skills was more suitable for Amish children than the state's program.[220]

Additional litigation was fomented by language in the Court's opinion in *Yoder*[221] suggesting that persons seeking religiously based exemptions were required to demonstrate that the belief on which their claim was based is "a central, fundamental, important,

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215. L. PFEFFER, *supra* note 79, at 60-61. Thus, there no longer appears to be any question that states may require parents to provide their children with the minimum essentials of a basic secular education, either at home or in public or private schools.

216. *Yoder*, 406 U.S. at 221.

217. *Id.* at 235.

218. *Id.*

219. *Id.* at 228.

220. *Id.* at 228-29.

221. The Court's guidance in many respects presents more questions than it answers. *See, e.g., id.* at 224-26. For example, there is some question whether the state's interest in preparing students to become socialized within the conventional mainstream of our society is ever important enough to subordinate the interests of parents whose religious convictions require them to train their children to live in religious communities that are kept separate from the mainstream. This ambiguity makes the issues in the Tennessee textbook case more difficult to resolve.

or essential part of their faith."[222] Justice Brennan subsequently wrote that it is necessary to consider the "sincerity and centrality" of the objection to the claimant's religion.[223] This language emphasizing the need to show that the conviction upon which the free exercise claim rests is "an essential part of . . . religious belief and practice"[224] is questioned by some commentators because it involves some "subjective judgments about how sincere a particular group is, how important various beliefs and practices are to it, and how adversely the public interest will be affected by a special exemption."[225] However, the Court's concern about centrality is an aspect of the Court's balancing test, not a *sine qua non* of a legitimate free exercise claim.[226]

Because the trial record disclosed that it is relatively easy to determine the sincerity and intensity of an Amish parent's claim that his religion requires him to separate his children from the world,[227] it is not enormously difficult to process such claims,[228] particularly since the governing statute already contemplated a procedure to determine if school-age children have a "legal excuse" for not attending school.[229] The *Yoder* Court also noted that some states already have voluntarily "developed working arrangements with the Amish regarding high school attendance."[230] Yoder's counsel demonstrated that practicable, less restrictive alternatives were available. In short, the administration of a system that permitted exemptions for Amish individuals, and other individuals similarly

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222. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 900 n.189 (1984) (citing *Yoder*, 406 U.S. at 210-19).

223. McDaniel v. Paty, 435 U.S. 618, 635 n.8 (1978) (Brennan, J., concurring).

224. *Yoder*, 406 U.S. at 219.

225. Johnson, *supra* note 192, at 842. Professor Phillip Johnson adds:

> In *Yoder*, the Court's opinion left no doubt that the decision turned largely on the respect the Justices had for the Old Order Amish . . . . The opinion warned that other groups with different characteristics should not necessarily expect similar treatment. It is not easy to achieve this kind of outcome by a neutral application of legal concepts; rather . . . perhaps it would be more honest simply to acknowledge that the Court occasionally gives a deserving party a break.

Id.

226. Greenawalt, *supra* note 11, at 780-81; *see also infra* text accompanying notes 231-32.

227. *Yoder*, 406 U.S. at 216-19.

228. As a practical matter, the threat to any regulatory program is de minimis if only a few persons have religious objections that require them to disobey the programs' legal requirement. Therefore, the Court wisely abandoned its requirement that the plaintiff prove that many others share his religious convictions. *See infra* notes 236-37 and accompanying text.

229. *Yoder*, 406 U.S. at 207 n.2 (citing WIS. STAT. § 118.15(1)(a) (1969)).

230. *Yoder*, 406 U.S. at 218 n.9.

situated, does not seriously interfere with the administration of Wisconsin's compulsory attendance laws or the pursuit of its educational objectives.

Although *Yoder* stressed that the beliefs of Mr. Yoder were central to his religion, Chief Justice Burger's opinion in *Thomas v. Review Board*[231] disclosed that this line of inquiry is not part of the Court's threshold test.[232] In *Thomas*, an applicant for unemployment benefits left his job because his "employment, once acceptable, became religiously objectionable."[233] At the hearing before the Unemployment Review Board, Thomas, a Jehovah's Witness, admitted that he did not object to working in a plant that produced steel that could be used to manufacture war weapons, but his conscience would not allow him to actually hammer the steel into a tank. During the hearing, another Jehovah's Witness testified that working on tanks was scripturally acceptable. Because Thomas was struggling with his own beliefs, which he did not articulate with precision or clarity,[234] Thomas did not satisfy the statute's requirement of good cause.[235]

The Supreme Court reversed. Instead of determining whether the applicant's belief was central or important to a sect, the Court held that the narrow function of the reviewing court is to determine if the individual's own belief is an "honest conviction" that such activity "was forbidden by his religion."[236] The Court added that the "guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect."[237]

Once the *Thomas* Court was convinced that the applicant's religious convictions were sincerely held, the burden of producing relevant evidence to rebut the claim was entirely on the state. Eight Justices joined in that part of the Court's opinion which made it incumbent on the state to prove that its important goals were particularly compelling. The Court held that "the interests advanced by the State do not justify the burden placed on the free exercise of religion."[238]

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231. 450 U.S. 707 (1981).
232. For a discussion of the threshold test, *see supra* note 11.
233. *Thomas*, 450 U.S. at 718.
234. *Id.* at 711, 714, 715.
235. *Id.* at 712-13.
236. *Id.* at 716.
237. *Id.* at 715-16.
238. *Id.* at 719.

The state's particularized goals were: (1) to avoid burdens on the unemployment compensation fund "resulting if people were permitted to leave jobs for 'personal' reasons, and (2) to avoid a detailed probing by employers into job applicants' religious beliefs."[239] The Court seemed to place the entire record-making burden on the attorneys for the state agency. This was a fair allocation of the risk of nonpersuasion since the government agency, rather than the plaintiff, had access to nearly all the relevant evidence.

The Court, however, did not indicate that the free exercise claimant no longer has any obligation to make a record. For those who viewed *Thomas* as an unambiguous endorsement of a balancing test that almost always tips in favor of individuals requesting religion-based exemptions, Chief Justice Burger's opinion in *United States v. Lee*[240] must have been a surprise, and *Goldman v. Weinberger*[241] must have been a shock. The Supreme Court is becoming more sensitive to the government's boilerplate, administrative necessity argument. It is therefore not clear whether the Court's seminal cases illustrate the rule, or the exception, in free exercise cases. Explanations of the Court's current position are speculative whenever a new trend of case rulings interrupts a stable line of growth.

VI. Ominous Overtones in Recent Opinions

In the three seminal cases, the Supreme Court balanced competing interests when laws neutral on their face interfered with religious liberty. Despite governmental claims of administrative inconvenience, the Court compelled the government to carve out special exemptions for persons who believed that Biblical commands have precedence over secular law. A different approach was taken in *Goldman v. Weinberger*[242] when the Court, declining to exercise its independent judgment, rubber-stamped the Air Force's application of dress code regulations that interfered with a rabbi's religious liberty. *Goldman* illustrates the exception to the rule, requiring the government to endure manageable administrative inconveniences in order to make good on the guarantees of the first amendment.

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239. *Id.* at 718-19.
240. 455 U.S. 252 (1982).
241. 106 S. Ct. 1310 (1986); *see supra* Section IV.
242. 106 S. Ct. 1310 (1986).

There is still a reasonable likelihood that *Goldman* will be limited to a unique line of military cases.

Clearly the Supreme Court has rejected a mechanical application of Professor Kurland's thesis: "religion may not be used as a basis of classification for purposes of government action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations."[243] Kurland, like Justice Stevens, believes in "a 'neutral' principle of equality."[244] This principle, fine in theory, does not work in practice,[245] and might indicate insensitivity on the part of the Court.

Needless to say, the Court cannot be unconcerned and stay in neutral gear when the government is oppressing believers in a religious creed. Instead of sitting idly by, insensitive to the plight of persons oppressed by laws not directly aimed at religious minorities, the Court should take affirmative action and ameliorate the disproportionately harsh effect of laws that impose undue burdens on religion. Amelioration can best be accomplished by siding with the oppressed individual and by granting personal exemptions if practicable. Although this kind of judicial relief entails the use of religion as a basis for classification,[246] as Justice White has pointed out, "[i]t cannot be ignored that the First Amendment itself contains a religious classification."[247]

The Court refused to use religion as a basis for a judicially imposed tax exemption in *United States v. Lee*,[248] but not because of any principle of neutrality. After equating social security taxes with other general taxes, the Court concluded that "[t]he tax system could not function if denominations were allowed to challenge the tax system because the tax payments were spent in a manner that violates their religious belief."[249] The reasoning of the Court

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243. P. KURLAND, RELIGION AND THE LAW 18 (1962) *quoted in* McDaniel v. Paty, 435 U.S. 618, 638-39 (1978) (Brennan, J., concurring). Professor Kurland himself conceded that his principle "is meant to provide a starting point for solutions to problems before the Court, not a mechanical answer to them." *Id.*

244. P. KURLAND, *supra* note 243, at 18.

245. "Strict neutrality might indeed produce results plainly inconsistent with free exercise. Must restrictions on sex discrimination in employment be applied to the hiring of Roman Catholic priests?" McConnell, *supra* note 2, at 19.

246. This kind of judicial relief has been called "constitutional neutrality" or "benevolent neutrality." *Cf.* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

247. Welsh v. United States, 398 U.S. 333, 372 (White, J., dissenting).

248. 455 U.S. 252, 260 (1982).

249. *Id.*

in *Lee*, however, neither embraces Professor Kurland's principle of neutrality, nor abandons the Court's well established balancing test. If we have learned anything from the Court's leading free exercise cases, it is this: the enclave of religious freedom for the individual is determined after the Court evaluates the competing interests in the case *sub judice*.[250] Unreliable as balancing tests are, they have produced many cases which indicate that religious freedom, although not absolute, is a fundamental right.

This painstaking process of groping for justice does not satisfy Justice Stevens, who prefers a more inflexible, predictable, and objective methodology.[251] He admittedly advocates adoption of a "standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[252]

The majority of the Justices are resisting the entreaty of Justice Stevens. Even after deciding *Lee*, the Court chose to apply the compelling interest test, in *Bob Jones University v. United States*.[253] Moreover, *Murdock v. Pennsylvania*[254] and *Follett v. McCormick*[255] were cited in *Lee* without indication of any disapproval.[256] *Murdock* held that a flat license tax challenged by an evangelist unduly burdened his religious freedom.[257] The words "undue burden on religious freedom" simply indicate that the Court has balanced competing interests and the scales have tipped against the government.

In *Follett*, the Court agreed that a general, nondiscriminatory license fee imposed on an evangelist who makes his living selling

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250. Justice O'Connor wrote in *Goldman* that "the Government can present no sufficiently convincing proof in *this* case." *Goldman*, 106 S. Ct. at 1326. She stressed the facts found by the district court "in this particular case." *Id.*

251. *See also* Thomas v. Review Bd., 450 U.S. 707, 722-23 (1981) (Rehnquist, J., dissenting).

252. *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring).

253. 461 U.S. 574, 604 (1983). For a more detailed discussion of this case, see *infra* text accompanying notes 299-306. *See also* Freed and Polsby, *Race, Religion, and Public Policy*: Bob Jones University v. United States, 1983 SUP. CT. REV. 1 (1984); Stephan, Bob Jones University v. United States: *Public Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33. (1984).

254. 319 U.S. 105 (1943).

255. 321 U.S. 573 (1944).

256. *Lee*, 455 U.S. at 259 n.10.

257. *Murdock*, 319 U.S. 105.

tracts is a tax on the exercise of religion.[258] But this is only the beginning of the judicial inquiry. The inquiry does not end until the Court determines whether a regulation which is nondiscriminatory on its face unduly burdens religious liberty in its application. The Court sided with the evangelist. Justice Murphy, concurring in *Follett*, wrote, "[i]t is claimed that the effect of our decision is to subsidize religion. But this is merely a harsh way of saying that to prohibit the taxation of religious activities is to give substance to the constitutional right of religious freedom."[259] In short, constitutional neutrality "is not so narrow a channel that the slightest deviation from an absolutely straight course" is prohibited.[260]

Since Justice Stevens does not believe that *Wisconsin v. Yoder*[261] is consistent with *Lee*, he apparently thinks that *Yoder*, *Murdock*, and *Follett* were incorrectly decided.[262] In *Lee*, he explained his concerns more fully:

> In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.[263]

In *Yoder*, the Supreme Court was aware of the risks of violating the establishment clause when court-ordered exemptions are carved out from facially neutral laws of general applicability, but noted that "danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise."[264] Concededly, many cases require the Court to risk traversing a tight rope as it tries to preserve religious

258. *Follett*, 321 U.S. at 577-78.

259. *Id.* at 578-79 (Murphy, J., concurring).

260. Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting).

261. 406 U.S. 205 (1972).

262. Justice Stevens was not a Justice of the United States Supreme Court when *Yoder* was decided. In *Goldman*, Justice Stevens reiterated the position he stated in *Lee*. *Goldman*, 106 S. Ct. at 1314-16 (Stevens, J., concurring); *see also supra* note 164 and accompanying text.

263. *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring).

264. *Yoder*, 406 U.S. at 221.

freedom and the autonomy of the individual "while avoiding any semblance of established religion."[265]

Justice Stevens' concerns about the risks of violating the establishment clause are understandable,[266] but his solution is not consistent with the Court's seminal cases. Moreover, in *Witters v. Washington Department of Services For the Blind*,[267] the Court indicated that financial aid to certain religious individuals does not necessarily violate the establishment clause. *Witters* is a recent, although somewhat hedged, affirmation of the idea that the establishment clause may not be used as a sword to justify the repression of adherents to a religion; instead, it is a shield against any attempt to inhibit religion.[268] This is what Justice Stewart meant when he wrote that the scope of the establishment clause prohibition is inherently limited and "compelled by the free exercise guarantee."[269]

Justice Stevens wants to resurrect a rejected distinction between legislatively created exemptions and exemptions that are judicially imposed. The latter, according to a dissenter in *Sherbert v. Verner*,[270] violates the establishment clause.[271] This distinction is weak because the Court carves out a religiously based exemption only after it decides that the free exercise clause requires the government to accommodate the religious needs of an individual. Neither the notion of strict neutrality nor nonestablishment "can account for the idea of accommodation or define its limits."[272]

When the Court balances competing interests, it must also be mindful of its own test in establishment clause cases: "the statute must have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion

265. *Walz*, 397 U.S. at 672.

266. A version of Stevens' argument was advanced by Justice Rehnquist in Thomas v. Review Bd., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting), and rejected in an opinion that Stevens joined.

267. 106 S. Ct. 748 (1986). Justice Stevens joined the Supreme Court's opinion in *Witters*. The Washington Supreme Court had ruled that the establishment clause precluded the state from extending vocational rehabilitation assistance to a blind person studying for the ministry at a Christian college. The Supreme Court reversed, noting that the record on appeal did not disclose that extension of financial aid violates the establishment clause.

268. *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring); *see also* Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

269. *Schempp*, 374 U.S. at 311 (Stewart, J., dissenting).

270. 374 U.S. 398 (1963).

271. *Id.* at 422-23 (Harlan, J., dissenting).

272. McConnell, *supra* note 2, at 3.

. . .; finally, the statute must not foster 'an excessive entanglement with religion.' "[273] Normally, however, when a court compels a state to grant an exemption for a particular individual, there is no excessive entanglement. Moreover, the Court's desire to guarantee the free exercise of religion is a secular purpose, and the primary effect of any court-ordered exemption does not advance religion improperly if accommodation is required by the free exercise clause. Recall that the judicial remedies required in *Murdock* and *Follett* were financial subsidies in the form of a fiscal exemption, but the Court's opinions clearly indicated that not all financial subsidies to secure the free exercise of religion violate the establishment clause. As Justice White wrote in dissent in *Committee for Public Education & Religious Freedom v. Nyquist*,[274] the Court's decisions in controversies involving the establishment clause "have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships."[275]

Exemptions for religious dissenters discriminate in favor of religion, but "our whole constitutional history refutes the argument that what is meant by religious liberty is a principle directed against preferential or discriminatory treatment on religious grounds."[276] Indeed, the Supreme Court's decisions have, as Paul Kauper wrote:

> elevated religious liberty to the position of a preferred freedom, not only because religious activities cannot be abridged except for clear and compelling reasons related to the public interest, but also because in some situations the legislature may, and in other situations must, take the religious factor into account as a basis for preferential treatment under tax and regulatory laws.[277]

"It is sometimes forgotten that religious liberty [not separation of church and state] is the central value and animating purpose of the Religion Clauses of the First Amendment."[278]

The Court's seminal cases follow the best of our traditions be-

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273. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The three prong purpose, effect and entanglement test is restated in *Witters*, 106 S. Ct. at 751.

274. 413 U.S. 756 (1973).

275. *Id.* at 820 (White, J., dissenting).

276. P. KAUPER, *supra* note 159, at 17.

277. *Id.* at 43-44.

278. McConnell, *supra* note 2, at 1.

cause the majority of the Justices have demonstrated over the years their respect for the place religion occupies in the life of serious believers.[279] Justice Stevens, however, distinguished *Sherbert* and *Thomas v. Review Board*[280] on the ground that the Supreme Court's intervention "could be viewed as a protection against unequal treatment."[281] Perhaps Justice Stevens' campaign for the complete neutrality principle influenced Chief Justice Burger, whose plurality opinion in *Bowen v. Roy*[282] resounds with ominous overtones.

Roy, a Native American and member of the Abenaki Tribe, objected on religious grounds to the government's use of the number that identified his daughter.[283] The Court held that the government's use of any number, already issued, does not unduly burden the applicant's exercise of religion.[284] Chief Justice Burger's apparent alliance with Justice Stevens surfaced in connection with another distinct claim made by Roy, who also wanted an exemption from the requirement that he *furnish* his daughter's number to the state agency as a condition of eligibility under the state's Aid to Families with Dependent Children plan.[285] Roy believed he was being forced to harm his daughter's "spirit" each time he *furnished* his daughter's number on benefit applications.

The evidence showed that the government's computers are capable of identifying Roy's daughter without her number and that only four other challenges to the government's requirements were reported.[286] Accordingly, the district court enjoined the government from denying the benefits to Roy's daughter because of his *failure to furnish* the number already established as her identifier.[287] On appeal, this issue was not resolved by the Court. However, Chief Justice Burger wanted to resolve the issue, and he wrote, "[i]n the enforcement of a facially neutral and uniformly

279. *Cf.* Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).
280. 450 U.S. 707 (1981).
281. *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring).
282. 106 S. Ct. 2147 (1986).
283. *Id.* at 2150-51.
284. *Id.* at 2151.
285. *Id.* at 2153.
286. Roy v. Cohen, 590 F. Supp. 600, 612 (M.D. Pa. 1984), *vacated sub nom.* Bowen v. Roy, 106 S. Ct. 2147 (1986).
287. *Roy*, 590 F. Supp. at 614. The record was not crystal clear that Roy was actually under any further obligation to furnish this number, and therefore Justice Stevens refused to resolve the issue, *Roy*, 106 S. Ct. at 2160-64 (Stevens, J., concurring in part), and Justice Blackmun addressed the issue only in part. *Id.* at 2160 (Blackmun, J., concurring in part).

applicable requirement for the administration of welfare programs reaching millions of people, the Government is entitled to wide latitude."[288]

The Chief Justice not only refused to apply strict scrutiny,[289] but he also invoked a rational basis test stating, "[a]bsent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[290] *Thomas* and *Sherbert* were distinguished by the Chief Justice as cases already involving "a mechanism for individualized exemptions," and involving welfare programs that exhibited "hostility, not neutrality, towards religion" because religiously motivated reasons were not considered "good cause" for refusing employment.[291] Justices Blackmun, O'Connor, Brennan, Marshall, and White, however, indicated, either expressly or implicitly, that the applicant's objection to furnishing his daughter's number on each benefit application required "a straight forward application of *Sherbert*, *Thomas* and . . . *Yoder*."[292] Although Justice Blackmun thought the record was inadequate for a definitive decision on the claim, he indicated that "the Government may not deny assistance to [Roy's daughter] solely because the parents' religious convictions prevent them from supplying the Government with a social security number."[293] Justice White dissented on the ground that *Thomas* and *Sherbert* controlled the outcome of both claims.[294]

Justice O'Connor (whose opinion was joined by Justices Marshall and Brennan) accurately observed that the government had not shown that a rigid requirement forcing Roy to furnish his daughter's number was necessary to prevent fraud and abuse,[295] or that "a significant number of other individuals were likely to make

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288. *Id.* at 2156.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 2160. Justice Stevens did not reach the second claim because, in his view, it was "either moot or not ripe for decision." *Id.* at 2161-62 (Stevens J., concurring in part and concurring in result).

293. *Id.* at 2160 (Blackmun, J., concurring in part).

294. *Id.* at 2169.

295. *Id.* at 2166.

a claim similar to that at issue here."[296] Justice O'Connor expressed dismay that the Chief Justice found it "necessary to invoke a new standard to be applied to test the validity of government regulations under the Free Exercise Clause."[297] In her view:

> Such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides. I would apply our long line of precedents to hold that the Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.[298]

Justice O'Connor's approach, like the approach of the Court in the seminal cases, adds up to an ad hoc balancing test with the scales usually tipped in favor of the claimant.

However, the Court is not always prepared to tip the scales in favor of the claimant. For example, in *Bob Jones University v. United States*,[299] the Court, without indicating what evidence supported its judgment, held that no less restrictive means, other than a denial of a religious school's tax exempt status, can demonstrate the government's disapproval of a racially discriminatory private school. Arguably, the Court decided that a religious exemption interferes with its own compelling *constitutionalized* policy[300] of eradicating racially discriminatory education.[301]

In *Bob Jones*, "Chief Justice Burger disposed of the constitutional issue in two pages, with no reference to the justifications for the special place of religion" in our Constitution.[302] One commen-

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296. *Id.* at 2167. The district court found that there had only been four reported cases involving religiously based challenges to the social security number requirement for welfare benefits. *Id.*

297. *Id.* at 2166.

298. *Id.* Justice O'Connor's position was endorsed by the Court in Hobbie v. Unemployment Appeals Comm'n, 167 S. Ct. 1046, 1049 (1987).

299. 461 U.S. 574 (1983).

300. *Bob Jones* is a unique case because the Court took the lead when it encouraged all branches of the government to eradicate racial discrimination in education. None of the Justices are willing to countenance foot dragging by recalcitrant, segregated institutions, regardless of their proprietors' religious convictions. Nevertheless, if the Court continues to make exceptions to its normal policy of heightened scrutiny, the potency of the free exercise guarantee will diminish.

301. Justice O'Connor clarified *Bob Jones* by noting that the interest balanced against the religious interests of the university "was not merely a compelling governmental interest, but a *constitutional* interest." *Roy*, 106 S. Ct. at 2167-68 (O'Connor, J., concurring).

302. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 122 (1984).

tator suggested that some "fundamentalist Protestant groups may seem to these Justices . . . [as] heretics who disrupt the social harmony by disavowing a major article of the American creed."[303] If so, the prospects for the fundamentalists' success in the appeal of *Mozert v. Hawkins County Public Schools*[304] will diminish if the secular relativism inculcated by school textbooks becomes constitutionalized as another article of the American creed.[305] It will be interesting to see if the appellate courts cater to those who think the fundamentalist plaintiffs are ignorant "heretics who disrupt social harmony,"[306] or whether the courts will continue to balance the competing interests of devout individuals and secular educators.

VII. The Tennessee Textbook Case

Several fundamentalists began battling with school authorities shortly after the Hawkins County Board of Education recommended compulsory use of the 1983 edition of the Holt, Rhinehart and Winston basic reading series in the public schools. In the Holt series there were references to witchcraft and magic, selections that commented favorably on rebellion against parental authority, and materials that implied certain theories of evolution were indisputably truthful. Although most parents do not object to their children's exposure to the Holt series, parental concern about curriculum requirements are not limited to Hawkins County. As a 1976 article in the *New York Times* stated:

> As America's children return to school, many conscientious parents are genuinely uncertain whether they may be delivering their children into enemy territory . . . . Much of America's popular culture adds up to a conspiracy to destroy the innocence of youth and to force upon children premature knowledge and ways of acting that they can understand intellectually but not cope with emotionally.[307]

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303. *Id.* at 123.

304. 647 F. Supp. 1194 (E.D. Tenn. 1986).

305. Emboldened by *Goldman*, by the position of Chief Justice Burger in *Bob Jones* and *Roy*, and by Justice Stevens' hard-line position, the Court will surely seek to expand the idea that the government's interest in uniformity of treatment in public schools is itself a compelling interest. This argument, in most cases, adds up to a euphemism for the *ipse dixit* that rules are rules, which would effectively guarantee victory for the government in every case.

306. Smith, *supra* note 302, at 123.

307. Shannon, *Too Much, Too Soon*, N.Y. Times, Sept. 8, 1976, at 37, col. 5, *quoted in* J. Whitehead, The Stealing of America 88 (1983).

James J. Kilpatrick, who disagrees that the fundamentalists have rights to withdraw their children from a class in reading instruction, admits that "religion has been washed out of [the textbooks]. The child who learns from these texts will learn nothing of the role of the church in American history."[308] Kilpatrick adds, "[t]he one minority that has been consistently put down [by the school texts] is the minority of white Protestant fundamentalists."[309] The relief sought by the plaintiffs included a court order that prevented the county's public school system from forcing impressionable children to consider ethical relativism as an alternative to their parents' Bible-based religious convictions.

The controversy between the fundamentalist plaintiffs and school authorities is similar to many cases that arise when the government acts neutrally with respect to religion, extending its benefits and burdens among a wide range of persons without regard to religion. The issue in such cases is whether religious persons are entitled to special exemptions or protections.[310]

The district court enjoined the school authorities from requiring the student-plaintiffs to read from the Holt series,[311] and officials were ordered "to allow the student-plaintiffs to attend the Hawkins County public schools without participating in the course of reading instruction."[312] School authorities were also ordered to excuse the student-plaintiffs from the classroom during the normal reading period, and to provide them "with suitable space in the library or elsewhere for a study hall."[313] The injunction provided that "[n]o student shall be penalized for exercising" the option to decline to participate in the public school's course of reading instruction, which utilized the Holt series."[314]

The order is less sweeping than it appears because state law had previously provided the parents with a home school option. Indeed, the order[315] provided that the student-plaintiffs could be excused only if their parents submitted written intent of their notice to

308. Richmond News Leader, Nov. 3, 1986, at 17, col. 4. Mr. Kilpatrick was referring to the exhaustive study of textbooks made in 1985 by Professor Paul E. Vitz of Columbia University.

309. *Id.*

310. *See* McConnell, *supra* note 2, at 7.

311. Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194, 1203 (E.D. Tenn. 1986).

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

provide home school reading instruction in accordance with the Tennessee statute[316] that allows children to be taught *all subjects* at home rather than in private or public school.

In *Mozert v. Hawkins County Public Schools*,[317] like *Wisconsin v. Yoder*,[318] the state's general interest is the education of young children pursuant to compulsory school attendance laws. Hawkins County authorities, however, expel children from school when their parents prevent them from reading materials that are offensive to their religious convictions. It is not clear how the state's interest in socialization is furthered by expelling fundamentalists. In any event, because the state's belief in the value of the Holt textbooks and the plaintiffs' religious values are antagonistic, the trial court endeavored to "decide whether the state can achieve literacy and good citizenship for all students without forcing them to read the Holt series."[319]

In order to understand that the district court's injunction is in line with *Yoder*, *Sherbert v. Verner*,[320] and *Thomas v. Review Board*,[321] it is helpful to consider the following facts: shortly after the Board of Education began using the Holt series, an organization of parents apprised the Board "that they found the Holt series offensive to their religious beliefs."[322] Petitions were presented requesting removal of the Holt series from the school, but these petitions were properly rejected. There would be an establishment clause violation if any court imposed the religious views of some parents on school authorities and on any nonconsenting parent or child.[323]

The concerned parents subsequently requested school authorities to provide their children with an alternative reading assignment. This proposed solution did not infringe on the religious liberty of others, and did not present serious establishment clause problems.[324] Even Justice Harlan, who dissented in *Sherbert*,

316. TENN. CODE ANN. § 49-6-3050 (Supp. 1986).
317. 647 F. Supp. 1194.
318. 406 U.S. 205 (1972).
319. *Mozert*, 647 F. Supp. at 1201.
320. 374 U.S. 398 (1963).
321. 450 U.S. 707 (1981).
322. 647 F. Supp. at 1196.
323. *Cf.* Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985).
324. The government may voluntarily create special religious exemptions to accommodate an individual's religious beliefs even when the government is not compelled to do so by the free exercise clause. McDaniel v. Paty, 435 U.S. 618, 638-39 (1978) (Brennan, J., concurring);

agreed that a state may single out religiously motivated conduct for a special exemption as "a permissible accommodation of religion . . . if it *chose* to do so."[325] Quite properly, therefore, a school official at Church Hill Middle School acceded to the parents' request for alternative reading assignments.[326] This accommodation hardly conveyed a message "of endorsement of a particular religious belief, to the detriment of those who do not share it."[327]

Litigation became necessary after the school board adopted a resolution requiring teachers to "use only textbooks adopted by the Board of Education."[328] Thereafter, school officials at the Church Hill Middle School told seven of the student-plaintiffs that they would no longer be allowed to use an alternative reader. The district court summarized the ensuing events:

> [T]hese [seven] students refused, on religious grounds, to read the Holt series or to attend the reading classes in which the Holt series was used. They were suspended from school for three days as a result. On November 22, 1983, they were again suspended, this time for ten (10) days, because they continued to refuse to attend reading class and/or read the Holt books. Following this rigorous enforcement of the Board's mandate [which included a third suspension], many of the student-plaintiffs withdrew from public schools . . . .[329]

During the early stages of litigation, Judge Hull of the district court granted summary judgment against the plaintiffs, but this decision was reversed by the United States Court of Appeals for the Sixth Circuit.[330]

The court of appeals noted that the parents "emphasized that they were not seeking to ban the Holt books from the schools nor did they object to its [sic] use by the rest of the student body."[331] The plaintiffs had alleged that statements made by the authors of the Holt series show they admittedly reject "traditional Judeo-Christian values and . . . teach contrary values."[332] The court of

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see McConnell, *supra* note 2, at 29-41.

325. *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting).

326. *Mozert*, 647 F. Supp. at 1196.

327. *Estate of Thornton*, 105 S. Ct. at 2919 (O'Connor, J., concurring).

328. *Mozert*, 647 F. Supp. at 1196.

329. *Id.*

330. *Mozert*, 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd and remanded*, 765 F.2d 75 (6th Cir. 1985), *reh'g*, 647 F. Supp. 1194 (E.D. Tenn. 1986).

331. *Mozert*, 765 F.2d at 76.

332. *Id.* at 77.

appeals held that summary judgment was improper in view of the following unresolved factual issues: (1) whether plaintiffs' religious beliefs were sincerely held; (2) whether the Holt series books are offensive because they are used to teach values contrary to Judeo-Christian beliefs; (3) whether an option enabling plaintiffs' children to learn from different books than those used by the public schools would impair the school authorities' ability to teach reading.[333]

After remand to the district court, the parties stipulated "that the plaintiffs' beliefs were sincerely held religious convictions."[334] The district court did not determine whether the plaintiffs' religious beliefs are central to their faith, since "[n]o Supreme Court decision turned on the issue of whether a particular belief was central."[335] Instead, Judge Hull simply required the plaintiffs to prove that their beliefs and actions were "rooted in religion."[336]

The district court allocated the litigants' respective burdens of proof as follows:

> When deciding a free exercise claim, the courts apply a two-step analysis. First, it must be determined whether the government action does, in fact, create a burden on the litigant's exercise of his religion. If such a burden is found, it must then be balanced against the governmental interest, with the government being required to show a compelling reason for its action.[337]

In addition, it must be determined whether the state has acted in a way which constitutes "the least restrictive means of achieving [the] . . . compelling state interest,"[338] as measured by its impact upon the plaintiffs. Although the parties subsequently stipulated that material in the Holt series was "offensive,"[339] it is not necessarily an unduly oppressive burden on religious liberty when a student is required to read offensive materials. The plaintiff-parents, however, produced substantial evidence demonstrating that "cer-

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333. *Id.* at 78. Other factual disputes were unresolved because school authorities argued that the accommodation requested by plaintiffs violates the establishment clause. *Id.*

334. *Mozert*, 647 F. Supp. at 1197.

335. *Id.* at 1198.

336. *Id.* The court cited *Thomas*, which stated that "beliefs rooted in religion are protected by the Free Exercise Clause." *Thomas*, 450 U.S. at 713.

337. *Mozert*, 765 F.2d at 78 (citations omitted).

338. *Thomas*, 450 U.S. at 718.

339. *Mozert*, 647 F. Supp. at 1199.

tain recurring themes"[340] expressing viewpoints "repulsive to the[ir] Christian faith"[341] were not balanced by any reading material which supports their creed.

The parents listed more than 300 objections to the Holt series which, in their view, exposed the children to an excessive number of selections with secular humanistic viewpoints which, they believed, were anti-Christian. This imbalance rendered the reading assignments "so repulsive" that the parents, in good conscience, could not "allow their children to be exposed to the Holt series."[342] "Clearly, government cannot teach atheism, agnosticism, or secularism as a way of life."[343]

Many pundits, however, are appalled that the plaintiffs are so "closed-minded" that they object to Shakespeare's "Macbeth" and books like the "Diary of Anne Frank." Yet, one thematic viewpoint expressed in the Anne Frank diary denies the need to be "[o]rthodox . . . or believe in heaven and hell."[344] The parents were trying to convince their children that "all religions are [not] merely different roads to God,"[345] and that the one and only road that avoids hell is the walk with Jesus Christ. On the other hand, school authorities were attempting to get the children to think for themselves. The reading program is designed to train children to criticize dogma and values established at home.

Judge Hull's fact findings disclose that the parents drew their line because they believed sincerely that "after reading the entire Holt series, a child might adopt the views of . . . an anti-Christian."[346] Echoing the Supreme Court, Judge Hull held that the plaintiffs "have drawn a line, 'and it is not for us to say that the

340. *Id.* at 1204.

341. *Id.* at 1199.

342. *Id.* Thus, the books were not only offensive to the plaintiffs' religious beliefs, but they also undermined the children's faith—contrary to the parents' wishes—because:

> (1) [T]hey teach [the children] witchcraft in violation of Biblical precepts against such teaching; (2) they teach that certain values, held to be absolute by appellants, are relative depending on the situation; (3) they teach that it is proper to be disobedient to parents, despite Biblical precepts to the contrary; (4) they teach that idol worship may be beneficial and that prayer to a horse god [has been beneficial]; (5) they teach that one can achieve salvation by simply having faith in the supernatural, without necessarily believing in Jesus . . . .

Mozert, 765 F.2d at 76.

343. P. KAUPER, *supra* note 159, at 32.

344. *Mozert*, 582 F. Supp. at 202.

345. *Id.*

346. *Mozert*, 647 F. Supp. at 1199.

line [they] drew was an unreasonable one.' "[347] As Judge Hull recognizes, the parents views cannot be completely ignored, yet professional educators have the duty to train "American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions."[348] The plaintiff-parents believe, however, that a distorted part of the American heritage was being communicated by the Holt series. Like the parents in *West Virginia v. Barnette*,[349] they wanted only to be excused from *part* of the public school's regular activities. The insulation requested by the parents arguably perpetuates ignorance, as is suggested by Norman Lear's group, People for the American Way. Judge Hull, however, correctly held (following the guidelines of *Yoder* and *Thomas*), that the plaintiffs are entitled to draw certain lines rooted in their religion.

The case requires the courts to balance carefully competing interests. On the one hand, educators believe that children should be exposed to a wide variety of materials, and then allowed to make up their own minds about the truth. However, contrary to the assumptions of many of their detractors, the plaintiff-fundamentalists believe that parents are responsible for protecting their impressionable young children from repetitious exposure to relativistic beliefs that have profound theological implications, and which have the apparent imprimatur of the state.

The issues can be narrowed because of the conditions laid down by school authorities. More specifically, the plaintiffs are required to surrender either their entitlements to free public education or their beliefs rooted in religion. Arguably the plaintiffs have to take the bitter with the sweet, but the district court found that plaintiffs were confronted with a Hobson's Choice that interferes with their free exercise of religion.[350]

Although the state's generalized interests in the "education of its young"[351] are, in the abstract, "compelling" and "overriding,"[352] the district court (following *Sherbert*, *Yoder*, and *Thomas*) placed

347. *Id.* (quoting *Thomas*, 450 U.S. at 715).

348. Abington School Dist. v. Schempp, 374 U.S. 203, 242 (1963)(Brennan, J., concurring).

349. 319 U.S. 624 (1943).

350. *Mozert*, 647 F. Supp. at 1197-99.

351. *Id.* at 1200.

352. *Id.*

the following additional burden of persuasion on the state: "[t]he defendants must show that the state's interest in the education of its children necessitates the uniform use of the Holt reading series—that this uniformity is essential to accomplishing the state's goals . . . [to] achieve literacy and good citizenship for all students . . . ."[353] The district court did not defer to school authorities the way the Supreme Court deferred to the expertise of military officials in *Goldman v. Weinberger*.[354]

Although "uniformity would make the testing, grading, and teaching of reading more manageable,"[355] the trial record contained credible testimony indicating that some expert educators, including teachers in Hawkins County, believe that the teaching of reading "is best accomplished through individualized instruction."[356] Moreover, plaintiffs' counsel had introduced "proof at trial demonstrat[ing] that accommodating the plaintiffs is possible without materially and substantially disrupting the educational process."[357] If the goal of the school district is to unsettle the settled convictions of all children who adhere to the absolute "truths" taught by their parents, this is not a compelling state interest.

Judge Hull noted that the parents limited their objections to books used in one class, and this diminished the potential for disruption. Moreover, the trial record disclosed that "[a]commodating the beliefs of the small group of students involved in this case probably would not wreak havoc in the school system by initiating a barrage of requests for alternative materials."[358] Under these circumstances, the district court found that "a reasonable alternative which could accommodate the plaintiffs' religious beliefs, effectuate the state's interest in education, and avoid Establishment Clause problems, would be to allow the plaintiff-students to opt out of the school district's reading program."[359]

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353. *Id.* at 1201. In other words, the district court inquired "whether a less restrictive means could accommodate both plaintiffs and defendants without running afoul of the Establishment Clause." *Mozert*, 765 F.2d at 78.

354. 106 S. Ct. 1310 (1986).

355. *Mozert*, 647 F. Supp. at 1201.

356. *Id.*

357 *Id.*; *see also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1960) (students' freedom of speech was violated by ban on black armbands which were worn in protest of Vietnam war, but which did not materially and substantially disrupt the educational process).

358. *Mozert*, 647 F. Supp. at 1202.

359. *Id.* at 1203.

The district court's order requires the parents and school officials to confer if conferences are appropriate to facilitate any needed improvement in reading.[360] The child's reading proficiency continues to be rated by the standardized achievement tests used by the school authorities. Judge Hull noted that the plaintiff-children "are bright and capable of completing . . . a program [of home instruction under the tutelage of their parents] without serious detriment to their reading skills or citizenship."[361]

The district court's order was narrowly tailored to the circumstances of the case; the opinion cannot "be interpreted to require the school system to make this option available to any other person or to these plaintiffs for any other subject."[362] Any further requests for alternative texts, if not voluntarily acceded to by school authorities, are not within the scope of the injunction. In sum, the plaintiff-children are "entitled to opt out of the Hawkins County public school reading program while still enjoying the benefit of the rest of the curriculum (so long as they comply with the state's existing requirements for home instruction)."[363] The order appears both reasonable and appropriate, for "[w]hen rendering to God and rendering to Caesar are in irreconcilable conflict, it does not offend a proper notion of separation of church and state for Caesar to recede when he can conveniently do so."[364]

The school authorities had urged the district court to adopt *in toto* Chief Justice Burger's opinion[365] in *Bowen v. Roy*[366] but Judge Hull noted that the relevant part of the Chief Justice's opinion was joined by only two of his colleagues. The district court noted that Justice O'Connor correctly pointed out that Burger's strict neutrality approach—suddenly invoked in *Roy*—had no solid basis in precedent.[367]

The appellate courts will notice that the district court applied the methodology used in the Supreme Court's seminal cases, which requires school authorities to show why the alternative reading program suggested by the plaintiffs was not a practicable, less re-

360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.* at 1204.
364. McConnell, *supra* note 2, at 26.
365. *See supra* text accompanying notes 275-85 for a description of the retired Chief Justice's opinion.
366. 106 S. Ct. 2147 (1986).
367. *Mozert*, 647 F. Supp. at 1200 n.11.

strictive means of accommodating the plaintiffs' religious objections and the state's educational objectives.[368] The evidence was not adduced, and the district court's judgment, in my view, is a great victory for religious freedom. Whether the decision in favor of the fundamentalists is a Pyrrhic victory depends on the appellate courts.

VIII. DEJA VU

As Yogi Berra said, "This is deja vu—all over again." *Mozert v. Hawkins County Public Schools*,[369] however, is not a rerun of the Scopes trial; it is the echo of *Minersville School District v. Gobitis*,[370] which also involved students who were expelled from public schools. They were expelled "for refusing to salute the national flag as part of a daily school exercise."[371] "The children had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of Scripture."[372]

The Supreme Court in *Gobitis* held that injunctive relief was improper. Justice Frankfurter wrote that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[373] To hold otherwise, Frankfurter added, "would . . . make us the school board for the country. That authority has not been given to this Court, nor should we assume it."[374] Chief Justice Stone, the lone dissenter, stated:

> . . .I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.[375]

Gobitis was overruled by *West Virginia Board of Education v.*

368. *Id.* at 1194.
369. 647 F. Supp. 1194 (E.D. Tenn. 1986).
370. 310 U.S. 586 (1940).
371. *Id.* at 591.
372. *Id.* at 591-92.
373. *Id.* at 594.
374. *Id.* at 598.
375. *Id.* at 607 (Stone, J., dissenting).

Barnette.[376]

Although the fundamentalists in the Tennessee textbook controversy do not have to declare their allegiance to any idea, idol or symbol, the *Barnette* Court pointed out that it does not matter whether pupils are required to "forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony."[377] What can be constitutionally objectionable is "officially disciplined uniformity."[378] In *Mozert*, a nonjudgmental "values-neutral" teaching approach is the officially disciplined protocol in "reading" class.

Barnette illustrates that in some situations, the Supreme Court acts, however reluctantly, as the "school board for the country . . .[379] if we are not . . . to teach youth to discount important principles of our government as mere platitudes."[380] Justice Jackson stated, "[w]e cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[381] The Court stated that "the sphere of intellect and spirit" is reserved from "all official control."[382] Official control is no less upsetting when a school's reading program discredits a child's belief that there are right answers to questions of morality and religion.

The Supreme Court imposes certain constitutional limits upon the power of school authorities to control the curriculum and classroom.[383] It has held that, in the selection of library books, the broad discretion of local school boards must be exercised "in a manner that comports with the transcendent imperatives of the First Amendment."[384] Local school boards, unless checked by judicial review, have the power to become village tyrants, but liberty of

376. 319 U.S. 624 (1943).
377. *Id.* at 633.
378. *Id.* at 637.
379. *Id.* (quoting *Gobitis*, 310 U.S. at 598).
380. *Barnette*, 319 U.S. at 637.
381. *Id.* at 640.
382. *Id.* at 642.
383. Epperson v. Arkansas, 393 U.S. 97 (1968) (declaring unconstitutional a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a state law that forbade the teaching of modern foreign languages in public and private schools).
384. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982).

conscience cannot be infringed in the name of "national unity,"[385] or pluralism, or values clarification in the name of socialization.

The Hawkins County school authorities are really arguing that they have virtually unfettered discretion to choose texts that awaken in their students' minds ideas and considerations which might be contrary to those implanted by religious parents. The guarantee of religious freedom, however, carries with it a presumption that permits a parent to respond to coercion by stating, "I know what is best for my children's salvation." Bob Mozert's views that the Bible is an inerrant and infallible source of truth are unorthodox, but recall Justice Jackson's warning that "one man's comfort and inspiration is another's jest and scorn."[386]

The modern Supreme Court often quotes Justice Jackson's famous admonition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[387] There may be some exceptions to this eloquently stated principle,[388] but the defendants in *Mozert* failed to demonstrate that their unyielding attempt to impose a doctrine of ethical relativism is a proper undertaking for school authorities.

385. *Barnette*, 319 U.S. at 640-41.
386. *Id.* at 633.
387. *Id.* at 642.
388. *Id.*