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Core Periphery Dichotomy in First Amendment Free Exercise Clause Doctrine Goldman v. Weinberger Bowen v. Roy and O'Lone v. Estate of Shabazz

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THE "CORE"-"PERIPHERY" DICHOTOMY IN FIRST AMENDMENT FREE EXERCISE CLAUSE DOCTRINE: *GOLDMAN v. WEINBERGER, BOWEN v. ROY*, AND *O'LONE v. ESTATE OF SHABAZZ*

In its October 1985 Term the Supreme Court introduced a rational basis standard of review into its first amendment free exercise clause[1] jurisprudence. In *Goldman v. Weinberger*[2] the Court examined a challenged military dress regulation with minimal scrutiny and in *Bowen v. Roy*[3] three Justices agreed that courts should examine neutral restrictions on government benefits with minimal scrutiny.[4] This departure from the Court's traditional analysis of free exercise restrictions[5] continued in its October 1986 Term in *O'Lone v. Estate of Shabazz*,[6] a case involving the rights of prison inmates to exercise freely their religion.

This Note describes the developing dichotomy of first amendment free exercise doctrine using a sphere[7] as a metaphor. In *Goldman* and *Roy* the Court implicitly began separating contemporary free exercise doctrine into two categories, which this Note labels the "core" and the "periphery." Core cases arise in the context

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1 "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I. The clause applies to the states through the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); *see* U.S. CONST. amend. XIV.

2 106 S. Ct. 1310 (1986); *see infra* notes 77-91 and accompanying text. *See generally* Goldberg, *The Free Exercise of Religion*, 20 AKRON L. REV. 1 (1986); O'Neil, *The Tenth Charles L. Decker Lecture in Administrative and Civil Law: Civil Liberty and Military Necessity—Some Preliminary Thoughts on* Goldman v. Weinberger, 113 MIL. L. REV. 31 (1986); Note, *First Amendment Rights in the Military Context: What Deference is Due?*—Goldman v. Weinberger, 20 CREIGHTON L. REV. 85 (1986); Casenote, *Constitutional Law—Free Exercise Clause—Appropriate Military Officer May Prohibit the Wearing of Visible Religious Apparel in the Interest of Uniformity*, 23 WILLAMETTE L. REV. 135 (1987).

3 106 S. Ct. 2147 (1986); *see infra* notes 92-114 and accompanying text. *See generally* Note, Roy v. Cohen: *Social Security Numbers and the Free Exercise Clause*, 36 AM. U.L. REV. 217, 243-44 (1986) (brief postscript discusses Supreme Court's *Roy* opinion); Casenote, *supra* note 2.

4 *Roy*, 106 S. Ct. at 2156. Only Justices Powell and Rehnquist joined this segment of Chief Justice Burger's majority opinion.

5 *See infra* notes 11-32 and accompanying text.

6 107 S. Ct. 2400 (1987).

7 In terms of this metaphor, the core of traditional doctrine is located at the center of the sphere. Travelling outward from the core, one crosses various layers of the periphery. Upon passing into the first layer, one crosses the border between compulsion and choice, from discriminatory restrictions in the core to neutral restrictions on government benefits in the periphery. However, this first layer of the periphery is within the context of ordinary social and political existence. As one continues outward, one reaches another border: the interface between cases arising within the political community and those arising in societies apart. *See infra* notes 8-10 and accompanying text.

of common social and political existence and involve government compulsion rather than individual choice.[8] In contrast, cases in the periphery arise either outside of the political community[9] or involve nondiscriminatory restrictions on government benefits.[10] The Court appears willing to abandon strict scrutiny in cases arising in the periphery, although prior to *Goldman* and *Roy* the Court used strict scrutiny to examine all free exercise claims.

This Note argues that the Court should abandon the developing dichotomy because courts must protect the freedom to act on religious beliefs outside of the political community and protect individuals from government compulsion disguised as choice. The nascent periphery doctrine effectively creates an irrebuttable presumption of a compelling state regulatory interest, allowing courts to avoid an in-depth factual inquiry into possible infringements of free exercise rights.

I
BACKGROUND

A. Contemporary Doctrine and the "Core" of Free Exercise

Modern free exercise clause jurisprudence originated in 1963 with *Sherbert v. Verner.*[11] There the Court held that South Carolina's

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8 Most free exercise claims arise in the political community. The political community consists of daily social and political existence in which community, social, political, and constitutional norms govern the relationship between sovereign and citizen. Suppose, for example, an Orthodox Jewish minor objected to a state law requiring her to attend school on Saturday, the day of her Sabbath. Her claim would fall into the core of free exercise doctrine because it arises in the political community and the law compels her to violate her beliefs. *See infra* notes 11-32 and accompanying text.

9 Two examples of settings beyond the political community are the military and prisons. Claims arising in such separate societies fall into the periphery regardless of whether they involve compulsion or choice. *See infra* notes 33-53 and accompanying text.

10 Although these cases arise in the political community, they fall into the inner periphery because the restrictions at issue involve some element of choice rather than direct compulsion. Suppose, for example, a state law required welfare recipients to pick up their checks in person, and to provide photographic identification upon receipt. Suppose further that an individual's religious beliefs forbade him to possess a graven image and he therefore had no form of photographic identification. Because this restriction is facially neutral and governs receipt of a government benefit, it falls into the periphery. *See infra* notes 54-73.

11 374 U.S. 398 (1963). The Court examined South Carolina's finding that a Seventh Day Adventist failed to show "good cause" for refusing to work on Saturday even though it was her Sabbath. Because Sherbert refused to accept Saturday work, the state denied her request for statutory unemployment benefits. *Id.* at 401.

Prior to *Sherbert,* the Court struggled with the dichotomy between religious belief and belief-motivated conduct, gradually developing restrictions on the government's ability to burden religious conduct. *See* Murdoch v. Pennsylvania, 319 U.S. 105 (1943) (licensing tax unconstitutional when levied on solicitors of religious contributions); Cantwell v. Connecticut, 310 U.S. 296 (1940) (solicitation licensing scheme invalid be-

unemployment benefits program placed a substantial burden on the free exercise of Sherbert's religion[12] and that the state could justify such a burden only by showing a " 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.' "[13] The Court explained that the state failed to demonstrate such an interest[14] and, even if it had, it also would have had to demonstrate that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[15] Thus, the Court adopted a strict scrutiny balancing approach to analyze free exercise challenges.[16]

The Court sharpened and refined the *Sherbert* test in *Wisconsin v. Yoder,* [17] finding a Wisconsin compulsory education law invalid as applied because the "law affirmatively compels [Amish parents], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[18] Because the statutory scheme substantially inhibited free exercise, the Court required the state to demonstrate an "interest of sufficient maguitude to override the interest claiming protection under the Free Exercise Clause."[19] The *Yoder* Court then elaborated on the *Sherbert* compel-

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cause officials had discretion in determining which groups were religious); Reynolds v. United States, 98 U.S. 145, 164 (1878) (Congress may regulate actions but may not prohibit beliefs). However, the Court decided many of the pre-*Sherbert* cases on the ground that the challenged state action also violated the plaintiffs' freedom of speech. *See, e.g.,* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Jehovah's Witness's religious objection to mandatory flag salute upheld primarily on freedom of expression grounds). Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion), marks the doctrinal transformation leading to *Sherbert* and its progeny. The *Braunfeld* Court denied an Orthodox Jew's challenge to Sunday closing laws by reasoning that "if the State regulates conduct by enacting a general law within its power, . . . the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden." Id.* at 607 (emphasis added).

12 The court viewed the scheme as compulsory because it forced Sherbert to choose between her job and her religious beliefs. *Sherbert,* 374 U.S. at 404. Under South Carolina law, a claimant was ineligible for unemployment benefits if he or she failed to accept available work without "good cause." *See id.* at 400 n.3.

13 *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). *See generally* Clark, *Guidelines for the Free Exercise Clause,* 83 HARV. L. REV. 327, 328-29 (1969) (analysis of *Sherbert* standard of review).

14 *Sherbert,* 374 U.S. at 406-09. The Court found *Braunfeld* distinguishable because in that case the state had a compelling interest and no less restrictive means of achieving that interest. *Id.* at 408.

15 *Id.* at 407 (citing Shelton v. Tucker, 364 U.S. 479, 487-90 (1960)).

16 One commentator noted that "*Sherbert* introduced a new range of complexity into the free exercise clause [because f]or the first time the Court had affirmed a duty to weigh the damage to an individual's freedom of conscience against the harm to the state's legislative scheme." Clark, *supra* note 13, at 329.

17 406 U.S. 205 (1972); *see* Comment, *The Education of the Amish Child,* 62 CALIF. L. REV. 1506 (1974) (noting that *Yoder* Court did not account for children's interests); Recent Developments, 18 VILL. L. REV. 955 (1973).

18 *Yoder,* 406 U.S. at 218.

19 *Id.* at 214.

ling interest standard, stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"[20]—a right the Court deemed fundamental.[21] The Court concluded that the Amish parents' free exercise rights outweighed the state's interest in compulsory education beyond age fourteen.[22]

In *Thomas v. Review Board*[23] the Court reaffirmed *Sherbert* by ruling that exclusion from certain statutory benefits is tantamount to compulsion. Thomas left his job after his employer transferred him to a department engaged in the manufacture of tank turrets.[24] A Jehovah's Witness, Thomas claimed that manufacturing war materials violated principles of his religion.[25] The Supreme Court found that Thomas was entitled to state unemployment benefits because he terminated his employment for religious reasons,[26] noting that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[27] The majority upheld Thomas's challenge explaining, "Here, as in *Sherbert*, the employee was put to a choice between fidelity to religious belief or cessation of work [and therefore] the coercive impact on Thomas is indistinguishable from *Sherbert*."[28] The

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20 *Id.* at 215.

21 *Id.* at 214. The *Yoder* Court briefly discussed the significance of the religion clauses:

> Long before there was general acknowledgement of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.

Id.

22 *Id.* at 228-29. The mandatory education law reflected the "concern that children under [age sixteen] not be employed under conditions hazardous to their health." *Id.* at 228. Because Amish children between ages fourteen and sixteen were employed on their families' farms, the state's interest was partly achieved, despite non-compliance.

23 450 U.S. 707 (1981). *See generally* Garvey, *Freedom and Equality in the Religion Clauses,* 1981 SUP. CT. REV. 193.

24 450 U.S. at 709.

25 *Id.* at 710.

26 *Id.* at 716. Under Illinois law a claimant was ineligible for unemployment benefits if he or she voluntarily left his or her job without "good cause." *See id.* at 709 n.1.

27 *Id.* at 714. The Court explained, "Courts should not undertake to dissect religious beliefs because the believer admits that he is 'strnggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 715; *see* Comment, Thomas v. Review Board of Indiana Employment Security Division: *Denying Freedom of Religion in Unemployment Compensation Cases,* 9 N.Y.U. REV. L. & SOC. CHANGE 371, 387 (1979-1980) [hereinafter Comment, *Unemployment Compensation*]; Comment, *Constitutional Law: The Religion Clauses—A Free Reign to Free Exercise?,* 11 STETSON L. REV. 386, 393-97 (1982).

28 450 U.S. at 717. The Court viewed the regulation as compulsory even though

Court applied a "compelling interest-least restrictive means" analysis[29] and found that the state failed to justify the burden placed upon Thomas's religious freedom.[30]

The Supreme Court synthesized the *Sherbert-Yoder-Thomas* line of cases in *Bob Jones University v. United States*[31] by holding that, despite their religious beliefs, private religious schools that discriminate on the basis of race cannot maintain tax-exempt status. The Court stated, "The governmental interest at stake here is compelling [because] the Government has a fundamental, overriding interest in eradicating racial discrimination [which] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs [and] no 'less restrictive means' are available to achieve the government interest."[32]

B. Free Exercise in the "Periphery"

Two kinds of free exercise cases fall into the periphery: those arising outside the political community and those involving neutral restrictions on government benefits.[33] Many lower courts evaluating cases arising outside the political community have applied a relaxed standard of review. In addition, a few courts have done so when evaluating claims in neutral government benefits cases.

1. *Beyond the Political Community*

Courts frequently tolerate restrictions on free exercise in the

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Thomas (like Sherbert before him) was not "forced" to quit his job. *See infra* notes 54-73 and accompanying text.

29 One pre-*Thomas*, post-*Yoder* Note explained that a court examining a free exercise claim will first consider the sincerity of the claimant's belief along with the degree to which the challenged restriction hinders that belief. Note, *Religious Exemptions under the Free Exercise Clause: A Model of Competing Authorities,* 90 YALE L.J. 350, 355 (1980). However, one court recently argued that the "least restrictive means" inquiry is the most critical aspect of the *Sherbert-Yoder-Thomas* free exercise analysis. Callahan v. Woods, 736 F.2d 1269, 1272 (9th Cir. 1984). This prong of the compelling interest test forces a court "to measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction." *Id.*

Since *Thomas,* the Court no longer inquires into the sincerity of the claimant's belief, *see supra* note 27 and accompanying text; consequently, the balancing analysis weighs the harm to the believer's practice against the state's interest in restricting the practice. *See infra* notes 31-32 and accompanying text; *see also infra* note 173.

30 450 U.S. at 719. The Review Board gave two reasons for the disqualifying provision of the Indiana unemployment scheme: to avoid widespread unemployment if people were permitted to leave their jobs for personal reasons and to avoid detailed probing by employers into job applicants' religious beliefs. *Id.* at 718-19; *see* Comment, *Unemployment Compensation, supra* note 27, at 398-402.

31 461 U.S. 574 (1983). *See generally* Freed & Polsby, *Race, Religion, and Public Policy:* Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 20-30.

32 461 U.S. at 604 (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).

33 *See supra* notes 9-10 and accompanying text.

military, in police forces, and in prisons.[34] Traditionally, courts hesitate to review any self-regulation by these bodies, each of which must exert virtually unquestioned authority to control its ranks and thereby serve its important societal function.[35] Although these bodies often have compelling interests in regulating their members, courts tend simply to defer to the judgment of those who control the organizations rather than account for these compelling interests in a strict scrutiny analysis of a challenged action.[36]

Courts generally treat free exercise claims arising in the armed services with lessened scrutiny because the military has a tremendous interest in maintaining quasi-autonomy, uniformity, discipline, and esprit de corps. For example, in *Goldman v. Secretary of Defense*[37] the D.C. Circuit rejected the free exercise claim of an Orthodox Jewish Air Force psychologist whose commanding officer, pursuant to Air Force dress regulations, ordered him not to wear his yarmulke while in uniform. The court refused to employ strict scrutiny in this context, explaining that "we must simply judge whether the restrictions on Goldman's right to exercise his religion were authorized and justified by the power of the military to regulate itself, giving due weight to each of the conflicting interests."[38]

Many courts hearing free exercise claims against the military have applied a standard of review falling short of the "compelling government interest-least restrictive means" standard of *Sherbert* and its progeny.[39] Moreover, some courts have refused to review the merits of free exercise claims against the military altogether.[40]

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34 *See* Note, Goldman v. Secretary of Defense: *Restricting the Religious Rights of Military Servicemembers,* 34 AM. U.L. REV. 881, 889-96 (1985) (surveying free exercise in contexts outside political community).

35 *See, e.g.,* Goldman v. Secretary of Defense, 734 F.2d 1531, 1535-36 nn.5-6 (D.C. Cir. 1984) (explaining military interest in self-regulation), *aff'd sub nom.* Goldman v. Weinberger, 106 S. Ct. 1310 (1986).

36 *See infra* notes 37-43 & 49-53 and accompanying text.

37 734 F.2d 1531 (D.C. Cir. 1984), *aff'd sub nom.* Goldman v. Weinberger, 106 S. Ct. 1310 (1986); see *infra* notes 84-91 and accompanying text for a comprehensive discussion of the Supreme Court's decision. *See generally* Note, *supra* note 34; Note, *Constitutional Law—The Clash Between the Free Exercise of Religion and the Military's Uniform Regulations*—Goldman v. Secretary of Defense, 58 TEMP. L.Q. 195 (1985).

38 734 F.2d at 1536.

39 *See, e.g.,* Ogden v. United States, 758 F.2d 1168, 1178-81 (7th Cir. 1985) (applying D.C. Circuit's *Goldman v. Secretary* standard); Kalinsky v. Secretary of Defense, No. 78-17, slip op. at 16-18 (D.D.C. June 25, 1979) (modified rational basis test), *quoted in* Folk, *Military Appearance Requirements and Free Exercise of Religion,* 98 MIL. L. REV. 53, 84-85 (1982). *But see* Sherwood v. Brown, 619 F.2d 47, 48 (9th Cir. 1980) (per curiam) (applying strict scrutiny analysis), *cert. denied,* 449 U.S. 919 (1980); Bitterman v. Secretary of Defense, 553 F. Supp. 719, 726 (D.D.C. 1982) (dress regulations least restrictive means to accommodate Air Force's substantial interests).

40 Under the limited reviewability doctrine of Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971), a court must weigh the constitutional claim against the possible extent of interference with military functions and expertise to determine whether it can

The Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society."[41] Consequently, " 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.' "[42] Courts have concluded that precedent involving the military and fundamental constitutional rights such as freedom of speech and assembly mandates deferential treatment of military free exercise cases.[43]

Many of the same concerns that have prompted courts to restrict fundamental rights in the military arise in cases involving police forces. For example, in *Cupit v. Baton Rouge Police Department*,[44] a Louisiana state court required that police grooming regnlations bear only a rational relation to a legitimate state interest when they infringe upon free exercise rights.[45] A federal district court facing much the same issue adopted an intermediate approach in *Marshall v. District of Columbia.*[46] That court balanced the plaintiff's free exercise right against the state's interests, specifically rejecting a rational relation test,[47] although not requiring the state to demonstrate a compelling interest.[48]

Prisons are the ultimate paradigm of a society beyond the political community. Courts have applied a variety of tests to determine

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review the claim. *See* Khalsa v. Weinberger, 787 F.2d 1288, 1288-89 (9th Cir. 1986) (amended order in light of Goldman v. Weinberger, 106 S. Ct. 1310 (1986), affirming previous decision not to review free exercise challenge to Army appearance regulations); Note, *Judicial Review of Constitutional Claims Against the Military,* 84 COLUM. L. REV. 387 (1984).

41 Parker v. Levy, 417 U.S. 733, 743 (1974).

42 *Id.* at 744 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion)); *see* Everett, *Military Justice in the Wake of* Parker v. Levy, 67 MIL. L. REV. 1 (1975); Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights,* 62 N.C.L. REV. 177 (1984); Peck, *The Justices and the Generals: the Supreme Court and Judicial Review of Military Activities,* 70 MIL. L. REV. 1 (1975); Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L. REV. 181 (1962); Zillman & lmwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart,* 51 NOTRE DAME LAW. 397 (1976); Comment, *Free Speech and the Armed Forces: The Case Against Judicial Deference,* 53 N.Y.U. L. REV. 1102 (1978).

43 *See, e.g.,* Ogden v. United States, 758 F.2d 1168, 1178-81 (7th Cir. 1985); *see also* Folk, *supra* note 39; Folk, *Religion and the Military: Recent Developments,* ARMY LAW., Dec. 1985, at 6; Foreman, *Religion, Conscience and Military Discipline,* 52 MIL. L. REV. 77 (1971).

44 277 So. 2d 454, 456 (La. Ct. App.), *writ refused,* 281 So. 2d 745 (La. 1973).

45 Shortly after joining the Baton Rouge Police Department, the plaintiffs joined a religious group that forbade them to shave. Charged with violating the Department's regulations requiring that they shave regularly, the plaintiffs lost their jobs. The court provided neither precedent nor rationale for adopting a rational relation standard.

46 392 F. Supp. 1012, 1015 (D.D.C. 1975), *aff'd,* 559 F.2d 726 (D.C. Cir. 1977).

47 *Id.* at 1016 n.5.

48 *Id.* at 1013-14. The court upheld the regulation, reasoning that "appearance regulations promote [a state] interest which, in light of the facts of this case, outweigh [sic] the plaintiff's interest in maintaining his hair and beard as his religious beliefs dictate." *Id.* at 1015.

whether prison authorities have violated inmates' free exercise rights.[49] The tests, ranging from a mere reasonableness inquiry to a compelling interest analysis, give varying weight to the unique concerns of prison officials. In another prison civil liberties context, the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[50]

Many courts have deferred to officials' judgment in determining whether restrictions on prisoners' free exercise rights are necessary to secure prison order. In *St. Claire v. Cuyler,*[51] for example, the court required that prison officials merely "produce evidence [demonstrating] that to permit the exercise of first amendment rights would create a potential danger to institutional security."[52] The court held that the warden's restrictions on St. Claire's religious liberty were "reasonably related to [that] legitimate correctional

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49 As one commentator on the topic of free exercise rights in prison noted,

> Seven distinct tests can be identified in the cases and the law review literature: 1) the clear and present danger test; 2) the substantial interference test; 3) the *Procunier v. Martinez* [416 U.S. 396 (1974)] test; 4) the reasonableness test; 5) the ad hoc balancing test; 6) the *Braunfeld v. Brown* [366 U.S. 599 (1961)] test; and 7) the compelling interest test.

Comment, *The Religious Rights of the Incarcerated,* 125 U. PA. L. REV. 812, 837-38 (1977) (footnotes omitted); *see* Dettmer v. Landon, 799 F.2d 929, 933-34 (4th Cir. 1986) (reasonableness test); Shabazz v. O'Lone, 782 F.2d 416, 420 (3d Cir. 1986) (en banc) (modified compelling interest test), *rev'd sub nom.* O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987); Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975) (*Procunier v. Martinez* test, which requires an important or substantial government interest); Moore v. Ciccone, 459 F.2d 574, 576 (8th Cir. 1972) (en banc) (ad hoc balancing test); *see also* Udey v. Kastner, 805 F.2d 1218, 1219 n.1 (5th Cir. 1986) (per curiam) ("We pray the Supreme Court in *Shabazz v. O'Lone* will bring order to this unholy mess.").

50 Turner v. Safley, 107 S. Ct. 2254, 2261 (1987) (challenge to prison mail and marriage regulations). The *Turner* Court enumerated four factors relevant to determining the reasonableness of prison regulations: (1) whether the regulation bears a rational relation to the asserted penological goal; (2) whether there exist alternative means of exercising the restricted right; (3) the impact accommodation of the asserted right will have on guards and other inmates; and (4) whether there exist ready alternatives to the regulation. *Id.* at 2262.

51 634 F.2d 109 (3d Cir. 1980). St. Claire, a Muslim affiliated with the Ahmadiyya branch of Islam, alleged three violations of his right to free exercise: (1) a guard ordered him to remove his kufi, a religious head covering, while in the dining room; (2) a guard ordered him to remove a turban made from a bedsheet before passing through a security gate; and (3) the prison warden prohibited him from attending religious services while he was segregated from other prisoners. 634 F.2d at 111-12. The Third Circuit in Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986) (en banc), *rev'd sub nom.* O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987) severely modified *St. Claire. See infra* notes 115-34 and accompanying text.

52 634 F.2d at 114. The defendants' testimony at trial provided several reasons for limiting prisoners' free exercise rights. They first noted that hats could conceal contraband, such as small weapons, small tools, or drugs. *Id.* at 115. Second, some inmates wore head coverings for identification purposes. *Id.* Third, the defendants indicated that escorting prisoners to religious services was not feasible because of a shortage of guards. *Id.* at 116.

goal."[53]

2. *Neutral Restrictions on Government Benefits*

The periphery also includes neutral restrictions on government benefits.[54] In cases involving nondiscriminatory restrictions, the government has argued that because it has a great interest in uniformly enforcing regulations regarding benefit programs and because people can avoid such regulations by simply foregoing the benefits, courts should examine free exercise challenges to such restrictions with only minimal scrutiny.[55] In fact, courts have treated benefit program regulations with varying degrees of deference, although most employ the traditional strict-scrutiny standard.[56]

One court of appeals relaxed the level of scrutiny it applied in a benefit restriction case by presumptively declaring the burden on religion minimal and the government interest significant. In *Alexander v. Trustees of Boston University*[57] the First Circuit rejected the free exercise claims of theology students who were denied federal financial assistance because they refused to sign a statutorily required[58] statement of selective service registration compliance. The court explained that strict scrutiny was inappropriate because the burden on free exercise was remote and tangential.[59] The court acknowledged that denial of aid "arguably may constitute some slight burden on the plaintiffs' first amendment rights."[60] The appeals court reasoned, however, that "[i]f administrative convenience must give way on this occasion, [the court] would fear the erosion of the government's essential right to obtain from its citizens, without endless litigation and hassle, the basic information needed to govern."[61]

In *United States v. Lee*[62] an Amish farmer refused to withhold social security tax from his employees' pay and to pay his portion of the tax because he opposed the national social security system on religious grounds.[63] The Court applied strict scrutiny and con-

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53 *Id.* at 117.

54 *See supra* note 10 and accompanying text.

55 *See infra* notes 105-14 and accompanying text.

56 This Note argues that Sherbert v. Verner, 374 U.S. 398 (1963), Thomas v. Review Bd., 450 U.S. 707 (1981), and Bob Jones Univ. v. United States, 461 U.S. 574 (1983), are indistinguishable from cases involving benefit restrictions that some legal thinkers argue should receive different judicial treatment.

57 766 F.2d 630 (1st Cir. 1985).

58 50 U.S.C.A. app. § 462(f)(2) (West Supp. 1987).

59 766 F.2d at 643. The students objected on religious grounds to the selective service system itself rather than to the act of giving the school information required by the compliance statement. *Id.*

60 *Id.*

61 *Id.* at 644-45.

62 455 U.S. 252 (1982).

63 *Id.* at 254-55. The Court cited *Thomas* and *Yoder* for the proposition that "[t]he

cluded, "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[64] Although the Court characterized Lee's actions leading to tax liability as voluntary rather than compulsory,[65] it subjected the government's regulation to a strict scrutiny analysis.

Justice Stevens, concurring, argued that one who seeks a religious-based exemption from a neutral regulation should have to prove that there is a unique reason for a court to grant it.[66] He proposed a rational basis analysis under which courts would presume that a state's interests are legitimate and the claimant would have to demonstrate otherwise.[67] Stevens distinguished *Sherbert* and *Thomas* because "laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability."[68]

Dean Ely has argued that courts should permit religious-based exemptions from neutral restrictions on government benefits only when they can discern a discriminatory intent from the challenged legislation or regulation.[69] Ely explained that "judicial intervention [in free exercise claims] is indicated only when there is proof that the [regulation at issue] resulted from a desire comparatively to favor or disfavor a religion or religion generally."[70] Ely's approach is a greater departure from traditional free exercise doctrine than is Justice Stevens's concurrence in *Lee*.[71] Even if a claimant proves discriminatory intent, Ely's scheme would require a court to determine only whether the regulation "relate[s] rationally to an acceptable goal.[72]

In sum, a growing number of legal thinkers regard neutral restrictions on benefits as posing an insubstantial threat to free exercise. Consequently, some judges distinguish between compulsory

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state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* at 257-58. The Court then noted that the "Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is *very high*," *id.* at 258-59 (emphasis added), and it turned to the question of whether accommodation of Lee's belief would "unduly interfere with fulfillment of the governmental interest." *Id.*

64 *Id.* at 260.

65 *Id.* at 254-55.

66 *Id.* at 262, 264 n.3 (Stevens, J., concurring).

67 *Id.* at 262.

68 *Id.* at 264 n.3.

69 Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1315-16 (1970).

70 *Id.* at 1314 (footnote omitted).

71 *See supra* notes 66-68 and accompanying text.

72 Ely, *supra* note 69, at 1314.

regulations, which lie within the core of free exercise doctrine, and neutral regulations, which lie in the periphery. These jurists have carefully examined those regulations within the core and have largely deferred to regulations occupying the periphery.[73]

II
THE CASES

The deferential treatment that some judges have given restrictions on religious liberty in the periphery recently surfaced in three Supreme Court opinions. In *Goldman v. Weinberger*[74] the Court embraced a rational basis analysis for military regulations. *Bowen v. Roy*[75] produced a minority opinion advocating similar treatment for cases involving neutral restrictions on benefits. In *Shabazz v. Estate of O'Lone*[76] the Court applied minimal scrutiny to prisoners' free exercise claims.

A. *Goldman v. Weinberger*

1. *The Facts and the Decisions Below*

S. Simcha Goldman, an Orthodox Jew, wore his yarmulke every day while in the Air Force; his service cap concealed it while he was outdoors.[77] In April 1981 Goldman wore his yarmulke while testifying as a defense witness at a court-martial proceeding. The prosecuting counsel filed a complaint with Goldman's commander charging that Goldman violated an Air Force regulation by wearing his skullcap while in uniform.[78] The commander informed Goldman of the violation and ordered him not to wear his yarmulke on the base while outside of the hospital. In June 1981 Goldman

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73 In contrast, the Eighth Circuit applied a strict scrutiny analysis to a challenged neutral regulation in Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), *aff'd mem.*, 105 S. Ct. 3492 (1985) (equally divided Court). Citing religious beliefs, the plaintiff refused to comply with Nebraska's requirement that her photograph appear on her driver's license. *Id.* at 1122-23. The court of appeals noted that the burden on Quaring was indistinguishable from that placed on the plaintiff in *Sherbert*, for "Nebraska's photograph requirement puts Quaring to the choice of following an important precept of her religion or foregoing the important privilege of driving a car." *Id.* at 1125. The court applied a strict scrutiny analysis and held that the state failed to show that its regulation was the least restrictive means of achieving a compelling state interest. *Id.* at 1126. *See also* Dennis v. Charues, 571 F. Supp. 462, 464 (D. Colo. 1983) (state has compelling interest in requiring photographs on driver's licenses); Johnson v. Motor Vehicle Div., 197 Colo. 455, 593 P.2d 1363, 1366 (en banc) (compelling state interest), *cert. denied*, 444 U.S. 885 (1979). *But see* Bureau of Motor Vehicles v. Pentecostal House, 269 Ind. 361, 380 N.E.2d 1225 (1978) (no compelling state interest).

74 106 S. Ct. 1310 (1986).

75 106 S. Ct. 2147 (1986).

76 107 S. Ct. 2400 (1987).

77 *Goldman*, 106 S. Ct. at 1312.

78 *Id.* Air Force Regulation 35-10 provides in relevant part:

received the commander's written order that he refrain from wearing his yarmulke anywhere on the base. Moreover, the commander withdrew his recommendation that Goldman be permitted to extend his term of active duty.[79]

Goldman sought and obtained injunctive relief against enforcement of the regulation on the ground that it violated his right to free exercise.[80] On appeal, the D.C. Circuit framed the question as whether the restrictions on Goldman's right to free exercise were "justified by the power of the military to regulate itself, giving due weight to each of the conflicting interests."[81] However, the court explained, "This inquiry does not require a 'balancing' of the individual and military interests on each side, but rather a determination whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree."[82] The court found that the Air Force has a unique interest in uniformity because it must enforce its rules "not for the sake of the regulations, but for the sake of enforcement."[83]

2. *The Supreme Court Opinions*

The Supreme Court affirmed, but employed a different analysis than the D.C. Circuit. The Court noted that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."[84] It found that when deciding whether military needs justify a particular restriction on free exercise, courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[85] The Court rejected Goldman's claim that the military's dress code impinged on his right to free exercise, finding

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Wear of Headgear:

(1) Air Force personnel in uniform will wear proper headgear when outdoors . . . .

. . . .

(2) Headgear will not be worn:

. . . .

(f) While indoors except by armed security police in the performance of their duties.

. . . .

A.F.R. 35-10, *quoted in* Goldman v. Secretary of Defense, 734 F.2d 1531, 1533-34 n.1.

79 *Goldman v. Secretary*, 734 F.2d at 1533.

80 Goldman v. Secretary of Defense, 530 F. Supp. 12 (D.D.C. 1981) (preliminary injunction), *rev'd*, 734 F.2d 1531 (D.C. Cir. 1984), *aff'd sub nom.* Goldman v. Weinberger, 106 S. Ct. 1310 (1986).

81 *Goldman v. Secretary*, 734 F.2d at 1536; *see* 734 F.2d at 1535 (district court entered permanent injunction).

82 *Id.*

83 *Id.* at 1540.

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

85 *Id.*

instead that the challenged regulation "reasonably and evenhandedly regulate[s] dress in the interest of the military's perceived need for uniformity."[86] The majority did not require that any scientific findings serve as a basis for the Air Force regulations; the only constitutionally required basis was the reasonable exercise of professional judgment.[87] The Court cited several cases arising in military contexts to support its standard of review, but no cited case involved a free exercise clause claim.[88]

In dissent, Justice Brennan charged that the majority chose "a subrational-basis standard—absolute uncritical 'deference to the professional judgment of military authorities.' "[89] Justice O'Connor also dissented, asserting that the majority rejected Goldman's claim "without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital."[90] Justice O'Connor asserted that the majority neither articulated nor applied a clear test for free exercise claims in the military context.[91]

B. *Bowen v. Roy*

1. *The Facts and the Decision Below*

Stephen Roy, a Native American, believed that the spirit and person of his daughter, Little Bird of the Snow, had to remain unique and therefore could not be numerically identified.[92] Roy and his wife applied for aid to families with dependent children and food stamp program benefits, but refused to comply with the statutory requirement[93] that they supply their dependents' social security numbers. Roy and his wife filed suit in federal district court assert-

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86 *Id.* at 1314.

87 *Id.*

88 *Id.* at 1312-13. The Court cited Chappell v. Wallace, 462 U.S. 296, 300 (1983) (criminal rights); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (sex discrimination); Brown v. Glines, 444 U.S. 348, 354-55 (1980) (freedom of expression case holding that "the Air Force regulations [at issue] restrict speech no more than is reasonably necessary to protect the substantial government interest"); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) (criminal rights); Parker v. Levy, 417 U.S. 733, 743 (1974) (due process and freedom of expression); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (refusal to take loyalty oath).

89 *Goldman,* 106 S. Ct. at 1317 (Brennan, J., dissenting) (quoting majority opinion, 106 S. Ct. at 1313).

90 *Id.* at 1324 (O'Connor, J., dissenting).

91 *Id.*

92 Bowen v. Roy, 106 S. Ct. 2147, 2150 n.3 (1986). Roy referred to the social security number as part of a "great evil," Roy v. Cohen, 590 F. Supp. 600, 603 (M.D. Pa. 1984), *vacated sub nom.* Bowen v. Roy, 106 S. Ct. 2147 (1986), which would "serve to rob the spirit of Little Bird of the Snow and prevent her from preparing for greater spiritual power." Appellee's Brief at 3, Bowen v. Roy, 106 S. Ct. 2147 (1986) (No. 84-780).

93 42 U.S.C. § 602(a)(25) (1982).

ing that the Pennsylvania Department of Public Welfare's (DPW) refusal to provide benefits to their daughter for failing to supply a social security number violated their free exercise rights[94] and sought an order that the DPW pay them the benefits.[95]

The district court refused to apply strict scrutiny; instead, it applied a modified test, allowing the plaintiffs to prevail if "some *reasonable* alternative means which would not burden the Plaintiffs' first amendment rights"[96] could serve the government's interests in using social security numbers. The court concluded that although the government's general interest was great, its interest in this particular case was small and it therefore granted the Roys an exemption from the social security number requirement.[97] The court enjoined both the Department of Health and Human Services (HHS) and the DPW from denying benefits to the Roy girl and enjoined HHS from using or disseminating her social security number until her sixteenth birthday.[98]

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94 Roy v. Cohen, 590 F. Supp. at 603.

95 *Id.* at 613-14. During trial the government discovered that it had already issued a social security number to the girl and Roy modified his request for relief by asking that the district court prevent state and federal agencies from using the social security number. *Id.* at 609. The case was not moot, however, because the court found that "Roy believes that the establishment of a social security number for Little Bird of the Snow, without more, has not 'robbed her spirit,' but widespread use of the social security number by the federal or state governments in their computer systems would have that effect." *Id.* at 605.

96 *Id.* at 611 (emphasis in original). The court explained:

> In other words, if holding that the Plaintiffs' objection to the social security number requirement entitles them to an exemption from the requirement would substantially burden the benefit programs involved in this case by, for example, involving a cost so great that the efficient operation of the programs would be effected or by creating a substantial likelihood of chaos in the system resulting from a proliferation of claims to exemptions from the requirement then the governments' interest should be held superior to the Plaintiffs' right to exercise their religious beliefs.

Id.; *see* Note, Roy v. Cohen: *Social Security Numbers and the Free Exercise Clause*, 36 AM. U.L. REV. 217, 233-35 (1986) (discussing of district court's "reasonable less restrictive alternative" test).

97 The *Roy* district court noted that the defendants failed to demonstrate that the government encountered any administrative problems after Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977), a case in which a district court allowed a religious-based exemption to the social security number requirement. *Roy v. Cohen*, 590 F. Supp. at 612. In *Stevens*, the plaintiffs believed that use of their social security numbers was "a device of the Antichrist, and . . . they feared [their] children, if numbered in this way, might be barred from entering heaven." *Stevens*, 428 F. Supp. at 897. The *Stevens* court granted the plaintiffs injunctive relief, finding that "the deleterious effects of their actions on the welfare system is minuscule." *Id.* at 908.

98 *Roy v. Cohen*, 590 F. Supp. at 614.

2. *The Supreme Court Holding*

On direct appeal,[99] the Supreme Court reversed the district court. The Court divided the case into two issues: (1) whether Congress could require that every applicant for aid furnish his or her social security number; and (2) whether Congress could require that state agencies utilize such numbers.[100] The Justices agreed only on the second issue,[101] concluding that the government could require the use of the plaintiff's social security number, which the government already possessed, in administering its benefit program. The Court explained, "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[102] It concluded that the State's use of a social security number simply did not impair Roy's ability to exercise his religious beliefs and, consequently, that no balancing was necessary.[103] The Court therefore vacated the district court's order enjoining HHS from making use of Little Bird of the Snow's social security number.[104]

3. *The* Roy *Minority's Reasonableness Analysis*

In Part III of the Court's opinion, Chief Justice Burger, joined only by Justices Powell and Rehnquist, faced the issue of whether a statute constitutionally could require that the Roy's provide their daughter's social security number to a state welfare agency.[105] Chief Justice Burger wrote that courts should examine neutral restrictions[106] on government benefits affecting religious liberty with minimal scrutiny, stating that "the Government meets its burden

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99 HHS appealed directly to the Supreme Court under 28 U.S.C. § 1252 (1982) ("Direct appeals from decisions invalidating Acts of Congress").

100 Bowen v. Roy, 106 S. Ct. 2147, 2151-52 (1986).

101 One Justice opined that the court's disposition of the second issue mooted the first because the DPW already possessed a social security number for Little Bird of the Snow, *see supra* note 95, and she would not have to furnish one to receive benefits. *Roy*, 106 S. Ct. at 2162-63 (Stevens, J., concurring in part and concurring in the result). Five Justices resolved the first issue in favor of the plaintiffs. *Id.* at 2160 (Blackmun, J., concurring in part); *id.* at 2165-69 (O'Connor, J., concurring in part and dissenting in part) (joined by Justices Marshall and Brennan); *id.* at 2169 (White, J., dissenting). Three Justices resolved the first issue in favor of the government. *Id.* at 2153-58; *see infra* notes 105-114 and accompanying text.

102 *Roy*, 106 S. Ct. at 2152.

103 *Id.* at 2152 n.6. The Court remarked, "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Id.* at 2152.

104 *Id.* at 2158.

105 Chief Justice Burger contended that the issue was ripe for decision and was not moot. *Id.* at 2153 n.7.

106 The Chief Justice found that "in no sense does [the challenged regulation] af-

when it demonstrates that a challenged requirement . . . is a reasonable means of promoting a legitimate public interest."[107] The Chief Justice concluded that the social security number requirement easily passes muster under this test.[108]

Chief Justice Burger rejected the compelling interest standard used in *Sherbert* and its progeny as inappropriate in this case.[109] He explained that "government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."[110] Chief Justice Burger also distinguished *Sherbert* and *Thomas* because the challenged statutes in those cases required

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firmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct." *Id.* at 2154.

107 *Id.* at 2156. In Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987), a six member majority of the Supreme Court rejected the *Roy* minority argument in a case that it found indistinguishable from Sherbert v. Verner, 374 U.S. 398 (1963), *see supra* notes 11-16 and accompanying text, and Thomas v. Review Bd., 450 U.S. 707 (1981), *see supra* notes 23-30 and accompanying text. Hobbie, a Seventh Day Adventist, lost her job after she refused to work on her Sabbath. *Hobbie*, 107 S. Ct. at 1047-48. Her employer charged her with misconduct related to work, and consequently the state denied her benefits request. *Id.* at 1048. A Florida appeals court upheld the state's finding. Hobbie v. Unemployment Appeals Comm'n, 475 So. 2d 711 (Fla. Dist. Ct. App. 1985) (no opinion; no appeal possible under Florida law), *rev'd*, 107 S. Ct. 1046 (1986). Under Florida law, an employee discharged for work-related misconduct cannot qualify for benefits. FLA. STAT. ANN. § 443.101(b) (West 1981). Applying *Sherbert* and *Thomas*, the *Hobbie* Court held that the plaintiff's religious conversion after she began work "is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry under the Free Exercise Clause is the burden involved." 107 S. Ct. at 1051.

Although the neutral benefits issue was not squarely before the *Hobbie* Court, Justice Brennan's majority opinion emphasized that only three Justices supported Part III of Chief Justice Burger's *Roy* opinion. *Id.* at 1049, 1050 n.7. Justice Stevens did not join the *Roy* minority opinion because he thought that the issue was not properly before the Court. *Roy*, 106 S. Ct. at 2161 (Stevens, J., concurring). Moreover, Stevens endorsed the *Roy* minority's general approach in his separate opinion in United States v. Lee, 455 U.S. 252 (1982). *See supra* notes 66-68 and accompanying text. In *Hobbie*, Stevens wrote a separate opinion arguing that *Sherbert* and *Thomas* controlled the case because the Unemployment Appeals Commission's finding resulted in unequal treatment. 107 S. Ct. at 1053 (Stevens, J., concurring). Similarly, Justice Powell concurred in *Hobbie* on the ground that the majority should have simply distinguished the *Roy* Part III opinion rather than explicitly reject it. *Id.* at 1052 (Powell, J., concurring). Chief Justice Rehnquist dissented. *Id.* at 1052 (Rehnquist, C.J., dissenting). Although Chief Justice Burger has left the Court, three remaining Justices apparently support his *Roy* Part III opinion. Justice Scalia, who joined the Court after it decided *Roy*, sided with the majority in rejecting Chief Justice Burger's approach.

108 *Roy*, 106 S. Ct. at 2158.

109 *Id.* at 2156. Burger relied in part on Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (conscientious objector case decided prior to Court's incorporation of free exercise clause into fourteenth amendment). *Roy*, 106 S. Ct. at 2154.

110 *Roy*, 106 S. Ct. at 2155.

applicants to show "good cause" for quitting a job or refusing available work, and "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion."[111]

A majority of the Court refused to endorse Burger's analysis.[112] For example, Justice O'Connor explained in her separate opinion, "Such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."[113] Instead, Justice O'Connor "would apply [the Court's] long line of precedents to hold that the Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means."[114]

C. *O'Lone v. Estate of Shabazz*

1. *The Facts and the Decisions Below*

Plaintiffs Shabazz and Mateen, inmates at the New Jersey State Prison at Leesburg, were practicing Muslims.[115] In an effort to reduce overcrowding, prison authorities promulgated regulations requiring some prisoners to work outside of the prison. Under these regulations, once a prisoner left the compound in the morning, he could not return until the end of the day.[116] Plaintiffs objected to the rules because they prevented them from returning to the prison on Friday afternoons to attend Jumu'ah, their religion's central service.[117]

Plaintiffs filed a federal civil rights action seeking injunctive relief. The district court, applying the deferential standard set forth by the Third Circuit in *St. Claire v. Cuyler,* [118] stated that "all officials must do [to justify an infringement upon free exercise rights] is show a *potential* danger to security."[119] Because "no less restrictive alternative could be adopted without potentially compromising a legitimate institutional objective,"[120] the district court refused to

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111 *Id.* at 2156.

112 *See supra* note 101.

113 *Roy,* 106 S. Ct. at 2166 (O'Connor, J., concurring in part and dissenting in part).

114 *Id.*

115 Shabazz v. O'Lone, 782 F.2d 416, 417 (3d Cir. 1986) (en banc), *rev'd sub nom.* O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987).

116 *Id.* at 418.

117 Shabazz v. O'Lone, 595 F. Supp. 928, 930 (D.N.J. 1984), *vacated,* 782 F.2d 416 (3d Cir. 1986) (en banc), *rev'd sub nom.* O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987). According to the plaintiffs, this service could only take place during certain hours on Friday afternoons. *Id.*

118 634 F.2d 109 (3d Cir. 1980); *see supra* notes 51-53 and accompanying text.

119 *Shabazz v. O'Lone,* 595 F. Supp. at 933 (emphasis in original).

120 *Id.* at 934.

grant injunctive relief. On appeal to the Third Circuit, a three judge panel affirmed the district court's decision based upon its application of the *St. Claire* standard.[121] The Third Circuit then agreed to rehear the case en banc.[122]

Upon rehearing, the appeals court modified the *St. Claire* standard. The court noted that attendance at the prayer service was central to the Muslim prisoners' free exercise rights[123] and held that to sustain the regulations prison authorities "must show [upon remand] that [they] were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems."[124] Thus, the court refused to defer to the professional judgment of prison officials; rather, it embraced a standard similar to traditional strict scrutiny of regulations impinging on free exercise.[125]

2. *The Supreme Court Opinions*

The Supreme Court reversed. Relying on *Turner v. Safley,* [126] the Court held that the challenged prison regulations were "reasonably related to legitimate penological objectives."[127] The Court noted that the Third Circuit incorrectly placed a burden on prison officials to show that there existed no reasonable method to accommodate prisoners' religious needs.[128] Writing for the Court, Chief Justice Rehnquist explained, "While we in no way minimize the central importance of Jumu'ah to respondents, we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end."[129] Because the regulations did not prohibit prisoners from participating in other Muslim religious ceremonies, the Court found them constitutional.[130] Rehnquist explained that "this ability on the part of respondents to participate in other religious observances of their faith supports the conclusion that the restrictions at issue here were reasonable."[131]

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121 *See Shabazz,* 782 F.2d at 417.

122 *Id.*

123 *Id.* at 420.

124 *Id.*

125 The Third Circuit thus moved away from the deferential stance adopted by the Supreme Court in *Goldman* in the context of the military. *See supra* text accompanying notes 84-88. The dissent argued that under the majority standard "federal courts are no longer guardians of fundamental constitutional rights but arbitrators in disputes between prison officials and inmates." *Shabazz,* 782 F.2d at 423 (Hunter, J., dissenting).

126 107 S. Ct. 2254 (1987); *see supra* note 50 and accompanying text.

127 O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2407 (1987).

128 *Id.* at 2405.

129 *Id.* at 2406.

130 *Id.*

131 *Id.*

In dissent, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, argued that because attendance at the Jumu'ah ceremony is not presumptively dangerous, prison officials should have to demonstrate that their restrictions "are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives."[132] Justice Brennan discounted the importance of the implicit core-periphery dichotomy:

> It is . . . easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity. Nothing can change the fact, however, that the society that these prisoners inhabit is our own. Prisons may exist on the margins of that society, but no act of will can sever them from the body politic. When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.[133]

Brennan attacked the Court's application of the *Turner* standard on the ground that the Jumu'ah service is not a fungible religious practice and thus the prisoners have no alternative means of exercising their religious rights.[134]

III
ANALYSIS

The *Goldman* Court and the three Justices joining in Part III of the Court's opinion in *Roy* applied minimal scrutiny to regulations challenged as violating the free exercise clause. These cases indicate that a new branch of free exercise doctrine is emerging. This nascent mode of analysis separates the "periphery"[135] from the doctrinal "core."[136] This dichotomy is unnecessary and pernicious. Courts should abandon it and examine all free exercise claims with strict scrutiny.

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132 *Id.* at 2407 (Brennan, J., dissenting).
133 *Id.* at 2408.
134 *Id.* at 2410-11.
135 *See supra* notes 9-10 and accompanying text.
136 *See supra* note 8 and accompanying text.

A. The Illegitimate Origins of the "Core"-"Periphery" Dichotomy

Goldman, Shabazz, and Part III of *Roy* indicate the Supreme Court's willingness to distinguish between free exercise claims meriting strict scrutiny and those meriting only minimal judicial review. The *Goldman* and *Shabazz* Courts and the *Roy* minority defined an extremely deferential reasonableness standard, and they manipulated precedent to justify their results.

1. *The* Goldman *Court Failed to Justify Its Standard of Review*

Several flaws exist in the *Goldman* Court's rationale for choosing a standard of scrutiny that defers almost completely to military authorities' professional judgment. The majority relied on several of the Court's previous constitutional rights cases arising in a military context,[137] but provided no justification for treating free exercise in a similar fashion. Of the cases the Court cited, the freedom of expression cases are most analogous to free exercise cases because each involved a substantive right to freedom from state restrictions on actions based on beliefs. However, the Court failed to adopt completely the standard it applied in military free expression cases. Finally, the imprecise standard that the Court chose effectively prevents meaningful judicial review because it defers so broadly to military officials.

Although the *Goldman* majority may have stated correctly that the "military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment,"[138] courts should not treat free exercise like free speech for two reasons. First, the right to free exercise is more nearly absolute than the right to communicate. Regulations that inhibit free exercise of religion attack the very essence of individual autonomy by forcing one to choose between community-based obligations and conscience-based religious duties. The right of free exercise means more than simply freedom to believe; it also means freedom to act as those beliefs dictate.[139] Regulations on speech also attack individual autonomy, but they do not force a choice be-

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137 In addition to expression cases, the Court cited cases involving sex discrimination, criminal rights, and loyalty oaths. *See supra* note 88.

138 Goldman v. Weinberger, 106 S. Ct. 1310, 1313 (1986).

139 *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972). According to one commentator, "*Yoder* . . . is primarily about actions, and only secondarily about belief." Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution,* 18 CONN. L. REV. 739, 772 (1986). "As a matter of free exercise protection, the 'belief-versus-action' distinction never made sense in the first place . . . . [R]egulatory coercion is always targeted at action, and the free exercise clause would be drained of meaning if it did not protect action in some fashion." *Id.* at 772 n.155.

tween conflicting sovereigns. The state often channels expression by imposing time, place, and manner restrictions on speech without undermining individuals' right to freely communicate.[140] However, authorities cannot channel free exercise into a particular forum or a particular time.[141] Consequently, the Constitution protects religion-based action to a greater extent than action based on other motives.[142]

In addition, free exercise in the military poses fewer potential dangers than does unrestricted free speech. The military enforces regulations restricting free speech not only for enforcement's sake, but also to maintain discipline.[143] Although freedom of speech is an individual right,[144] it has value only when speech reaches its hearers.[145] It is precisely this value that can directly conflict with the military's need to maintain discipline.[146] In contrast, the right to free exercise involves only the believer and can exist in isolation.[147] The military "has no concrete interest [in enforcing restrictions on free exercise] separate from the effect of strict enforcement.

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140 *See* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977) ("laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether").

141 "[I]t is simply irrelevant in a case such as *Goldman* that the claimant can wear his yarmulke elsewhere. It is the command to remove the skullcap 'here and now' from which he sought relief." Lupu, *supra* note 139, at 778.

142 Professor Garvey noted that legal scholars have not enunciated the values underlying the right to free exercise. He suggested avoidance of special suffering, conflicting duties, and social costs accompanying nullification and civil disobedience as possible theories underlying this right. Garvey, *Free Exercise and the Values of Religious Liberty,* 18 CONN. L. REV. 779, 792 (1986). These values all presuppose that religion is different from other beliefs. Garvey argued that, like insanity, religion is special in two ways: "the first is a coguitive aspect, which concerns defects in practical reasoning; the second is a volitional aspect, which concerns the ability to conform one's conduct to legal norms one knows to be binding." *Id.* at 798.

143 "Since a commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force." Brown v. Glines, 444 U.S. 348, 356 (1980).

144 One commentator suggested that speech has a self-fulfillment function. M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.03 (1984). However, the self-fulfillment function has never served as a basis for first amendment protection. Powe, *Mass Speech and the Newer First Amendment,* 1982 SUP. CT. REV. 243, 255 ("the Court had never held that individual autonomy was the *sine qua non* of First Amendment [freedom of expression] jurisprndence").

145 Professor Nimmer referred to the communicative value of speech as its "enlightenment function." M. NIMMER, *supra* note 144, at § 1.02. The Supreme Court protects speech that serves an enlightenment function in the marketplace of ideas. Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. REV. 964, 967 (1978); *see, e.g.,* Dennis v. United States, 341 U.S. 494, 503 (1951) ("the basis of the First Amendment is the hypothesis that . . . free debate of ideas will result in the wisest governmental policies").

146 *See* M. NIMMER, *supra* note 144, at § 4.06(b).

147 *See* Lupu, *supra* note 139, at 778.

itself."[148]

The unrestricted exercise of an individual's religion might interfere with military concerns either by undermining uniformity (and consequently discipline)[149] or by posing a danger to safety.[150] However, strict scrutiny can account for these concerns if they are compelling and the resulting restrictions preserve to the fullest extent possible the individual's free exercise rights. Therefore, the *Goldman* Court should not have adopted a lesser standard.

The *Goldman* majority also failed to reconcile its minimal scrutiny standard with *Brown v. Glines,*[151] a military free speech case in which the Court applied heightened scrutiny. There the Court upheld a challenged regulation because it was "no more than is reasonably necessary to protect [a] substantial governmental interest."[152] The *Glines* standard requires a court to make a factual inquiry into the reasonableness of a restriction and the substantiality of an interest whereas the *Goldman* test calls for virtually complete deference.[153] Because the right to free exercise is more nearly absolute than the right to free speech and is potentially less harmful to military interests, the Court should have at least provided free exercise the intermediate degree of protection it afforded free speech in *Glines*.

Furthermore, the *Goldman* standard lacks clarity. Although the majority's opinion indicates that the Court applied a rational basis test,[154] its language does not necessarily deem unconstitutional a regulation bearing no rational relation to a legitimate military interest. The majority's standard gives great deference to military officials, stopping its inquiry as soon as the military proffers an interest.[155] Virtually any regulation bears a reasonable relation to some interest. Consequently, no conceivable military regulation affecting free exercise will fail to pass constitutional muster under *Goldman* because a court inquires not whether the restriction has a rational relation to a legitimate interest, but only whether it bears a rational relation to some perceived interest.

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148 Goldman v. Secretary of Defense, 734 F.2d 1531, 1540 (D.C. Cir. 1984), *aff'd sub nom.* Goldman v. Weinberger, 106 S. Ct. 1310 (1986).

149 *See* Goldman v. Weinberger, 106 S. Ct. 1310, 1313 (1986).

150 *See* Sherwood v. Brown, 619 F.2d 47, 48 (9th Cir.) (per curiam) ("Navy's interest in safety was sufficient to meet the compelling need requirement"), *cert. denied,* 449 U.S. 919 (1980).

151 444 U.S. 348 (1980).

152 *Id.* at 355.

153 *See supra* notes 84-88 and accompanying text.

154 Goldman v. Weinberger, 106 S. Ct. 1310, 1313-14 (1986).

155 "The desirability of dress regulations in the military is decided by the appropriate military officials and they are under no constitutional mandate to abandon their professional judgment." *Id.* at 1314; *see supra* notes 84-88 and accompanying text.

2. *The* Roy *Minority Mischaracterized Precedent*

The *Roy* minority misrepresented and mischaracterized precedent. The facts of *Roy* are indistinguishable from those of core free exercise cases where the Supreme Court had previously examined free exercise challenges to neutral restrictions on government benefits with strict scrutiny. Writing for a minority of three, Chief Justice Burger explained that the restriction at issue applied uniformly to all benefit recipients and involved no compulsion because a recipient could choose to forego the benefit.[156] However, the facially neutral state action that the claimant in *Sherbert v. Verner*[157] challenged forced her "to choose between following the precepts of her religion and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[158] "Governmental imposition of such a choice," the *Sherbert* Court held, "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[159] Moreover, the Court in *Thomas v. Review Board*[160] held:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.[161]

The DPW forced the Roys to choose between accepting important welfare benefits and adhering to their religious beliefs.[162] As in *Sherbert* and *Thomas*, the benefit restriction was facially neutral and did not "force" compliance, but failure to conform meant the forfeiture of necessary financial assistance. Thus, the regulation had a "coercive impact"[163] on the Roys.

Chief Justice Burger's attempt to distinguish *Roy* from these cases leads only to an inquiry into legislative and administrative motive. Both *Sherbert* and *Thomas* involved statutory schemes with "good cause" exemptions.[164] Chief Justice Burger explained that once a state creates an individualized exemption mechanism, its refusal to permit a religious excuse indicates discriminatory intent.[165]

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156 Bowen v. Roy, 106 S. Ct. 2147, 2155 (1986).
157 374 U.S. 398 (1963).
158 *Id.* at 404.
159 *Id.*
160 450 U.S. 707 (1981).
161 *Id.* at 717-18.
162 *See supra* notes 92-98 and accompanying text.
163 *Thomas*, 450 U.S. at 717.
164 *See supra* notes 12 & 26 and accompanying text.
165 *See supra* note 111 and accompanying text.

However, the good cause exemption provisions themselves were facially neutral. The legislators who drafted those exemptions no more intended to discriminate on religious grounds than Congress did when it enacted the social security number requirement. In addition, there was no indication of discriminatory administrative motive in *Sherbert* or *Thomas*. In all three cases, the regulations, as applied, siguificantly interfered with the plaintiffs' religious beliefs. It is disingenuous to claim that only the *Sherbert* and *Thomas* situations "exhibit[ed] hostility, not neutrality towards religion."[166] Consequently, Chief Justice Burger's approach conflicts with *Sherbert* and *Thomas*.[167]

3. *The* Shabazz *Court Applied Flawed Logic*

The Supreme Court wrongly carved out prisons as another area in which professional judgment can override fundamental rights. *Shabazz* is a compelling case, for the restricted activity was free exercise in its purest form: worship.[168] The Court did not carefully examine the state's proffered interests; rather, it implicitly erected a presumption that those interests were compelling. Consequently, the state's legitimate interest in prohibiting those prisoners on outside work details from returning to the prison before the end of each day sufficed to bar Muslim inmates from attending a service central to their religion.

In determining the reasonableness of the prison regulations, the Court applied the *Turner* factors.[169] But in doing so, the Court twisted logic to reach its conclusion. It argued that Muslim prisoners unable to attend the Friday afternoon Jumu'ah service have alternative means of exercising their religious rights.[170] It reasoned that because prison authorities permitted Muslim prisoners to carry out some of their religious obligations, no constitutional need existed requiring prison authorities to permit the prisoners to attend their central worship service as well.[171] The Court reached this conclusion by illogically analogizing free exercise to freedom of expression. The analogy fails, however, because specific religious duties, unlike other forms of expression, must occur in a particular time,

166 Bowen v. Roy, 106 S. Ct. 2147, 2156 (1986).

167 Note too that, as Justice O'Connor pointed out in her separate *Roy* opinion, the Chief Justice improperly relied on Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934), because the Court decided *Hamilton* before it had applied the free exercise clause to the actions of states. *Roy*, 106 S. Ct. at 2168 (O'Connor, J., concurring in part and dissenting in part); *see supra* note 1. *Hamilton* involved no free exercise clause analysis and therefore provides little support for Part III of the Court's *Roy* opinion.

168 O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2402 (1987).

169 *Id.* at 2405; *see supra* note 50 and accompanying text.

170 107 S. Ct. at 2406; *see supra* notes 131 & 134 and accompanying text.

171 *Id.*

place, and manner.[172] The Court's argument is tantamount to an argument that the state can prohibit Christian prisoners from celebrating Easter because they can celebrate Christmas.

B. The "Core"-"Periphery" Dichotomy is Undesirable

Courts should examine all state action inhibiting an individual's right to free exercise with strict judicial scrutiny.[173] The context in which a free exercise claim arises naturally has a tremendous impact on its resolution, but that context should not wholly determine the result. The existence of different standards of review creates the potential for a gradual erosion of free exercise rights. Furthermore, a strict-scrutiny standard can adequately resolve all free exercise cases.

1. *The Dangers of the "Core"-"Periphery" Dichotomy*

Given the Supreme Court's recent pronouncements in *Goldman*, *Roy*, and *Shabazz*, a court can permit government regulation of free exercise with little factual analysis by implicitly categorizing a given regulation as arising in the periphery. The traditional strict-scrutiny standard, unlike the reasonableness standard, forces a court to delve into the facts of a given case. Such careful inquiry ensures that individuals' free exercise rights will receive adequate consideration while it affords the government ample opportunity to show a compelling interest and that it narrowly tailored its regulation to that end. The implicit core-periphery dichotomy permits courts to sidestep such a factual inquiry.

If courts can adopt dramatically different standards of review depending upon whether a case falls into the core or the periphery, the opportunity arises to manipulate a particular set of facts in order to adopt one standard rather than another. A judge in favor of a particular restriction on free exercise could analogize the case to *Goldman*, *Roy*, and *Shabazz* and employ a deferential standard of review. For example, consider how a judge might approach *Menora v.*

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172 *See supra* notes 138-42 and accompanying text.

173 *See supra* note 29 and accompanying text. The Court's test has taken a variety of forms.

> One can, however, glean at least two consistent themes from [the] Court's precedents. First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to the interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served."

Goldman v. Weinberger, 106 S. Ct. 1310, 1325 (1986) (O'Connor, J., dissenting).

Illinois High School Association[174] under the emerging doctrine. The Illinois High School Association (IHSA) oversaw all interscholastic high school sports in Illinois. It promulgated a rule forbidding basketball players to wear hats or other headwear. The IHSA interpreted its rule to prohibit the players from wearing yarmulkes during games. Two Orthodox Jewish high schools and their players filed suit charging that the rule violated their right to free exercise.[175]

A judge might find that the IHSA has a strong interest in regulating play in the unique context of interscholastic athletics (a context similar to that of public schools[176]) and therefore classify the case as arising beyond the political community. Under *Goldman* and *Shabazz*, the judge could simply defer to the professional expertise of IHSA officials and permit the restriction.[177] She might also characterize the basketball players as benefit recipients and the regulations as neutral, justifying minimal scrutiny under the *Roy* minority analysis.[178] Alternatively, she could simply apply strict scrutiny by forcing the IHSA to demonstrate a compelling interest and that its regulation was the least restrictive means of achieving that interest. Only through the latter course would the judge fully examine the merits of the case. Under the emerging law, any of these approaches would be permissible.

If the Supreme Court openly recognized such a choice between standards, it would significantly dilute free exercise rights. Close judicial scrutiny would become an option rather than a mandatory safeguard of an important constitutional right. Moreover, if the views expressed in Chief Justice Burger's *Roy* minority opinion ever become the majority view, the periphery might swallow the core.

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174 683 F.2d 1030 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); *see* O'Neil, *supra* note 2, at 40-41. In *Menora*, Judge Posner compared the *Sherbert-Thomas* balancing test with that set forth in *Yoder*. Using a scale as a metaphor, he noted, "*Sherbert* indicates that our thumb should be on the claimant's pan, because it says that the state's interest must be 'compelling' to outweigh the claimant's." *Menora*, 683 F.2d at 1033. He continued, "*Yoder*, however, suggests that a secular regulation is permissible unless it 'unduly burdens the free exercise of religion.'" *Id.* Ultimately, however, the *Menora* court did not burden itself with tests, explaining that no real conflict existed between the parties:

> If the Talmud required basketball players to wear yarmulkes attached by bobby pins, there would be a conflict with the state's interest in safety. But it does not, so it would seem that all the plaintiffs have to do to obviate the state's concern with safety is to devise a method of affixing a head covering which will prevent it from falling off during basketball play.

Id. at 1034.

175 *Menora*, 683 F.2d at 1031-32.

176 *See* Bethel School Dist. v. Fraser, 106 S. Ct. 3159, 3164 (1986) (free speech case in which Court noted that "constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings").

177 *See supra* notes 85-87 and accompanying text.

178 *See supra* notes 105-14 and accompanying text.

Part III of the *Roy* opinion brings the periphery into the core by treating some claims arising in the political community with great deference.[179] The more that courts apply a deferential periphery analysis to cases arising in ordinary contexts, the smaller the core becomes.

One court has read Part III of the *Roy* opinion as law. In *Leahy v. District of Columbia*,[180] a federal district court applied the minority's test for challenges of neutral benefit restrictions[181] to a challenge of the District of Columbia's requirement that driver's license applicants supply their social security numbers. The plaintiff opposed providing his number for use outside of the social security system on religious grounds. The court found his religious belief to be legitimate but nonetheless held that "the defendant has met its required burden since it has demonstrated that its challenged requirement . . . is a *reasonable means of promoting a legitimate public interest*."[182]

2. *Strict Scrutiny Protects State Needs in the Periphery*

The religious rights of persons in societies apart and those receiving government benefits are no less important than the rights of persons in civilian life. Although the state often has greater interests in limiting free exercise outside the political community than it does within it,[183] the strict scrutiny standard applicable in core[184] free exercise cases can accommodate those interests. When courts apply reduced scrutiny in the periphery,[185] they lessen the importance of a claimant's rights rather than simply account for a heightened government interest.

The *Goldman* Court implicitly created an almost irrebuttable presumption that the government has a compelling interest in restricting free exercise in the armed services. If, under a strict scrutiny analysis, the Air Force had a compelling interest in enforcing its dress regulations, Goldman's challenge would have failed.[186] As

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179 *See* Bowen v. Roy, 106 S. Ct. 2147, 2156 (1986) (Burger, C.J., joined by Rehnquist and Powell, J.J.).

180 646 F. Supp. 1372 (D.D.C. 1986).

181 *See supra* notes 105-14 and accompanying text.

182 *Leahy*, 646 F. Supp. at 1378 (emphasis added).

183 *See supra* notes 34-35 and accompanying text.

184 *See supra* note 8 and accompanying text.

185 *See supra* notes 9-10 and accompanying text.

186 In Sherwood v. Brown, 619 F.2d 47 (9th Cir.) (per curiam), *cert. denied*, 449 U.S. 919 (1980), the Ninth Circuit upheld a dress regulation under a strict scrutiny analysis on the ground that the plaintiff's departure from the regulation jeopardized the Navy's interest in safety. However, absent safety concerns, it is difficult to imagine that a court would uphold a dress regulation infringing upon religious liberty under a strict scrutiny analysis. *See* Goldman v. Secretary of Defense, 530 F. Supp. 12 (D.D.C. 1981) (injunc-

Justice O'Connor stated in her *Goldman* dissent, "[T]he test that one can glean from the Court's decisions in the civilian context is sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending."[187]

In the prison context, strict judicial scrutiny could both accommodate the government's unique interests and safeguard inmates' free exercise rights. Courts should consider prison authorities' compelling interests in maintaining order within their institutions. However, courts belittle prisoners' free exercise rights by allowing virtually any reasonable state interest to supplant them.

Similarly, the standard of scrutiny that Chief Justice Burger proposed in *Roy* for neutral restrictions on government benefits[188] is unnecessary. If the government's needs actually mandated using the *Roy* claimant's social security number and no less restrictive means were available to the state, then the regulation would have survived strict scrutiny. As the Ninth Circuit noted, the compelling interest test "forces us to measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction."[189] If no compelling state interest existed, or if other means of accomplishing it were available, the public benefits recipient would not be compelled to violate his or her religious beliefs.

CONCLUSION

The *Goldman* and *Shabazz* Courts and the *Roy* minority employed an implicit dichotomy to justify minimal scrutiny of free exercise claims. Their opinions indicate the Court's willingness to divide free exercise doctrine into "core" and "periphery"; however, the dichotomy is unnecessary. *Goldman*, *Shabazz*, and Part III of *Roy* apply the most deferential standard possible simply because the regulatory schemes at issue involved unique state interests. However, if the special government needs in these contexts reached the level of

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tion granted under strict scrutiny standard), *vacated*, 734 F.2d 1531 (D.C. Cir. 1984) (incorrect standard applied below), *aff'd sub nom.* Goldman v. Weinberger, 106 S. Ct. 1310 (1986).

187 *Goldman*, 106 S. Ct. at 1325 (O'Connor, J., dissenting); *see* O'Neil, *supra* note 2, at 44-45. Justice Brennan noted that he continued "to believe that Goverument restraint on First Amendment rights, including limitations placed on military personnel, may be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation." 106 S. Ct. at 1317-18 n.2 (Brennan, J., dissenting) (citations omitted).

188 Bowen v. Roy, 106 S. Ct. 2147, 2156 (1986) (Burger, C.J., joined by Rehnquist and Powell, J.J.).

189 Callahan v. Woods, 736 F.2d 1269, 1272 (9th Cir. 1984).

a compelling interest, then the regulations would have passed muster under the core analysis. By abandoning the compelling interest test and turning instead to what is essentially a rational basis standard, the *Goldman* and *Shabazz* Courts and the *Roy* minority failed to safeguard adequately the right to free exercise.

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