STUDENTS' RELIGIOUS LIBERTY: RELIGIOUS ATTIRE AND SYMBOLS IN AMERICAN PUBLIC SCHOOLS

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INTRODUCTION

A student's right to express his or her religious belief by wearing religious attire or symbols is often limited in the public school context.[1] This restriction is particularly burdensome when the student sincerely believes that his or her religion requires the wearing of certain attire or symbols as it forces the student to choose between a duty to God and a duty to the state and its laws. This burden becomes especially pronounced in countries like France which has an official policy of strict secularism called "*laïcité*,"[2] but can be equally felt in countries like the United States, which has a neutral policy of separation of church and state. Such policies reveal that a major global issue today is the extent to which students have the right to wear religious attire and symbols in public schools, and the reasons and extent to which a government may limit this right.

The French ban on religious attire and symbols in public schools has been widely reported in the United States,[3] and U.S. critics have cited the French policy as evidence of religious intoler-

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1. *See infra* Parts I and III of this article.

2. France has a tradition of secularism, or *laïcité*, which has been criticized as rigid even by Western standards. *See, e.g.,* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 2013 281-82 n. 5, *available at* http://www.uscirf.gov/images/2013%20USCIRF%20Annual%20Report%20(2).pdf. *Laïcité* is a complex term that officially refers to a strict separation of church and state. Laura Barnett, *Freedom of Religion and Religious Symbols in the Public Sphere (Background Paper)*, LIBR. PARLIAMENT CAN., Jan. 15, 2013, at 11, *available at* http://www.parl.gc.ca/content/lop/researchpublications/2011-60-e.pdf.

Laïcité views religion as a private matter and state affairs as public matters. *Id*. *Laïcité* envisions a strictly secular government in which political institutions are completely devoid of religion and its influences. *See* T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France,* 2004 BYU L. REV. 419, 429 (2004). As such, *laïcité* promotes a republic that is politically independent from any religious authority, and that justifies the republic's interference with citizens' freedom of religion to ensure public order. *See* Dogru v. France, 2008 Eur. Ct. H.R. 1579.

3. *See, e.g.*, *French Report Backs Veil Ban*, CNN.COM, (Dec. 11, 2003, 9:06 AM), http://www.cnn.com/2003/WORLD/europe/12/11/france.religion.reut/; Elaine Sciolino, *Ban Religious Attire in School, French Panel Says*, N.Y. TIMES, Dec. 12, 2003, http://www.nytimes.com/2003/12/12/world/ban-religious-attire-in-school-french-panel-says.html?pagewanted=all&src=pm.; Annie Schleicher, *NewsHour Extra: French Government Bans Religious Clothing in Schools*, PBS.ORG (Mar. 8, 2004), http://www.pbs.org/newshour/extra/features/jan-june04/scarves_3-08.html.

ance.[4] Some of these critics, apparently under the impression that the wearing of religious attire and symbols is a protected activity in the United States, have drawn attention to the supposed greater liberality of American law in this regard.[5] However, in reality U.S. law is considerably more complex and, in effect, not as far removed from the French approach as many Americans believe.

This article examines how the federal government, states, and courts have treated the issue of wearing religious attire and symbols in American public schools. Part I considers religious attire and symbol restrictions in the United States, and argues that a student's right to wear religious attire is impinged by various religiously neutral policies such as school dress codes and uniform requirements. Part II surveys U.S. Supreme Court jurisprudence on First Amendment rights which provides the legal framework for lower court decisions on issues involving religious attire and symbols in public schools. Part III examines the rationale of lower court opinions on students' use of religious attire and symbols, and argues for the adoption of reasoning found in religion- and speech-protective cases that safeguard students' religious liberty.

Part IV discusses the lessons imparted by the American experience, and explores ways in which the United States can better protect students' religious liberty. This section proposes that school districts either consider abolishing mandatory uniform policies, include religious exemptions or opt-out provisions to dress code, or create uniform policies that do not unlawfully restrict students' and parents' constitutional rights. This section also proposes that U.S. courts apply strict scrutiny in reviewing religious

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4. *See, e.g.*, Tony Todd, *US Report Criticises French Islamic Veil Ban*, FRANCE 24 (Aug. 1, 2012), http://www.france24.com/en/20120731-us-report-critical-france-ban-islamic-veils-hollande-hillary-clinton-niqab-marseille; *France Brushes off US Criticism of Burqa Ban*, DAILY STAR (Lebanon), (July 31, 2012, 4:40 PM), http://www.dailystar.com.lb/News/International/2012/Jul-31/182827-france-brushes-off-us-criticism-of-burqa-ban.ashx#axzz2A3kgKQuF; Christopher Marquis, *U.S. Chides France on Effort to Bar Religious Garb in Schools,* N.Y. TIMES, Dec. 19, 2003, at A8; Bureau of Democracy, Human Rights, & Labor, *France: International Religious Freedom Report 2004*, U.S. DEP'T ST., *available at* http://www.state.gov/j/drl/rls/irf/2004/35454.htm (last visited Jan. 5, 2014).

5. *See e.g.*, Joanne M. Marshall, *Religion and Education: Walking the Line in Public Schools*, 85 PHI DELTA KAPPAN 239 (2003); Jaclyn Kass, *Religious Accommodations in Education: A Comparison of Non-Establishment in the United States and Established Religion in England and Wales*, 38 SETON HALL L. REV. 1505 (2008).

attire and symbol cases to ensure a more balanced consideration of both state and student interests. Finally, Part IV proposes the enactment of local or state statutes to adequately protect students' right to wear religious attire and symbols in public schools.

I. THE FRAMEWORK FOR RELIGION IN THE UNITED STATES

A. American Pluralism, Philosophy, and Religious Liberty

Despite a traditional rhetorical emphasis on religious liberty, the United States has a long history of intolerance regarding individuals and practices that fall outside the Protestant religious majority.[6] For example, Puritans in colonial Massachusetts executed Quakers and passed anti-Catholic laws.[7] Other states continued to enact anti-Catholic legislation as late as the early twentieth century. These laws included religious attire and symbol statutes directed at Catholics teaching in public schools.[8]

Americans have been reluctant to spell out an explicit philosophy on religion and government, and the religious heterogeneity of contemporary society makes it all the more difficult to do so.[9] Indeed, any attempt at a generalization or design of a formal state policy concerning church-state relations would likely conflict with one of the constitutional, moral, theological, and biblical ideas that have entered into the unwritten éntente of the United States.[10] It is thus highly unlikely that Americans will expressly define a socio-political philosophy in this regard.

Nevertheless, Americans have generally turned to the First Amendment of the U.S. Constitution to guarantee their right to religious liberty. The U.S. Supreme Court began to apply the First Amendment to religious liberty claims in the early twentieth century when it also applied the Bill of Rights to state laws through the Fourteenth Amendment's Due Process Clause.[11] In the mid- to

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6. Gunn, *supra* note 2, at 442-52.

7. *Id.* at 443-45.

8. *Id.* at 450; OR. REV. STAT. § 342.650 (repealed 2010); 24 PA. CONS. STAT. § 11-1112 (West 2002).

9. ROBERT F. DRINAN S.J., RELIGION, THE COURTS, AND PUBLIC POLICY 5 (1963).

10. *Id.* at 3.

11. Gunn, *supra* note 2, at 451. Under the Fourteenth Amendment, the U.S. Supreme Court applied the Bill of Rights and its protections to the states, including the free exercise of religion, free speech, and the Establishment Clause. *Id.*; U.S Attorney's Office of Minn., *Know Your Rights: A Guide to the United States*

late twentieth century, the Court developed its religious liberty jurisprudence and held that federal and state laws could not discriminate against specific religious practices without a compelling state interest.[12] However, in more recent years the U.S. Supreme Court has moved toward a narrower conception of religious protections, as evidenced by *Employment Division v. Smith,* in which the religious neutrality of a law was deemed constitutional whether the state's interest was compelling or otherwise.[13] Indeed, as will be seen below and in Part II of this article, neutrality has been a key element in the U.S.'s approach to the relationship between church, state, and individual religious freedom. Moreover, such liberties have been narrowed to preserve and reflect the ideal of church-state separation that is embodied in the First Amendment's Establishment Clause.[14]

B. Students, Religious Attire and Symbols, and American Public Schools

The U.S. government has never officially denied students' right to wear religious attire or symbols in public schools,[15] and the U.S.

Constitution, U.S. DEP'T JUST., http://www.justice.gov/usao/ne/press_releases/Civil%20Rights%20Book-NE-2.pdf. (last visited Jan. 5, 2014).

12. *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (holding an ordinance prohibiting the Santeria religion's ritual of animal sacrifice was unconstitutional); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a religiously neutral state law could not burden a person's free exercise of religion without a compelling state interest in cases where the state denies unemployment benefits to an employee who refused to work on Saturdays for religious reasons).

13. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990). *Smith* rejected the earlier test provided in *Sherbert* that required the government to establish a compelling interest whenever it burdened a religious practice. *Sherbert*, 374 U.S. at 398. In *Smith,* the Court ruled that laws "neutral" toward religion but that burdened a religious practice did not have to show a compelling state interest to be constitutional. *Id.* Although *Smith* was superseded by Congress under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, the U.S. Supreme Court later found that RFRA was unconstitutional and exceeded Congress' authority to regulate state laws. *See* City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997). *See also infra* Part III, section B.

14. *See* discussion on the Establishment Clause *infra* Part II, section A.

15. McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 885-86 (2005) (Justice Scalia, in his dissent, argues that the United States has never adopted a strictly secular model).

Supreme Court has never decided a case on this issue.[16] Yet, students' use of religious attire and symbolism is a matter of considerable controversy in the context of American public schools because of the sharply contested boundary between government and religion. Indeed, the First Amendment's Establishment Clause requires the separation of church and state and, as such, prohibits the government from favoring any one religion by requiring it to act "neutrally" towards all religious and secular belief systems.[17] Thus, any state prohibition on religious attire and symbolism could be construed as strengthening the boundaries between church and state, and protecting the secular public sphere from religious interference.[18] Moreover, the current judicial enforcement of public school dress code policies,[19] and the shift toward a narrower interpretation of religious free exercise[20] suggest that, in the post-9/11 socio-political climate,[21] church-state separation in the United States is perhaps becoming re-entrenched in something not unlike the French model of strict secularism. This vigilant protection of a legitimate U.S. socio-political tradition may be reassuring to those who are concerned over the power and influence of dogmatic fundamentalist movements and, perhaps less justifiably, who fear a phantom international Muslim (or other) conspiracy. Yet, for all the pluralistic gains of contemporary multicultural society, the judicial re-entrenchment of church-state separation is making the presumptive right of American students wearing religious attire and symbols in public schools more tenuous than in the past.

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16. *See, e.g.*, Oriana Mazza, *The Right to Wear Headscarves and Other Religious Symbols in French, Turkish, and American Schools: How the Government Draws a Veil on Free Expression of Faith*, 48 J. CATH. LEG. STUD. 303, 304-05 (2009) (The U.S. has no ban on religious symbols such as the *hijab*).

17. For a discussion of the First Amendment's Establishment Clause *see infra* Part II, section A, of this article.

18. Kathleen M. Moore, *Visible Through the Veil: The Regulation of Islam in American Law*, 68 SOC. RELIGION 237, 243 (2007).

19. *See infra* Part III; *see also* Vines v. Bd. of Educ. of Zion School Dist., No. 01C7455, 2002 WL 58815 (N.D. Ill. Jan. 14, 2002) (upholding public school dress code); Long v. Bd. of Educ. of Jefferson Cnty., Ky., 121 F. Supp. 2d 621 (2000) (finding dress code did not violate First Amendment).

20. *See* discussion of First Amendment's Free Exercise Clause *infra* Part II, section B, of this article.

21. Moore, *supra* note 18, at 240; *see* discussion *supra* pp. 8-12 for a discussion of the ways in which Muslim students have been victims of discrimination post 9-11 because of their religion.

Numerous incidents in American public schools in recent years provide evidence that notions of the need to preserve the secular character of attire in this particular public sphere, and to protect students from harm, may be contributing to the prejudicial treatment of religious minorities and even to the legitimation of discriminatory restrictions on individual attire. In 2004, for example, a professor at a public college in Lancaster, California ordered a Muslim student to remove her *hijab* in class.[22] When the student refused the professor took the student to the college dean who informed him that the student had the right to wear her *hijab* for religious purposes.[23] Although the student was allowed to wear her *hijab*, she was ultimately denied a seat in the class because the professor claimed he was saving the slot for an "emergency."[24] Thus, although U.S. law, as interpreted in institutional policy in this case, provided theoretical protection for the student's right to wear religious attire, this right was nevertheless circumvented in that her participation as a student was effectively denied.

There is evidence that many Americans see the wearing of the *hijab* not as an act of religious expression but as a sign of Islamic extremism,[25] and this may account for many of the documented acts of not only discrimination,[26] but also of violence. For example, in early 2004 a middle-school student wearing the *hijab* in Florida was taunted with the name "Osama" and was beaten with a belt by several classmates.[27] Similarly, a Nevada high school student who wore the *hijab* was harassed by classmates with school officials' knowledge and participation.[28] When the student asked school officials to intervene, they subjected her to inappropriate comments and refused to take any action.[29]

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22. Hector Becerra, *Woman's Scarf a College Issue*, L.A. TIMES, Feb. 27, 2004, http://articles.latimes.com/2004/feb/27/local/me-scarf27.

23. *Id*.

24. *Id*.

25. *See* Moore, *supra* note 18, at 239.

26. *See* Becerra, *supra* note 22, and the other incidents discussed in this section.

27. *See Religious Freedom Under Siege in America: A Special Report from The Rutherford Institute*, RUTHERFORD INSTITUTE, (June 8, 2004), https://www.rutherford.org/publications_resources/legal_features/Religious_Freedom_Under_Siege_In_America_A_Special_Report_from_The_Rutherf [hereinafter *Rutherford Institute*].

28. *See* ACLU Women's Rights Project, *Discrimination against Muslim Women*, AM. CIV. LIBERTIES UNION, n. 13, http://www.aclu.org/pdfs/womensrights/discriminationagainstmuslimwomen.pdf (last visited Nov. 1, 2012).

29. *Id*.

In 2003, a sixth-grade student from Muskogee, Oklahoma was suspended twice from public school for wearing a *hijab*, which violated the school's dress code banning hats, bandanas, and other headdress.[30] Although the student had worn her *hijab* for some time without incident, school officials asked her to remove her *hijab* on September 11**,** 2003—two years after the 9-11 terrorist attacks—because the *hijab* would allegedly "frighten" other students.[31] With the assistance of the Rutherford Institute, a Christian public interest law firm, the student and her family brought suit against the school board.[32] However, the student was reinstated to school and the case settled only after the U.S. Department of Justice intervened.[33]

Another 2003 case involved a public high school junior from Plattsburgh, New York who was suspended "in-school"—i.e. solitary confinement within school premises—for wearing a red headband that reflected his Native American religion.[34] During his seventy-three-day suspension, the student was confined to the school library, had no access to educational instruction from teachers, and was prohibited from participating in extracurricular activities.[35] A civil rights group eventually pressured the school to drop the suspension and allow the student to wear his headband in class.[36]

Ironically, in a 1999 case that would not even pass muster under French law,[37] a Jewish student in Biloxi, Mississippi was pro-

30. *See Rutherford Institute*, *supra* note 28.

31. *Id*.; U.S. Memorandum of Law in Support of its Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 7, Hearn v. Muskogee Pub. School Dist. 020, No. CIV 03-598-S (E.D. Okla. May 6, 2004), *available at* http://www.justice.gov/crt/spec_topics/religiousdiscrimination/musk_memo.pdf.

32. *Id*.

33. *Id*.; *Justice Department Reaches Settlement Agreement with Oklahoma School District in Muslim Student Headscarf Case*, U.S. DEPT. JUSTICE (May 19, 2004), http://www.justice.gov/opa/pr/2004/May/04_crt_343.htm.

34. Pagan Institute Report: Religious Liberty and School-Aged Pagans, *Press Release from the Becket Fund: After 73 Days, Native American Student Allowed to Go Back to Class*, PAGAN INSTITUTE (May 15, 2003), http://www.paganinstitute.org/PIR/liberty_and_schools.shtml.

35. *Id*.

36. *Id.*

37. The French National Assembly passed Law No. 2004-228 in 2004, which prohibited all "conspicuous" religious attire and symbols from public schools. *See* Loi 2004-228 du 15 Mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appurtenance religieuse dans les

hibited from wearing his Star of David necklace, which violated the school's anti-gang dress code.[38] When the student challenged the ban, the school board supported the policy and the school officials' position that the necklace could be interpreted as a gang symbol.[39] The school board eventually capitulated by granting the student a religious exemption and by agreeing to change the dress code policy to allow other students to wear religious attire and symbols.[40] However, this reversal in position only came about after the American Civil Liberties Union (ACLU) intervened.[41] Likewise, in a 2011 case, a sixth-grader from Omaha, Nebraska was told by school officials that she could not wear a cross necklace because crosses and rosaries had become identifying symbols for gang members in states such as Oregon, Arizona, and Texas.[42] Although no particular incident was cited at the school or in neighboring districts to merit the ban, school officials insisted that the ban was necessary to uphold "student safety."[43] The student has yet to file a lawsuit against the school protesting the ban.

Student participation in extra-curricular activities has also been impacted by perceptions (or allegations) of the inappropriate nature of religious garb. In 2005, a university basketball player in Florida lost her athletic scholarship and left the basketball team because the head coach refused to allow her to wear a *hijab*, along

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écoles, collèges et lycées publics [Law 2004-228 of Mar. 15, 2004 regulating, in accordance with the principle of secularism, the wearing of symbols or clothing denoting religious affiliation in schools, colleges and public schools], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977&dateTexte=&categorieLien=id; *see also* Dawn Lyon & Debora Spini, *Unveiling the Headscarf Debate*, 12 FEMINIST LEGAL STUD. 333 (2004). The law did not expressly prohibit more discreet religious symbols, such as necklaces with a cross, a Star of David, or the hand of Fatima. *See* Law No. 2004-228.

38. *Religious Clothing and Jewelry in School: News Events 1998 to 1999*, RELIGIOUSTOLERANCE.ORG, http://www.religioustolerance.org/sch_clot2.htm (last updated June 6, 2006).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Fremont Girl Banned From Wearing Rosary At School: District Says Church Symbol Being Used By Gangs*, KETV7 (Oct. 4, 2011, 10:46 AM), http://www.ketv.com/Fremont-Girl-Banned-From-Wearing-Rosary-At-School/-/9675214/10134418/-/rxirgc/-/index.html.

43. *Id.*

with pants and a long-sleeve shirt during competitions.[44] Similarly, in 2005, a 12-year-old Florida student was told she could not compete in a basketball tournament while wearing a *hijab*.[45] Tournament officials eventually relented after being contacted by a civil rights organization.[46] Later, in 2008, a high school senior in the District of Columbia was disqualified from participating in a track-and-field meet after officials said her Muslim attire violated national competition rules.[47]

As of the present writing, the U.S. government has left it to the states to decide the level of protection afforded to student's religious expression.[48] Many states in turn, have left it to the school districts to come up with a compromise or to add a religious exemption to their dress codes.[49] This locally-determined, case-by-case approach has resulted in the arbitrary application and enforcement of school dress code and uniform policies, producing varying results. Indeed, in the incidents recounted above, results were generally favorable to students wearing religious attire only when civil rights organizations, religious groups, or government agencies intervened. Meanwhile, many students continue to be punished for expressing their religious beliefs, an open question whether institutional and judicial attempts to suppress such expression positively or negatively impact the level of discriminatory treatment and even outright violence to which these students continue, unacceptably, to be subjected in America today.

II. THE U.S. SUPREME COURT AND FIRST AMENDMENT JURISPRUDENCE

As the incidents discussed above demonstrate, the struggle to balance students' interests in religious self-expression with state interests in preventing inappropriate intrusions of religion in secular education and maintaining public order is not only complex, it

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44. Michael Schneider, *Muslim Woman Was Denied Job for Wearing Headscarf, Suit Says*. MIAMI HERALD, June 23, 2005, at B3.

45. Robert Spencer, *Florida: Muslim Athlete Can Wear Scarf*, JIHAD WATCH (Apr. 8, 2005, 1:30 AM), http://www.jihadwatch.org/2005/04/florida-muslim-athlete-can-wear-scarf.html.

46. *Id.*

47. *See* Alan Goldenbach, *When the Rules Run Up Against Faith*, WASH. POST, Jan. 16, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/15/AR2008011503356.html.

48. *See discussion infra* Part III and Part IV.

49. *Id.*

is intrinsically linked to the fundamental political question of the relationship between government and religion. After all, the First Amendment of the United States Constitution requires the separation of church and state,[50] although it does not express a strictly secular policy similar to that of France's *laïcité*.[51] The American system is far more complex and consists of legal rules designed by the U.S. Supreme Court in its interpretation of the Establishment, Free Exercise, and Free Speech clauses of the First Amendment. Influenced by its unique socio-political culture, the United States recognizes the separation of church and state under the Establishment Clause, while also recognizing the historical and cultural importance of accommodating religious freedom under the Free Exercise Clause.[52] More recently, the United States has recognized religious expression as a form of private speech that is protected under the First Amendment's Free Speech Clause.[53] However, the U.S. Supreme Court has yet to decide a single case on students' use of religious attire and symbols in public schools. This article therefore considers the three clauses and the legal framework they provide for lower court decisions that have opined on the issue.

A. Modern Establishment Clause: Everson v. Board of Education

The meaning of the modern Establishment Clause was shaped by the 1947 case, *Everson v. Board of Education*.[54] At issue in *Everson* was a New Jersey policy that allowed school districts to reimburse transportation costs incurred by parents of children attending public and Catholic schools.[55] In a 5-4 split, the U.S. Supreme Court upheld the lower court's decision that the school district did not violate the Establishment Clause requiring separation of church and state.[56] However, *Everson's* result proved far less consequential than the commonality in principle which bound the majority and dissent. Both groups agreed that the Establishment Clause required the states to follow a policy of church-state sepa-

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50. *See* U.S. CONST. amend. I (guaranteeing right to free exercise of religion). *See infra* Part II.

51. *See* Pagan Institute Report: Religious Liberty and School-Aged Pagans, *supra* note 34.

52. *See* U.S. CONST. amend. I.

53. *Id.*; *see also* Widmar v. Vincent, 454 U.S. 263, 269 (1981) (holding that the First Amendment protects private, religious speech).

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

55. *Id.*

56. *Id.* at 17.

ration that prohibited state support of all religions or any one religion.[57] As such, tax dollars were prohibited from being used to aid religious activities or institutions.[58] In justifying this reading of the Establishment Clause, the majority relied on Thomas Jefferson's Virginia Statute and "Wall of Separation" letter to the Danbury Baptists, while the dissent relied on James Madison's "Memorial and Remonstrance" opposing state-supported religion.[59] Ironically, despite the central importance of Virginia's policy in the majority and dissent's reasoning, either side of the Court failed to offer any direct support from the text of the Virginia bill, rendering unclear the source of the Establishment Clause's meaning.

In essence, the meaning the *Everson* Court established cannot be found on the face of the Establishment Clause, nor is the Court's reading obvious from the Virginia bill referenced. Instead, the *Everson* majority attributed the Establishment Clause's definition to the framers by asserting that, "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'"[60] Under this expansive separationist reading, the majority concluded that the New Jersey policy did not violate the First Amendment since it was a "neutral" policy enacted to assist parents of all religions with providing transportation to school for their children.[61] The dissent also attributed the Establishment Clause to the framers in arguing the reimbursement was unconstitutional but cited Madison's "Memorial and Remonstrance," which was written in opposition to a proposed Virginia bill that would levy a tax to support religion teachers.[62] On this basis, the dissenters demanded strict adherence to church-state separation under the Establishment Clause.[63] With this borrowed and balmy foundation, *Everson* ultimately established the modern philosophy for separation of church and state now grafted onto the First Amendment. As it stands, Americans today understand the Establishment Clause as prohibiting the government from favoring any one religion and requiring "neutrality" in government treatment of religious and secular belief systems.

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57. *Id.* at 17, 27, 31, 52.
58. *Id.* at 16-17, 27-28.
59. *Everson*, 330 U.S. at 12-13, 16, 31, 34-36, 39-40, 45.
60. *Id*. at 16.
61. *Id.* at 16-17.
62. *Id.* at 37.
63. *Id.* at 28.

B. Free Exercise Clause: Employment Division v. Smith

Free Exercise jurisprudence, which governs the constitutionality of religious practice and expression, has shifted in the last twenty years as a result of *Employment Division v. Smith*.[64] *Smith* involved two Oregon state workers who were fired from their jobs for ingesting the illegal hallucinatory drug, peyote, as part of a Native American sacramental ceremony.[65] When both workers applied for state unemployment benefits, they were denied on the ground that their employment had been terminated for illegal conduct.[66] Although the peyote was used for sacramental purposes, Oregon law offered no religious exemptions.[67] The U.S. Supreme Court accordingly held that an individual's religious beliefs did not excuse him from compliance with otherwise "neutral" laws prohibiting conduct that states were free to regulate.[68] After all, the Court argued, allowing exceptions to every state law or policy affecting religion "would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind."[69]

Prior to the U.S. Supreme Court's ruling in *Smith*, the government was permitted to burden a person's sincerely held religious practice only if it was the "least prohibitive" means of achieving a "clearly compelling government interest."[70] Plaintiffs therefore had a greater chance of succeeding on claims under this strict scrutiny analysis, and could seek redress for secular laws that discriminated against religious practices, regardless of whether religion was the intended target.[71] With the *Smith* decision, however, the U.S. Supreme Court moved towards a narrower conception of free exercise by holding that the government need not show a compelling interest if the law was "neutral" on its face and "generally applicable."[72] In other words, so long as the burden on reli-

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64. *See generally* Emp't Div. v. Smith, 494 U.S. 872 (1990).
65. *Id.*
66. *Id.* at 876.
67. *Id.*
68. *Id.* at 901-02.
69. *Smith*, 494 U.S.at 889.
70. *See generally* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972). Under *Sherbert* and *Yoder*, plaintiffs who sought to have their religious claims balanced against government interests actually prevailed.
71. *See Sherbert*, 374 U.S. 398; *Yoder*, 406 U.S. 205.
72. *Smith*, 494 U.S. at 872-73, 880-81, 893-94.

gious free exercise was incidental and not specifically targeted, the law was constitutional and the government need not provide any religious exemptions. Thus, plaintiffs bringing claims of Free Exercise Clause violations today can succeed only where the law at issue can be deemed purposefully discriminatory and burdensome to religion. Justice Sandra Day O'Connor, in her concurring opinion, expressed her own reservations with the complete abandonment of "strict scrutiny."[73] After all, any law that presents a significant burden on the free exercise of religion can elude scrutiny if it can be deemed "neutral" and "generally applicable," thereby encouraging deference to governmental interests.[74]

Nevertheless, the U.S. Supreme Court attempted to counter the negative effects of its ruling by introducing the notion of hybrid claims in *Smith*. Under the Court's "hybrid-rights exception," strict or heightened scrutiny could be applied to claims only where a free exercise claim combined with another, independent constitutional claim, such as the right to free speech or a parent's right to direct the upbringing of his or her child.[75] In short, hybrid claims are two separate constitutional claims that combine to give greater force to a claim than simply having either claim stand alone.[76] In a broader sense, the *Smith* Court did not completely abandon strict scrutiny of "neutral" laws of "general" application with its creation of the hybrid-rights exception. Thus, a claim that combines both an alleged free exercise violation and a free speech violation, such as a challenge to a public school policy banning a student's use of religious attire and symbols, could theoretically be subject to strict scrutiny under *Smith*. In any event, modern Americans generally understand the Free Exercise Clause to limit federal and state governments' ability to enact laws or engage in in activities that curtail citizens' free exercise of religion.

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73. *Id.* at 892, 902-04.

74. *Id.* at 894.

75. *Id.* at 881-82.

76. *Id.* However, one of the problems with the hybrid-rights exception is that it makes it more difficult for plaintiffs to bring claims under strict scrutiny since they would have to present a minimum of two constitutional issues to fulfill the hybrid-rights requirement.

C. Free Speech Clause: Tinker v. Des Moines Independent School District

The seminal case protecting student attire and symbols as free speech in public schools is *Tinker v. Des Moines Independent School District*.[77] In *Tinker*, three public school students were suspended for wearing black armbands protesting the Vietnam War, violating school policy.[78] The district court dismissed plaintiffs' suit against the school administrators, ruling that their actions were reasonable to prevent threats to school discipline and thus constitutional.[79] Although the U.S. Court of Appeals affirmed the lower court's decision, the U.S. Supreme Court reversed in a 7-2 ruling.[80] Applying a strict scrutiny analysis, the *Tinker* majority concluded that the First Amendment right to free speech applied to students in the public school environment, and that school administrators could not curtail such rights simply to "avoid controversy" or because of "a mere desire to avoid the discomfort and unpleasantness that always accompany . . . unpopular viewpoint[s]."[81] In the majority's view, the First Amendment's Free Speech Clause protected the students' use of armbands as a form of "pure speech," even though the school did not officially sanction the students' expressions and ideas. By contrast, the dissent argued that the students were not wise enough to support or reject a cause and, thus, it was best to leave the order of education to the school administrators' judgment.[82]

Meanwhile, the *Tinker* majority created a test for school administrators to determine if a particular regulation violated a student's right to free speech. A regulation was deemed constitutional if the student's expression: (1) "materially and substantially" interfered with school requirements of discipline; and (2) invaded the rights of others.[83] Student expressions meeting this criterion would not be "immunized" by the Free Speech Clause. Moreover, in *Tinker's* progeny, the U.S. Supreme Court established a rule protecting religious expression to the same extent as

77. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).
78. *Id*. at 504.
79. *Id.* at 504-05.
80. *Id.* at 505.
81. *Id.* at 509.
82. *Tinker*, 393 U.S. at 524-26.
83. *Id.* at 509, 513.

nonreligious expression in public schools.[84] Indeed, *Tinker* itself emphasized that school administrators' "mere uncertainty" with respect to the weight and acceptability of various forms of student expression was insufficient to overcome a student's right to free speech.[85] Any deviation from this, warned the Court, would compromise the "basis of our national strength and the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[86] Consequently, most Americans today understand the Free Speech Clause in the public school context as protecting student speech that does not unduly interfere with school activities or the rights of others.

III. U.S. FEDERAL COURTS DECIDE STUDENTS' USE OF RELIGIOUS ATTIRE AND SYMBOLS IN PUBLIC SCHOOLS

That First Amendment law has committed itself to recognizing the transcendent importance of each American following his or her own religious conscience under the Free Exercise Clause indicates the profoundly religious orientation of American legal institutions. However, while religious liberty is an important aspect of contemporary America, the First Amendment right of students to religious free exercise is not as strongly protected as most Americans might expect. Indeed, the recent incidents discussed earlier suggest that the right of students to wear religious attire and symbols is not necessarily guaranteed in the public school context, and these rights will continue to be challenged in the future. Specifically, problems arise when dealing with the issue of religious attire and symbols in public schools, because the federal government has left it to the states to resolve the matter.[87] Contributing to the confusion, U.S. Supreme Court case law has provided only a general framework for lower courts deciding such matters.[88] As demonstrated in the following section, this vagueness has resulted in uneven school policies and conflicting lower court case law, including a variety of judicial standards of review being used to determine the same First Amendment claims. This conflict, however, is not a mere judicial artifact but is reflective of a larger split within U.S. society regarding the appropriateness and lawfulness of wearing

84. *See* Widmar v. Vincent, 454 U.S. 263, 277 (1981)
85. *Tinker*, 393 U.S. at 509.
86. *Id.*
87. *See supra* text accompanying note 13.
88. *See infra* Part II, sections A, B, and C.

religious attire and symbols in governmental and quasi-governmental public contexts such as U.S. public schools.[89] This tension, predictably, manifests itself in U.S. case law directly addressing students' use of religious attire and symbols in public schools, as reflected in the circuit split among federal appellate courts and in the split among judges opining on such issues.[90]

A. Cases Providing Limited to No Protection of Religious Free Exercise and Free Speech

This section reviews the leading circuit court cases on students' use of religious attire and symbols in public schools, which provide limited to no protection for students' religious free exercise and speech.

i. Seventh Circuit Downplays Dress Code's Burden on Free Exercise

In *Menora v. Illinois High School Association*, a high school association with membership composed mostly of public high schools enacted a dress code prohibiting basketball players from wearing headgear, including *yarmulkes*, for safety reasons during basketball games.[91] Jewish students responded by bringing a class action suit challenging the dress code.[92] The district court invalidated the headgear ban, finding that the ban burdened religious free exer-

89. Indeed, this dissention is reflected among legal scholars on the question of the constitutional standards that should be applied to issues involving students wearing religious attire or symbols in public schools. *Compare* Todd A. DeMitchell et al., *Dress Codes in the Public Schools: Principals, Policies, and Precepts*, 29 J.L. & EDUC. 31, 47 (2000) (Students' freedom of expression in school is not absolute or expansive. Student expression must neither be disruptive nor collide with the rights of others. It also must not be lewd, vulgar, or offensive. Courts are thus best served by adopting a policy of "judicial parsimony" toward school dress regulations.), *with* John E. Taylor, *Why Student Religious Speech is Speech*, 110 W. VA. L. REV. 223, 260-61, 273 (2007) (Students' religious liberty should be analyzed under free speech and not the free exercise doctrine. But, any preferential treatment of student speech should be viewed as unconstitutional.), *and* Jay Alan Sekulow, Tinker *at Forty: Defending the Right of High School Students to Wear "Controversial" Religious and Pro-Life Clothing*, 58 AM. U. L. REV. 1243, 1261 (2009) (Expansive protection of student speech in public schools is necessary and required by the First Amendment. As such, courts should analyze these cases using *Tinker's* strict scrutiny test.).

90. Compare case law discussed in Part III, sections A and B.

91. Menora v. Ill. High Sch. Ass'n, 683 F.2d 1030 (7th Cir. 1982).

92. *Id.* at 1031.

cise because students were forced to choose between observing their religious beliefs and participating in the competitions.[93] The district court also noted, under a strict scrutiny analysis, that the defendants failed to show any safety risks or to consider other alternatives to the ban in light of the fact that students used *yarmulkes* for a number of years without incident.[94] On appeal, the Seventh Circuit majority vacated the lower court's decision and remanded the case with instructions to allow the students to design a secure headdress that complied with Jewish law and addressed the association's safety concerns.[95] In the event they failed to do so, however, the students would have to choose between observing their religious beliefs and participating in the games without *yarmulkes*.[96]

The Seventh Circuit majority's decision is deeply flawed for several reasons. First, the majority downplayed the burden the ban placed on the plaintiffs' free exercise right and misidentified this right as an exclusion from interscholastic basketball rather than as an abridgement of their right to wear religious attire. Thus, the Seventh Circuit was able to conclude (1) that the rule did not prohibit religious observance, but only made it more "costly," (2) that no free exercise rights were infringed, and thus (3) the case did not have to be decided on constitutional grounds.[97] Second, the ban forced the plaintiffs to choose between observing their religious obligations and participating in the games, which the district court and the Seventh Circuit's dissent correctly recognized.[98] Because this choice directly interfered with plaintiffs' right to free exercise, the majority should have applied a strict scrutiny analysis by considering whether a compelling interest existed to justify the ban.

Under this test, the Seventh Circuit's majority would have found that even if the plaintiffs' inability to participate in the games was a "de minimis" burden,[99] the ban would still be unconstitutional because the defendants failed to substantiate their safety interests to justify the ban. Indeed, the fact that the students used *yarmulkes* for a number of years without incident

93. *Id.* at 1032.
94. Menora v. Ill. High Sch. Ass'n, 527 F. Supp. 637, 642 (N.D. Ill. 1981).
95. *Menora*, 683 F.2d at 1030, 1035.
96. *Id.*
97. *Id.* at 1032-33, 1035.
98. *Id.* at 1037.
99. *Id.*

weakens the defendants' claim in this regard.[100] Moreover, even if the defendants' safety interests were deemed "compelling," the ban would still be unconstitutional because it would not be the least restrictive means of assuring the defendants' safety interests. For example, the ban could have prohibited only insecurely fastened headgear or created an exemption for securely fastened religious headgear. Furthermore, the fact that the defendants had acknowledged that the *yarmulke's* "method of attachment [was] not a [genuine] concern" and that all "headwear, other than headbands, is illegal regardless of the method of attachment"[101] ultimately reveals that this case went beyond a mere safety issue, but was plainly rooted in the defendants' refusal to accommodate the plaintiffs' free exercise rights.

In the end, *Menora* is instructive, as it demonstrates how the Seventh Circuit's (1) decision to assign to the plaintiffs the burden of proposing an alternative method of securing *yarmulkes* that would meet the state's interest, and (2) failure to apply strict scrutiny or to fully recognize the constitutional issue before it, ultimately compromised the students' religious liberty.

ii. Tenth Circuit Ignores Dress Code's Burden on Free Exercise and Bolsters Assimilationist Policy

In *New Rider v. Board of Education of Independent School District No. 1*, three Native American students were suspended from a public high school for violating a dress code that prohibited long hair among male students.[102] The students challenged the ban claiming, among other things, that it denied their First Amendment right to free speech, and to freely exercise their religion and culture as Pawnee Indians.[103] The Tenth Circuit, in a unanimous decision, dismissed the case on the ground that plaintiffs failed to present a religion-based claim regarding hair length that could invoke constitutional protection.[104] Moreover, the court dismissed testimony on the cultural significance of hair length in Pawnee tradition in favor of evidence that Pawnee "warriors" did not gen-

100. *See* Menora v. Ill. High Sch. Ass'n, 527 F. Supp. 637, 642 (N.D. Ill. 1981).
101. *Menora*, 683 F.2d at 1037.
102. New Rider v. Bd. of Educ. of Indep. Sch. Dist. No. 1, 480 F.2d 693 (10th Cir. 1973).
103. *Id.* at 696.
104. *Id.* at 695.

erally wear their hair long or in braids.[105] On this basis, and in light of the fact that white students were equally affected by the ban, the Tenth Circuit concluded that plaintiffs' claims reflected nothing more than a desire to celebrate their Pawnee heritage, which was not a constitutionally protected right.[106]

The Tenth Circuit's decision is perhaps the most troubling. First, and contrary to the Tenth Circuit's conclusion, the plaintiffs *did* include a religious free exercise claim. However, the court disregarded this distinction and held that plaintiffs' claims were "based on nothing more than school regulations" that were enacted for the students' own good—i.e., "to amalgamate children of various . . . backgrounds . . . [thereby making] uniform regulations . . . necessary . . . to maintain order, spirit, scholarship, pride, and discipline" among students in public school.[107] Second, the fact that the students were not "warriors" suggests the absurdity of the court's decision to give weight to the traditional dress of warriors in its analysis in order to discount the religious sincerity behind the students' desire to wear their hair long. Third, in dismissing the case, the Tenth Circuit effectively forced the plaintiffs to cut their hair in order to remain in school, which in turn limited the ability of their parents to raise them according to tribal custom. Indeed, under a *Smith* hybrid rights claim, which would include the (1) students' religious free exercise and free speech claims, as well as (2) their parents' claim to direct their upbringing, it is difficult to imagine a public policy rationale for the hair-length ban that would be sufficient to overcome both the students' and parents' First Amendment rights.

That the Tenth Circuit failed to apply a strict scrutiny analysis in this case ultimately prevented it from determining whether the school had a compelling interest in the ban and whether this interest could have been served in a less restrictive way. Interestingly, Justice William Douglas, in his dissent to the U.S. Supreme Court decision denying certiorari in this case, applied the strict scrutiny test and observed that school officials failed to show how granting the students an exemption would "substantially endanger school operations."[108] He reached this conclusion in light of the fact that the students' hairstyle "never caused any disruption" in the

105. *Id.* at 696.
106. *Id.* at 701.
107. *New Rider*, 480 F.2d at 690.
108. New Rider v. Bd. of Educ. of Indep. Sch. Dist. No. 1, 414 U.S. 1097, 1099 (1973).

past, and that the defendants had conceded to this fact.[109] Moreover, although Justice Douglas failed to consider the students' religious free exercise right, he recognized their free speech right to wear their hair long under *Tinker*. He concluded that the Tenth Circuit had wrongly decided the case because *Tinker* effectively "repudiate[ed] the idea that a State may conduct its schools 'to foster a homogenous people.'"[110] That the Tenth Circuit adopted an assimilationist approach in this case is instructive, because it reveals how racial and religious discrimination can motivate school officials as well as courts to deny a student's request for a religious exemption.

iii. Ninth Circuit Sidesteps Uniform Policy's Burden on Free Exercise and Denies Burden on Free Speech

In *Jacobs v. Clark County School District*, the Ninth Circuit decided by a 2–1 vote that a public high school did not infringe the free speech and free exercise rights, among other constitutional rights, of a student suspended for wearing a T-shirt expressing her religious beliefs in violation of a school uniform policy.[111] Citing *Smith*, the court held that the dress code was "valid and neutral," and of "general applicability" because it applied to all students equally and presented no "obvious impediment" to the free exercise of any particular religion.[112] On this basis, the court swiftly dismissed the student's free exercise claim. The court also observed that the school policy in *Tinker* singled out certain viewpoints, whereas the "viewpoint and content neutral" policy in *Jacobs* did not.[113] As such, *Tinker's* strict scrutiny did not apply to the free speech claim in this case, but intermediate scrutiny did.[114]

Under intermediate scrutiny, a school policy is constitutional if: 1) it furthers an important government interest, 2) the interest is unrelated to the suppression of free expression, and 3) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.[115] Consequently, the Ninth Circuit determined that the school's uniform policy was

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109. *Id.* at 1099-1100.
110. *Id.* at 1100.
111. Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419 (9th Cir. 2008).
112. *Id.* at 439.
113. *Id.* at 432.
114. *Id.*
115. *Id.* at 428-29.

motivated by the goal of enhancing the school environment, school safety, and student achievement, and that this was an important government interest unrelated to the suppression of speech.[116] As to the latter, there was no suggestion that the school had an underlying purpose of suppressing student expression, especially since the policy left students alternative channels to express their views, including publishing in the school newspaper and joining student organizations.[117] The court thus concluded that the uniform policy was narrowly tailored to further the school's goals without infringing upon students' free speech rights any more than was necessary to achieving these goals.[118]

In *Jacobs*, the Ninth Circuit unjustifiably impinged on students' free speech and free exercise rights. First, the Ninth Circuit majority wrongly held that the school uniform policy was both viewpoint and content neutral, even though it clearly favored pro-school speech by exempting attire that contained school logos and messages "touting the school's athletic teams."[119] As the dissent rightly observed, "[c]onfining messages to [such] pro-government content cannot be said to be viewpoint or content-neutral," but rather "indubitably content-based."[120] Second, the fact that students wore school logos and messages suggests the absurdity of the court's decision to view them only as "identifying" marks, rather than as "communicative" ones.[121] In applying this flawed reasoning, however, the court determined the "neutrality" of the uniform policy, and discounted the religious sincerity behind students' desire to wear religious attire and symbols. Third, the majority downplayed the burden the uniform policy placed on students' free exercise rights by focusing on the non-discriminatory "motivations" of school officials in enacting the school-wide policy, rather than on the resulting abridgement of the students' right to wear religious attire or symbols in school. With these deficits in its reasoning, the court was able to conclude that the policy (1) was neutral and generally applicable, and (2) presented no "obvious impediment" to the free exercise of any particular religion.[122]

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116. *Jacobs*, 526 F.3d at 432.
117. *Id.* at 437.
118. *Id.*
119. *Id.* at 444.
120. *Id.*
121. *Jacobs*, 526 F.3d at 433.
122. *Id.* at 439.

Yet, the mandatory uniform policy also deprived students of their rights to engage in expressive conduct and to be free of compelled speech. By interfering with students' free speech right in this regard, the majority should have applied *Tinker's* strict scrutiny analysis, which would have required the court to consider whether a compelling interest existed to justify the uniform policy. Under this test, the majority would have found that even with the government's interests in enhancing student achievement, school safety, and the school environment, the uniform policy would still be unconstitutional because public school officials failed to substantiate these interests sufficiently to justify the free speech ban. Indeed, officials offered no empirical evidence to this effect and instead offered only conclusory affidavits claiming uniforms would achieve these goals.[123] Meanwhile, school officials, along with the majority, completely disregarded the only empirical evidence available, which established the plaintiff's declining academic performance as a direct result of the ban.[124]

Ultimately, *Jacobs* is instructive, especially when compared with *Menora* and *New Rider*, because it demonstrates how federal appellate courts apply different standards of judicial review to determine the same First Amendment claims.[125] *Jacobs* additionally demonstrates that lower courts' movement away from strict scrutiny and toward (1) intermediate scrutiny in the free speech context and (2) *Smith's* rational basis test in the free exercise context, fails to adequately protect students' right to religious expression.

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123. *Id.* at 445.

124. *Id.*

125. The Tenth Circuit in *New Rider* failed to apply any test at all and simply granted deference to public school administrators, while the Seventh Circuit majority in *Menora* applied a diluted form of strict scrutiny in light of the theory of "false conflict." "False conflict" is a conflict of laws concept developed by Professor Brainerd Currie. *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws,* 1959 DUKE L.J. 171, 178 (1959). *See also* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). The "false conflict" concept helps courts to determine which law to apply when multiple conflicting laws from competing jurisdictions are equally applicable. This concept seeks to eliminate the perceived conflict by carefully and precisely defining the competing interests of each jurisdiction so as to reconcile the conflict. The "false conflict" is reconciled by demonstrating that only one jurisdiction is actually "interested," or by demonstrating that the two competing laws would reach similar results. In *Menora,* there was only one applicable law—the First Amendment. Thus, there was no choice of law to be made and the resort to "false conflict" was entirely inappropriate.

B. *Cases Providing Broad Protection for Religious Free Exercise and Free Speech*

This section reviews the leading court cases on students' use of religious attire and symbols in public schools and argues for the adoption of the reasoning of these religion- and speech-protective cases, which safeguard students' religious liberty.

i. Ninth Circuit Grants a Religious Exemption Pre-*Jacobs*

Cheema v. Thompson was a case decided by the Ninth Circuit before the U.S. Supreme Court determined that a federal statute—the Religious Freedom Restoration Act of 1993 (RFRA)— protecting Americans' free exercise rights did not apply to state and local government actions.[126] Using a strict scrutiny analysis, as required by RFRA, the *Cheema* majority approved a temporary injunction,[127] and later, a preliminary injunction,[128] allowing Sikh students to wear *kirpans*, or religious ceremonial knives, to school under certain restrictions. Although school officials argued that allowing the students to wear *kirpans* compromised school safety, the Ninth Circuit held that the blanket ban on knives was not the "least restrictive means" for allowing the students to fulfill their religious obligations.[129] That the students demonstrated a sincere religious belief ultimately rendered their suspension from school an undue hardship.[130]

In direct opposition to the *Jacobs* decision, the Ninth Circuit majority upheld students' free exercise right to wear *kirpans* for religious purposes. Using a strict scrutiny analysis, as required by RFRA,[131] the majority provided broad protection to students' religious free expression. The dissent, however, viewed the majority

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126. Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995). Congress passed RFRA to overrule *Smith* and the weaker protection it afforded religious liberties. Cheema v. Thompson, 36 F.3d 1102, at *2 (9th Cir. 1994) (unpublished). Indeed, RFRA restored the strict scrutiny analysis as set forth in earlier U.S. Supreme Court precedent. *Id.* However, the U.S. Supreme Court later invalidated the RFRA as applied to state and local government actions. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

127. *Cheema*, 36 F.3d at *3.

128. *Cheema*, 67 F.3d at 883.

129. *Id.* at 885.

130. *Id.*

131. *Id.* at 887.

decision as deeply "troubling."[132] According to the dissent, allowing young students to wear *kirpans* to school not only condoned public school violence, but also posed a serious enforcement problem for school officials.[133] That the young students had shown a willingness to play with their riveted *kirpans* (i.e., blade sewn tightly to sheath) substantiated the school's compelling interest in ensuring a "fear-free" and "violence-free" school.[134] Thus, school officials were justified in demanding a complete ban of the *kirpan* or, in the alternative, the use of a permanently riveted (i.e., blade permanently stuck to sheath) *kirpan* sporting a blade of three inches or less.[135]

Nonetheless, the dissent's fears were completely unfounded. First, the dissent's argument is undermined by the fact that there had never been any reported incidents of the *kirpan* being used for violent purposes on school grounds or elsewhere.[136] Even the evidence the dissent offers—that the students were allegedly playing with their *kirpans*—is conflicting.[137] Public fear has never been, nor should it be, the sole justification for any judicial decision. Second, the district court already imposed an accommodation plan that balanced both the students' interest in observing and expressing their religious beliefs, and the state's interest in ensuring school safety.[138] The district court held that the *kirpan* (1) must have a dull blade of 3 to 3 ½ inches in length, (2) must be sewn tightly to its sheath, (3) must not be readily visible, and (4) must be inspected from time to time by a designated school official.[139] Permanently riveting the *kirpan* was out of the question because it would "alter" and "destroy" the religious character of the object under Sikh tradition.[140] However, to ensure student compliance, the district court added a caveat that students found violating any of the conditions would lose their privilege to wear the *kirpan*.[141]

The Ninth Circuit majority was right to uphold students' religious liberty in this case. After all, denying the students their

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132. *Cheema*, 36 F.3d at *4.
133. *Cheema*, 67 F.3d at 889-93.
134. *Id.* at 887.
135. *Id.* at 894.
136. *Id.* at 885.
137. *Id.* at 891.
138. *Cheema*, 67 F.3d at 889.
139. *Id.*
140. *Id.* at 890.
141. *Id.* at 888.

right to wear the *kirpan* would allow the public school to restrict their religious free exercise, which directly contradicts the First Amendment, notwithstanding *Smith*. The plain meaning and spirit of the Free Exercise and Free Speech Clauses protect students' desire to engage in religious practice and expression. Allowing the dissent to prevail in this case would only encourage intolerance for religious differences and an unwillingness to accommodate and learn about such differences, which circuit court decisions argue against. However, with the overruling of RFRA,[142] it is unlikely that a similar case involving campus safety would have the same outcome in the Ninth Circuit (and even other circuits), especially in light of its recent decision in *Jacobs*. Nevertheless, *Cheema* remains an important precedent because it demonstrates how a court applying the strict scrutiny analysis to free exercise claims engages in a more balanced consideration of the state's and students' interests.

ii. Fifth Circuit Rejects Secular Favoritism and Assimilationist School Policy

In *A.A. ex rel. Betenbaugh v. Needville Independent School District*, the Fifth Circuit majority exempted a Native American kindergartner from a public school dress code that required boys to have hair that did not touch the collars of their shirts.[143] The student's long hair was of religious significance to him and his family, leading his parents to request a religious exemption from the school on his behalf.[144] Despite the student's sincerely held belief in his Native American religion, however, the student was denied the exemption.[145] Instead, school administrators said that if the student wished to attend school, he would have to wear his hair in a bun or in a single braid tucked inside his shirt.[146] Applying a strict scrutiny analysis, as required by the Texas State RFRA,[147] the majority determined that although the school policy reflected a compelling state interest in maintaining order at the school, the

142. *See supra* text accompany note 13. The legal basis upon which the students won in this case is RFRA, making the victory all the more unique given that the RFRA was overturned by the U.S. Supreme Court two years later.

143. Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248 (5th Cir. 2010).

144. *Id.* at 257.

145. *Id.* at 256-57.

146. *Id.* at 256.

147. *Id*. at 258.

administrators failed to establish that the policy was the least restrictive means for furthering this interest.[148] The school administrators countered that granting an exemption would conflict with the school's interest in instilling discipline and asserting authority—goals, they claimed, that were best achieved by having the student bear a closer resemblance to other male students.[149] However, the majority was not persuaded, and held that any requirement of uniformity among students failed to satisfy any compelling interest.[150] Indeed, even if the policy was meant to instill discipline and teach respect for authority, the act of wearing two long braids for religious purposes was far from being an act of rebellion.[151] Furthermore, the school failed to show that the student's visibly long hair would reduce obedience and discipline among other students at the school.[152]

In a case reminiscent of the Tenth Circuit's *New Rider*, the Fifth Circuit majority rightly upheld a student's First Amendment right to wear his hair long for religious purposes. Using a strict scrutiny analysis, as required by the Texas RFRA,[153] the majority was able to afford the student broader protection of his right to religious expression. The dissent, however, claimed that the majority's decision was mistaken by addressing the "substantial burden" issue.[154] According to the dissent, the school officials' policy did not impose any requirement that violated the student's right to maintain his sincerely held belief that his hair should remain uncut.[155] Thus, the majority erred in finding that wearing his hair inside the back of his shirt, or in a bun, were the only options available to the student and that this created an undue burden.[156] Furthermore, according to the dissent, the majority allegedly confused the student's right to keep the *length* of his hair with the right to keep it *visible*.[157] In other words, the majority incorrectly concluded that any hairstyle concealing the exact length of the student's hair was a substantial burden on his religious belief because it was not *visi-*

148. *Betenbaugh*, 611 F.3d at 267.
149. *Id.* at 269.
150. *Id.* at 269.
151. *Id.* at 271.
152. *Id.*
153. *Betenbaugh*, 611 F.3d at 258.
154. *Id.* at 273.
155. *Id.*
156. *Id.* at 274.
157. *Id.* at 274-75.

ble long hair. According to the dissent, this argument is belied by the fact that hair tucked inside the back of a shirt or set in a bun *is* visible long hair.[158] Thus, neither of the school officials' "off the collar" options imposed a substantial burden on the student's religious belief.[159]

However, the dissent misses several key points. First, the fact that the school policy allowed *girls* to wear their hair visibly long down their backs—not in a bun or in a single braid tucked inside their shirts—weakened the school officials' claims that denying the student a religious exemption was the least restrictive means for furthering state interests.[160] Indeed, the school officials failed to show that girls sporting long hair were somehow less prone to accidents or were more successful at complying with school hygiene standards than the student.[161] Nor did the school officials explain why any "gender confusion issues" associated with the student's long hair would not also be true for girls who chose to wear their hair short, as the dress code allowed.[162] The fact that school officials permitted girls to wear their hair short "undoubtedly undermines" any interest the school had in promoting a "uniform appearance" through its dress code.[163] That the school officials contemplated secular, gender-based exceptions implies that, like *New Rider's* assimilationist approach, the student's "non-conforming [Native American] appearance" was what really caused school officials to deny his request for a religious exemption.

Second, the school officials conceded that the only religious exemption they ever granted—to a Muslim girl who wished to wear a *hijab*—permitted the girl to look different from other students.[164] Yet, at the time of their consideration of that exemption this difference neither posed a threat of school disruption, nor a concern that the student would be bullied or teased.[165] The most the school could muster, then, was that a bun or a shirt tuck will present about the same potential for disruption as allowing the student to wear long hair in other ways.[166] Finally, the fact that the student

158. *Betenbaugh*, 611 F.3d at 274-75.
159. *Id.* at 275.
160. *Id.* at 272.
161. *Id.*
162. *Id.*
163. *Betenbaugh*, 611 F.3d at 272.
164. *Id.* at 269.
165. *Id.*
166. *Id.*

could not wear his hair visibly long at all during the school day, as required by his religion, is especially problematic in light of this critical period in the young kindergartner's development.[167]

Ultimately, *Betenbaugh* serves as an important example of how courts can circumvent racist assimilationist policies, and better protect students' right to religious expression with the help of a state RFRA or, alternatively, a state constitution with provisions similar to RFRA.

iii. Texas District Court Protects Religious Free Speech and Free Exercise

In *Chalifoux v. New Caney Independent School District*, two students violated a dress code banning the use of rosary necklaces, which were sometimes used as gang symbols.[168] However, the students were not gang members and only wore the rosaries to express their Catholic faith.[169] The district court found that the "symbolic speech" at issue was a form of religious expression protected by the First Amendment.[170] Because religious symbols were "akin to pure speech," the court looked to *Tinker*.[171] Under *Tinker*, the school had to show that the students' use of the rosaries caused substantial disruption to school discipline.[172] Since the students had worn the rosaries for some time without incident, the district court held that the school was unjustified in infringing upon the students' religiously motivated speech.[173] Moreover, although the court recognized that school officials were entitled to some flexibility in drafting and enforcing disciplinary rules, it also determined that when school policies threaten students' free speech rights, greater specificity was required.[174] Since the Student Handbook lacked a sufficient definition for "gang-related apparel," and because rosaries were not included on the list of gang-related apparel, the school dress code failed to provide adequate notice to the students of prohibited attire.[175] The court also held

167. *Betenbaugh*, 611 F.3d at 265.
168. Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997).
169. *Id.* at 665.
170. *Id.* at 665.
171. *Id*.
172. *Id.* at 663.
173. *Chalifoux*, 976 F. Supp. at 671.
174. *Id.* at 669.
175. *Id*.

that the dress code gave too much discretion to district police and school officials to determine what constituted "gang-related apparel."[176] As such, the district court concluded that the dress code was vague and led to arbitrary enforcement.[177]

The district court held, moreover, that the dress code violated students' free exercise rights.[178] The court observed that both students demonstrated their sincere religious beliefs by wearing rosaries as a means of emphasizing their Catholic faith.[179] Though wearing a rosary was neither required by the Catholic faith, nor common among practicing Catholics, the court found that this did not defeat the students' right to freely exercise their religious beliefs.[180] Under a hybrid free exercise/free speech claim, the court subjected the dress code to a strict scrutiny standard of review.[181] In keeping with this test, the court required school officials to show that the policy bore more than a reasonable relation to its stated purpose of controlling gang activity and ensuring school safety.[182] The court then balanced that showing against the burden placed on the students' First Amendment rights.[183] While the court did not dispute that dress codes might be appropriate under some circumstances, it held that the school's blanket ban on wearing rosaries was the least effective means available for achieving school goals.[184] This was especially true in light of the fact that there were only three instances of alleged gang members wearing rosaries as gang symbols, with only one of those incidents occurring at the school.[185] Thus, the court held that the dress code placed an undue burden on the students' free exercise rights.[186]

Ultimately, *Chalifoux* serves as an excellent model for how courts should decide students' free speech and hybrid claims.

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176. *Id.* at 668.
177. *Id.* at 669.
178. *Chalifoux*, 976 F. Supp.at 670-71.
179. *Id.* at 670.
180. *Id*. at 670-71.
181. *Id.* at 671.
182. *Id.*
183. *Chalifoux*, 976 F. Supp. at 671.
184. *Id.*
185. *Id.*
186. *Id.*

IV. LESSONS OF THE AMERICAN EXPERIENCE

Student religious expression in public schools has fairly weak protection in the United States where the law accommodating religious attire and symbols is less than clear and highly dependent on local rules and officials. Regulations specifically targeting young students' religious expression are especially noteworthy because children are not yet fully formed democratic citizens, but are still subject to their parents' supervision.[187] Although the role of public education is often viewed as a means for helping children to become autonomous democratic citizens,[188] it must also be viewed as a means for freeing them from those constraints that limit their growth. Thus, as an alternative to regulations imposing the government's preferred secular perspective on children, government regulations should include religious exemptions or opt-out provisions that allow students in public schools to express their religious beliefs through the use of religious attire and symbols.

Indeed, constraints on governmental paternalism are justified in many instances because such constraints increase a citizen's range of options for exercising his or her individual liberties.[189] Students' ability to wear religious attire and symbols in the public school context makes sense because it encourages students to discuss and respond thoughtfully to the religious opinions of others, while eliminating the burden that forces students to choose between their duty to God and their duty to the state and its laws. Whether we like it or not, religious perspectives commonly provide support for secular ideas,[190] and an understanding of these perspectives through an exploration of something like the use of religious attire and symbols in public schools can help children grasp some of the socio-political currents of the world in which they live. Consequently, this view of governmental authority may be helpful in resolving the diverging positions that the U.S. states have taken to deciding students' First Amendment rights.

As it stands, the United States has nothing approaching France's conception of *laïcité* or laws allowing for the secular coercion of young students attending public schools.[191] Instead, local

187. Widmar v. Vincent, 454 U.S. 263, 265 (1981).
188. *Id.* at 265 n.2.
189. *See infra* Part IV.
190. KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS 23-28 (2005).
191. However, the French approach is not unfamiliar in the U.S. context. During the early twentieth century, the American theory of educational reform

governments in the United States have used much more subtle tactics, such as dress codes and uniform policies, to proselytize an equally powerful form of secular coercion of young students attending public schools.[192] As discussed in this article above, a government regulation allowing students to wear religious attire and symbols could limit these exercises of governmental coercion. Admittedly, there is great value in providing young students with a protected secular space in which they can consider ideas free from the pressure of others, while preserving school safety and order. However, this does not mean that the government must smother students' right to religious expression to achieve this goal.

Indeed, governmental intrusion is often inappropriate in a political system that boasts a racially, ethnically, and culturally diverse citizenry, particularly when such intrusion is merely a pretext for religious and racial discrimination, as seen in *New Rider* and *Needville*.[193] Like race, the visible characteristics of religion can easily facilitate discrimination, as demonstrated by *New Rider* and *Needville*, making it incumbent upon the state and its citizens to clearly establish the boundaries between religious liberty and politics, and to guard against state-sanctioned exercises of discrimination under the guise of "neutral" and "generally applicable" laws.

A robust legal doctrine regarding religious attire and symbols in public schools must therefore balance four sets of rights: the rights of the students, the rights of parents, the rights of non-believing students, and the state's right to educate students to become democratic citizens in a pluralist society. Balancing these interests means that courts must, on the one hand, consider the interests of the state in upholding secularism, public order and safety, and citizen equality by protecting the rights of non-believing students who wish to be free from religious proselytizing; on the other hand, the courts must weigh the interests of students who wish to observe their religion and express their religious beliefs, and the interests of parents in raising their children according to religious traditions. Citizen equality is a particularly important aspect in these considerations because overt displays of religion, even by young students, cannot be permitted to make other

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recognized strict secularism as a potentially viable model for the public education system. *See* JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 99-100 (1916).

192. *See supra* Part I, section B, and Part III, section A.

193. *See supra* Part III.

students so uncomfortable that they feel degraded or compelled to leave the public school.[194] Thus, when student religious expression rises to a level that infringes on the rights of others, it should be subject to reasonable restrictions.[195]

In the end, the haphazard and individualized state-based approach in the United States is problematic in that it creates confusion and lacks the resiliency to balance all four sets of rights.

V. SAFEGUARDING STUDENTS' FREE EXERCISE AND FREE SPEECH RIGHTS IN PUBLIC SCHOOLS

A. Reworking Mandatory Uniform Policies of Public Schools

The issue of mandatory uniform policies is noteworthy in the American context because such policies typically prohibit all choice of dress and thus substantially limit the student expression for which First Amendment protection may be invoked. Indeed, mandatory uniform policies have become an increasingly popular tool for public school administrators that endeavor to promote student safety, student discipline, and quality learning environments.[196] School administrators that have adopted uniform policies have often based their decisions on claims that uniforms (1) increase student safety by decreasing gang activity and violence, (2) increase student learning by encouraging positive school attitudes, (3) decrease behavioral problems by increasing attendance rates and lowering substance abuse, and, in the process, (4) increase students' self-esteem and motivation, while also saving parents money on clothing.[197] Nevertheless, empirical studies have shown

194. *See, e.g.*, Sapp v. Sch. Bd. of Alachua Cnty., Fla., No.1:09CV242-SPM/GRJ, 2011 WL 5084647, at *1 (N.D. Fla. Sept. 30, 2011) (public school student wears "Islam is the Devil" t-shirt to school).

195. *See id.* at *2-3. (T-shirt caused school disruption and fostered hostile school atmosphere. Thus, school administrators prohibited student from wearing t-shirt at school.); *see also supra* Part II, section C, for a discussion of the *Tinker* majority's test determining if a student's expression would invade the rights of others.

196. *See* National Center for Education Statistics, *Indicators of School Crime and Safety: 2011*, NCES.ED.GOV, *available at* http://nces.ed.gov/programs/crimeindicators/crimeindicators2011/tables/table_20_1.asp (last visited May 1, 2013) (Table 20.1 showing percentage of public schools using safety and security measures from 1999 to 2010).

197. David L. Brunsma & Kerry A. Rockquemore, *Effects of Student Uniforms on Attendance, Behavior Problems, Substance Use, and Academic Achievement*, 92 J. EDUC. RES. 53, 53 (1998).

that uniforms are *not* effective in achieving any of these outcomes.[198] Uniforms have not deterred absenteeism, behavioral problems, substance abuse, violence, poor academic achievement, or poor school attitudes.[199] In fact, uniforms have only become an economic burden for low-income parents.[200]

Perhaps the most significant of these findings is that public school policies requiring uniforms have been found to *negatively* impact students' academic achievement[201]which, after all, is most parents' primary concern regarding their child's education. Moreover, uniform policies have been found to act as a catalyst for positive change only when, as is often the case, other school reforms have accompanied such a policy change[202]—a fact that goes some way to explaining the popular misconception of the benefits of uniforms themselves. Indeed, an examination of school district implementation of such policies, such as the Long Beach, California school district, which involved the first large urban district to adopt a mandatory school uniform policy, reveals that several other substantial reforms were responsible for a district's overall improvement. In the Long Beach example, these reforms included a reassessment of school standards, a large monetary grant, development of alternative pedagogical strategies, and creation of an oversight and reporting board.[203] The implication, therefore, is that the rhetoric of the benefits of mandatory uniform policies relies primarily on folk belief and anecdotes rather than empirical evidence.

Given this evidence, public school administrators should abolish mandatory uniform policies and, instead, craft suitable dress codes that include opt-out provisions, because such policies offer

198. *See id.* at 60; *see also* David L. Brunsma, *School Uniform Policies in Public Schools: The School Uniform Movement Continues to Grow Despite Research Indicating that it Doesn't Do What It's Supposed to Do*, NAESP.ORG, 4 (January/February 2006), *available at* http://www.naesp.org/resources/2/Principal/2006/J-Fp50.pdf.

199. *See* Brunsma & Rockquemore, *supra* note 197, at 58, 60.

200. *See* Daniel Gursky, *Uniform Improvement?*, 67 EDUC. DIG. 46 (1996) (the cost of uniforms disadvantage families that are unable to afford them); Susan Thomas, *Uniforms in the Schools: Proponents Say it Cuts Competition: Others are Not So Sure*, 44 BLACK ISSUES HIGHER EDUC. 44 (1994) (dress codes and uniform policies are applied largely in urban school districts and, thus, burden predominately minority and poor student populations).

201. *See* Brunsma & Rockquemore, *supra* note 197, at 58, 60.

202. *Id.* at 60.

203. *Id.*

students and parents greater flexibility. If school administrators insist on using uniform policies, however, as empirical data suggests,[204] they must include opt-out provisions or religious exemptions and actually exercise those option to grant accommodations to students and families who request them; otherwise, in limiting such attire, they will continue to unlawfully infringe upon students' and parents' constitutional rights. Arguably, uniform policies reflect a compelling state interest in providing a safe and disciplined educational environment for students. However, the fact that uniform policies cannot bring about this desired outcome, together with the evidence that they actually have a *negative* impact on students' academic performance,[205] reveals that such policies run *contrary* to state interests.

Moreover, uniform policies are not the least restrictive means of furthering the state's interests. Uniform policies without opt-out provisions essentially condone discrimination by failing to protect students' rights to express themselves and parents' rights to direct the upbringing of their children. In other words, the lack of an opt-out provision impedes the full enjoyment of the benefits and opportunities of their religious and cultural heritage—a right that the First Amendment was designed to protect.

Adding opt-out provisions to uniform policies would not conflict with the state's interests in instilling school discipline and asserting school authority because uniformity among students fails to satisfy any compelling interest, especially in light of the demonstrated failure of uniform policies to realize state goals. Including an opt-out provision in a uniform policy also makes sense because it is the least restrictive alternative imaginable. After all, school policies must be narrowly tailored, not overly broad, when substantially burdening the exercise of religious conduct.[206] That mandatory uniform policies too broadly impede students' First Amendment rights is clear from the fact that they affect *all* student expression, impacting even those students who are not underachieving, who are not associating with gangs, and who seek merely to comply with their religious obligations.

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204. Indeed, a national survey released in 2011 revealed that 57% of U.S. public schools had adopted dress code policies, while another 19% had adopted uniform policies. *See* National Center for Education Statistics, *supra* note 196.

205. *See* Brunsma & Rockquemore, *supra* note 197, at 58, 60.

206. "Narrowly tailored" means to remove or cure a substantial burden on the free exercise of religious conduct. *See* Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 267-68 (5th Cir. 2010).

Notably, a number of states already recognize that they have a legitimate interest in fostering the free exercise of religion in public schools, as demonstrated by state statutes requiring exemptions to school dress code and uniform policies.[207] Other states should follow this example. After all, courts have rightly held that these exemptions are appropriate because they represent an attempt by the state to "accommodate, not hinder, the religious beliefs of students and their parents."[208] Moreover, religious exemptions and opt-out provisions are narrowly tailored and rationally drawn because they further the state's legitimate interest in accommodating students' free exercise of religion without undermining the state's pedagogical goals.

In the end, therefore, adding exemptions or opt-out provisions to uniform policies is necessary because they further the state's educational interests, while also protecting students' and parents' free exercise rights under the First Amendment.

B. Adding Religious Exemptions and Opt-Out Provisions to School Uniform and Dress Code Policies

The suggested procedure for religious exemptions and opt-out requests would operate as follows.

> (1) A parent or guardian shall submit a written application to the school to request a religious exemption on a student's behalf.

The parent or guardian should submit a written request for a religious exemption to the school principal or to another designated school official explaining the religious belief at issue and how it is adversely impacted by the student's compliance with the dress code or uniform policy.[209] The parent or guardian should also

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207. *See, e.g.*, ARK. CODE ANN. § 6-18-102 (West 2012); 105 ILL. COMP. STAT. ANN. 5/10-22.25b (LexisNexis 2013); TEX. EDUC. CODE ANN. § 11.162 (West 2012); WASH. REV. CODE ANN. § 28A.320.140 (West 2012); WIS. STAT. ANN. § 118.035 (West 2012). Unfortunately, there is no empirical data available that tracks the results of the granting of exemptions to school dress policies.

208. Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 704 (N.D. Tex. 2000); *see also* Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 292 (5th Cir. 2001); Wilkins v. Penns Grove-Carneys Point Reg'l Sch. Dist., 123 F. App'x 493, 495 (3d Cir. 2005) (unpublished).

209. *See, e.g.*, *Student Dress Policy: Policy No. 4340*, NORTHAMPTON COUNTY BOARD EDUC., http://northampton.sharpschool.com/UserFiles/Servers/Server_1005942/File/Revised%20Uniform%20Policy.pdf (last visited May 5, 2013).

submit any of the following information to support the religious exemption request and establish that a religious belief is "sincerely held" by the student: a) a written statement from a religious authority explaining the religious belief and how it is impacted by the school dress code or uniform policy; b) reference to a religious text that provides or explains the basis for the religious belief; c) identification of the religious group holding the belief, if such a group exists; d) written descriptions based on encyclopedias, religious publications, and other materials explaining the religious belief and how its exercise would be affected by the student's compliance with the dress code or uniform policy; or e) examples of circumstances in which the sincerity of the religious belief has been demonstrated, including the length of time that the child has worn the religious attire or symbol, and the child's express commitment or admission to wearing the attire or symbol to signify his or her religious belief.[210]

Ultimately, requiring a written request from parents and guardians is valuable because it a) formalizes the exemption process; b) allows school administrators to adequately track such requests; and c) gives parents and guardians the opportunity to offer support for their requests based on evidence that is crucial to the school officials' decision making.

> (2) A school administrator shall review and evaluate the religious exemption application and meet with the student's parent or guardian, if appropriate, to make a determination.

The principal, or another designated school official, shall review the written application and accept or deny the request for a religious exemption.[211] The decision to grant or reject an application for an exemption to the dress code or uniform policy will be communicated to the parent or guardian in writing.[212] If the principal is considering denying the request, he or she must first send a letter to the parent or guardian requesting a meeting to discuss and clarify the reasons for the exemption request. The parent

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210. *See id*. (including some of these elements).

211. *See, e.g.*, *6.310 School Uniforms and Dress Codes*, MEMPHIS CITY SCHOOLS (Effective date: July 10, 2006), http://www.mcsk12.net/schools/kirby.hs/site/documents/MCSDressCode.pdf (last visited Aug. 5, 2013).

212. *See id.*

must meet with the principal within a week of receiving the letter.[213]

In making a determination regarding the religious exemption, the principal should not attempt to determine whether the religious belief is valid, but rather whether the belief is sincerely held by the child and his or her family. In then deciding whether a religious exemption should be granted, the principal may look to the information that the parent or guardian has provided to see if it demonstrates that: a) the objection to the dress code or uniform policy is grounded in religious tenets rather than in a mere personal preference, b) the religious belief is sincerely held and practiced by the child and the family, and c) compliance with the requirements of the dress code or uniform policy would interfere with the exercise of the religious belief.[214]

The principal must accept or deny the religious exemption request within a week of meeting with the parent or guardian. If the principal still believes that the student does not qualify for an exemption, the principal can appeal to the superintendent (or the superintendent's designee), who may still authorize the exemption using the same analysis.[215] If the superintendent believes that the student does not qualify for the religious exemption, the superintendent should seek the advice of the school board's legal counsel. After consideration of counsel's advice, the superintendent should decide whether to allow the exemption.

If the religious exemption request is denied, the principal or superintendent must provide the parent or guardian with a written basis for the decision. The school official must demonstrate that denial of the exemption was based on direct evidence. For example, the official could establish that gang activity is prevalent at the school, and that recent incidents involved the use of religious or pseudo-religious symbols to intimidate or provoke others. In other words, school administrators must show a realistic and foreseeable, or imminent, threat to the school environment that is attributable to a student's use of religious attire or symbols. In this way, school officials can ensure school safety and order, while parents and guardians are assured that their requests will be seriously considered and that a denial of their request is not a mere pretext for discrimination.

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213. *Id.*
214. *See, e.g., Student Dress Policy: Policy No. 4340, supra* note 209.
215. *See, e.g., 6.310 School Uniforms and Dress Codes, supra* note 211.

(3) A parent or guardian may appeal the decision denying the religious exemption.[216]

The principal and superintendent's decision to deny a religious exemption should be subject to review by the school district's board and the State Board of Education. If the principal and superintendent do not grant the exemption, a parent or guardian may appeal the denial by writing to the school board within a week of the denial.[217] The school board may affirm or reverse the decision of the principal and superintendent at a hearing to be scheduled within a week of receipt of the appeal.[218] Meanwhile, the student should be permitted to remain in school and not be required to comply with the school dress code or uniform policy until the appeal and review process is completed.[219]

If the school board affirms the principal and superintendent's denial of an exemption, the parent or guardian should consider making a final appeal to the State Board of Education, and should ask the Board to review the written record of the exemption request and grounds for the denial.[220] This appeal must be made within a week of the school board's denial of the appeal. The State Board of Education may hold a hearing on the issue at its discretion, but will be required to render a final decision within a week if no hearing is granted.[221]

The value of providing an appeals process lies in the fact that it assures parents and guardians that their exemption requests are thoroughly vetted, and not arbitrarily adjudicated.

(4) School administrators shall provide alternatives to parents or guardians in the event that a religious exemption is denied on appeal.

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216. Some schools have already instituted policies and procedures relating to the appeals process, which are cited throughout this section. However, the appeals process discussed in this section is more comprehensive and presents an idealized version of the appeals process.

217. *See e.g.*, *6.310 School Uniforms and Dress Codes, supra* note 211.

218. *Id.* (holding the hearing within a week of receipt of the appeal is ideal). However, parents' work schedules and the busiest school days of the year might make this unworkable and a two-week time frame more feasible.

219. *See e.g., 6.310 School Uniforms and Dress Codes, supra* note 211.

220. *Id.*

221. *Id*.

Once the religious exemption is officially denied, school administrators should offer alternatives to parents and guardians. For example, administrators could recommend that the student transfer to a neighboring school or campus that has no dress code requirement or that could accommodate the student's use of religious attire or symbols.[222] School administrators could also refer parents and guardians to programs that reimburse transportation costs incurred by students attending schools located in other districts. In this way, parents and guardians would not need to feel oppressed or abandoned by school officials and community school systems, but could retain their general sense of acceptance and support within the community.

> (5) A parent or guardian shall renew a religious exemption waiver annually or biennially.

School administrators should require parents and guardians to renew a religious exemption waiver either annually[223] or biennially. Requiring parents and guardians to renew waivers would provide administrators with an opportunity to assess the effectiveness and appropriateness of continuing to grant such waivers. Indeed, renewals would allow administrators to ensure that waivers take into account changes within the school environment and any emerging safety issues. Renewals also offer an opportunity for school administrators to check-in with parents in order to ensure that students are not abusing the privilege of wearing religious attire and symbols in public school.

In the end, these five procedural steps show that the key to operating a successful religious exemption and opt-out policy is the ability to compromise. In other words, school administrators should be able to ensure the quality, safety, and order of public schools, while refraining from unnecessarily infringing on students' and parents' First Amendment rights.

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222. *See, e.g.*, TEX. EDUC. CODE § 11.162, which allows parents to transfer to another school or campus without a requirement that interferes with the student's use of religious attire or symbols.

223. *See* National Center for Education Statistics, *supra* note 196.

C. Bringing Back Strict Scrutiny as the Judicial Standard of Review

Religious free exercise and free speech are fundamental rights of American students and deserve the utmost constitutional protections by U.S. courts. Because of the weak protection afforded by *Smith* to students' religious liberties, American courts should consistently apply strict scrutiny in analyzing free exercise, free speech, and hybrid claims.[224]

Applying strict scrutiny in the public school context would operate as follows. First, a student must satisfy a burden demonstrating his or her sincerely held religious belief.[225] Next, school administrators must demonstrate a compelling interest in enforcing the challenged policy to justify the burden placed on students.[226] Finally, school administrators must show that the school interests cannot be served in a less restrictive manner.[227] Indeed, failing to apply strict scrutiny, as demonstrated throughout this article, has allowed lower courts to employ a plethora of tests, or to apply the same test unevenly, with varying results.[228] For example, the Ninth Circuit applied strict scrutiny in *Cheema*, but the *Smith* test in *Jacobs*, resulting in diametrically opposed results for factually similar First Amendment claims.[229] Meanwhile, the Fifth Circuit in *Needville*, along with the Texas District Court in *Chalifoux*, applied strict scrutiny, resulting in broader First Amendment protections.[230] Moreover, the Seventh Circuit in *Menora* only partially applied strict scrutiny, and the Tenth Circuit in *New Rider* failed to apply any test at all, choosing instead to defer to public school administrators.[231] What is important to discern here

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224. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969). *Sherbert* and *Yoder* established the strict scrutiny standard to free exercise claims, while *Tinker* established the strict scrutiny standard to free speech claims. *See also* Mazza, *supra* note 16, at 339 (suggesting using *Smith*'s hybrid rights exception to get out from *Smith* and back to the strict scrutiny standard).

225. *See, e.g.*, *Yoder*, 406 U.S. at 205-06, 235.

226. *Id.* at 205-06, 215.

227. *Id.* at 205-06.

228. *See supra* Part III, sections A and B.

229. *See* Cheema v. Thompson, 67 F.3d 883 (9th Cir. 2003); Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419 (11th Cir. 2008).

230. Chalifoux v. New Candey Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 2008).

231. *See* Menora v. Ill. High Sch. Ass'n., 683 F.2d 1030 (7th Cir. 1982); New Rider v. Bd. of Educ. of Indep. Sch. Dist. No. 1, 480 F.2d 693 (10th Cir. 1973).

is that the failure to apply strict scrutiny has resulted in less than adequate protection of students' free exercise and free speech rights. While the application of strict scrutiny does not ensure that students' rights will always be found to outweigh the interests of the state, failure to apply the test seems to ensure that those rights will not be adequately considered or protected.

The Ninth Circuit's opinion in *Jacobs* perfectly illustrates the problems inherent in the application of a standard other than strict scrutiny.[232] Because of the ease in discerning "neutral" and "generally applicable" dress codes and uniform policies banning religious attire and symbols, *Smith's* rational basis test, as applied in *Jacobs*, unfairly shielded the uniform policy from a more considered review. Indeed, the *Smith* test appears to favor state interests in school safety and discipline, at the expense of students' free exercise and free speech rights. By contrast, if the *Jacobs* court had applied strict scrutiny, it could have engaged in a more balanced consideration of school safety and discipline, and students' religious expression, as demonstrated by *Cheema*, which resulted in significant compromise but yielded successes for both sides.[233] In essence, strict scrutiny allows courts to assess state interests and local values without automatically ruling against students' First Amendment rights.[234] As such, the decisions in *Cheema*, *Needville*, and *Chalifoux*,[235] coupled with the lack of protection from a federal RFRA, demonstrate a pressing need for courts to apply strict scrutiny, and for states to impose other safeguards to ensure a more balanced consideration of state and student interests.

D. Adopting a State Religious Freedom Restoration Act (RFRA)

States should consider adopting a RFRA to ensure that students' religious liberty is adequately protected.[236] In fine-tuning the provisions of a State RFRA, local governments should make

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232. *See supra* Part III, section A (iii).

233. *See supra* Part III, section B (i).

234. *See* Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

235. *See supra* Part III, section B.

236. H.R. REP. No. 88, 103d Cong., 1st Sess. 8 (1993), H.R.J. RES. 1308, 103d Cong. (1993). When Congress enacted the federal RFRA, it sought to reinstate the strict scrutiny standard found in cases prior to *Smith.* In restoring the compelling interest test established in *Sherbert* and *Yoder,* Congress recognized that the test used in those two cases was significantly stronger than the *Smith* test.

sure to include a provision requiring the application of strict scrutiny, such as that found in the Texas RFRA.[237]

Adopting a State RFRA mandating a strict scrutiny standard of review is beneficial for a variety of reasons. First, a State RFRA mandating strict scrutiny would allow courts to conduct a more balanced assessment of students' interest in religious expression, and public schools' interest in maintaining school order. The RFRA would also make it easier for courts to balance these interests because courts can rely on a specific standard requiring public school officials to provide a compelling interest not only for enacting a dress code or uniform policy, but for failing to accommodate a request for an exemption.

Second, a strict scrutiny-inspired RFRA would explicitly allow a judge to create an exemption for a dress code or uniform policy in cases where the school has failed to articulate a compelling interest for denying a student an exemption. This, in turn, would clarify the burdens of proof required from both students and public schools, ultimately fostering judicial expediency.

Third, adopting a strict scrutiny-inspired RFRA would help ensure that courts properly and consistently apply the same standard in deciding issues involving the accommodation of religious exemptions or opt-out provisions. This would be the case because judges would have to decide matters involving students and families seeking religious exemptions; as such, judges will be forced to craft decisions and include language that directly addresses a variety of considerations.

Fourth, a strict scrutiny-inspired RFRA would implement a standard that provides better protection for students' First Amendment rights, as seen in *Cheema*, *Needville*, and *Chalifoux*. Indeed, explicit authority protecting students' religious liberties through a specific provision in a State RFRA would encourage courts to be more rights protective. A strict scrutiny-inspired RFRA would also lead public school officials to be more cautious in designing and enforcing school dress code or uniform policies. Indeed, if public school officials knew they were required to present a compelling interest and to consider the least restrictive means

237. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon 2005). *See also* other state RFRAs: ARZ. REV. STAT. ANN. § 41-1493.01 (2004); CONN. GEN. STAT. ANN. § 52-571(b) (West 2005); FLA. STAT. ANN. § 761.03 (West 2005); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); N.M. STAT. ANN. § 28-22-3 (LexisNexis 2000); OKLA. STAT. ANN. tit. 51, § 253 (West 2008); R.I. GEN. LAWS § 42-80.1-3 (2006); S.C. CODE ANN. § 1-32-40 (2005).

possible when burdening a student's religious liberty, they would more faithfully review and tailor dress code and uniform policies to accommodate religious exemptions which, in turn, would help to ensure the policy's constitutionality. As a result, religious exemptions and opt-out opportunities would be more easily available to students. However, overly generous protections would be tempered by the fact that strict scrutiny requires a student to demonstrate his or her sincerely held religious belief. For example, in *Cheema*, the students had to prove that they were wearing their *kirpans* to comply with a sincerely held religious belief. Thus, requiring students to prove that their religious beliefs or practices are "sincerely held" would serve as a safeguard against claims by those students who wish to use the shield of the Free Exercise Clause to advance other non-religious goals.

Critics have argued that State RFRAs would only lead to arbitrary results.[238] However, a strict scrutiny-inspired State RFRA would mitigate against such outcomes. Critics also fear that a State RFRA would extend free exercise rights to all citizens, which would inundate courts with frivolous challenges from groups such as state prisoners.[239] However, these fears are unfounded since state attorney generals' own reported data show that State RFRAs caused an increase of only 3.5 filings from prisoners per year.[240] Finally, critics claim that State RFRAs would violate the First Amendment's Establishment Clause because they essentially advance religion.[241] However, such arguments have never been accepted by the U.S. Supreme Court, which has ruled that religious exemptions may be accommodated without violating the Establishment Clause.[242] In fact, the strict scrutiny test was applied for nearly fifty years prior to *Smith* without the U.S. Supreme Court

238. *See* Tania Saison, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act,* 28 COLUM. J.L. & SOC. PROBS. 653, 672-74 (1995).

239. *More Attempts at Federal Laws: RLPA & RLUIPA*, RELIGIOUSTOLERANCE.ORG, http://www.religioustolerance.org/rfra3.htm (last visited May 1, 2013) [hereinafter *More Attempts at Federal Laws*].

240. *See* Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. DAVIS L. REV. 573, 601 (1999).

241. *See More Attempts at Federal Laws*, *supra* note 239.

242. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) (rejecting argument that Title VII exemption for religious institutions violated Establishment Clause); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987) (recognizing that government may accommodate religious practices and do so without violating Establishment Clause).

ever holding that this violated the Establishment Clause. Moreover, the existence of the Free Exercise Clause, which explicitly protects religion, demonstrates that the framers envisioned an exemption to the Establishment Clause that protects religion in the public sphere.[243] Finally, accommodating religion is not the same as advancing religion. In other words, a state removing a burden placed upon a students' religious practice or expression is not the same as a state favoring or supporting (or endorsing or establishing) a particular religion. An accommodation is merely a recognition that the state intruded beyond its proper limits into the realm of students' religious liberty.

In sum, the confusing state of lower court cases opining on students' use of religious attire and symbols in public schools, along with the myriad benefits of strict scrutiny-inspired State RFRAs, demonstrates the need for state governments to take immediate action by adopting such RFRAs.

CONCLUSION

Religious liberty is a central concern in the United States. However, state and judicial restrictions on the use of religious attire and symbols in public schools has unwittingly demonstrated animosity towards religion. This animosity, in turn, has interfered with public school students' constitutional right to freely exercise and express their religion. Americans must take steps to ensure true religious liberty for students. The sanctity ascribed to religious liberty must be shielded from discrimination and political whims and, instead, affirmed as a welcome aspect of society. Nowhere is this affirmation more vital than in public schools. Americans must recognize that constitutional laws protecting students' religious liberties are vital living principles that demand reaffirmation. Thus, state governments, U.S. courts, and individuals charged with such responsibilities must make the commitments necessary to guarantee this fundamental freedom to all public school students.

243. *See* U.S. CONST. amend. I, which guarantees Americans' right to free exercise of religion.