Religion and National Security:
Goldman Revisited

by

Vincent A. Carrafello*

Introduction

The First Amendment guarantee of the free exercise of religion has been one of those rights that Jefferson originally sighted in the bright constellation of our republican liberties. Its protection has contributed to making the American nation a pluralist society in terms of religious beliefs or non-beliefs. And with other freedoms having to do with the conscience and mind of our citizens, it has been accorded in more than one case a privileged position definition and essence of personal integrity. All of us are more than familiar with those flag-saluting cases involving the Jehovah’s Witnesses almost half a century ago -- when the Supreme Court made such an abrupt and sudden reversal of directions as it realized where complete subservience to the dictates of authority might lead. More recent decisions have shown to what lengths the Court will go to accommodate the religious belief of a claimant seeking relief from some state mandate that goes counter to the individual’s conscience and burdens it with an impending hobble. Seventh Day Adventists have been restored their unemployment compensation benefits when it was demonstrated that their refusal to work on their Sabbath was a fundamental tenet of their creed. The children of the Amish were exempted from attending public school through the age of sixteen though members of that denomination could not succeed in claiming no coverage under Social Security. And though the Selective Service System did allow conscientious objector status to one whose religious beliefs condemns all wars, it was withheld from those who objected to particular wars only. Thus there has been a constant and healthy interplay between the claims of the State and the individual citizen in this area -- a round of decisions that do add up to a pattern of respect for the person and for the demands of civic responsibility. In is against this background of give and take that we should pay particularly close attention to the Goldman decision. The majority, concurring, and dissenting opinions all suggest that this case has called a resounding and jarring “halt” to the assertion of individual conscience.

S. Simcha Goldman was an Orthodox Jew and an ordained rabbi. He was admitted into the Armed Forces Health Profession Scholarship program in 1973. On inactive reserve rank with the Air Force, he pursued graduate study in clinical psychology at Loyola University in Chicago. The scholarship provided him with a monthly allowance for tuition, books, and fees during a three year period. With his Ph.D. in psychology, Goldman entered active service in the United States Air Force as a commissioned officer. The program required one year of active duty for each year of subsidized education.
Goldman was assigned to March Air Force Base in California as a clinical psychologist in the mental health facilities there. And that is where his problems began.

Up to 1981, he had not been prevented from wearing his yarmulke on the base. He stayed close to his duty stations while in the clinic and wore his service cap over the yarmulke out of doors. Indeed, during this period he received extremely high ratings in his performance evaluations with one of his evaluators even noting he maintained “appropriate dress and bearing.” 7 But in 1981 Goldman appeared as a defense witness in a court martial wearing his yarmulke. It was only after that occurrence -- and some might suggest in retaliation in response to it -- that his commanding officer decided that his wearing the yarmulke violated Air Force Regulations. When Goldman protested, he was issued a forma letter of reprimand and threatened with court martial himself. And his commanding officer actually withdrew a positive recommendations that Goldman’s term of service be extended and replaced it with a negative recommendation. Goldman sued asserting such actions constituted an illegal abridgement of his First Amendment right of free exercise because for him the wearing of the yarmulke was a most serious religious obligation. The Federal District Court in the District of Columbia issued an injunction in his favor but the Federal Circuit Court reversed. Goldman then appealed to the Supreme Court.

Judicial Deference to Military

Justice William Rehnquist rejected Goldman’s plea for the majority of the Court and decided for the Air Force. Careful examination of his opinion, however, suggests that in doing so he may have gone further than even he wanted to in carving out a realm operated by the military free form any restraint -- indeed a state within a state having dire consequences not only for the individual conscience of Simcha Goldman but also for the preservation of our republican liberties as we have known them since the adoptions of the Constitution. Rehnquist rejected Goldman’s argument that since his conduct was religiously motivated it should be analyzed under a strict standard that would make for a healthy comprise of accommodations. He cited varied precedents to the effect that “the military is, by necessity a specialized society separate form civilian society” 8 and again that the “military must insist upon a respect for duty and discipline without counterpart in civilian life.” 9 But then Rehnquist continues on and in his own language crates a whole new category of governmental action that seems to be almost immune from constitutional scrutiny:

Our review of military regulations challenged on First Amendment grounds is far more differential that constitutional review of similar laws or regulations designed for civilian society 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; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. 10
This is quite strong and uninhibited language constituting almost a blanket and prior approval for what the military would like to do. And Rehnquist, realizing the extremity of this position, becomes immediately defensive and quickly adds that such “aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment.” Are those guarantees partially nugatory then? But these cautionary words are rendered meaningless and without substance because Rehnquist insists that when evaluating whether military necessity justifies such restrictions as the present one, the courts must give “great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” Thus, an advocate for the military might very well argue that they are to be the judges as to what is fit, proper, and seemly and quote these words to justify making the generals the of their own case.

Rehnquist next proceeds to focus attention on other issues raised by the Goldman case. The Air Force maintains vehemently that “the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities of the overall group mission … a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank.” And this the Air Force claims is essential in “peacetime as … war because its personnel must be ready to provide an effective defense on a moment’s notice.” Rehnquist emphatically insists that “habits of discipline and unity must be developed in advance of trouble.” But it is overspeculative or beyond human possibility that such attitudes of discipline, obedience, and unity constitutionally promulgated by Rehnquist will come to affect civilian life as well as life under the control of the military? Why does Rehnquist consider protest to be tolerated in their civilian order, when a libertarian and individualist society should welcome it? And can the power so unconditionally granted to the military ever be circumscribed in its influences?

Rehnquist recapitulates Goldman’s assertions that the Air Force should make an exception to its code, that there was no danger of discipline being undermined, that, even though visible, the yarmulke was “unobtrusive” and, more seriously that the Air Force objections to this wearing it were based on no supporting evidence and contradicted by expert witnesses. But Rehnquist quickly rejoins that the opinion of expert testimony ca be readily dismissed as irrelevant and that the military are under no requirement to provide evidence that would sustain their professional judgments! What constitutes appropriate dress is to be “decided by the appropriate military officials” -- and that is that! For these officials are not mandated by the Constitution to “abandon their considered professional judgment.” While this may make military life more objectionable for some, no accommodation is to be made that “would detract from the uniformity sought.” The Air Force had made a clear and essential distinction between religious garment that are visible and non-visible by allowing one and forbidding the other. This standard of visibility satisfies their professional military judgment and should satisfy the Supreme Court as well. Consequently Rehnquist holds that the present ban on the yarmulke is one that “reasonably and even-handedly regulates dress in the interest of the military’s perceived need for uniformity: and such a proscription does not run counter to the First Amendment although it insufferably may burden the conscience of Goldman and others like him. But can the tradition of accommodation survive such an eyes-only test? And are
the military restricted at all when they can introduce and enforce rules with no evidence to support their rationality other than their own statement?

Strict Separation

Justice Stevens joined the majority in denying relief to Goldman but delivered his own concurring opinion that took a markedly different approach than Justice Rehnquist. Stevens was at pains to give due recognition to the sincerity and good faith of the claimant. His religious devotion was “readily apparent.” And he thought Goldman had submitted some very persuasive arguments -- the yarmulke is indeed “a familiar and accepted sight” in cities and universities, in courthouses and business offices. For the simple yarmulke was “the symbol of a distinguished tradition and an eloquent rebuke to the ugliness of anti-Semitism.” Goldman had argued in his brief that “the symbolic significance of our Nation’s military services and the educational role of the military in teaching the young defenders of our country the principles of liberty” required acceptance of his wearing of the yarmulke. And it is Justice Stevens who pointedly and suggestively remarks that on the basis of “the record before us,” there existed “reason to believe that the policy of strict enforcement” was based on a “retaliatory motive” due to Goldman’s appearance on the defense side in a court martial. 16

Nonetheless, Stevens decides against Goldman precisely because he wants to make sure that government is kept out of the religious sphere. The uniformity that Stevens finds of value is not the lockstep, heel-clicking automation type some might discern as Rehnquist’s desideratum -- but rather a uniformity that has “a dimension of still greater importance for me … the interest in uniform treatment of all religious faiths.” The Government has “exaggerated” the necessity for a uniformity of dress when one remembers that it was a “‘rag tag band’” of soldiers that won our independence for us. So Stevens quotes the words of the Government’s brief against its case. But to make an exception from the uniformity rule would be to compel the evaluator to judge “the character and the sincerity of the … faith as well as the probable reaction of the majority to the favored treatment of that faith.” 17 And what could be more of a governmental intrusion and search into conscience that Stevens quotes from one of his previous opinions that it is the “‘overriding interest’” to keep “‘the government -- whether it be the legislature or the courts -- out of the business of evaluating the relative merits of differing religious claims.’” 18 This was the absolutely necessary position of neutrality that Government must assume lest it violate the First Amendment. Stevens reasons that the Air Force rule Goldman challenged was based “on a completely neutral, completely objective standard -- visibility.” Not “hostility against or any special respect for any religious faith” had motivated that rule. A Sikh’s turban and a Rastafarian’s dreadlocks were like visible religious signs that would fall under the ban. But to except the yarmulke from the rule applying to all such visible accouterments by reason of their visibility would constitute “a fundamental departure from the true principles of uniformity” 19 that do not prefer one faith above another. This argument is a powerful one for he is maintaining that to make the exception requested would violate the separation of religion from the State.
Free Exercise and Religious Discrimination

But neither the lethal quip dismissals of Rehnquist’s opinion or the persuasive libertarian logic of Stevens are left unanswered by the lengthy dissent filed by Justice Brennan. It is one of three dissents filed in this case -- an extended and forceful argument on behalf of Goldman and the principle he represents. Brennan begins by addressing what he categorizes as the confusion of the majority. They treat the case as one only dealing with “certain dress regulations” and ignore the first Amendment claims an issue. Brennan would vote with the majority if Goldman wanted to wear a hat to “keep his head warm or to cover a bald spot” because individual tastes in attire are not constitutionally guaranteed. The majority likewise minimized “the burden that was places on Dr. Goldman’s rights.” For what the Air Force has done is to establish “an almost absolute bar to the fulfillment of a religious duty.” Precisely because of this imposed regulation Goldman was compelled to “violate the tenets of his faith virtually every minute of every workday.” By its virtual elimination of judicial review of military regulations, the Court had evaded its responsibility to protect constitutional rights. The Court, Brennan concedes had always allowed the military to “command service member to sacrifice a great many of the individual freedoms they enjoyed in the civilian community and to endure certain limitations on the freedoms they retain.” And the Court has been reluctant “due to our lack of expertise concerning military affairs and our respect for the delegated authority of a coordinate branch to strike down restrictions on individual liberties.” But it has adhered to that pattern only when such restrictions could “reasonably by justified as necessary to the military’s vital function.” 20 In the present case, however, the majority has adopted “a sub rational-basis standard” by giving the military an absolute and uncritical deference. All the military has to do is to describe its regulation as “sufficiently important” and the majority will accept that statement “no matter how absurd or unsupported it may be.” But Brennan argues that when a regulation burdens the free exercise of religion the military must provide “a credible explanation of how the contested practice” would interfere with the military interest. What Brennan calls an “unabashed ipse dixit” cannot destroy this First Amendment freedom. The majority simply restates the Air Force’s assertion that wearing the yarmulke would undermine discipline and uniformity -- and it does so, like the Air Force, “without offering any explanation” of how it can do so. 21 The Judicial parroting of military orders is what especially troubles Brennan -- and should trouble us all.

The Government had maintained that non-Jewish personnel would consider the wearing of the yarmulke to be “an unauthorized departure from the rules.” They then would begin to question “the principle of unswerving obedience.” Brennan ironically describes how our military forces will soon “slip down the treacherous slope toward unkempt appearance, anarchy, and ultimately defeat at the hands of our enemies.” But can a yarmulke do all this? Brennan considers the contention has no “support in the record of this case … and no basis… as a general proposition.” 22

The Government also argued the dress rule preserved “the preeminence of group identity … fostering esprit de corps and loyalty to the service that transcends individual bonds “and so the yarmulke becomes an assertion of individuality…a badge or religious and ethnic identity” that would foster divisiveness in the service. Yet this absolute
insistence on uniformity is belied by the Air Force’s own dress code which “expressly abjures” that it be total:

(2) Appearance in uniform is an important part of this image …
Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad. 23

Brennan does not think the yarmulke has an image so “extreme … unusual …or faddish” as to disrupt the Air Force. Its rules also allow for the wearing of rings even though such items might identity the wearer with a religious or secular social organization. If these signs of identity are allowed, the Air Force is unable to “rationally justify” its ban on the yarmulke. In the barracks our service people see “Mormons wearing temple garments. Orthodox Jews wearing tzizets, and Catholics … crosses and scapulars.” According to Brennan, this is what America is all about -- e pluribus unum. In this context the yarmulke becomes “an eloquent reminder that the shared and proud identity of United States servicemen embraces and unites religious and ethnic pluralism.” Brennan makes little of the Government’s dangling “a classic parade of horribles” 24; allow the yarmulke, and then come turbans, saffron robes and dreadlocks! But each of these must be evaluated on its own. If a reasoned 25 basis of judgment is available because of “functional utility, health and safety” -- then the prohibition will be allowed. For example, short haircuts may be militarily necessary to prevent being “grabbed in battle” and also be kept “louse free in field conditions.” It is precisely the lack of “any reasonable basis” to bar the yarmulke that Brennan finds “so striking here.” Indeed, Goldman had even declared himself quite willing to wear “whatever style and color yarmulke the Air Force believes best comports with its uniform.” 26

Justice Brennan also responds to Justice Stevens’ argument that the visible/non-visible standard allows the State to remain neutral in the realm of religion and so not intrude into the beliefs of conscience -- thus preventing the drawing of possibly preferential distinctions among adherents of different religious faiths. But by rejecting the standard of “functional utility, health, and safety considerations,” such a test does in fact pick and choose which believers will be able to fulfill their religious dress obligations and which will not. It thus directly violates free exercise by permitting “only individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians” to practice their faith. Is not this a form of establishment, preference, and discrimination? And does not the Constitution mandate a standard that would allow the “greatest possible number of persons” to exercise their beliefs? Stevens’s concern had to do with a sense of elemental “fairness” -- if Orthodox Jews are allowed to wear the yarmulke, then how can the Air Force prohibit Sikhs from donning turbans? But Brannan submits that the “existing neutral standard” results in the “different treatment of Christians on the one hand, and Orthodox Jews and Sikhs on the other.” For him each of these standards are constitutionally suspect. To be upheld it would have to be demonstrated that they were “narrowly tailored” to promote military requirements. He suggests that what the majority is doing is to divide religious faiths into two groups: those with visible dress and body attire and those without. But the “practical effect” of such a categorization is that “majority religious are favored over distinctive minority faiths.”
Such “dual category analysis” remains “fundamentally flawed” for the Constitution intends “only one relevant category -- all faiths.”27 Burdens placed on members of one religion cannot be justified by preference to those placed on another. That Rastafarians must shear their dreadlocks does not necessarily mean that Orthodox Jews must doff their yarmulkes aside.

Likewise specious for Brennan is the Air Force’s announced goal of uniformity which he takes to really mean “uniformly accommodating majority religious practices and uniformly rejecting distinctive minority practices.” Brennan believes that only a uniformity of dress is the military interest that comports with the First Amendment. But that standard does not sustain the bar against the yarmulke. For the Air Force has “failed utterly” to explain why the covering of a “neat and conservative yarmulke” would interfere with discipline and uniformity. The constitutional heritage of Americans rests on a deep commitment to “religious freedom and acceptance of religious pluralism.” That tradition has only been preserved by not trusting to government agencies alone but through the “vigilant and checking authority of the judiciary.” While the courts will not “second guess” military judgments, in a case like the present one there must exist some “rational foundation for assertions of military necessity when they interfere with the free exercise of religion.” One must ever bear in mind that precisely because of the conformity and obedience the military demands, it may be specially “impervious to minority needs and values.” It is thus essential to safeguard minority religions against “quiet erosion by majoritarian social institutions that dismiss [them] as unimportant because unfamiliar.” The present regulation leaves patriotic American Orthodox Jews with the “painful dilemma” of choosing “between fulfilling a religious obligation and serving their country.” If the draft were re-instituted, he notes that “compulsion will replace choice.” Such a rule is unworthy of our services particularly because Brennan deems it “unnecessary.”28

Cost Benefit Analysis?

Justice Blackmun begins his own dissent by allowing that the Air Force could have justified its rule on the basis of cost. Thus it would have pointed to the expense of exempting Goldman but also to “the cumulative costs of accommodating constitutionally indistinguishable requests for religious exemptions.” But since it had failed to demonstrate that “either set of costs is significant,” Blackmun dissents. He also emphasizes that religious freedoms must not be compromised simply on the ground of alleged military necessity because our service people must not be made to “forfeit their…rights as the price of enlistment.” He notes that the Air Force failed to offer “even a minimally credible explanation” for its rule. While admitting the need for judicial deference to professional military judgments as to dress, there was simply no evidence presented to substantiate concern over the yarmulke. In fact, Goldman had worn one for years “without any adverse effect on his performance, any disruption of operations at the base, or any complaints from other personnel.” Blackmun also shares Brennan’s concern that present rules “discriminate in favor of this country’s more established mainstream religions.” The standard for exclusion should not be familiarity or unfamiliarity with the particular religions. It instead should be measured by “how difficult it would be to
accommodate” the religious needs of the individual involved. The present practice constitutes a “favoritism based on how unobtrusive a practice appears to the majority.” Blackmun thinks that this is constitutionally defective on both equal protection and religious establishment grounds. The visibility test is fatally flawed in the light of the First Amendment. Furthermore, the Air Force failed to show that so many of its personnel would request religious exemptions that they could not be denied on “neutral grounds such as safety.” The Chaplain’s Handbook prepared by the Air Force does not even hint at how many service people would be likely to seek dress code exemptions on religious grounds. Thus Blackmun concludes that deference here is “unwarranted.” The courts must respect “reasoned military judgments” but the military have failed to show the judgment here was “a reasoned one.” If the demands for exemptions were so numerous, there might be an argument that a blanket rule was warranted. But that would be a case “different from the one at hand.”

The limits of Deference

Some might suggest Justice Sandra Day O’Connor’s dissent is the most condemnatory of all. In listing enumerated steps and conditions, she seems to be going merrily along erecting a syllogism of logic too abstract for life on a base. But in so doing she creates one of the most devastating and chillingly lethal attacks this author has read on the notion that authority should prevail on its mere ipse dixit. She notes that the Courts made not even “the slightest attempt to weigh” the conflicting claims of Goldman and the military and neither articulated nor “much less applied” a test for Free Exercise. It is enough for the Court if the military merely alleges need even if such an allegation remains unsupported evidentially. She commends Brennan’s recognition of the Court’s abdication of its role as judging but faults him as well for applying “no particular test or standard to determine” the claims before the Court. She maintains that the Court had to establish a standard to judge religious claims in a military context. A clear standard is admittedly difficult to define even in the civilian context. But from the precedents dealing with the conflicts between governmental authority and religious beliefs Justice O’Connor perceives “two consistent themes.” The first is that once Government attempts to curb a free exercise claim, it has to satisfactorily demonstrate that “an unusually important interest is at stake” – variously denominated in the case law as “‘compelling’” or “‘of the highest order’” or “‘overriding.’” The Second theme is that the Government must also provide that “granting the requested exemption will do substantial harm to that interest” either because the means adopted is the “‘least restrictive’” or “‘essential’” or because the interest will not “‘otherwise be served.’”

Justice O’Connor considers these two standards “entirely sensible” in dealing with free exercise claims. And she does so because of two reasons. To begin with, because the government is dealing with “an interest specifically protected by the Bill of Rights,” it must show that the “opposing interest it asserts is of especial importance” to succeed. And, secondly, because our “Bill of Rights it expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state,” the government must likewise prove that its own asserted interest will “in fact be
substantially harmed” by conceding the individual’s request for exemption. And Justice O’Connor discerns “no reason why” that such general principle of analysis should not be applied in the “military as well as the civilian context.” The standard fixed by the Court’s decisions in civilian life remains “sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending.”

Justice O’Connor then applies that very test to the dress code rule in Goldman. Thus the “first question” posed for the Court is if the Government’s asserted interest is “of unusual importance.” There can be no doubt that the “need for military discipline and esprit de corps” is such a significant governmental interest. But the mere fact that such an interest is presented does not end analysis for Justice O’Connor as it did for the majority. For even in pursuing legitimate interests of a compelling nature, the Government remains “subject to specific restraints in doing so.” Then, a second question must be dealt with:

Will granting an exemption of the type requested by the individual do substantial harm to the especially important governmental interest?  

Here Justice O’Connor notes that because of the “unique fragility” of military life, there may be a need for a certain king of “rigidity” that would not pass constitutional scrutiny in the “civilian sphere.” But she emphatically agrees with Justice Brennan that in the case before them, the Government had failed to demonstrate with “sufficiently convincing proof” that the wearing of the yarmulke would work “substantial harm to military discipline and esprit de corps.”

She observes that the Government’s assertion for absolute uniformity was “contradicted by the Government’s own exceptions to its rule.” Did not the Air Force code speak of personnel having the right to “express individuality through his or her appearance?” Nor could the Government even “plausibly argue” that wearing the yarmulke presents “a threat to health or safety.” And she pointedly notes that the Federal District Court had included a Finding of Fact that from “September, 1977 to May 7, 1981, no objection was raised” to Goldman’s donning his yarmulke while in uniform.

So Justice O’Connor states her own holding. If the military had not “consistently or plausibly justified” the claimed need for rigidity of application and where the individual making the free exercise claim proves the “threat to discipline or esprit de corps is … completely unfounded,” then the plea for uniformity must give way to the individual’s religious claim. Justice O’Connor does qualify her position – perhaps some would suggest drastically—by the present case she would require the military to accommodate Goldman precisely because the “facts of this case” make it one of those “rare instances.”

Concluding Considerations

So we complete this examination of a recent example of the conflict between the claims of authority and the claims of conscience. Perhaps the most jolting aspect of the way the majority rule was formulated was that it failed to demand any substantial evidential support in the record for the military’s denial of the exemption. Equally
disturbing was its completely ignoring the possible retaliatory nature of the imposition of the rule in full force. Each of the concurring and dissenting opinions took careful note of both of these issues. Justice Rehnquist does indeed decide that the military will be allowed to proceed on the basis of its own unsupported say so. Command must always lead to obedience.

But should this much leeway be granted the armed services in a constitutional system that prides itself on its bridling of authority? Should the military be permitted to enforce a rule without any justification in fact? Should their inconsistency in applying it not be deemed an act arbitrary, whimsical and capricious in the worse sense of trying to “get back” at a professional who was doing his duty by testifying at a court martial? Quite obviously such behavior by diktat would not pass muster in the civilian realm. Why may hot the same standard apply to the military as Justice O’Connor holds? There can be no question that the judicial deference Rehnquist posits for the military is really a judicial surrender to anything that might come down the chain of command. This has some very sinister and perilous implications on the two hundredth anniversary of our Constitution. Does it not create a very special fraternity somehow immune and exempt from all restraint – a super and separate caste freed altogether from constitutional restrictions altogether? When one considers the economic stake that already is invested in the military, does not this grant of actually unlimited power not make for an authority unimpeachable and unquestioned? And does America really want a military like that – a state within a state – or, more exactly, a state above the state?

When General George C. Marshall was summoned to Washington by President Franklin Roosevelt on the eve of World War II and commissioned to make ready our national defenses for the titanic struggle that loomed ahead, he and his staff – upon his orders – wore civilian suits. Marshall did this, according to his definitive biographer, precisely because he recognized a greater deference than the kind Justice Rehnquist writes about: the deference of a dedicated military officer and public servant to the Constitution of the United States and the heritage of liberties it guarantees.37
Footnotes:


7. Id. At 1315, n.4.


10. Id. At 1313.

11. Id. At 1313.

12. Id. At 1313.

13. Id. At 1313.


15. Id. at Goldman, supra at 1314.

16. Id at 1315.

17. Id. at 1315-1316.

18. Id. at 1315, n.6, citing United States v. Lee 455 U.S. 252 (1982).

19. Id. at Goldman, supra at 1316.

20. Id. at 1316-1317.
21. Id. at 1317-1318.
22. Id. at 1318.
23. Id. at 1318-1319.
24. Id. at 1319.
25. Emphasis in original.
26. Id. at Goldman, supra at 1319-1320.
27. Id. at 1320.
28. Id. at 1321-1322.
29. Id. at 1322-1324.
30. Id. at 1324. For a critique of the balancing test Justice O’Connor refers to, see Carrafello, “Weighing the First Amendment on the Scale of the Balancing Test: The Choice of Safety Before Liberty,” 8 Southern L. Rev. 255 (1982).
31. Id. at 1324-1325.
32. Id. at 1325.
33. Id. at 1325-1326.
34. Id. at 1326.
35. Id. at 1326. Emphasis in original.
36. Id. at 1326.