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Religious Freedom and the Interscholastic Athlete

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RELIGIOUS FREEDOM AND THE INTERSCHOLASTIC ATHLETE

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INTRODUCTION

Americans often appear to be as much devoted to competitive athletics as they are to religious observance, the First Commandment notwithstanding.[1] There is, in fact, a great deal of evidence suggesting that athletic competition and religious observance are, in many cultures and in many faith traditions, complementary if not convergent endeavors.[2] In the United States, in particular, the last two decades have witnessed an unprecedented public mixture of athletics and religious faith,[3] leading some to suggest that sport has itself become another—if not *the*—American religion.[4]

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1. *Exodus* 20:2-3 ("I am the Lord your God . . .; you shall have no other gods before me.").

2. *See, e.g.*, Mark S. Rosentraub, *Governing Sports in the Global Era: A Political Economy of Major League Baseball and Its Stakeholders*, 8 IND. J. GLOBAL LEGAL STUD. 121, 124 (2000) (discussing the historical interplay between religion and sports across cultures); Judy Harrison, *Sports a Soul-Saving Activity*, BANGOR DAILY NEWS (Me.), Nov. 25, 2000 (describing the evolution of the modern convergence of religion and sports in the United States, based on the work of historian William J. Baker), *available at* 2000 WL 28978115. *See generally* SPORT AND RELIGION (Shirl J. Hoffman ed., 1992).

3. *See, e.g.*, Jarrett Bell, *Religion in Heart of NFL*, USA TODAY, Dec. 24, 1996, at C1, *available at* 1996 WL 15362151; John Blake, *Power Christianity: Athletes Are Becoming More Open and Outspoken About Their Faith*, ATLANTA J.-CONST., Dec. 14, 1996, at G4, *available at* 1996 WL 8246340; Deborah Kovach Caldwell, *It's Faith in Numbers—More Athletes Going Public with Religion*, SAN ANTONIO EXPRESS-NEWS, Jan. 15, 1997, at E1, *available at* 1997 WL 3157531; Jason Cole, *Jaguars Make Religion a Part of the Game Plan*, SUN-SENTINEL (Ft. Lauderdale), Jan. 9, 1997, at C10, *available at* 1997 WL 3079297; Mark Kram, *Locker-Room Evangelism Infiltrates Pro Sports*, SEATTLE TIMES, Nov. 13, 1988, at C10, *available at* 1988 WL 3389117; Robert Lipsyte, *The Crossing of Faith and Big-Time Sport*, N.Y. TIMES, Mar. 4, 2001, *available at* 2001 WL-NYT 0106300040. For a more historical assessment of the evangelical Protestant influences, see TONY LADD & JAMES A. MATHISEN, MUSCULAR CHRISTIANITY: EVANGELICAL PROTESTANTS AND THE DEVELOPMENT OF AMERICAN SPORT (1999).

4. *See generally* ROBERT J. HIGGS, GOD IN THE STADIUM: SPORTS AND RELIGION IN AMERICA (1995); CHARLES S. PREBISH, RELIGION AND SPORT: THE MEETING OF SACRED AND PROFANE (1992); FROM SEASON TO SEASON: SPORTS AS AMERICAN RELIGION (Joseph L. Price ed., 2001).

Ordinarily, these two commitments—the athletic and the religious—can both be honored without serious conflict or negative consequence.[5] But not always. One need only recall the famous refusal of Sandy Koufax to pitch on Yom Kippur during the 1965 World Series,[6] or more recently (and less famously) the unwillingness of Islamic NBA player Mahmoud Abdul-Rauf to stand during the pre-game national anthem.[7] Of course, the vast majority of such collisions garner little national attention. Yet it is generally amidst these less publicized conflicts, typically involving amateur interscholastic athletes, that the religious rights of sports competitors are most often put to the test.[8]

The primary purpose of this article is to delineate the religious rights of interscholastic athletes under the Free Exercise Clause of the First Amendment at a time when athletes appear increasingly willing to assert these rights,[9] and courts appear more willing to recognize them.[10] To

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5. This was not always the case. Sunday laws, for example, often expressly forbade certain athletic activities, particularly those deemed incompatible with the solemnity of Sabbath observance. *See, e.g.*, Carolina Amusement Co. v. Martin, 115 S.E.2d 273, 274 (S.C. 1960), *cert. denied*, 367 U.S. 904 (1961); State v. Thornbury, 69 P.2d 815, 815-16 (Wash. 1937); State v. Dean, 184 N.W.2d 275, 275 (Minn. 1921); Koelble v. Woods, 159 N.Y.S. 704, 705 (N.Y. Sup. Ct. 1916); Hiller v. State, 92 A. 842, 842 (Md. 1914).

6. For accounts of the Koufax incident, see Rabbi Lee Bycel, *Sandy Koufax Taught Pride to Generation of Young Jews*, JEWISH BULL. N. CAL. ONLINE, Sept. 20, 1996, *at* http://www.jewishsf.com/bk960920/comm2.htm; Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1579-83 (1993).

7. Abdul-Rauf was suspended for the refusal, see *NBA Suspends Mahmoud Abdul-Rauf: A Matter of Respect*, VIRGINIAN-PILOT & LEDGER-STAR, Mar. 18, 1996, at A6, *available at* 1996 WL 5988258, but he subsequently agreed to stand with the caveat that he would silently pray during the anthem. *Abdul-Rauf Decides To Stand Up and Pray*, ORANGE COUNTY REG., Mar. 15, 1996, at D8, *available at* 1996 WL 7017135. Regarding the suspension's legality, see generally Kelly B. Koenig, Note, *Mahmoud Abdul-Rauf's Suspension for Refusing to Stand for the National Anthem: A "Free Throw" for the NBA and Denver Nuggets, or a "Slam Dunk" Violation of Abdul-Rauf's Title VII Rights?*, 76 WASH. U. L.Q. 377 (1998).

8. *See, e.g.*, Debbie Fetterman, *Religious Sacrifice: Kimball Star Damon Arnette Won't Play on Sabbath*, DALLAS MORNING NEWS, Jan. 25, 1994, at B1 (reporting on a Seventh Day Adventist high school basketball player who, observing his Sabbath from sundown Friday to sundown Saturday, was compelled to miss Friday night games, and citing the earlier case of a collegiate basketball player who belonged to the Worldwide Church of God and likewise missed games for Sabbath observance), *available at* 1994 WL 6115006; Irene Garcia, *Team Harassed Over Skullcaps*, L.A. TIMES, Jan. 22, 1995, at B1 (reporting instances of alleged adverse treatment, by referees, players, and spectators, of Jewish basketball players for wearing yarmulkes), *available at* 1995 WL 2007840; *Soccer Game Forfeited for Religious Reasons*, COM. APPEAL (Memphis), July 5, 1996, at D2 (reporting that a referee told a youth soccer player that tournament rules precluded the player from wearing a head covering, notwithstanding that such a head covering was required by his Sikh religious beliefs), *available at* 1996 WL 9912461.

9. Gil Fried & Lisa Bradley, *Applying the First Amendment to Prayer in a Public University Locker Room: An Athlete's and Coach's Perspective*, 4 MARQ. SPORTS L.J. 301, 311 (1994)

this end, the article will proceed in two parts. Part I will provide a comprehensive overview of contemporary free exercise doctrine, followed by a brief summary of other laws that may govern religion-related conflicts arising in the context of interscholastic athletics.[11] Part II will then survey the types of controversies that can arise in this context and will examine their resolution in light of the governing laws. Part II will also offer guidelines to coaches and administrators for the prevention and resolution of such conflicts, including steps that can be taken to avoid First Amendment violations and, thus, legal liability.

I. THE LEGAL FRAMEWORK

For Americans, the most familiar and universal religious liberty guarantees are those of the First Amendment to the United States Constitution, which forbid any governmental entity from enacting or enforcing laws or rules that either "respect[ ] an establishment of religion, or prohibit[ ] the free exercise thereof . . . ."[12] It is the latter of these guarantees, the so-called Free Exercise Clause, that is the principal focus of this article. By no means, of course, is this provision the only source of potential protection for the religious beliefs and practices of interscholastic athletes. As Section B will illustrate, there exist many federal and state provisions, both constitutional and regulatory, that may afford such protection, some more generously than the Free Exercise Clause itself.

Before proceeding to the main analysis, a few prefatory comments are necessary. First, readers should bear in mind that it is the religious practices or sensibilities of an athlete, and not the athletic participation itself, that the Constitution protects. From time to time, perhaps due to

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(noting an increased willingness of student-athletes to assert their legal rights); Mark Silk, *Freedom of Religion Wins One in Athletics*, ATLANTA J.-CONST., Mar. 20, 1993, at F6 (surmising that recent cases involving conflicts between collegiate athletic schedules and religious observance by athletes "reflect a growing readiness on the part of members of minority religions to ask athletic associations to accommodate their religious needs"), *available at* 1993 WL 3349560. *See also* Robert L. McGahey, Jr., *A Comment on the First Amendment and the Scholar-Athlete*, 6 HUM. RTS. 155, 157 (1977) (noting early indications of the willingness of student athletes to assert their First Amendment rights).

10. *See generally* M. Chester Nolte, *Judicial Intervention in School Athletics: The Changing Scene*, 8 EDUC. L. REP. 1 (1983).

11. Regarding the religious rights of coaches and other athletic personnel, see GEORGE W. SCHUBERT ET AL., SPORTS LAW § 3.3, at 78-79 (1986).

12. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). Although textually applicable only to Congress, "[t]he Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).

the social and developmental importance of student athletics, the public and the media, when viewing a conflict between an athlete's religious beliefs and an administrative rule, will seemingly fixate on the possible loss of athletic participation that may result from the conflict. But, unless the athlete is claiming a religious basis for the participation itself, this emphasis is misplaced. There is, after all, no independent constitutional right to engage in interscholastic athletics,[13] either as a species of liberty (protected against deprivations independently) or as a species of property (protected against deprivations absent procedural due process),[14] although some courts have recognized that state law may create a protectable interest[15] or that there may be an attendant property interest related to scholarships, future professional participation, or the overall educational process.[16] In fact, government schools or associations are presumably not constitutionally required to establish athletic programs at all, and it is only because they do so that the Constitution's guarantees, such as the Free Exercise Clause, come into play.[17]

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13. Much less is there a right to attend summer athletic camps. Kite v. Marshall, 661 F.2d 1027, 1029 (Former 5th Cir. 1981) (rejecting claims that "parents possess a fundamental right to send their children to summer athletic camps" and that "the children have a constitutional right to attend such activities"), *cert. denied*, 457 U.S. 1120 (1982).

14. The U.S. Supreme Court has never so held, but several U.S. Courts of Appeals and state supreme courts have. Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953, 959 (6th Cir. 1986); Hardy v. University Interscholastic League, 759 F.2d 1233, 1234 (5th Cir. 1985); *In re* United States *ex rel.* Missouri State High Sch. Activities Ass'n, 682 F.2d 147, 151 (8th Cir. 1982); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd*, 460 U.S. 719 (1983); Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492, 497 (1st Cir. 1977); Albach v. Odle, 531 F.2d 983, 984-85 (10th Cir. 1976) (per curiam); Denis J. O'Connell High Sch. v. Virginia High Sch. League, 581 F.2d 81, 84 (4th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); Indiana High Sch. Athletic Ass'n, Inc. v. Carlsberg by Carlsberg, 694 N.E.2d 222, 242 (Ind. 1997); Arkansas Activities Ass'n v. Meyer, 805 S.W.2d 58, 61 (Ark. 1991); Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 758 P.2d 968, 972 (Wash. 1988); Eanes Indep. Sch. Dist. v. Logue, 712 S.W.2d 741, 742 (Tex. 1986). Courts have also rejected the notion that athletes are a "suspect class" under the Equal Protection Clause. *Missouri State High Sch. Activities Ass'n*, 682 F.2d at 152. Nor is athletic participation a fundamental right under the Privileges and Immunities Clause. Alerding v. Ohio High Sch. Athletic Ass'n, 779 F.2d 315, 317 (6th Cir. 1985).

15. *See, e.g.*, Butler v. Oak Creek-Franklin Sch. Dist., 116 F. Supp. 2d 1038, 1047-49 (E.D. Wis. 2000).

16. Haverkamp v. Unified Sch. Dist. No. 380, 689 F. Supp. 1055, 1057 (D. Kan. 1986); Weiss v. Eastern Coll. Athletic Conference, 563 F. Supp. 192, 196 n.10 (E.D. Pa. 1983); Tiffany by Tiffany v. Arizona Interscholastic Ass'n, Inc., 726 P.2d 231, 234-35 (Ariz. Ct. App. 1986).

17. *See, e.g.*, Robbins by Robbins v. Indiana High Sch. Athletic Ass'n, Inc., 941 F. Supp. 786, 791 (S.D. Ind. 1996); Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839, 842 (Pa. Commw. Ct. 1975); Bell v. Lone Oak Indep. Sch. Dist., 507 S.W.2d 636, 638 (Tex. App. 1974).

Second, like most federal constitutional provisions, the Free Exercise Clause is binding only on the actions of the government, whether federal, state, or local. Private or nongovernmental educational institutions, in other words, are not independently subject to the strictures of the First Amendment.[18] In particular, virtually all of the Constitution's liberty provisions contemplate a threshold requirement that the allegedly violative conduct be governmental or "state action."[19] Of course, this requirement is generally not difficult to satisfy when the athlete is directly challenging a rule, policy, or decision of a public school or school board or of a coach or administrator acting on the school's behalf.[20] As the Supreme Court has recently held, moreover, the state action inherent in such entities and their decisions cannot necessarily be laundered through mere associations or affiliations with private institutions.[21]

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18. *See, e.g.*, Hack v. President & Fellows of Yale Coll., 16 F. Supp. 2d 183, 188-92 (D. Conn. 1998) (dismissing a free exercise challenge under 42 U.S.C. § 1983 for want of state action), *aff'd*, 237 F.3d 81 (2d Cir. 2000), *cert. denied*, 122 S. Ct. 201 (2001); Joshua C. Weinberger, Comment, *Religion and Sex in the Yale Dorms: A Legislative Proposal Requiring Private Universities To Provide Religious Accommodations*, 147 U. PA. L. REV. 205, 216-19 (1998) (discussing this aspect of *Hack*). In fact, where an athlete challenges a private institution's religiously-based decisions, it may be the institution, rather than the athlete, that is the free exercise claimant. Matthew J. Mitten, *Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision?*, 71 NEB. L. REV. 988, 1001-02, 1004, 1014-15, 1022 (1992) (discussing instances in which Roman Catholic schools have argued, or might argue, that their refusal to allow an athlete to play due to health concerns is based on the religious tenet of preserving human life, and that a governmental ruling mandating participation would violate their institutional free exercise rights); *see also* Windsor Park Baptist Church, Inc. v. Arkansas Activities Ass'n, 658 F.2d 618, 621-23 (8th Cir. 1981) (upholding against a free exercise challenge a state athletic association's exclusion of a religious school that refused to obtain state accreditation).

19. *See generally* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE §§ 2.10-2.11 (2001). One who asserts a federal constitutional claim against a municipal or state defendant must generally do so under 42 U.S.C. § 1983, rather than directly under the Constitution itself. Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 732 n.3 (7th Cir. 1994); Ward v. Caulk, 650 F.2d 1144, 1148 (9th Cir. 1981). Accordingly, the state action requirement is, in the first instance, really a statutory element, usually subsumed under the requirement that the defendant have acted "under color" of state law. Reed v. City of Chicago, 77 F.3d 1049, 1051 (7th Cir. 1996) ("To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) the defendant deprived the plaintiff of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under color of state law.").

20. LEWIS & NORMAN, *supra* note 19, § 2.11, at 68; Dunham v. Pulsifer, 312 F. Supp. 411, 416 (D. Vt. 1970) ("[S]tate action is readily found in the acts of duly elected or appointed officials at all levels of the governmental hierarchy within the state. The action of a local school board is state action within the context of the fourteenth amendment."). Conversely, "[w]hen addressing whether a *private* party acted under color of law, [the court] . . . start[s] with the presumption that private conduct does not constitute governmental action." Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 835 (9th Cir. 1999) (emphasis added).

21. Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 121 S. Ct. 924, 934 (2001) (finding state action in statewide association's regulation of interscholastic athletics

A. The Free Exercise Clause of the First Amendment

The Free Exercise Clause basically entails a balancing of the respective interests of the claimant (the athlete asserting the challenge) and the government or the public, where the precise balance or level of judicial scrutiny will vary upon the claimant's initial evidentiary showings. What follows is a generalized overview of this balancing methodology, including key opportunities and limitations for both claimants and governmental defendants.

1. Elements of the Claimant's Prima Facie Case

Ordinarily, a free exercise claimant must first demonstrate that the government, by rule or policy, has placed a constitutionally significant burden on a practice that is sufficiently related to the claimant's sincerely held religious beliefs.[22] As this phrasing implies, not all burdens are constitutionally significant, not all practices are sufficiently related to a claimant's beliefs, and not all beliefs are religious. Normally, only burdens which are "substantial"[23] or "undu[e]"[24] —especially those which are truly prohibitory or punitive—will trigger the clause.[25] Likewise, there are some indications that the clause protects only those practices which are "central" to the claimant's religion[26] or which are mandated,

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among public and private secondary schools, where the association was, among other things, predominantly composed of public schools, overwhelmingly governed by public school officials, and fiscally tied to the state's retirement system); *see also* Clark by Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Missouri State High Sch. Activities Ass'n*, 682 F.2d at 151 (8th Cir. 1982). For further analysis, see generally Alan R. Madry, *Statewide School Athletic Associations and Constitutional Liability:* Brentwood Academy v. Tennessee Secondary School Athletic Association, 12 MARQ. SPORTS L. REV. 365 (2001).

22. These are not phrased as absolute requirements because some courts have held that "if a law is not neutral and of general applicability, a plaintiff is not required to prove that his or her free exercise of religion has been 'substantially burdened.'" Rader v. Johnston, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1996) (citing Hartmann v. Stone, 68 F.3d 973, 979 n.4 (6th Cir. 1995); Brown v. Borough of Mahaffey, Pa., 35 F.3d 846, 849 (3d Cir. 1994)).

23. Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

24. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

25. *See, e.g.*, Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago, 157 F. Supp. 2d 903, 914 (N.D. Ill. 2001) ("A substantial burden exists when the government pressures a plaintiff to modify her behavior and violate her beliefs, by, for example, discriminating against her because of her religious belief, inhibiting her dissemination of particular religious views or pressuring her to forgo a religious practice.").

26. *See, e.g., Hernandez*, 490 U.S. at 699; Forest Hills Early Learning Ctr., Inc. v. Lukhard, 728 F.2d 230, 240 (4th Cir. 1984). *But cf.* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 887 n.4 (1990) (questioning the validity of the inquiry into centrality and observing that "'[c]onstitutionally significant burden' would seem to be 'centrality' under another name").

rather than simply motivated, by the claimant's religious beliefs.[27] Finally, the clause by its text protects only exercise rooted in "religion,"[28] so that mere philosophical beliefs, even if strongly held, will not suffice.[29]

The substantial burden requirement, in particular, has proven especially difficult for athletes to satisfy. To some extent this may be attributable to the elusive nature of the requirement itself, which is not well-defined and may serve, in some cases, as a "gatekeeper doctrine[ ], . . . function[ing] to increase the likelihood of failure at the prima facie stage"[30] and specifically "obviat[ing] the need for judicial determination of other, perhaps more troubling questions."[31] This lack of success may also be attributable to the initial premise that athletic participation standing alone is not a constitutionally protected interest,[32] or that it is voluntary and extracurricular,[33] which may cause judges to dwell on the legal insignificance of athletic nonparticipation rather than on the religious basis of the claimant's predicament.[34] Whatever the reason, courts generally have been unreceptive to allegations where the religious prac-

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27. *Compare* Henderson v. Kennedy, 253 F.3d 12, 16-17 (D.C. Cir. 2001) (applying a mandatoriness standard under Religious Freedom Restoration Act (RFRA)), *with* Kikumura v. Hurley, 242 F.3d 950, 960-61 (10th Cir. 2001) (applying a motivation standard under RFRA as amended), *and* Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 670 (S.D. Tex. 1997) (applying a motivation-type standard under the Free Exercise Clause).

28. U.S. CONST. amend. I; Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."); *cf.* Alvarado v. City of San Jose, 94 F.3d 1223, 1226-27 (9th Cir. 1996) (noting similar requirement for the Establishment Clause). Nonetheless, courts have held that the Establishment Clause also protects the nonreligious from religious coercion. Johnson v. Board of County Comm'rs, 528 F. Supp. 919, 921 (D.N.M. 1981), *rev'd on other grounds sub nom.* Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986); Seegers v. Parker, 241 So. 2d 213, 216 n.4 (La. 1970), *cert. denied*, 403 U.S. 955 (1971).

29. *Yoder*, 406 U.S. at 216; McGlothin v. Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853, 865-66 & n.19 (S.D. Miss. 1992).

30. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 935 (1989).

31. *Id.* at 936; *see also id.* at 953-60 (examining the types of troubling questions that can be avoided, including the claimant's sincerity and the religiosity of the claimant's beliefs or practices).

32. SCHUBERT, *supra* note 11, at 77 (speculating that this premise may skew the balancing analysis).

33. *Butler*, 116 F. Supp. 2d at 1047 ("[B]y choosing to go out for the team, high school athletes voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995))).

34. *See, e.g.*, Calandra by Calandra v. State Coll. Area Sch. Dist., 512 A.2d 809, 811 (Pa. Commw. Ct. 1986) (holding that an interscholastic baseball program could exclude a would-be participant who refused for religious reasons to receive a tetanus immunization, finding that "participation in interscholastic sports . . . does not rise to the level of an important govern-

tice is not an essential or mandatory aspect of the athlete's faith,[35] where the athlete or the athlete's parents did not undertake all possible steps to avoid or mitigate the conflict,[36] or where the administrative rule (such as a transfer ineligibility rule) was already in place and the conflict arose from the claimant's or claimant's parents' subsequent religiously motivated decisions.[37]

2. Limitations on the Government's Rebuttal

To the extent that a claimant makes these initial evidentiary showings, which comprise the elements of a prima facie free exercise claim, the government may then attempt to challenge their factual or legal sufficiency. In so doing, however, the government may find that some of its efforts are restricted by, of all things, the First Amendment. In particular, courts are manifestly uncomfortable with the notion that either they or any other governmental entity should be able to second-guess a claimant's allegation that his or her beliefs constitute a "religion" or that the burdened practice is "religious," much less that the claimant's religious belief or practice is adequate.[38] The issue merits some attention in this

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ment benefit" and therefore the administrative exclusion does not burden the child's free exercise of religion).

35. *See, e.g.*, Griffin High Sch. v. Illinois High Sch. Ass'n, 822 F.2d 671, 674 (7th Cir. 1987) (finding no interference with important or fundamental religious tenets by application of a transfer rule); Menora v. Illinois High Sch. Ass'n, 683 F.2d 1030, 1033-34 (7th Cir. 1982) (finding no burden on Jewish basketball players who, because of a no-headwear rule, could not wear yarmulkes, where Jewish law did not specifically dictate the type of head covering that must be worn), *cert. denied*, 459 U.S. 1156 (1983); *Robbins*, 941 F. Supp. at 792 (finding no evidence of "'grave interference with important . . . religious tenets'" by application of a transfer rule (quoting *Yoder*, 406 U.S. at 218)); Keller by Keller v. Gardner Cmty. Consol. Grade Sch. Dist. 72C, 552 F. Supp. 512, 514-15 (N.D. Ill. 1982) (finding that a rule precluding elementary school basketball players who miss a practice, except in cases of illness or death in the family, from playing in the next scheduled game did not impose a burden on the free exercise of religion of a player who missed practices due to catechism classes because the classes were not truly mandatory).

36. *See, e.g.*, Valencia v. Blue Hen Conference, 476 F. Supp. 809, 822 (D. Del. 1979) (sustaining a conference's refusal to admit a religious school, holding among other things that the refusal did not burden the parents' free exercise rights because "there are means available to [the school] and the plaintiffs to alleviate the burdens complained of here that do not create any conflicts with the precepts of the Catholic religion"), *aff'd*, 615 F.2d 1355 (3d Cir. 1980).

37. *See, e.g.*, Walsh v. Louisiana High Sch. Athletic Ass'n, 616 F.2d 152, 158 (5th Cir. 1980) (rejecting student's challenge to "student transfer rule," making student attending high school outside his home district ineligible to participate in interscholastic athletics for one year, because of "the *de minimis* nature of the burden placed on the plaintiffs' free exercise of religion"), *cert. denied*, 449 U.S. 1124 (1981); Cooper v. Oregon Sch. Activities Ass'n, 629 P.2d 386, 390-91 (Or. Ct. App. 1981).

38. Only a few courts have attempted to formulate systematically a constitutional definition of religion. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430,

article because school administrators are periodically confronted with unusual or unorthodox beliefs and practices, and therefore run the risk of reflexively utilizing a conventional definition of religion, rejecting an unconventional claim out of hand, and violating (unwittingly) both the Establishment and the Free Exercise Clauses. To prevent this, administrators should carefully consider the following judicial admonitions.

First, while the government is not entirely disabled from deeming a claimant's beliefs or practices categorically nonreligious,[39] it cannot do so merely because they are "not . . . acceptable, logical, consistent, or comprehensible to others,"[40] inconsistent with the beliefs of fellow adherents to the same religion,[41] or only recently acquired or apprehended

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438-41 (2d Cir. 1981); Africa v. Pennsylvania, 662 F.2d 1025, 1031-36 (3d Cir. 1982), *cert. denied*, 456 U.S. 908 (1982). The larger problem of defining religion is examined in Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 28-32 (2000); Val D. Ricks, *To God God's, To Caesar Caesar's, and To Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053 (1993); Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982).

39. Ben-Yahudah v. Bolden, No. 94-2438, 1996 WL 571145, at *4 n.1 (6th Cir. Oct. 3, 1996) ("The [s]tate . . . obviously has no business deciding whether any religion is 'true' in a theological sense, but we assume for purposes of this opinion that it is not inappropriate for the state to determine whether a group of prisoners seeking permission to worship together will in fact be meeting for purposes that can fairly be termed 'religious.'").

40. *Thomas*, 450 U.S. at 714; *see also* Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."). *But cf. Thomas*, 450 U.S. at 715 (conceding that a claim might be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause").

41. *See, e.g.*, *Hernandez*, 490 U.S. at 699 ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 457-58 (1988) (rejecting an approach that "would require us to rule that some religious adherents misunderstand their own religious beliefs").

> Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ. . . . Intrafaith differences of that kind are not uncommon among followers of a particular creed . . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow [adherent] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Thomas, 450 U.S. at 715-16. *See also* Doswell v. Smith, No. 94-6780, 1998 WL 110161, at *3 (4th Cir. Mar. 13, 1998) (stating that a religious "practitioner's understanding of the origins, exact contours, or reasons for . . . [a] particular practice may be mistaken, or incomplete, or at serious odds with the understanding of others holding the belief, including even those most expert by education or experience in interpreting its true nature, is beside the point"). *But see* State v. Phelps, 967 P.2d 304, 311 (Kan. 1998) ("The First Amendment to the United States

by the claimant.[42] These considerations *may* be relevant to a determination of whether the claimant's beliefs are sincerely held, but they generally cannot be employed to assess whether those beliefs are in the first instance religious. Second, while the government may permissibly conclude as a factual matter that a certain religious belief is not sincerely held by a claimant,[43] the government may not assess the ultimate validity—that is, the "'truth or falsity,' 'reasonableness,' 'verity,' 'correctness,' or 'worthiness'"[44]—of the religious belief itself.[45] As one federal judge recently explained:

> Under the United States Constitution, an individual's right to believe in anything he or she chooses is unquestioned. Religious beliefs are not required to be consistent, or logical, or acceptable to others. Governmental questioning of the truth or falsity of the beliefs themselves is proscribed by the First Amendment. A religious belief can appear to every other member of the human race preposterous, yet merit the protections of the Bill of Rights. Popularity, as well as verity, are inappropriate criteria.[46]

For its part, the judiciary has thus typically erred towards an inclusive conception of religion, often bypassing the issue entirely and simply assuming for adjudication purposes that a particular claim is, in fact, relig-

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Constitution . . . does not . . . allow one to commit a crime and then seek protection based on a personal interpretation of the Bible not shared by a recognized religious group or clearly exercised as a religious act.").

42. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987) ("The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired. The timing of [the employee's] conversion is immaterial to our determination that her free exercise rights have been burdened . . . .").

43. *See, e.g.*, Mosier v. Maynard, 937 F.2d 1521, 1523, 1526-27 (10th Cir. 1991) (elaborating on the nature of the sincerity analysis), *cert. denied*, 510 U.S. 895 (1993); Lipton v. Peters, No. SA-99-CA-0235-EP, 1999 WL 33289705, at *4-*5 (W.D. Tex. Oct. 12, 1999) (finding insincerity), *aff'd*, 240 F.3d 1074 (5th Cir. 2000).

44. Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 221 (2000) (respectively quoting Sherbert v. Verner, 374 U.S. 398, 407 (1963); Callahan v. Woods, 658 F.2d 679, 685 (9th Cir. 1981); United States v. Ballard, 322 U.S. 78, 86 (1944); Smith by Smith v. Board of Educ., 844 F.2d 90, 93 (2d Cir. 1988); Kaplan v. Hess, 694 F.2d 847, 851 (D.C. Cir. 1982)).

45. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985) ("[I]t is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course, to the verity—of someone's religious beliefs in . . . the free exercise context . . . ."), *aff'd*, 479 U.S. 60 (1986); United States v. Lemon, 723 F.2d 922, 938 n.49 (D.C. Cir. 1983) (similar); Cohen v. United States, 297 F.2d 760, 765 (9th Cir. 1962) (similar), *cert. denied*, 369 U.S. 865 (1962); Ala. & Coushatta Tribes v. Treasurers of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1328 (E.D. Tex. 1993).

46. Dekoven v. Bell, 140 F. Supp. 2d 748, 762 (E.D. Mich. 2001).

ious.[47] What this means for school officials—whether principals, teachers, athletic administrators, or coaches—is that they, too, should err on the side of inclusion and must never, under any circumstances, summarily reject an athlete's religious claim on the ground that it is believed to be mistaken, heretical, or incredible.

3. Levels and Components of Judicial Scrutiny

Should the claimant successfully demonstrate the substantial burdening of a religious practice, and should this demonstration go unrebutted, the challenged regulation will then be subjected to one of two levels of judicial scrutiny.[48] Under current free exercise doctrine, *strict scrutiny* obtains if the regulation is not religiously neutral,[49] if it is not generally applicable,[50] if the government refuses to consider a religious exemption even though the regulation "len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct[,]"[51] or, possibly, if the free exercise claim is asserted "in conjunction with other constitutional protections."[52] In such instances, the evidentiary burden shifts to the government to demonstrate that its action "advance[s] 'interests of the highest order' and . . . [is] narrowly tailored in pursuit of those inter-

47. *See, e.g.*, Wells v. City & County of Denver, 257 F.3d 1132, 1152 (10th Cir. 2001) ("assum[ing], without deciding, that atheism is a religion for First Amendment purposes"); Kunselman v. Western Reserve Local Sch. Dist., 70 F.3d 931, 931 (6th Cir. 1995) ("assum[ing] that Satanism or the Church of Satan is a 'religion' for purposes of summary judgment"); Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1378 (9th Cir. 1994) ("assum[ing], without deciding, that [witchcraft or Wicca] is a religion for the purpose of this appeal"); Haff v. Cooke, 923 F. Supp. 1104, 1108 (E.D. Wis. 1996) ("assum[ing], without deciding, that Identity Christianity is a religion"); Church of Iron Oak, Inc. ATC v. City of Palm Bay, 868 F. Supp. 1361, 1362 n.1 (M.D. Fla. 1994) ("assum[ing] without deciding that Wicca is a 'religion' within the meaning of applicable federal law"), *aff'd*, 110 F.3d 797 (11th Cir. 1997); Faheem-El v. Lane, No. 82 C 4404, 1984 WL 717, at *2 n.1 (N.D. Ill. June 29, 1984) (assuming that "the El Rukn Science Temple . . . is a valid religion"); *cf.* Muhammad v. Giant Food, Inc., No. Civ. JFM-98-3565, 2000 WL 1828248, at *5 n.4 (D. Md. Nov. 27, 2000) ("assum[ing] for the purpose of this memorandum that the Million Man March constitutes a religious holiday").

48. This may not be entirely accurate. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 n.7 (3d Cir. 1999) (applying by assumption "an intermediate level of scrutiny . . . since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny"), *cert. denied*, 528 U.S. 817 (1999). For a discussion of whether intermediate standards of scrutiny should or do apply specifically within the primary and secondary educational context, see Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 658-61 (1999).

49. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 546 (1993); *Smith*, 494 U.S. at 877-78.

50. *City of Hialeah*, 508 U.S. at 531, 542, 546; *Smith*, 494 U.S. at 877-78.

51. *Smith*, 494 U.S. at 884.

52. *Id.* at 881.

ests"[53] or, more succinctly, that it is "necessary to effectuate a compelling interest."[54] In all other cases, *rational basis scrutiny* applies, and the evidentiary burden remains with the claimant to demonstrate that the action is not rationally or reasonably related to a legitimate government interest.[55]

In actuality, the appropriate standard of judicial review has for several years been the source of both interpretive discord within the Supreme Court and institutional wrangling between the Court and Congress. Beginning in the 1960s, the Court's opinions indicated that in *any* instance where a claimant could demonstrate a substantial governmental burden on a religious practice rooted in sincerely held religious beliefs, the government had to prove that its law was necessary to achieve a compelling interest (strict scrutiny), even if the law was neutral and generally applicable and the free exercise burden was merely incidental or inadvertent.[56] In 1990, however, the Court definitively rejected this reading of the First Amendment,[57] holding instead that strict scrutiny is triggered only when there arises one of the conditions noted above, such as lack of neutrality or lack of general applicability.[58] In 1993, Congress responded by enacting the Religious Freedom Restoration Act,[59] known by the rather canicular acronym "RFRA." Statutorily, RFRA purported to reimpose the strict scrutiny standard upon all state and local (and federal) laws, including neutral and generally applicable laws, that placed a substantial burden, even incidentally, on a claimant's religious practices. Then, in 1997, the Court held that RFRA's application to state and local governments exceeded Congress's

53. *City of Hialeah*, 508 U.S. at 546 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (plurality opinion)) (internal quotation marks omitted); *see also Sherbert*, 374 U.S. at 407 (requiring that there be "no alternative forms of regulation [which] would combat such abuses without infringing First Amendment rights").

54. *Smith*, 494 U.S. at 883 (dictum).

55. Hyman v. City of Louisville, 132 F. Supp. 2d 528, 538 (W.D. Ky. 2001). *Smith* does not expressly impose a rationality requirement as such, but it is implicit in the requirement that the government action must, at the very least, be "consistent with the Federal Constitution." *Smith*, 494 U.S. at 876.

56. *See, e.g.*, *Hobbie*, 480 U.S. at 141-42; *Thomas*, 450 U.S. at 718; *Yoder*, 406 U.S. at 215; *Sherbert*, 374 U.S. at 406.

57. *Smith*, 494 U.S. at 878-80; *see also City of Hialeah*, 508 U.S. at 531.

58. *Smith*, 494 U.S. at 878-84; Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1051-60 (2000) (discussing the underlying purposes, doctrinal modifications, and wider implications of the *Smith* decision).

59. 42 U.S.C. §§ 2000bb – 2000bb-4 (1994).

enforcement power under the Fourteenth Amendment,[60] once again leaving neutral and generally applicable state and local laws largely subject only to rational basis review as a matter of federal law. Finally, in 2000, Congress enacted yet another religious freedom statute, the Religious Land Use and Institutionalized Persons Act.[61] But while this statute, like RFRA, reapplies the strict scrutiny standard to the decisions of state and local government,[62] as its title implies it does so only to decisions relating to land use and institutionalized persons (which student athletes are not).[63] The end result, therefore, is that after several years of judicial and congressional sparring, state and local governmental decisionmaking that burdens the religious practices of student athletes will now, as a matter of federal law, for the most part be subject to rational basis review, absent one of the conditions noted above.

Of the two possible standards of judicial review, of course, rational basis scrutiny is by far the more favorable to the government. For one thing, laws ordinarily are presumed constitutional. This presumption is maintained under rational basis scrutiny, and therefore the *claimant* must demonstrate that the law is not rationally or reasonably related to a legitimate government interest.[64] For another thing, this is an enormously difficult task. Legitimate interests are many and omnipresent, ranging from the traditional aspects of a state's police power (health, welfare, safety, and morals) to the mundane needs of governmental ad-

60. City of Boerne v. Flores, 521 U.S. 507 (1997). The holding and reasoning of *City of Boerne* were most competently forecast by Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 60-79 (1995). Constitutionally humbled, Congress eventually amended RFRA to conform to the Court's holding. Pub. L. No. 106-274, § 7, 114 Stat. 803, 806 (Sept. 22, 2000).

61. 42 U.S.C. §§ 2000cc – 2000cc-5 (2001).

62. *Id.* §§ 2000cc(a)(1), 2000cc-1(a). The statute was recently upheld against an array of constitutional challenges. Mayweathers v. Terhune, No. CIVS961582LKKGGHP, 2001 WL 804140 (E.D. Cal. July 2, 2001). However, the district court's analysis of congressional power under the Commerce Clause, which undergirds some of the statute's provisions, failed to address the issue of whether governmental burdening of religious practices can legitimately be deemed economic or commercial, as *United States v. Lopez*, 514 U.S. 549, 561, 565-66 (1995), appears to require. *Mayweathers*, 2001 WL 804140, at *8 (addressing only the existence of a jurisdictional element).

63. 42 U.S.C. § 2000cc-1(a) defines institutionalized persons with reference to 42 U.S.C. § 1997, which in turn defines "institution" as any state facility for the disabled, for prisoners, for pretrial or juvenile detainees, or for those receiving various forms of care. *Id.* § 1997(1) (1994).

64. Branson v. O.F. Mossberg & Sons, 221 F.3d 1064, 1065 n.4 (8th Cir. 2000) (explaining that under rational basis review "state statutes are presumed constitutional, and the plaintiff has the burden to show otherwise").

ministration (cost minimization and resource allocation).[65] Likewise, a reasonable or rational relationship between a regulation's design and one of these legitimate interests should be virtually impossible not to articulate. To be sure, courts have generally shown a willingness at this level of review to accept after-the-fact characterizations of a regulation's objectives or internal logic, and in some instances have even been willing to divine them on their own.[66]

This sharply contrasts with the rigors of strict scrutiny. Under this standard, the evidentiary onus shifts to the government, requiring *it* to demonstrate that the law is necessary to achieve a compelling government interest. The presumption of constitutionality is extinguished, as is the judiciary's willingness to assist the government in salvaging its regulatory handiwork.[67] In addition, the elements of this test—what the government must now demonstrate—are appreciably more difficult to satisfy. Compelling interests by definition comprise a much narrower set of government objectives,[68] and regulations are seldom written or designed so precisely as to make them "necessary" or the "least restrictive means" to achieve the government's interest. Often there are alternative ways of accomplishing the same objective that would be less burdensome to a claimant's religious practices, and a court's task under strict scrutiny is essentially to hold the government to these less restrictive alternatives.[69]

The conditions that can trigger strict scrutiny will be discussed shortly. At this point, the focus will remain on satisfaction of the test itself. Of its two parts—compelling interest and necessity or least restrictive means—the compelling interest requirement is, in general, probably the easier to satisfy, except perhaps where the challenged regulation is selectively aimed at religious practices.[70] Health and safety, for

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65. Scott C. Idleman, *Why the State Must Subordinate Religion, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 175, 177 (Stephen M. Feldman ed., 2000).

66. United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) ("Under the rational basis test, if there is a 'plausible reason[ ] for Congress' action, our inquiry is at an end.' We need not find that the legislature ever articulated this reason, nor that it actually underlay the legislative decision, nor even that it was wise." (quoting United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980))), *cert. denied*, 529 U.S. 1005 (2000).

67. Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993) ("Under the strict scrutiny standard, we accord the classification no presumption of constitutionality."), *cert. denied*, 511 U.S. 1127 (1994).

68. Idleman, *supra* note 65, at 177.

69. *See, e.g., Fraternal Order of Police*, 170 F.3d at 366-67; *Rader*, 924 F. Supp. at 1558; *cf.* State v. Miller, 549 N.W.2d 235, 241-42 (Wis. 1996).

70. In such cases, the government faces at least two problems. First, the failure to extend the law to comparable nonreligious activities undermines the notion that the law's objective is

example, are often deemed compelling interests,[71] and many athletic regulations are clearly rooted in health or safety concerns.[72] In addition, some courts have held that a state's interest in the regulation of high school athletics, specifically the prevention of harmful recruiting practices through transfer ineligibility rules, is by itself compelling.[73] Interests in cost reduction or administrative convenience are, by comparison, less likely to be deemed compelling and, due to their empirical nature, are also vulnerable to the corollary inquiry into least restrictive means. That said, courts *may* be persuaded by administrative arguments which overlap with their own institutional interest in keeping the scope of the free exercise guarantee within manageable bounds. Thus, for example, a demonstrable assertion that allowing a particular claimant to prevail would effectively open the free exercise floodgates—either because of the number of similarly situated potential claimants or because of an inability to distinguish between genuine and insincere claims—may be influential in the judicial scrutiny process.[74] Finally, governments have periodically tried to justify religiously burdensome rules, particularly those that distinguish between religious and nonreligious participation or expression, as efforts to comply with the Establishment Clause. In recent years, however, as Establishment Clause doctrine has itself

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compelling. If an interest is truly compelling, its achievement should be sought generally, not selectively. *City of Hialeah*, 508 U.S. at 546-47; *Rader*, 924 F. Supp. at 1557. Second, because the law is not religiously neutral, the interest not only must generally compel the law as such, but also must specifically compel the religious discrimination. *See, e.g.*, *Fraternal Order of Police*, 170 F.3d at 365 (rejecting governmental efforts to distinguish between medical exemptions, which were provided, and religious exemptions, which were not).

71. *See, e.g.*, Cheema v. Thompson, 67 F.3d 883, 885 (9th Cir. 1995) (finding that "the school district had a compelling interest in campus safety"); Brandon v. Board of Educ. of Guilderland Cent. Sch. Dist., 635 F.2d 971, 976 (2d Cir. 1980) (noting the state's "compelling interest in public health, welfare, [and] morality"), *cert. denied*, 454 U.S. 1123 (1981); O'Halloran v. University of Wash., 679 F. Supp. 997, 1007 (W.D. Wash. 1988) (upholding an athletic drug testing program in light of "the compelling interest . . . in protecting the health of student-athletes").

72. *See, e.g.*, *Menora*, 683 F.2d 1030 (addressing a state high school association's safety-based ban on headwear among basketball players); *Schools Get Right to the Point with Body Piercing*, PLAIN DEALER (Cleveland, Ohio), Feb. 8, 1999, at B10 (reporting that "[t]he Ohio High School Athletic Association prohibits jewelry of any kind, for safety reasons"), *available at* 1999 WL 2348108; *see also* McGahey, *supra* note 9, at 163 (noting the potential validity of certain safety regulations).

73. *Walsh*, 616 F.2d at 158-59; *Cooper*, 629 P.2d at 390.

74. Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 CUMB. L. REV. 47, 77 (2000-2001) ("[C]ourts will often consider whether the claimant's behavior is of the kind that many people would like to engage in—that is, whether the behavior coincides strongly with secular self-interest. If so, then granting one exemption will likely require granting scores of others in order to be consistent, and will thus be far more likely to undermine a law's basic purposes.").

changed, courts have been increasingly less willing to accept such attempted compliance as a compelling interest.[75]

The second inquiry asks whether the challenged rule is necessary or narrowly tailored to the achievement of the government's interest, and especially whether there is an equally efficacious alternative that is less restrictive of the athlete's religious practices.[76] Unlike the compelling interest analysis, which tends to be legal and categorical, this inquiry is heavily factual or empirical and will turn on the specific data, expert testimony, and other evidence that the parties present to the court.[77] Useful generalizations are therefore difficult to make. Nonetheless, it is probably fair to say that, within this inquiry, aggressive claimants are more likely to undermine the government's assertions and, correspondingly, those assertions may be less likely to receive the deference of the court.[78]

4. Causes of Heightened Judicial Scrutiny

Although some have argued that strict scrutiny within the free exercise context is actually applied less rigorously than within other constitutional contexts,[79] nevertheless it is far more demanding than rational

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75. Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2103-07 (2001); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95 (1993); Peter v. Wedl, 155 F.3d 992, 997 (8th Cir. 1998); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 97-98 (2000).

> At present, there remain only a few areas in which the Establishment Clause imposes special disabilities on religion which might provide a justification for exemptions. These include prohibitions on government encouragement of or participation in religious worship, on the delegation of governmental authority to religious organizations, and on laws wholly lacking a plausible secular purpose.

Gedicks, *supra*, at 98.

76. In cases of non-neutrality, a court may also examine (under the narrow tailoring requirement) the extent to which there is an equally effective alternative that is less discriminatory towards the athlete's religious practices. *City of Hialeah*, 508 U.S. at 546 (deeming it problematic that the challenged ordinances were "in substantial respects" not only "overbroad" or "achiev[able] by narrower ordinances that burdened religion to a far lesser degree" but also "underinclusive" or "not pursued with respect to analogous nonreligious conduct").

77. *See, e.g.*, *Walsh*, 616 F.2d at 159.

78. *Cf.* Sable Communications, Inc. v. FCC, 492 U.S. 115, 129 (1989) (noting that legislative findings are not conclusive with regard to First Amendment compliance). *Compare* Hamilton v. Schriro, 74 F.3d 1545, 1554 n.10 (8th Cir. 1996) (explaining in a RFRA case that even prison authorities, normally entitled to deference, "must do more than offer conclusory statements and post hoc rationalizations for their conduct"), *cert. denied*, 519 U.S. 874 (1996), *with* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 596 (1998) (contending that the least restrictive means may have actually been the "most common instrument" by which judges weakened RFRA's textually rigorous standard of review).

79. Idleman, *supra* note 65, at 180.

basis scrutiny and should therefore be avoided unless absolutely necessary.[80] To this end, the following is a somewhat closer examination of the conditions that can trigger this heightened judicial scrutiny.[81] It should be noted at the outset, however, that the precise scope of these conditions is presently unclear[82] and lower courts, both state and federal, are not uniform in either their interpretation or their application of them.[83]

a. Lack of Neutrality

A governmental action will be subjected to strict scrutiny if it is not religiously "neutral," that is, if its "object . . . is to infringe upon or restrict practices because of their religious motivation . . . ."[84] This neutrality must exist not only among religions, but also "*between* religion and non-religion."[85] Most obviously, non-neutrality can inhere in a law or policy as it is enacted. Thus, a court will look first and foremost at the policy's wording,[86] and if necessary at its breadth and structure, its apparent objectives, the history and context of its enactment, and its in-

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80. As the *Smith* Court remarked, "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test." *Smith*, 494 U.S. at 888.

81. There is an additional condition, not examined here, that can trigger strict scrutiny. This is the judicially recognized "ministerial exception" to Title VII of the Civil Rights Act of 1964. Combs v. Central Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 348-51 (5th Cir. 1999) (holding that the exception triggers strict scrutiny even after *Smith*); EEOC v. Catholic Univ., 83 F.3d 455, 461-63 (D.C. Cir. 1996) (same). The exception relates to the employment of clergy and like personnel, however, and has no obvious relation to student athletes at public educational institutions.

82. Kaplan, *supra* note 58, at 1046-47.

> [T]he *Smith* opinion itself does not articulate clearly a test for determining what is a neutral, generally applicable law, nor does it expressly clarify how narrowly or broadly the *Sherbert* exception should be construed. At the same time, *Smith* offers no clear indication of whether its reference to precedents that it describes as 'hybrid situations' establishes an additional exception to *Smith*.

Id.

83. *Id.* at 1060-73 (cataloging the confusion).

84. *City of Hialeah*, 508 U.S. at 533; *see also id.* at 532 (explaining that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons"). Conversely, "[a] law is neutral with respect to religion if it does not use religion as a basis of classification—that is, if the religious character of the beliefs and practices of those to whom a law applies is irrelevant to the goals of its classification scheme." Gedicks, *supra* note 75, at 96-97.

85. *Hartmann*, 68 F.3d at 978.

86. *City of Hialeah*, 508 U.S. at 533-34.

tended and natural mode of operation.[87] Non-neutrality can also inhere in the manner in which an otherwise neutral law or policy is applied, as might occur with selective application in the absence of reviewably clear standards of implementation (in which case the law may effectively lose its general applicability, as well).[88]

Apart from instances where the government is attempting to avoid an Establishment Clause violation, few laws or policies are enacted today that expressly provide for, or otherwise have the object of, the adverse treatment of religious practices.[89] The more likely risk is that a neutral law may be discriminatorily applied, particularly among religions and especially against unpopular or unorthodox religious practices. Athletic regulations, no less than other laws, can be constitutionally mishandled in this way. Consider a regulation, rooted in safety, generally banning the wearing of jewelry in a certain sport. Unless enacted specifically to prevent athletes from wearing religious symbols, such as a cross or a Star of David, the regulation will presumably be deemed neutral. Consider, however, a coach's decision to allow Christian and Jewish players to wear their symbols, but then not to allow a Wiccan player to

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87. *Id.* at 534-35; *Hyman*, 132 F. Supp. 2d at 537-38; Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead, 98 F. Supp. 2d 347, 352-54 (S.D.N.Y. 2000); Storm v. Town of Woodstock, 32 F. Supp. 2d 520, 527 (N.D.N.Y.), *aff'd*, 165 F.3d 15 (2d Cir. 1998); *see, e.g.*, Horen v. Commonwealth, 479 S.E.2d 553, 557 (Va. Ct. App. 1997) (holding that a state criminal law was not religiously neutral where its prohibition applied "except as specifically permitted by law" and there was no religion exception). These factors are similar to the factors used to discern a legislative objective under the Equal Protection Clause, *see City of Hialeah*, 508 U.S. at 540, or "purpose" under the first prong of the *Lemon* test of the Establishment Clause. *See generally* Edwards v. Aguillard, 482 U.S. 578, 586-94 (1987); Stone v. Graham, 449 U.S. 39, 41-42 (1980) (per curiam).

88. *See, e.g.*, *Rader*, 924 F. Supp. at 1554-55 (concluding that a university housing policy, though "neutral on its face and in its purpose[,]" was not "being enforced in a neutral manner" when it exempted over one-third of students for a variety of reasons but not religious reasons and "when administrators base decisions upon their own religious experiences and their own perceptions of the religious beliefs of others"); *cf. Yeshiva Chofetz Chaim Radin*, 98 F. Supp. 2d at 353; *cf., e.g.*, Cosby v. State, 738 N.E.2d 709, 712 (Ind. Ct. App. 2000) (addressing, somewhat facetiously, the application of a facially neutral law).

89. "In fact, there are almost no cases in which an arm of the government has prohibited a religious practice because it was a religious practice. The majority of cases deal with at least ostensibly neutral laws." *Hartmann*, 68 F.3d at 979. Periodically, governmental entities, particularly in the educational setting, enact or implement policies concerning expression or access to resources (such as funding or facilities) that explicitly discriminate on the basis of religion, purportedly in an effort to comply with the Establishment Clause. However, such regulations in recent years have generally been invalidated, often on free speech grounds. *See, e.g.*, *Good News Club*, 121 S. Ct. at 2099-2102 (after-hours access to school facilities); Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 828-37 (1995) (funding for student organizations); *Lamb's Chapel*, 508 U.S. at 393-94 (after-hours access to school facilities).

wear a Wiccan symbol. If that should occur, and assuming no plausible safety reason for distinguishing among the symbols, then the law's application would invariably be deemed non-neutral and thus subject to strict scrutiny.

b. Lack of General Applicability

A law will also be strictly scrutinized if it is selectively, as opposed to generally, applicable. Applicability describes a law's breadth of coverage in relation to comparably situated persons or activities, and a generally applicable law, accordingly, is one that basically applies to all such persons or activities, except where noncoverage either is necessary as a matter of public safety or welfare or is congruent with the law's particular objectives.[90] A highway speed limit, for example, is considered generally applicable, even though ambulances may be allowed to exceed it to preserve life or health and even though police officers may be allowed to exceed it in the process of apprehending speeders.

For free exercise purposes, the issue of general applicability is relevant when a law appears to exempt from its coverage one or more nonreligious activities, persons, or institutions, but does not comparably exempt those of a religious nature. More specifically, a reviewing court will examine whether the nonexemption of religion is so unwarranted or so aberrational that it may fairly be said that the "government . . . [has] in a selective manner impose[d] burdens only on conduct motivated by religious belief . . . ."[91] Because "[a]ll laws are selective to some extent"[92] the test is necessarily one of *substantial underinclusiveness*,[93] wherein a court will carefully examine the effective scope of the law (the

90. *Cf., e.g., Fraternal Order of Police*, 170 F.3d at 366 (explaining that heightened scrutiny will not be triggered by statutory exceptions which "do[ ] not undermine the [government's] interest" or which allow "activities that [the government] does not have an interest in preventing"). For additional analysis, see David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201 (1997); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001).

91. *City of Hialeah*, 508 U.S. at 543. Needless to say, "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531. *See also id.* at 557-58 (Scalia, J., concurring in part and concurring in the judgment) ("[C]ertainly a law that is not of general applicability . . . can be considered 'nonneutral'; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability."); Kaplan, *supra* note 58, at 1075 (proposing that, because "the two inquiries overlap in many significant ways, . . . it is easier to collapse them into a single test").

92. *City of Hialeah*, 508 U.S. at 542.

93. *Id.* at 543, 546, 547.

"categories of selection"[94]) and the precise justifications for that scope, and determine whether or not the nonexemption of religion is "inconsequential."[95] In assessing a law's effective scope, moreover, courts will take into account not merely the exemptions expressly provided for in the law, but also those comparable persons or activities that the law, by its apparent silence, simply does not cover.[96]

For illustration, consider again a ban on the wearing of jewelry by athletic competitors. If the ban is absolute, with no categorical exemptions and no room for discretionary administrative waivers, then it is truly generally applicable. Alternatively, if the rule expressly exempts from its coverage medical alert bracelets or medals, and especially if it requires that they be securely fastened to the athlete, then the law would still probably be deemed generally applicable, because the exemption is not inconsistent with (and arguably furthers) the objective of the rule. If, however, the rule expressly exempts medical alert bracelets or medals as well as several other categories of jewelry, such as earrings and wedding bands, but does not exempt religious jewelry, then a court might find the rule to be non-generally applicable, especially if the non-medical exemptions are incongruent with the rule's objective. It is perhaps out of this very concern for general applicability that certain model athletic rules issued by the National Federation of State High School Associations (NFHS), which otherwise would prohibit jewelry, expressly provide exemptions for "[m]edical alert or religious medals" as long as they are "taped to the body so as not to be a hazard to the player or others."[97]

c. Exclusion from an Extant System of Individualized Assessment

Apart from the conditions of non-neutrality and selective applicability, the occasions for invoking strict scrutiny are less defined. One possi-

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94. *Id.* at 542.

95. *Id.* at 543. *See, e.g., id.* at 543-45 (finding that municipal ordinances prohibiting ritualistic or sacrificial animal slaughter were not generally applicable when, by their text and context, it remained lawful to, among other things, exterminate mice and rats, euthanize animals, hunt and fish, and kill animals for agricultural or food purposes); *Rader*, 924 F. Supp. at 1553 (finding that a state university rule, requiring freshman to live in university housing, was not generally applicable where "exceptions are granted . . . for a variety of non-religious reasons . . . [but] are not granted for religious reasons" and, because of the exceptions, "[o]ver one third of the freshman students . . . are not required to comply with the parietal rule").

96. *City of Hialeah*, 508 U.S. at 543-44 (assessing the applicability of ordinances by citing the activities that the ordinances' narrow drafting leaves unprohibited).

97. *E.g.*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, BOYS LACROSSE RULES BOOK, rule 1-10-2 (2001-2002) ("Jewelry is not permitted. Medical alert or religious medals, if worn, shall be taped to the body so as not to be a hazard to the player or others."), *available at* http://www.nfhs.org/sports/lacrosseboys_rules_change.htm.

bility, noted but not thoroughly explained by the Supreme Court, is that strict scrutiny may apply "where the [government] has in place a system of individual exemptions" but "refuse[s] to extend that system to cases of 'religious hardship[.]'"[98] More specifically, strict scrutiny may apply if the regulation, by its terms or actual implementation, "len[ds] itself to individualized governmental assessment of the reasons for the . . . conduct"[99] for which the claimant seeks an exemption, but the government categorically refuses to consider religious beliefs or practices as a potential basis of exemption.[100] Importantly, strict scrutiny in such cases is triggered not by the refusal of the religious exemption per se, but rather by the government's blanket refusal to consider religion as a possible reason for an exemption.[101]

This condition would seem to overlap significantly with the condition of selective or non-general applicability, leading some courts to analyze them together.[102] The difference appears to concern the mode, and perhaps the degree, of non-applicability. The inquiry into general applicability examines the enumerated exceptions, if any, provided for in the statute, whereas the inquiry into individual assessment examines the existence of some discretionary device, such as a "good cause" or "[ ]necess[ity]" or "exceptional circumstances" standard,[103] that the gov-

98. *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion)).

99. *Id. See also* Swanson by Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 701-02 (10th Cir. 1998); *Rader*, 924 F. Supp. at 1552-53.

100. Although the Court has spoken of this condition almost entirely in relation to unemployment compensation cases, see *Smith*, 494 U.S. at 882-84; *Swanson*, 135 F.3d at 701 (noting "some doubt concerning the continued validity of the . . . analysis outside the unemployment context"), the Court has not explicitly limited its relevance to that context. *City of Hialeah*, 508 U.S. at 537 (invoking it in a case involving municipal animal slaughter ordinances); *Rader*, 924 F. Supp. at 1552 n.23 ("Whether individualized exemptions constitute an exception to the *Smith* rule or merely preclude a finding of general applicability, . . . I see no justifiable basis for limiting consideration of them to only those cases involving unemployment compensation.").

101. Brian A. Freeman, *Expiating the Sins of* Yoder *and* Smith*: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 50-51 (2001) (explaining that the Court in *Smith* did not "mean[ ] that any refusal to exempt a person for reasons of religious hardship must be measured by strict scrutiny" but rather that "the categorical refusal to give any consideration to religious hardship whatsoever, while giving consideration to non-religious reasons for seeking an exemption, triggers strict scrutiny").

102. Kaplan, *supra* note 58, at 1062 (observing that some "courts conflate the 'generally applicable' inquiry with the 'individualized exemptions' analysis").

103. Respectively, see *Smith*, 494 U.S. at 884 (discussing the "good cause" standard in the unemployment compensation context); *City of Hialeah*, 508 U.S. at 537 (analyzing a municipal ordinance prohibiting one from "unnecessarily" killing animals); *Rader*, 924 F. Supp. at 1546-47 (addressing a university policy requiring that freshman live on-campus which provided for

ernment uses on a case-by-case basis to determine whether an individual should be excused from the statute's otherwise general application.[104] In fact, while this condition may superficially appear closer to non-general applicability, it is equally if not more related to non-neutrality (at least non-neutrality at the stage of implementation).[105] If the government has in place an open-ended mechanism for assessing individual hardship and employs this mechanism to assess secular reasons but refuses to employ it to assess religious reasons—"when the government makes a value judgment in favor of secular motivations, but not religious motivations"[106]—then what else, other than religious discrimination or non-neutrality, could explain the government's execution of the law?[107]

The potential relevance of this condition to any given athletic regulation will obviously depend on the regulation's wording and history of implementation. If the regulation expressly provides for its waiver upon some showing, such as good cause or exceptional circumstances, then athletes cannot categorically be denied the opportunity to assert religious reasons for seeking a waiver. Thus, for example, if medical conditions or family problems constitute recognized grounds for a waiver, then religious circumstances must also be considered. As noted earlier, the Free Exercise Clause does not necessarily require the waiver itself, but it does require assessment of religious reasons in the process contemplating waivers. Likewise, if the regulation contains no express provision for waiver, but nevertheless there is an informal practice of granting waivers in circumstances deemed appropriate, then this practice must include the consideration of religious and nonreligious reasons alike.[108]

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discretionary exemptions, such as medical or family-related matters, based on a showing of "significant and truly exceptional circumstances which would make living on-campus impossible").

104. *Cf. Fraternal Order of Police*, 170 F.3d at 365 (distinguishing between "a mechanism for individualized exemptions" and "a categorical exemption for individuals with a secular objection but not for individuals with a religious objection").

105. *City of Hialeah*, 508 U.S. at 537-38 (invoking this condition within an analysis of neutrality, analyzing the application of a municipal ordinance).

106. *Fraternal Order of Police*, 170 F.3d at 366.

107. *Bowen*, 476 U.S. at 708 (explaining that, "[i]f a state creates . . . a mechanism [for individual exemptions by using a good cause standard], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent" and that for the state "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion").

108. *Fraternal Order of Police*, 170 F.3d at 365-67 (holding that a police department's no-beard rule, to which an exception had been made for medical conditions, could not be applied without like consideration of religious objections, and ultimately that an exemption was required).

d. Assertion of a Hybrid Claim

A final possible condition for triggering heightened scrutiny is the claimant's assertion of a free exercise claim in conjunction with another constitutional claim,[109] although what level of scrutiny is actually triggered by such a "hybrid situation"[110] remains uncertain.[111] At present, the judiciary is deeply divided over the meaning, and even the existence, of this particular concept.[112] While a few courts have basically repudiated it,[113] most others have wrestled with the issues of what types of accompanying, or "conjunctive," claims will qualify and how viable these claims must be.[114]

As for what types of claims will suffice, the Supreme Court itself has explicitly identified "freedom of speech and of the press, . . . the right of parents . . . to direct the education of their children"[115] and possibly

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109. *Smith*, 494 U.S. at 881-82. For commentary, see William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998); Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993); Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119 (2000); James R. Mason, III, Comment, Smith*'s Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201 (1995).

110. *Smith*, 494 U.S. at 882.

111. Watchtower Bible & Tract Soc'y v. Village of Stratton, 240 F.3d 553, 561-62 (6th Cir. 2001) (holding that hybrid rights, even speech and religion, do not trigger strict scrutiny), *cert. granted in part*, 122 S. Ct. 392 (2001); Church at 925 S. 18th St. v. Employment Dep't, 28 P.3d 1185, 1192 (Or. Ct. App. 2001) ("Strictly speaking, the [*Smith*] Court did not say that, in any particular class of cases, a neutral, generally applicable law will be subject to strict scrutiny. It simply noted—without reference to any particular standard—that, in the past, the Court had struck down neutral, generally applicable laws when a case 'involved' both the Free Exercise Clause and some other constitutional protection.").

112. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704-07 (9th Cir. 1999) (canvassing the problem), *withdrawn by* 192 F.3d 1208 (9th Cir. 1999); City Chapel Evangelical Free, Inc. v. City of S. Bend, Ind., 744 N.E.2d 443, 452, 452-53 nn.11-12 (Ind. 2001) (noting federal and state court interpretations of the hybrid claim concept).

113. *See, e.g.*, Kissinger v. Board of Trs., 5 F.3d 177, 180 & n.1 (6th Cir. 1993); Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1288 n.12 (S.D. Fla. 1999) (questioning whether it "is tenable").

114. This article will use the term *conjunctive claim* to describe the claim asserted along with free exercise to constitute the hybridized claim. Others have employed varying terms. *See, e.g.*, Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) ("companion right") (quoting *Thomas*, 165 F.3d at 703); Kaplan, *supra* note 58, at 1069 n.107 ("conjoined constitutional claim"). In all events, both the free exercise claim and the conjunctive claim must presumably be leveled against the same law or governmental conduct, and their mere presence together in the same lawsuit would not be sufficient.

115. *Smith*, 494 U.S. at 881.

"freedom of association,"[116] but has not clearly indicated whether this enumeration is exclusive or merely illustrative.[117] Although some lower courts have expressed reluctance to extend the hybrid rights concept beyond these enumerated claims,[118] others have been willing to entertain the hybridization of free exercise with constitutional guarantees relating to the nonestablishment of religion,[119] the rights of property,[120] and the right to life,[121] though even they have drawn the line at the infamous "right to employ" of *Lochner v. New York*.[122]

This issue of defining the domain of potential conjunctive claims fundamentally concerns the coherence and administrability of the hybrid rights concept itself. Certainly, it cannot be the case that litigants may simply add to their free exercise claims one or more garden variety constitutional claims, each of which would ordinarily prompt only rational basis review, and expect that strict scrutiny will alchemically result from the blend. If nothing else, the omnipresence of potential due process and equal protection claims, normally requiring only rational basis review, reveals the unmanageability of such an approach.[123] But the alternative—to recognize only conjunctive claims that independently trigger heightened scrutiny—would seem to empty the hybrid rights concept of

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116. *Id.* at 882; *City Chapel*, 744 N.E.2d at 454 (entertaining the possibility of a hybrid free association-free exercise claim).

117. *Smith*, 494 U.S. at 882 (finding no hybrid situation, and declining to apply strict scrutiny, where the free exercise claim was "unconnected with any communicative activity or parental right" and there was "no contention that [the challenged law] represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs" but not explicitly stating that other constitutional claims could not also suffice).

118. *See, e.g.*, United States v. Carlson, No. 90-10465, 1992 WL 64772, at *2 (9th Cir. Apr. 2, 1992) ("It is questionable whether an equal protection claim can satisfy the hybrid claim requirements of *Smith*."), *cert. denied*, 505 U.S. 1227 (1992); Jane L. v. Bangerter, 794 F. Supp. 1537, 1547 n.11 (D. Utah 1992) (concluding that claims not involving communicative activity or parental rights "go beyond the formulation of the 'hybrid rights' exception established . . . in *Smith*").

119. *Catholic Univ. of Am.*, 83 F.3d at 467 (explaining in dictum that governmental interference with religious university employment "presents the kind of 'hybrid situation' referred to in *Smith*" because it "would both burden [the university's] right of free exercise and excessively entangle the Government in religion").

120. *Thomas*, 165 F.3d at 707-09.

121. *In re* Baby K, 832 F. Supp. 1022, 1030-31 (E.D. Va. 1993), *aff'd*, 16 F.3d 590 (4th Cir. 1994), *cert. denied*, 513 U.S. 825 (1994).

122. American Friends Serv. Communication Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991) ("At least since the demise of *Lochner v. New York*, 198 U.S. 45 (1905), the 'right to employ' has been accorded insufficient constitutional protection to place it alongside the cases *Smith* cites as examples of 'hybrid claims.'").

123. Kaplan, *supra* note 58, at 1067 (suggesting that "a very broad interpretation of the hybrid rights exception" by courts "destabilize[s], if not eviscerate[s], the holding of *Smith*").

any significance. If the conjunctive claim on its own would lead to heightened or strict scrutiny, then the presence of the free exercise claim adds nothing, and there really is no hybridization after all.[124] Arguably, the only clear application for the concept is for conjunctive claims that by themselves trigger some form of intermediate scrutiny (more than rational basis but less than strict), whereby hybridization could plausibly increase the level of review to strict scrutiny. But the intermediate scrutiny standard is relatively uncommon,[125] and opportunities to invoke the hybrid rights concept would, as a consequence, be proportionately infrequent, although perhaps this is precisely what the Supreme Court intended.[126]

Yet another uncertainty, regardless of how one defines the domain of potential conjunctive claims, is the extent to which the conjunctive claim must be legally viable. Obviously it cannot be legally frivolous. As the D.C. Circuit remarked of an attempt to assert a hybridized free exercise-free speech claim, where neither of the underlying claims had any merit, "in law as in mathematics zero plus zero equals zero."[127] Just as plainly, however, courts cannot require that the conjunctive claim be demonstrated to be definitively successful, for then the free exercise claim and the resulting strict scrutiny become an unnecessary postscript. Accordingly, several courts have adopted what is perceived to be an intermediate position: the conjunctive claim must be shown to be "colorable,"[128] that is, having "a fair probability or a likelihood, but not a certitude, of success on the merits."[129] In addition to, or as part of, this colorability showing, courts have also generally required that the conjunctive claim fall within the specific, precedentially-defined parameters of an existing constitutional right.[130] Regarding the parental right to direct a child's education, for example, the Tenth Circuit requires "a colorable showing

124. *City of Hialeah*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in the judgment).

125. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (gender discrimination); Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-24 (1995) (commercial speech); Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 65 (1988) (residency discrimination under the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2); Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (illegitimacy); United States v. O'Brien, 391 U.S. 367, 377 (1968) (content-neutral regulations of expression).

126. Kaplan, *supra* note 58, at 1083-84 ("To ensure that hybrid rights cases remain within the parameters established in *Smith*, the exception must be construed extremely narrowly.").

127. Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001).

128. *See, e.g.*, *Miller*, 176 F.3d at 1207-08; *Swanson*, 135 F.3d at 700.

129. *Miller*, 176 F.3d at 1207.

130. *See, e.g.*, *id.* at 1208; *Swanson*, 135 F.3d at 699-700; Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 933 (6th Cir. 1991).

of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child."[131]

As for the relationship between hybrid challenges and athletic regulations, there is, as they say, both good news and bad news. The bad news is that there is little that administrators can do prospectively to ward off potential hybrid claims. Unlike the other conditions, strict scrutiny is triggered in this instance not because of an intrinsic regulatory defect, such as non-neutrality or selective applicability, but because of an extrinsic convergence of two constitutional rights, one of which happens to be the free exercise of religion. Thus, administrators must basically wait for such challenges to arise and then decide whether to accommodate or to adjudicate the conflict. The good news is that such challenges are likely to be infrequent, mostly limited to conjunctive claims based on freedom of speech and possibly freedom of association, such as challenges to incidental restrictions on prayer, evangelization, or the wearing of religious clothing or symbols.[132] Indeed, even if the range of conjunctive claims is broad, extending beyond those acknowledged by the Supreme Court, it is difficult to envision their relevance within the specific context of interscholastic athletics.[133]

5. Forms of Accommodation—Mandatory and Permissible

If the regulation fails judicial scrutiny, the court will require by injunction that the defendant accommodate the religious practice of the athlete. Ordinarily, the regulation as a whole will remain constitution-

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131. *Swanson*, 135 F.3d at 700; *see also* Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (holding against hybridization because the parents' free exercise claim was "qualitatively distinguishable" from precedent), *cert. denied*, 516 U.S. 1159 (1996).

132. Assertions of parental rights, though often implicated within the educational context, would likely not survive the requirement (noted above) that a claim be well within existing precedent. *See, e.g.*, *Kite*, 661 F.2d at 1029-30 (rejecting a claim of parental right "to send their children to summer [collegiate] athletic camps"); Eastern N.Y. Youth Soccer Ass'n v. New York State Pub. High Sch. Athletic Ass'n, 488 N.Y.S.2d 293, 295 (N.Y. App. Div. 1985) (holding that parental rights encompass a student's decision to participate in athletics but do not extend to the regulation of athletics), *aff'd*, 490 N.E.2d 538 (N.Y. 1986); Eric W. Schulze, Commentary, *The Constitutional Right of Parents to Direct the Education of Their Children*, 138 EDUC. L. REP. 583, 593 (1999) (discussing *Kite*). *But see infra* notes 200-02 and accompanying text (exploring the viability of certain hybrid claims by home-schooling parents).

133. This is not to deny the relevance of other constitutional provisions to interscholastic athletics. 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 11.03[5] (Gary A. Uberstine ed., 2000) (noting several constitutional limitations). But within the athletic venue, it is difficult to imagine a convergence of most such provisions, other than the Free Speech Clause, with the free exercise of religion.

ally valid, but as applied to the claimant's religious practice, under the facts presented to the court, it will be declared violative of the Free Exercise Clause. In such a case, the result is one of judicially compelled or *mandatory accommodation*, subsequent denial of which by the defendant can result in a declaration of contempt of court subject to monetary penalty.

If so inclined, governmental entities may avoid the cost and publicity associated with a lawsuit seeking court-compelled accommodation by voluntarily accommodating an athlete's religious practice. Called discretionary or *permissible accommodation*, this method has been explicitly sanctioned by the Supreme Court[134] and can be prospectively employed by educational institutions to "avoid[ ] conflicts between [the] secular and religious activities" of their students.[135] The only specific qualification to the method of permissible accommodation is that it must abide by certain limits imposed by the Establishment Clause,[136] although these limits appear to be somewhat relaxed where the government is genuinely attempting to accommodate religious practices.[137] In particular, while a

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134. *Grumet*, 512 U.S. at 705-06 (recognizing that "the Constitution allows the State to accommodate religious needs by alleviating special burdens"); *Smith*, 494 U.S. at 890 (acknowledging legislative accommodation); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334-35 (1987).

135. Student Members of Playcrafters v. Board of Educ., 424 A.2d 1192, 1198 (N.J. Super. Ct. App. Div.) (explaining that "permissible accommodations to religion can take the form of avoiding conflicts between secular and religious activities"), *aff'd*, 438 A.2d 543 (N.J. 1981).

> When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

136. *Grumet*, 512 U.S. at 696-705 (invalidating a state statute uniquely enacted for "a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally"); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708-11 (1985) (invalidating a state statute that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath"); Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283, 287-88 (4th Cir. 2000) (expounding "[t]he line between benevolent neutrality and permissible accommodation, on the one hand, and improper sponsorship or interference, on the other"), *cert. denied*, 121 S. Ct. 1192 (2001); Conkle, *supra* note 38, at 12-13 (noting limitations on permissible accommodations).

137. *See, e.g.*, *Ehlers-Renzi*, 224 F.3d at 287 (explaining that "the government is entitled to accommodate religion without violating the Establishment Clause, and at times the government must do so" and that "[t]his authorized . . . accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice"); Montano v. Hedgepeth, 120 F.3d 844, 850 n.10 (8th Cir. 1997) ("[S]tates might commit a tech-

discretionary accommodation may be either informal (a one-time nonapplication of the rule) or formal (the inclusion and application of an express exception to the rule for religious practices), the Supreme Court has suggested that the latter method is constitutionally preferable because it reduces the likelihood of non-neutrality or discrimination among religious practices.[138]

B. Other Sources of Legal Protection

Although the Free Exercise Clause is perhaps the best known guarantee of religious liberty, several other laws may be equally or more relevant to conflicts between the religious beliefs or practices of interscholastic athletes and the rules or policies enacted or enforced by coaches, administrators, or athletic associations. First of all, there are other provisions of the U.S. Constitution. The Establishment Clause of the First Amendment, for example, prohibits a variety of governmental interactions with religion,[139] and in some instances may present distinct

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nical violation of the Establishment Clause by even hiring prison chaplains. Nonetheless, this is condoned as a permissible accommodation for persons whose free exercise rights would otherwise suffer."); *cf.* Snyder v. Charlotte Pub. Sch. Dist., Eaton County, 365 N.W.2d 151, 162-68 (Mich. 1984) (holding that public school classes can be provided to religious school students without violating the Establishment Clause).

138. *Grumet*, 512 U.S. at 702-05.

139. As interpreted today, the Clause prohibits governmental laws, policies, or actions: (1) that have no secular purpose, *Edwards*, 482 U.S. at 589-94; *Stone*, 449 U.S. at 41-42; Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), or that have the purpose of advancing or inhibiting religion, Agostini v. Felton, 521 U.S. 203, 222-23 (1997); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963); or (2) that have the primary effect of advancing or inhibiting religion, *Agostini*, 521 U.S. at 223; *Lemon*, 403 U.S. at 612, or of objectively endorsing or disapproving of religion, Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-69 (1995); County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989); Elewski v. City of Syracuse, 123 F.3d 51, 53-54 (2d Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); or (3) that create excessive entanglement between government and religion, *Agostini*, 521 U.S. at 232-33; Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126-27 (1982); *Lemon*, 403 U.S. at 613; Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); or (4) that coerce religious participation, either by legal sanction, Kerr v. Farrey, 95 F.3d 472, 476-80 (7th Cir. 1996); Griffen v. Coughlin, 673 N.E.2d 98 (N.Y. 1996), *cert. denied*, 519 U.S. 1054 (1997); Warner v. Orange County Dep't of Probation, 870 F. Supp. 69 (S.D.N.Y. 1994), or by psychological pressure, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311-12; Lee v. Weisman, 505 U.S. 577, 591-98 (1992); or (5) that discriminate among religious beliefs or practices, *Grumet*, 512 U.S. at 703; Larson v. Valente, 456 U.S. 228, 244-46 (1982); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); Everson v. Board of Educ., 330 U.S. 1, 15 (1947); Sasnett v. Litscher, 197 F.3d 290, 292-93 (7th Cir. 1999), or between religious beliefs or practices and nonreligious beliefs or practices. *Grumet*, 512 U.S. at 703; *Epperson*, 393 U.S. at 103-04. Having recited the litany, it is important to add that there are qualified exceptions for longstanding, culturally imbedded practices, Lynch v. Donnelly, 465 U.S. 668, 674 (1984); Marsh v. Chambers, 463 U.S. 783, 795 (1983); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997), and for government attempts to

advantages to would-be claimants.[140] In addition, abridgement of religious expression is likely limited by the First Amendment Free Speech Clause,[141] while religious discrimination is potentially actionable under the Fourteenth Amendment Equal Protection Clause.[142]

Alternative or heightened protection may also be afforded by federal statutory law. For instance, the relatively potent RFRA,[143] which em-

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accommodate the religious needs of its citizens. *See supra* notes 134-38 and accompanying text.

140. For one thing, the Establishment Clause normally does not demand the type or degree of personal religious infringement that the Free Exercise Clause requires, *Schempp*, 374 U.S. at 224 n.9, although for this very reason claimants may lack the personal factual injury necessary to satisfy the jurisdictional requirement of standing. *See, e.g.*, ACLU-NJ v. Township of Wall, 246 F.3d 258, 264-66 (3d Cir. 2001); Freedom from Religion Found. v. Zielke, 845 F.2d 1463, 1468-69 (7th Cir. 1988). For another thing, unlike the Free Exercise Clause, which judicially functions by balancing the relative interests of the parties, the Establishment Clause for the most part operates categorically: with one exception, once any of its proscriptions is transgressed, the offending government action becomes irredeemably and universally unconstitutional, no matter how compelling its objectives or well-tailored its means. Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514, 1539 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994); Ams. United for Separation of Church & State v. Dunn, 384 F. Supp. 714, 718 (M.D. Tenn. 1974), *judgment vacated on other grounds sub nom.* Blanton v. Americans United for Separation of Church & State, 421 U.S. 958 (1975). The exception is for facial religious discrimination, which is instead subject to strict scrutiny. *Larson*, 456 U.S. at 246-47; Koenick v. Felton, 190 F.3d 259, 264 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000).

141. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). Like the religion clauses, the Free Speech Clause applies to state and local governments via the Fourteenth Amendment. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964). Many religious practices, particularly those related to worship, are intentionally and intelligibly expressive or communicative; they deliberately convey particularized messages to God, to other practitioners, or to outsiders. In turn, they may warrant protection under the Free Speech Clause. In particular, discrimination against religious speech, at least within some type of public forum, is generally treated as violating the Clause's norm of content- or viewpoint-neutrality and, as such, is subjected to strict scrutiny. *See, e.g.*, *Good News Club*, 121 S. Ct. at 2099-2102; *Rosenberger*, 515 U.S. at 828-37. For a more complete exposition of current law, see the U.S. Secretary of Education's *Guidelines on Religious Expression in Public Schools* (rev. May 1998), *available at* http://www.ed.gov/Speeches/08-1995/religion.html.

142. U.S. CONST. amend. XIV, § 1 ("[No State shall] deny to any person within its jurisdiction the equal protection of the laws."). A parallel and identical guarantee of equal protection has been read, rather mysteriously, into the Fifth Amendment Due Process Clause. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215 (1995). Under the guarantee of equal protection, religious discrimination is apparently subject to heightened scrutiny. Miller v. Johnson, 515 U.S. 900, 911 (1995); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam); Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992); *Peter*, 155 F.3d at 997; Tolchin v. Supreme Ct. of the State of N.J., 111 F.3d 1099, 1113-14 (3d Cir. 1997), *cert. denied*, 522 U.S. 977 (1997); *But cf.* Gillette v. United States, 401 U.S. 437, 449 n.14 (1971) (suggesting the contrary). Insofar as such discrimination is clearly prohibited by the religion clauses, however, the Equal Protection Clause appears to add nothing unique to the constitutional mix.

143. 42 U.S.C. §§ 2000bb – 2000bb-4 (1994).

ploys a strict scrutiny standard, can apply to the educational institutions of the United States government (such as the military academies) as well as to those of the District of Columbia and Puerto Rico.[144] Importantly, however, there appears to be no general federal statute that explicitly protects the religious freedom of amateur athletes at educational institutions.[145]

Yet another source of protection can be state law, whether constitutional, statutory, or administrative. State constitutions, for example, typ-

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144. *Id.* § 2000bb-2(1)-(2) (providing that RFRA applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States" and to "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States"). RFRA's application to state and local governments, expressly included in the original version, was invalidated in *City of Boerne*, 521 U.S. 507. *See supra* note 60 and accompanying text. Notwithstanding *City of Boerne*, which rested largely on lack-of-congressional-power grounds, RFRA apparently remains valid as applied to the federal government. *Kikumura*, 242 F.3d at 958-60; Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 858-61 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998). *But cf. Henderson*, 253 F.3d at 16 (questioning, though not determining, RFRA's constitutionality in relation to the federal government); Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998) (arguing that RFRA is unconstitutional as applied to federal law); Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410 (1998) (same).

145. In general, private entities are subject to federal statutory requirements regarding religious nondiscrimination or accommodation when acting as employers, 42 U.S.C. § 2000e-2(a) (1994), or holding themselves out to the public in general as, for example, places of accommodation or as sellers or lessors of property. *See id.* § 3604(a)-(e). None of these relationships obviously pertains to the amateur student athlete, however. *But cf.* Kristi L. Schoepfer, Comment, *Title VII: An Alternative Remedy for Gender Inequity in Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 107 (2000); *and cf.* Thomas Joshua R. Archer, *The Structure of a Title VII Action Against a College for the Enforcement of NCAA Proposition 48*, 2 SPORTS LAW. J. 111 (1995). In addition, while schools can be subject to nondiscrimination requirements as direct or indirect recipients of federal funding, these requirements extend to gender, 20 U.S.C. § 1681(a) (1994), to disability, *id.* §§ 794(a), 794(b)(2)(A), and to race, color, or national origin, 42 U.S.C. § 2000d (1994); 34 C.F.R. § 100 (2000), but not to religion. Likewise, 42 U.S.C. § 1985(3) (1994) could conceivably cover certain conspiratorial deprivations of free exercise, see LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 426-27 (2d Cir. 1995), but it is unlikely that the promulgation or enforcement of an ordinary athletic rule, without more, would violate this statute. Nor would such promulgation or enforcement likely be deemed an attempt to "intentionally obstruct[ ], by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs . . . ." 18 U.S.C. § 247(a)(2). Lastly, while the Ted Stevens Olympic and Amateur Sports Act prohibits its recognized amateur sports organizations from discriminating on the basis of religion, 36 U.S.C. § 220522(a)(8), these organizations are regulatorily distinct from primary, secondary, or higher educational athletic programs. And it is unlikely, in all events, that there is an implied right of action for religious discrimination under the statute. *Cf.* Sternberg v. U.S.A. Nat'l Karate-Do Fed'n, Inc., 123 F. Supp. 2d 659, 666 (E.D.N.Y. 2000) (recognizing only "[a] narrow right of action regarding sex discrimination").

ically have counterparts to the federal religion clauses,[146] and while some are textually quite similar to the First Amendment,[147] many contain language or traditions indicating greater coverage than the federal provisions.[148] Several state constitutions may also have additional clauses governing specific interactions between religion and government within the educational context[149] or may, by judicial interpretation, even secure a right to participate in interscholastic athletics.[150] In recent years, largely due to RFRA's inapplicability to state and local governments,[151]

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146. *See, e.g.*, ALA. CONST. art. I, § 3; ALASKA CONST. art. I, § 4; ARIZ. CONST. art. II, § 12; ARK. CONST. art. II, §§ 24-26; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3 & art. VII; DEL. CONST. art. I, §§ 1-2; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 1, paras. III-IV & § 2, para. VII; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, §§ 2-7; IOWA CONST. art. I, §§ 3-4; KAN. CONST. BILL OF RTS. § 7; KY. CONST. BILL OF RTS. § 5; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MD. CONST. DECL. OF RTS. arts. 36-37; MASS. CONST. pt. I, arts. II-III & amend. art. 46; MICH. CONST. art. I, §§ 4, 18; MINN. CONST. art. I, §§ 16-17; MISS. CONST. art. III, § 18; MO. CONST. art. I, §§ 5-7; MONT. CONST. art. II, § 5; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. pt. I, arts. 4-6; N.J. CONST. art. I, par. 3-4; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7 & art. VIII, § 3; OKLA. CONST. art. I, § 2 & art. II, § 5; OR. CONST. art. I, §§ 2-6; PA. CONST. art. I, §§ 3-4; R.I. CONST. art. I, § 3; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, §§ 3-4; TEX. CONST. art. I, §§ 4-7; UTAH CONST. art. I, § 4; VT. CONST. ch. I, art. 3; VA. CONST. art. I, § 16 & art. III, § 11; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, §§ 18-19; WYO. CONST. art. I, §§ 18-19 & art. XXI, § 25.

147. *See, e.g.*, ALASKA CONST. art. I, § 4; HAW. CONST. art. I, § 4; LA. CONST. art. I, § 8; MONT. CONST. art. II, § 5.

148. *See, e.g.*, *City Chapel Evangelical Free*, 744 N.E.2d at 446 (per Dickson, J., joined by Rucker, J.) ("[r]eject[ing] the contention that the Indiana Constitution's guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees"); Humphrey v. Lane, 728 N.E.2d 1039, 1043-45, 1044 (Ohio 2000) (concluding that the phrasing of OHIO CONST. art. I, § 7 is "broader than that which proscribes any law prohibiting free exercise of religion"); Planned Parenthood v. Sundquist, 38 S.W.3d 1, 13 (Tenn. 2000) (noting that "the language of [TENN. CONST. art. I, § 3], when compared to the guarantee of religious freedom contained in the federal constitution, is a stronger guarantee of religious freedom"); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska 1994) (recognizing independent analysis under ALASKA CONST. art. I, § 4), *cert. denied*, 513 U.S. 979 (1994); Kentucky State Bd. of Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877, 879-81 (Ky. 1979) (interpreting KY. CONST. art. I, § 5), *cert. denied*, 446 U.S. 938 (1980); *see generally* Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49 (1992).

149. *See, e.g.*, WIS. CONST. art. I, §§ 23-24 & art. X, § 3.

150. *See, e.g.*, Kaptein by Kaptein v. Conrad Sch. Dist., 931 P.2d 1311, 1316 (Mont. 1997) (holding that the right to participate in extracurricular activities, including athletics, is protected under the Montana Constitution); Duffley v. New Hampshire Interscholastic Athletic Ass'n, 446 A.2d 462, 467 (N.H. 1982) (holding that "the right of a student to participate in interscholastic athletics is one that is entitled to the protections of procedural due process under [N.H. CONST.] pt. I, art. 15").

151. *See supra* notes 60, 144.

many states have recognized a level of state constitutional protection for religious practices above that of the First Amendment, either by state constitutional amendment[152] or by judicial interpretation of an existing state constitutional provision.[153] In most instances, these newly added or interpreted state constitutional provisions provide (as did RFRA) that even neutral and generally applicable laws, if they impose a substantial burden on a religious practice, will be subject to a standard of strict scrutiny similar to that found vestigially under the First Amendment.

State law also may protect the religious practices of athletes by statute or regulation.[154] As an alternative to state constitutional revision, for example, many states have enacted their own religious freedom restoration acts that, also like RFRA, impose strict or heightened judicial scrutiny on the laws and policies of state and local government, even those which are neutral and generally applicable.[155] Furthermore, several states have statutory anti-religious discrimination provisions that apply generally to their educational institutions[156] or specifically to their

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152. ALA. CONST. amend. No. 622.

153. *City Chapel Evangelical Free*, 744 N.E.2d at 445-51 (interpreting IND. CONST. art. I, §§ 2-4); *Humphrey*, 728 N.E.2d at 1043-45 (interpreting OHIO CONST. art. I, § 7); Munns v. Martin, 930 P.2d 318, 321 (Wash. 1997) (interpreting WASH. CONST. art. I, § 11); State v. Miller, 549 N.W.2d 235, 239-41 (Wis. 1996) (interpreting WIS. CONST. art. I, § 18); Hunt v. Hunt, 648 A.2d 843, 852-53 (Vt. 1994) (interpreting VT. CONST. ch. I, art. 3); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994) (interpreting MASS. CONST. amend. art. 46, § 1); *Swanner*, 874 P.2d at 280-84 (interpreting ALASKA CONST. art. I, § 4); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271, 1276-77 (Mont. 1992) (interpreting MONT. CONST. art. II, § 5); State v. Hershberger, 462 N.W.2d 393, 397-99 (Minn. 1990) (interpreting MINN. CONST. art. I, § 16). *See generally* Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017 (1994); Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747 (1993).

154. *See generally* Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531 (1999).

155. ARIZ. REV. STAT. ANN. §§ 41-1493 to 41-1493.02 (West 2000); CONN. GEN. STAT. ANN. § 52-571b (West 2001); FLA. STAT. ANN. §§ 761.01-.05 (West 2000); IDAHO CODE §§ 73-401 to 73-404 (Michie 2000); 775 ILL. COMP. STAT. ANN. §§ 35/1-35/99 (2000); N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie 2001); OKLA. STAT. ANN. §§ 51-251 to 51-258 (West 2001); R.I. GEN. LAWS §§ 42-80.1-1 to 42.80.1-4 (2001); S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (Law Co-op 2001); TEX. CIV. PRAC. & REM. CODE §§ 110.001-.012 (2000). Additional compilations of these state provisions can be found at EUGENE VOLOKH, THE FIRST AMENDMENT: LAW, CASES, PROBLEMS, AND POLICY ARGUMENTS 925 (2001); Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275, 305-19; Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 245-47 nn.71-79 (1998); Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 44 nn.81-84 (2000).

156. *See, e.g.*, WIS. STAT. ANN. § 106.58 (West 2001) ("No child may be excluded from or discriminated against . . . in obtaining the advantages, privileges and courses of study of [any]

athletic programs,[157] although incidental burdens on religious practices may or may not be considered actionable discrimination under these provisions. In addition, a few states explicitly protect students' religious speech (including prayer, viewpoint expression, and distribution of religious literature),[158] and at least one state specifically safeguards the ability of "members of athletic teams at any public elementary and secondary school . . . [to] engag[e] in voluntary, student-initiated, student-led prayer."[159]

Student-athletes' religious practices may likewise find protection under the laws or rules of their particular municipality, county, school board or corporation, college or university, or interscholastic or intercollegiate athletic association. The National Collegiate Athletic Association (NCAA), for example, has a policy of accommodating religious institutions that foresee a conflict between a scheduled championship competition and the religious observances of the institution's student-athletes.[160] The NCAA has also exempted brief religious observances by

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public school on account of . . . religion . . . ."); WIS. STAT. ANN. § 118.13(1) (West 2001) ("No person may be denied participation . . . in, be denied the benefits of or be discriminated against in any [public school] curricular, extracurricular, pupil services, recreational or other program or activity because of the person's . . . religion . . . [or] creed . . . .").

157. *See, e.g.*, CAL. CODE REGS. tit. 5, § 4920 (2001) ("No person shall on the basis of . . . religion . . . be excluded from participation in, be denied the benefits of, be denied equivalent opportunity in, or otherwise discriminated against in interscholastic, intramural, or club athletics."); FLA. ADMIN. CODE ANN. r. 6C2-4.018 art. II(1)(b) (2000) (prohibiting Florida State University from "[l]imit[ing] . . . participation in educational, athletic, social, cultural, or other activities of the University because of . . . religion"); N.J. ADMIN. CODE tit. 6, § 4-1.5(f) (2001) ("The athletic program, including but not limited to intramural, extramural, and inter-scholastic sports, shall be available on an equal basis to all students regardless of . . . creed [or] religion . . . ."); *see also* D.C. MUN. REGS. tit. 5, § 2700.3 (2001) ("Students shall not be excluded from participation in, be denied the benefits of be treated differently from other students, or otherwise be unlawfully discriminated against in interscholastic athletics, for any reason, including but not limited to . . . religion . . . .").

158. *See, e.g.*, KY. REV. STAT. ANN. § 158.183 (Banks-Baldwin 2001); TENN. CODE ANN. § 49-6-2904 (2001).

159. LA. REV. STAT. tit. 17, § 2115.8 (2000).

160. NAT'L COLLEGIATE ATHLETIC ASS'N, 2001-02 NCAA DIVISION I MANUAL, art. 31.1.4.1 (2001), *available at* https://goomer.ncaa.org/wdbctx/LSDBi/LSDBI.home.

> If a participating institution has a written policy against competition on a particular day for religious reasons, it shall submit its written policy to the governing sports committee on or before September 1 of each academic year in order for it or one of its student-athletes to be excused from competing on that day. The championship schedule shall be adjusted to accommodate that institution, and such adjustment shall not require its team or an individual competitor to compete prior to the time originally scheduled.

Id. In recent years, this policy, known as the BYU Rule, has been the source of some controversy. A 1998 amendment allowed for the rule's waiver "[i]f a governing sports committee concludes that accommodating an institution's policy as required by 31.1.4.1 would unduly

football players, such as pausing for an end-zone prayer, from its general prohibition against football players celebrating or drawing attention to themselves on-field.[161] Nondiscrimination or accommodation policies can also be found within collegiate athletic departments[162] and state interscholastic athletic associations.[163] Finally, to the extent that an athlete's sport is organizationally or extramurally regulated, in conjunction with or apart from the state or the school, the athlete's religious practices may also be protected by the organization's own rules.[164]

II. APPLYING THE LEGAL FRAMEWORK: A SURVEY OF CONFLICTS AND A LIST OF RECOMMENDATIONS

Turning from the exposition to the application of these legal principles, this part will examine actual and potential cases involving conflicts between athletes' religious beliefs or practices and the policies or regula-

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disrupt the orderly conduct of a championship . . . ." No. 98-32, NCAA Championships—Conflicts Due to Religious Conflicts, *available at* http://www.ncaa.org/databases/legislation/1998/98-032.html; Bob Lipper, *NCAA Throws Religious Athletes Sunday Punch*, RICHMOND TIMES-DISPATCH, July 30, 1998, at C1, *available at* 1998 WL 2041746. The waiver process, however, was eliminated in 1999. No. 99-64, NCAA Championships—Religious Conflicts, *available at* http://www.ncaa.org/databases/legislation/1999/99-064.html; Editorial, *Reason Prevails with NCAA*, DESERET NEWS, Sept. 21, 1999, at A10, *available at* 1999 WL 26533985. Other provisions relating to Sunday competition include NCAA Div. I Bylaws 31.1.4.2 & 31.1.4.3, *available at* https://goomer.ncaa.org/wdbctx/LSDBi/LSDBI.home.

161. Rajiv Chandrasekaran, *A Reverse in the End Zone: After Liberty's Challenge, NCAA Clarifies Rule, Allows Praying After Touchdowns*, WASH. POST, Sept. 2, 1995, at C1, *available at* 1995 WL 9260020. However, the exemption only came by clarification of the rule's scope, and only after litigation was looming. Regarding the potential unlawfulness of the rule as written, see Amanda N. Luftman, Comment, *Does the NCAA's Football Rule 9-2 Impede the Free Exercise of Religion on the Playing Field?*, 16 LOY. L.A. ENT. L.J. 445 (1995) (addressing religion); Jeffrey C. True, *The NCAA Celebration Rule: A First Amendment Analysis*, 7 SETON HALL J. SPORT L. 129 (1997) (addressing speech).

162. The University of Wisconsin Athletic Department, for example, states in a 1996 policy that it "respects and supports the right of each student-athlete and staff member to worship or not to worship, and to practice or not to practice, a religion he or she chooses" and that it "maintains an environment in which student-athletes and employees can work, learn, and compete free of harassment or intimidation based on religious beliefs or practices." Andy Baggot, *Premium Seats Selling Well So Far, UW Fans Buy Kohl Center Court-Side Plan*, WIS. ST. J., June 16, 1996, at D9, *available at* 1996 WL 10527949; *see also* Paul Norton, *UW Bans Mixing Sports, Religion*, WIS. ST. J., June 25, 1996, at A1, *available at* 1996 WL 10528887.

163. *See, e.g.*, Cruz by Cruz v. Pennsylvania Interscholastic Athletic Ass'n, 157 F. Supp. 2d 485, 487 (E.D. Pa. 2001) (quoting the PIAA Constitution's preambulary declaration that "all boys and girls should have equal opportunity to participate in all levels of interscholastic athletics regardless of . . . creed . . . [or] religion").

164. *See, e.g.*, Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill., 134 F. Supp. 2d 965, 968 (N.D. Ill. 2001) (quoting the nondiscrimination policies of USA Hockey and the Amateur Hockey Association of Illinois as prohibiting "discrimination on the basis of . . . religion").

tions of schools, officials, or interscholastic entities. It will then offer several recommendations for the prevention and resolution of such conflicts.

A. A Survey of Religion-and-Sports Conflicts

1. Substantive Aspects of the Sport

Most conflicts involving an athlete's religious practices are logistical or otherwise peripheral to the content or substance of the sporting events themselves, and indeed all of the other categories within this survey—scheduling, apparel or appearance, and eligibility—address these types of nonsubstantive conflicts. After all, while some sports may have religious roots, few today retain any recognizably religious or even ideological aspects. From time to time, however, athletes do pose religious objections to one or more substantive elements of the sport itself. To the extent that such an objection has empirical merit, there is, in fact, a fair chance that the athlete's claim will succeed, as the athlete will likely be able to demonstrate a substantial religious burden and the court may perceive some element of physical or psychological coercion.

Consider a recent controversy involving the requirement within the sport of judo that competitors engage in various forms of bowing as part of a tournament. To athletes whose religion prohibits them from bowing to anyone or anything other than God,[165] or to those who subjectively perceive the bowing as "reflect[ing] a Shinto religious practice[,]"[166] this otherwise inoffensive requirement may give rise to a potential religious conflict.[167] Although this particular controversy arose in a nongovernmental context and has therefore been legally addressed without regard

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165. *In re* Akiyama, Case No. 30-190-994-99, slip op. at 8 (Am. Arb. Ass'n Trib. Aug. 17, 2000) (finding as factual matter (Finding 23) that certain Muslim competitors cannot, consistent with Islam, "bow[ ] to any thing or to anyone other than Allah" and they these competitors have "been disqualified from judo competitions in the United States because of their refusal to perform any of the required bows"), *available at* http://www.aboutlaw.com/firm/bow-html.htm.

166. *Id.* slip op. at 7 (finding as a factual matter (Findings 19-21) that such a belief is held by the parents of a Judo competitor and apparently by the competitor herself, and that the competitor "has been disqualified from judo competitions in the United States because of her refusal to perform these required bows"). This interpretation of the bowing requirement was rejected by the arbitration tribunal. *Id.* slip op. at 8-9 (finding as a factual matter (Finding 26) that "[t]hese ceremonial bows, as they are practiced in the modern sport of judo, are not understood or intended by U.S.J.I. [United States Judo Incorperated] to be religious in nature" but rather to be "a secular, traditional sign of respect for the sport and the officials who administer it, the match that is about to begin, and one's opponent").

167. Amy Shipley, *Taking a Bow—or Not*, WASH. POST, July 23, 1997, at D8, *available at* 1997 WL 11975338; *Athlete Won't Bow to Tradition*, NAT'L L.J., July 10, 2000, at A5; *Bowing*

to the Constitution,[168] it nevertheless provides a useful hypothetical for analysis under the First Amendment. Thus, for example, while the requirement very likely is generally applicable and appears to provide no discretionary system of waiver, the Shintoism allegation (though probably difficult to substantiate) at least superficially calls into question the requirement's neutrality and additionally raises issues of coercion under both the Free Exercise Clause[169] and the Establishment Clause.[170] Moreover, because bowing is expressive, and the requirement compels this expression, it is likely that a claimant could also assert a colorable free speech claim, thereby triggering heightened scrutiny through hybridization. In fact, this case would appear largely to be controlled by *West Virginia State Board of Education v. Barnette*,[171] cited by the Supreme Court as a hybrid rights case,[172] which prohibited public schools from requiring students to salute the United States flag while reciting the pledge of allegiance.[173]

Under Pressure?, ABCNEWS.COM, Feb. 9, 2000, *available at* http://204.202.137.110/sections/sports/DailyNews/Judobow_000209.html.

168. The competitor has been largely unsuccessful in pressing her claims, both in the United States and in Canada. In the United States, she initially obtained temporary injunctive relief from a federal district court. Akiyama v. United States Judo, Inc., No. C97-286L (W.D. Wash. May 13, 1997); *Tradition Violates Religious Freedom, Judge Says in Ruling*, SEATTLE TIMES, June 4, 1997, at B1, *available at* 1997 WL 3236785. However, her legal assertions have been unsuccessful when presented to United States Judo, Inc. and before several arbitration hearings. *In re Akiyama*, slip op. at 19 (upholding a U.S. Olympic Committee determination that U.S. Judo's requirement does not violate the religious discrimination prohibition of 36 U.S.C. § 220522(a)(8)), *available at* http://www.aboutlaw.com/firm/bow-html.htm; *Judo Club Won't Bow to Court*, SEATTLE TIMES, July 6, 1997, at B3 (adverse ruling by five-member U.S. Judo administrative hearing committee), *available at* 1997 WL 3241900. In Canada, a similar claim was turned away on jurisdictional grounds by the British Columbia Human Rights Tribunal. Akiyama v. Judo BC, 2001 BCHRT 4 (B.C. Hum. Rts. Trib. Jan. 16, 2001), *available at* http://www.bchrt.gov.bc.ca/akiyama.htm; *B.C. Rights Panel Rejects Judo Complaint*, SPOKESMAN-REV. (Spokane, Wash.), Feb. 3, 2001, at B2, *available at* 2001 WL 7045398.

169. *Smith*, 494 U.S. at 877-78 (explaining that the Free Exercise Clause, among other things, prohibits compulsory religious observance); *Schempp*, 374 U.S. at 222.

170. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311 (holding that student-led prayers at high school football games are impermissibly coercive, in part because "some students, . . . such as cheerleaders, members of the band, and, of course, the [football] team members" must be in attendance, even though the games may be deemed extracurricular); *Zorach*, 343 U.S. at 314 (stating that the government "may not thrust any sect on any person" and "may not make a religious observance compulsory"); Anderson v. Laird, 466 F.2d 283, 283-84 (D.C. Cir. 1972) (per curiam) (holding in effect that the federal military academies' requirement of chapel attendance was inconsistent with the First Amendment), *cert. denied*, 409 U.S. 1076 (1972).

171. 319 U.S. 624 (1943).

172. *Smith*, 494 U.S. at 882.

173. *Barnette*, 319 U.S. at 642 (explaining that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"). *Barnette* would also appear to govern

2. Scheduling of Practices and Competitions

Of the conflicts not related to a sport's substantive aspects, those involving scheduling are perhaps the most common. Such conflicts arise when athletic practices or competitions are inadvertently scheduled on a day or at a time of regular worship or Sabbath observance,[174] in the midst of a religious holiday (as was the case with Sandy Koufax), or during hours that happen to overlap with formal or informal religious education.[175] In general, schools and athletic associations are allowed, under the free exercise doctrine of permissible accommodation, to attempt to alleviate potential conflicts when setting a season schedule,[176] and they may certainly provide nondiscriminatory individual accommodations on a game-by-game or practice-by-practice basis.[177] However, unless the observance is mandated by the athlete's religious beliefs, school officials are not necessarily required to do so.[178] This is especially

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an athlete's religiously based challenge to standing for, and certainly singing, the National Anthem prior to competition. Sheldon v. Fannin, 221 F. Supp. 766, 774-75 (D. Ariz. 1963).

174. *See supra* note 8 (providing newspaper accounts of such conflicts); *cf. also Soccer League Asked To Move Games So They Don't Interfere with Religion*, SAN DIEGO UNION & TRIB., Jan. 10, 1997, at E7 (reporting that several churches and synagogues in Larchmont, New York, had petitioned the local soccer league not to schedule games on Saturday and Sunday mornings to avoid conflicts with religious services), *available at* 1997 WL 3110368.

175. *See, e.g.*, *Keller*, 552 F. Supp. at 514-16 (holding that a rule precluding elementary school basketball players who miss a practice from playing in the next scheduled game did not, as applied to a player who missed practices due to weekly catechism classes, violate the Free Exercise Clause).

176. *Cf. Playcrafters*, 424 A.2d at 1197-99 (upholding against federal and state nonestablishment claims a policy banning extracurricular activities other than interscholastic athletics on Friday evenings, Saturdays, and Sunday mornings).

177. *See, e.g.*, Tony Perri, *Board to Clarify Policy on Holidays*, CHI. TRIB., Oct. 2, 1995, at 3 (Metro N.W.) (reporting that a school board issued a memorandum to teachers, coaches, and staff providing that "no penalties, sanctions or repercussions may be based on a student's failure to attend a class, team practice, event or other activity when such failure is based on the student's indication that such absence was due to religious reasons or for the observance of a religious holiday or service"), *available at* 1995 WL 6251614; Silk, *supra* note 9 (reporting that the athletic directors of the collegiate Southeast Conference rescheduled a track and field championship event to accommodate a Seventh Day Adventist competitor, and that earlier in the year the NCAA had scheduled certain basketball games to accommodate a member of the Worldwide Church of God); *cf. Rangers to Adjust Pitching Schedule to Allow for Correa's Religious Beliefs*, L.A. TIMES, Feb. 10, 1988, at 2 (reporting that the Texas Rangers agreed not to make Edwin Correa, a Seventh Day Adventist, pitch from sundown Fridays to sundown Saturdays, his Sabbath, unless necessary), *available at* 1988 WL 2299155.

178. *Keller*, 552 F. Supp. at 514-16 (holding that a rule precluding elementary school basketball players who miss a practice, except in cases of illness or death in the family, from playing in the next scheduled game did not, as applied to a player who missed practices due to weekly catechism classes, violate the Free Exercise Clause, particularly because the classes were not truly mandatory); *cf.* Boyle v. Jerome Country Club, 883 F. Supp. 1422, 1429-32 (D. Idaho 1995) (holding that, in the absence of demonstrated and unrebutted religious discrimi-

true where the impact of the requested schedule change would be widespread—affecting many athletes or many events—rather than confined in scope.[179]

3. Regulations of Appearance and Apparel

Another category of nonsubstantive conflicts involves challenges to regulations governing an athlete's appearance or apparel, including equipment, uniforms, and accessories. A school or coach may have a grooming policy, for instance, but an athlete's religious beliefs may require facial hair that does not conform to the policy.[180] Or, a regulation may for safety reasons prohibit headwear during competitions, contrary to an orthodox Jewish athlete's obligation to wear a head covering[181] or

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nation, a country club's refusal to reschedule a golfer's tournament time from Sunday to another day was not a violation of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, which prohibits religious discrimination by places of public accommodation). The *Keller* case may be analyzed and perhaps resolved differently today pursuant to the individualized assessment (and possibly the general applicability) standard of *Smith*, 494 U.S. 872. *See supra* notes 90-108 and accompanying text.

179. Berg, *supra* note 154, at 559 (suggesting in regard to state religious freedom laws that "courts will likely consider whether the accommodation would change the school's policy or schedule for all students, or whether it would simply allow the objecting student to opt out of attending on the day in dispute" and that, "[w]hile even opt outs can create administrative difficulties for the school, especially if a large number of such claims arise, the difficulties multiply when the school is not just setting a different schedule for one student but is changing the overall schedule for all"). *But cf.* Nat Hentoff, *Not on the Sabbath*, WASH. POST, Sept. 12, 1987, at A21 (describing an apparently unreported federal district court decision holding that a school board violated the Free Exercise Clause by refusing to accommodate a Jewish student's request that high school graduation be moved from Saturday to Sunday), *available at* 1987 WL 2026278.

180. Some faiths either prohibit their adherents from cutting their hair or require their adherents to arrange their hair in a particular way. Such issues frequently arise in the prison context. *See, e.g.*, Benjamin v. Coughlin, 905 F.2d 571, 573 (2d Cir. 1990) (members of Rastafarian faith), *cert. denied*, 498 U.S. 951 (1990); Gallahan v. Hollyfield, 670 F.2d 1345, 1346 (4th Cir. 1982) (per curiam) (member of a Cherokee religious order); Phipps v. Parker, 879 F. Supp. 734, 735 (W.D. Ky. 1995) (orthodox Hasidic Jew); Wellmaker v. Dahill, 836 F. Supp. 1375, 1377 (N.D. Ohio 1993) (follower of the Nubian Islamic Hebrew faith); Wright v. Raines, 457 F. Supp. 1082, 1083 (D. Kan. 1978) (practitioner of the Sikh religion).

181. *See, e.g.*, *Menora*, 683 F.2d at 1033-36 (holding that Orthodox Jewish players were not constitutionally burdened by a general ban on headwear because their desired accommodation—wearing yarmulkes fastened by bobby pins—was not mandated by Jewish law, but remanding for consideration of other alternatives not incongruent with the objective of safety); *cf. also* Harris v. New York State Athletic Comm'n, 392 N.Y.S.2d 70, 71 (N.Y. App. Div. 1977) (holding that state athletic commission's safety-motivated refusal to allow a boxer to wear a skullcap for religious reasons did not violate the boxer's religious freedom).

an orthodox Sunni Muslim athlete's duty to wear a prayer cap.[182] Or an athletic association rule, also for safety reasons, may prohibit jewelry during competitions, but a devout Christian athlete may believe that he or she should wear a cross at all times.[183]

Grooming or clean-shaven policies for athletes are somewhat difficult to assess because they appear rarely, if ever, to be challenged on free exercise grounds, and their track record under other constitutional provisions is a rather mixed one.[184] However, to the extent that such a policy or its application includes only nonreligious exemptions (such as medical necessity), or to the extent that an athlete's personal appearance is independently protected by the First or Fourteenth Amendments (as a matter of expression or privacy), there is a distinct possibility that the policy, if ever challenged, will be subjected to some form of heightened judicial scrutiny. In turn, absent an unyielding confidence that the policy is necessary to achieve a compelling interest, or that an athlete's request is clearly insincere, administrators should strongly consider granting religious exemptions to grooming rules, particularly where the institutional costs of doing so are minimal.

Headwear rules are on somewhat firmer ground, in part because they are often and manifestly rooted in concerns for player safety. Generally, such rules prohibit headwear during competition, although they may

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182. *Cf., e.g., In re* Palmer, 386 A.2d 1112, 1114-16 (R.I. 1978) (holding that a trial judge violated a party's free exercise rights by not considering the religious grounds for wearing the prayer cap).

183. *See, e.g.*, Bob Wolfley, *Selig Doesn't Spare Praise for "*61,": Hold Your Tongue*, MILWAUKEE J. SENTINEL, Apr. 29, 2001, at C2 (noting "[t]he Wisconsin Interscholastic Athletic Association's long-standing ban on jewelry for high school athletes during competition"), *available at* 2001 WL 9353113; *Schools Get Right to the Point with Body Piercing*, PLAIN DEALER (Cleveland, OH), Feb. 8, 1999, at B10 (reporting that "[t]he Ohio High School Athletic Association prohibits jewelry of any kind, for safety reasons"), *available at* 1999 WL 2348108.

184. *Compare* Davenport by Davenport v. Randolph County Bd. of Educ., 730 F.2d 1395, 1397-98 (11th Cir. 1984) (upholding under the Fourteenth Amendment a high school coach's "clean shaven" policy as applied to basketball and football players), *and* Neuhaus v. Torrey, 310 F. Supp. 192, 193-95 (N.D. Cal. 1970) (upholding under the Fourteenth Amendment a school district athletic grooming regulation as applied to high school athletes), *and* Humphries v. Lincoln Parish Sch. Bd., 467 So. 2d 870, 872 (La. Ct. App. 1985) (upholding under the Fourteenth Amendment a high school football coach's clean shaven rule as applied to players during the season), *with* Long v. Zopp, 476 F.2d 180, 181-82 (4th Cir. 1973) (per curiam) (invalidating under the Fourteenth Amendment a high school football coach's "hair code" as applied to a team member off-season), *and* Dostert v. Berthold Pub. Sch. Dist. No. 54, 391 F. Supp. 876, 881-83 (D.N.D. 1975) (invalidating under the Fourteenth Amendment a board of education hair policy as applied to high school athletic participation), *and Dunham*, 312 F. Supp. at 414-21 (invalidating under the Equal Protection Clause a high school athletic grooming code as applied to male tennis players).

contain an exception for certain headwear (such as a sweatband) which, because it can be held securely in place and may even assist an athlete's vision, is consistent with the objective of safety. The most famous of the athletic headwear cases is the Seventh Circuit's *Menora v. Illinois High School Association*, which involved just such a rule and included a request by Orthodox Jewish basketball players that, despite the rule, they be able to wear yarmulkes fastened by bobby pins.[185] Although technically the appeals court decided against the athletes, finding that Jewish law required a headcovering but not necessarily a yarmulke,[186] it remanded to the trial court with the understanding that the players might propose a more secure headcovering, and that should they succeed in doing so, the Free Exercise Clause would very likely mandate that accommodation.[187] *Menora*, however, was decided prior to the Supreme Court's 1990 rollback of free exercise doctrine, and today such an accommodation would be mandatory, if at all, exclusively under the hybrid rights doctrine. Headwear rules are, in all likelihood, neutral and generally applicable, and they probably do not have in place of mechanism for individualized assessment. But the headcovering may very well be expressive within the meaning of the Free Speech Clause, thereby allowing the claimant to interpose a free exercise-free speech hybrid claim.[188] Absent such a showing, however, the claimant would have to demonstrate the irrationality of the headwear rule, and this would be a difficult task indeed.

The analysis of jewelry prohibitions is similar to that of headwear rules. Both are legitimately rooted in safety concerns, and both may inadvertently impinge on symbolic religious expression. Certainly a coach or administrator cannot constitutionally discriminate among types of religious jewelry, allowing a Christian athlete to wear a crucifix, for example, but not allowing a Wiccan athlete to wear a pentagram.[189] Even

185. 683 F.2d 1030. For commentary, see Judith M. Mills, Note, *Recent Development:* Menora v. Illinois High School Association: *Basketball Players' Free Exercise Rights Compromised—Technical Foul*, 1983 WIS. L. REV. 1487; Kurt H. Feuerschwenger, Note, *Inconsistent Judicial Protection of Religious Conduct: The Seventh Circuit Contributes to the Confusion in* Menora v. Illinois State High School Association, 32 DEPAUL L. REV. 433 (1983).

186. *Menora*, 683 F.2d at 1033-34.

187. *Id.* at 1035-36. According to Professor Berg, "[t]he parties eventually settled on this basis . . . ." Berg, *supra* note 154, at 558.

188. Goldman v. Weinberger, 475 U.S. 503, 525 (1986) (quoting from the petitioner's deposition that, "for many . . . Jews, 'a yarmulke is an expression of respect for God . . . intended to keep the wearer aware of God's presence'").

189. *Cf. Students Win Right To Wear Pentagram*, GRAND RAPIDS PRESS, Mar. 23, 1999, at B4 (reporting about a school district's reversal of its prohibition on wearing pentagrams after

neutral and generally applicable prohibitions may be subjected to heightened or strict scrutiny, however, if the athlete can assert a hybridized free exercise-free speech claim based on the inherently expressive nature of religious jewelry.[190] In turn, because safety is almost certainly a compelling interest, whether a jewelry prohibition can withstand heightened scrutiny will largely depend on whether it is the least restrictive means of achieving that objective. And, to the extent that the jewelry may be "taped to the body so as not to be a hazard to the player or others[,]"[191] as one model rule provides, the rule's defender may have difficulty arguing that a total ban is, in fact, necessary or the least restrictive means available. Of course, the actual outcome of that assessment in any given case will depend on the particular sport or competition and the nature of the jewelry in question.

4. Requirements for Eligibility

A fourth and final category involves religiously based decisions that render athletes, under governing regulations, ineligible to participate in their particular sports. A prospective athlete may have a religious objection to immunizations, for example, but the school district mandates tetanus immunization as a condition for eligibility in interscholastic sports.[192] Or, a student who for religious reasons is home-schooled may,

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a federal district court indicated that the prohibition, as applied to the particular student, was unconstitutional), *available at* 1999 WL 6411589.

190. The paradigmatic student symbolic expression case is *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), which held that a school could not prohibit students from wearing anti-war black armbands without demonstrating that "the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509. In recent years, there have been several successful challenges to school dress codes that have restricted the wearing of religious symbols. *See, e.g.*, *Chalifoux*, 976 F. Supp. at 664-67, 670-71 (holding that a ban on the visible wearing of rosaries, imposed in an effort to suppress gang activity and identification, violated the First Amendment Free Speech and Free Exercise Clauses); Diego Ribadeneira & Michael Paulson, *Alabama Student Permitted To Wear Cross Outside Clothing: School System Must Amend its Dress Code*, BOSTON GLOBE, Mar. 4, 2000, at B2 (reporting a school board's litigation-induced settlement with a sixth-grade student who was forbidden under the school's dress code to visibly wear a cross necklace, though Alabama has a state RFRA), *available at* 2000 WL 3316342; *School Board Relents on Star of David Ban*, ATLANTA J.- CONST., Aug. 24, 1999, at A7 (describing a school board's since-rescinded decision not to allow a Jewish student to wear a Star of David necklace, as part of its larger ban on gang symbols), *available at* 1999 WL 3793100. For guidance on drafting constitutionally acceptable dress regulations, see Christopher B. Gilbert, *We Are What We Wear: Revisiting Student Dress Codes*, 1999 BYU EDUC. & L.J. 3.

191. NAT'L FED'N OF STATE HIGH SCH. ASS'NS, *supra* note 97, R. 1-10-2.

192. *Calandra*, 512 A.2d at 811 (holding that an interscholastic baseball program could exclude a would-be participant who refused for religious reasons to receive a tetanus immunization, finding that "participation in interscholastic sports . . . does not rise to the level of an

when attempting to participate in interscholastic athletics, discover that school enrollment is a prerequisite to such participation.[193] Or, a prospective athlete may for religious reasons transfer to a religious school only to find that the state athletic association deems transferring students ineligible to play for one year.[194]

Eligibility conflicts have generally been resolved by courts in favor of the schools, not the athletes. Challenges to transfer rules, in particular, have been uniformly unsuccessful,[195] usually because the athletes are unable to demonstrate that the regulation places a constitutionally sufficient burden upon their religious beliefs or practices.[196] If there is (or will be) any possible exception to this overwhelming pattern of failure, it

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important government benefit" and therefore the administrative exclusion does not burden the child's free exercise of religion).

193. Casey Banas, *Playing for the Home Team After Fighting to Play Football for Hinsdale Central High, Home-School Student Brian Griffen Takes it One Tackle at a Time*, CHI. TRIB., Sept. 30, 1999, at 1, *available at* 1999 WL 2917231; Scott Cooper, *Thrown for a Loss: Home-Schooler Can't Play Football at East Central*, TULSA WORLD, June 5, 1997, at A11, *available at* 1997 WL 3640042; Kristina M. Knapcik, *Home-Schooled Boy's Family Goes to Court Over Football*, MILWAUKEE J. SENTINEL, Aug. 9, 1997, at 10, *available at* 1997 WL 12727631; Shannon Ryan, *Sharing the Sports Arena: Home-Schooled Kids Aim for Equal Chance*, S. BEND. TRIB., July 25, 1999, at C1, *available at* 1999 WL 21431515.

194. *See, e.g.*, *Robbins*, 941 F. Supp. at 792; Beck by Beck v. Missouri State High Sch. Activities Ass'n, 837 F. Supp. 998, 1002-03 (E.D. Mo. 1993), *judgment vacated and appeal dismissed on jurisdictional grounds*, 18 F.3d 604 (8th Cir. 1994); *Cooper*, 629 P.2d at 390-91; Chabert v. Louisiana High Sch. Athletic Ass'n, 323 So. 2d 774, 780 (La. 1975).

195. *See, e.g.*, *Walsh*, 616 F.2d at 158; *Robbins*, 941 F. Supp. at 792; Poret v. Louisiana High Sch. Athletic Ass'n, No. Civ. A. 96-1194, 1996 WL 169241, at *2 (E.D. La. Apr. 8, 1996); *Beck*, 837 F. Supp. at 1002-03; Miss. High Sch. Activities Ass'n v. Coleman, 631 So. 2d 768, 775-76 (Miss. 1994); *Cooper*, 629 P.2d at 390-91; *Chabert*, 323 So. 2d at 780; *cf. Alerding*, 591 F. Supp. at 1539 (citing a prior unpublished decision, Zeiler v. Ohio High Sch. Athletic Ass'n, Slip Op. No. 83-765 (N.D. Ohio Feb. 3, 1984), *aff'd*, 755 F.2d 934 (6th Cir. 1985) (per curiam), *cert. denied*, 474 U.S. 818 (1985), as holding that Ohio High Sch. Athletic Ass'n Bylaw 4, § 6.4-6.10, which prohibits participation by athletes whose parents reside outside Ohio, does not violate the Free Exercise Clause).

196. *Walsh*, 616 F.2d at 158 (finding a "*de minimis* nature of the burden placed on the plaintiffs' free exercise of religion"); *Robbins*, 941 F. Supp. at 792 (finding "no evidence that the rights of parents and students to practice their religion have been unduly burdened in this case"); *Poret*, 1996 WL 169241, at *2 (finding no constitutionally impermissible burden); *Beck*, 837 F. Supp. at 1003 (discerning no "evidence regarding the impact of the restriction on plaintiff's or his parents' religious practice or beliefs").

> The Association's anti-recruitment rule does not prevent a parent or child from actively practicing their chosen religion. A student may enroll in a private school and take advantage of the religious education offered. The Association's anti-recruitment regulation does not regulate the conduct of student athletes to the point of interfering with any religious practice.

Coleman, 631 So. 2d at 776. *See also Cooper*, 629 P.2d at 390-91 (finding that "the transfer rule's impact on plaintiffs' religious freedom is minimal" and is not "sufficient to invalidate it on religious freedom grounds"); Wm. Nicholas Chango, Jr., Case Note, Mississippi High

is likely to involve home-schooled students who are barred completely from interscholastic athletic participation despite their residency within the school district.[197] In several states, the issue has already been resolved by the promulgation of statutory provisions, educational regulations, or athletic association rules that either allow or require school districts to permit extracurricular (including athletic) participation by home-schooled students.[198] In other states and localities, administrators have been willing to waive the eligibility rules, though often after extended requests and periodically with curricular conditions attached.[199]

In the remaining states, particularly those without RFRA-like protection, the Free Exercise Clause may prove helpful insofar as religiously-based home-schooling implicates not merely free exercise, but arguably a conjunctive claim of parental rights as well, resulting in a hybrid claim potentially capable of triggering heightened scrutiny. Although, as noted, parental rights claims in the athletic or extracurricular context have largely failed to date,[200] typically these have involved at-

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School Activities Association v. Coleman, *631 So. 2d 768 (Miss. 1994)*, 6 SETON HALL J. SPORT L. 251 (1996).

197. For general analysis on the access of home-schooled students to extracurricular activities, including athletics, see Eugene C. Bjorklun, Commentary, *Home Schooled Students: Access to Public School Extracurricular Activities*, 109 EDUC. L. REP. 1 (1996); Michael Brian Dailey, *Home Schooled Children Gaining Limited Access to Public Schools*, 28 J.L. & EDUC. 25 (1999); Ralph D. Mawdsley, Commentary, *Parental Rights and Home Schooling: Current Home Schooling Litigation*, 135 EDUC. L. REP. 313, 317-19 (1999); Derwin L. Webb, *Chalk Talk: Home-Schools and Interscholastic Sports: Denying Participation Violates United States Constitutional Due Process and Equal Protection Rights*, 26 J.L. & EDUC. 123 (1997); William Grob, Note, *Access Denied: Prohibiting Homeschooled Students from Participating in Public-School Athletics and Activities*, 16 GA. ST. U. L. REV. 823 (2000).

198. David W. Fuller, Note, *Public School Access: The Constitutional Right of Home-Schoolers To "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599, 1615 n.73 (1998) (citing ARIZ. REV. STAT. ANN. § 15-802.01 (West Supp. 1995); COLO. REV. STAT. ANN. § 22-33-104.5(6) (West 1995); FLA. STAT. ANN. § 232.425 (West Supp. 1996); IDAHO CODE § 33-203; ILL. COMP. STAT. ANN. 5/10- 20.24; IOWA CODE ANN. § 281-31.5(299A) (West 1988 & Supp. 1996); ME. REV. STAT. ANN. tit. 20-A, § 5021 (West 1993); N.H. REV. STAT. ANN. § 193A:2(II) (Supp. 1995); N.M. REV. STAT. ANN. §§ 195:7, 195:8; N.D. CENT. CODE § 15-34.1-06 (1993 & Supp. 1995); OR. REV. STAT. § 339.460 (1995); UTAH STATE BD. OF EDUC. REG. R277-438-4; VA. CODE ANN. § 22.1-253-13:1(H) (Michie 1997); Wash. Common Sch. Provisions 28A.150.350; Wyo. High Sch. Activities Ass'n Rules 3.1.3, 6.2.0, 6.4). *See also* Dailey, *supra* note 197, at 32-34 (discussing a number of the state statutory provisions).

199. *See, e.g.*, Banas, *supra* note 193, at 1 (reporting about an Illinois high school football player who was eventually allowed by the school district to compete, though only after three appearances by his mother, including "verbal appeals and written statements she submitted to the board"); Cooper, *supra* note 193, at A11 (reporting about an Indianapolis high school football player and wrestler who "was allowed on the teams after his family made repeated requests to the Indiana High School Athletic Association").

200. *See supra* notes 131-32 and accompanying text.

tempts to alter existing programs. By comparison, home-schooling parents typically seek nothing more than inclusion within an extracurricular program as it stands.[201] There is, moreover, virtually no risk that the child is being home-schooled to bypass the safeguards against abusive recruitment (as is the concern in transfer ineligibility cases), and the hardship on the child—potentially no interscholastic sports at all—may be much more severe than in the transfer cases, where eligibility is normally attained after one year.[202] Nevertheless, to date, home-schooling claims for extracurricular participation have garnered little or no success when presented under the hybrid rights concept,[203] and at best limited success when presented under other constitutional provisions.[204]

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201. *But cf. Swanson*, 135 F.3d at 700 (perceiving no constitutionally significant distinction between parental efforts to exempt public school students from objectionable classes, which have largely been rejected, and parental efforts to have home-schooled children attend selected public school classes on a part-time basis, and thereby holding that no hybrid claim results from the latter situation).

202. In some areas, home-schooled athletes have few opportunities apart from recreational leagues. *See, e.g.*, Joanne C. Gerstner, *Kids Searching for Teams: Home Schoolers Try to be Included in Public-School Sports*, DETROIT NEWS, May 26, 1999, at D1 (noting the impact of the Michigan High School Athletic Association eligibility rules on athletic opportunities for home-schooled students), *available at* 1999 WL 3926603; Demorris Lee, *Home-Schooled Students Have Few Options for Team Sports*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 2, 2001, at 8N (reporting on the predicament of home-schooled athletes in light of the North Carolina High School Athletic Association rule requiring high school enrollment as a condition to athletic participation), *available at* 2001 WL 3450546. Due to these limitations, in recent years several home-schooled athletic teams and leagues have been created. Kim Brown, *Homeschoolers Prepare for Sports Season*, TULSA WORLD, Oct. 18, 2000, at 4, *available at* 2000 WL 6801445; Todd Jacobson, *Students of the Game: Patchwork Team of Home Schoolers Overcome Hassles for Love of Basketball*, WASH. POST, Feb. 18, 2001, at D14, *available at* 2001 WL 2544854; Dawn Ziegenbalg, *Getting a Shot: Sports Leagues for Home-Schoolers Arise to Meet Growing Need*, WINSTON-SALEM J. (N.C.), Nov. 5, 2000, at 1, *available at* 2000 WL 27230182.

203. Mawdsley, *supra* note 197, at 326-28; Grob, *supra* note 197, at 835-36. *Cf.* Thomas v. Allegany County Bd. of Educ., 443 A.2d 622, 625 (Md. Ct. Spec. App. 1982) (holding that a school board's refusal to allow home-schooled students to participate in its all-county music program did not violate the Free Exercise Clause because "[t]he rule neither prohibits a parent from enrolling the child in a private school, nor deters the students from following the practices of their faith" but "merely prevents a child from reaping the benefits of a public school activity once the constitutional right to a private school education is exercised" such that "[t]he impact of the rule on freedom of religion is minimal").

204. *Compare* Davis v. Massachusetts Interscholastic Athletic Ass'n, No. CA942887, 1995 WL 808968, at *2-*3 (Mass. Super. Ct. Jan. 18, 1995) (preliminarily enjoining MIAA rule 65, which requires school attendance to participate in interscholastic athletics, because the classification between in-school and home-school status is not rationally related to the state's legitimate interest as prescribed by federal and state equal protection doctrine), *with* McNatt by McNatt v. Frazier Sch. Dist., No. Civ. A. 95-0366, 1995 WL 568380 (W.D. Pa. Mar. 10, 1995) (holding that disallowing participation by home-schooled students in school district's athletics program, based on the district's eligibility rules, did not violate the Equal Protection Clause), *and* Bradstreet v. Sobol, 650 N.Y.S.2d 402, 403-04 (N.Y. App. Div. 1996) (holding that the

B. Recommendations for Administrators and Athletic Personnel

As this article demonstrates, the legal posture of athletic and school administrators *vis-a-vis* students is not always an enviable one. These administrators are regularly confronted by seemingly countless, sometimes conflicting directives issued by state and local officials, legislators, courts, lawyers, parents, and, to some extent, even students. The purpose of this final section is to offer a number of moderately concrete and fairly clear-cut guidelines for the handling of religion-related conflicts between athletes and school or association rules, decisions, or policies.

1. Approach All Accommodation Requests Seriously

The first recommendation is that administrators and athletic personnel should take every request for religious accommodation seriously. This does not necessarily mean that every request must be granted. But administrators should proceed as if each request may have legal merit and, in turn, as if their actions might eventually be challenged and scrutinized in a court of law. Taking a claim seriously basically means the following: If time permits, indicate to the athlete that the matter will be given due consideration. Then, consult with the appropriate administrators or legal counsel and promptly provide a response to the athlete. If time does not permit—if the request is made shortly before a competition, for example—then either allow the requested accommodation with no guarantee of future allowances, or deny the requested accommodation on the basis of a plausible, religion-neutral reason (that is, one having nothing to do with the underlying or comparative validity of the religious claim itself). Examples of religion-neutral reasons include supportable claims of health or safety, logistical impossibility, prejudice to the team or program (such as a resulting forfeit or disqualification), or undue cost or delay. In either event, as soon as possible thereafter consult with the appropriate administrators or legal counsel and carefully devise a policy to handle subsequent requests.

A corollary to this first recommendation is that administrators should never respond to a requested accommodation by questioning the sincerity or legitimacy of the athlete's religious beliefs or practices, let alone by ridiculing or rejecting them outright. At least two reasons, one legal and the other ethical, undergird this specific admonition. First, should the conflict eventually result in litigation, an initial administrative failure to

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exclusion of a home-schooled student from participation in interscholastic athletics violated neither the Due Process Clause nor the Equal Protection Clause).

take the request seriously can only be disadvantageous. Even if the governing law does not ultimately require an accommodation of the request, it almost certainly prohibits discrimination against or among religious beliefs, and failure to take a claim seriously at the outset may constitute an entirely unnecessary violation of the law. Second, it is ethically improper not to take the request seriously. Even if the request or the underlying religion is a sham, and the athlete is merely attempting to cause disruption or seek attention or special treatment, the coach or administrator should still perceive that this athlete is in need of assistance, psychological or otherwise. Summarily dismissing the athlete's request will likely not help, and may aggravate, this larger problem.

2. Address All Religions Equally and Similar Religious Claims Similarly

The second recommendation is that administrators and athletic personnel should treat all religions equally and should treat similar religious claims similarly. When considering to grant or deny a requested accommodation, administrators should assume that they will have to reach the same outcome with regard to every subsequent request under the same or any similar rule. Thus, if an administrator denies a scheduling accommodation to a Seventh-Day Adventist athlete (whose Sabbath is Saturday), then the next time around the administrator must be willing to deny the same type of accommodation to a Lutheran or Baptist athlete (whose Sabbath is Sunday). Likewise, if an administrator allows a Jewish athlete to wear a Star of David by waiving a no-jewelry rule, then the administrator must also be willing to allow a Wiccan athlete to wear a pentagram. As noted repeatedly in this article, the law strongly disfavors inequality of treatment between different religions, and even in jurisdictions that have no special protection for religious practices, interdenominational religious discrimination by government actors will always be subject to strict judicial scrutiny.

3. Accord Equal Consideration to Religious and Nonreligious Requests

The third recommendation is that administrators and athletic personnel should entertain religious requests for accommodation to the same extent that they consider nonreligious requests for accommodation. So, for example, if an administrator treats medical or family problems as potential grounds for exemption from an otherwise applicable regulation, or if the regulation itself expressly lists these as bases for exemption, then similar consideration should be given to an exemption request

that is based on an athlete's religious beliefs or practices. Again, the religious accommodation may or may not have to be provided; that decision will generally depend upon the balance of interests. But religious reasons cannot be categorically excluded from consideration when waivers are provided (even infrequently) for nonreligious reasons, especially when the nonreligious reasons are not discernibly consistent with the objectives of the regulation.

4. Attempt to Reasonably Accommodate Every Claim

The fourth recommendation is that administrators and athletic personnel, when confronted by an accommodation request, should make an affirmative and good faith effort to consider (if not ultimately provide) such an accommodation. This is obviously the correct approach if it appears from a careful legal analysis that an accommodation may be required by federal or state law. Even if not required, however, it remains the recommended approach. If there is flexibility in the regulation, and if the administrative burden is minimal, then an accommodation should be forthcoming if only out of institutional integrity and a concern for public relations. And, should the request eventually evolve into a lawsuit, the school or athletic association will be in a much more favorable position if it appears as though the claim was respectfully considered and a reasonable effort was made to find a workable accommodation. Although courts periodically overlook a defendant's insolicitude towards an accommodation request,[205] such insensitivity can itself constitute a needless violation of the First Amendment[206] and can only harm the defendant's legal posture, whether or not a legal violation is ultimately found.[207]

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205. *Cf., e.g.*, Rodriguez v. City of Chicago, 156 F.3d 771, 778 (7th Cir. 1998) (commenting that an employer's "failure to respond to [an employee's] formal request" for a religious accommodation "gives us some pause," though finding no violation of Title VII), *cert. denied*, 525 U.S. 1144 (1999).

206. *See, e.g.*, *In re Palmer*, 386 A.2d at 1114-16 (holding that a trial judge violated the free exercise rights of a person appearing before the court who was wearing a "takia" prayer cap, because, "[a]lthough [he] and his counsel made several abortive efforts to explain the nature and sincerity of the religious beliefs expressed by [him] in the wearing of the symbolic prayer cap, the trial justice did not attempt to discover whether these beliefs were sincerely held or whether they precluded petitioner from removing his takia in court").

207. *Cf., e.g., Nation in Brief*, ATLANTA J.-CONST., July 18, 2001, at A9 (reporting on a jury verdict awarding $2.25 million to an employee who was fired for refusing to work on his Sabbath, where one of his managers refused to accommodate his religious observance and "called his religious belief 'a scam'"), *available at* 2001 WL 3682592.

5. Avoid Litigation Unless Genuinely Necessary

The fifth recommendation is that administrators and athletic personnel should avoid litigation, including conduct precipitating litigation, unless their institution is fully committed to defending the regulation in a legal proceeding and is prepared to incur whatever costs may result from that defense. At the very least, these might include legal fees and court-awarded damages. But monetary costs should not be the only concern. Even if a prospective case appears to be a sure winner for the school or association, this legal victory may entail significant *qualitative* expense to the institution, such as friction within the athletic program or adverse public and alumni relations. To be sure, conflicts involving religion and sports, precisely because of the importance of each, can be among the most heated and polarizing legal disputes that an organization or community may face. In turn, gauging the "necessity" of litigation should entail determining not only that an accommodation would clearly thwart the legitimate or compelling objectives of the rule in question, but also that preserving the rule manifestly outweighs these possible qualitative harms. If the institution is not certain that this calculus dictates litigation, then it should give serious consideration to informally resolving the conflict by means of voluntary accommodation, thereby generally preserving the integrity and enforceability of the rule while nevertheless freeing the athlete from the burden that the rule imposes.

6. Anticipate Religious Conflicts When Drafting Rules

The sixth and final recommendation is that administrators and athletic personnel should draft rules that anticipate potential religious conflicts and, when drafting such rules, to do so in consultation with legal counsel, clergy or religious leaders, and parents or the public at large. This process of anticipating potential conflicts has both a general component and a specific component. The general component addresses whether the institution believes it appropriate to consider religious accommodation requests at all, regardless of the particulars, and to craft a rule that comports both with the answer to that question and with the requirements of the First Amendment. It may be that religious accommodations of any sort are considered undesirable, but then administrators must make sure that the rule is neutral, is generally applicable, and does not allow for accommodation or waiver requests of any kind, and if the rule does have exceptions that these exceptions are not inconsistent with the rule's objectives.

The specific component of this anticipation process addresses the actual religious conflicts that might arise and, based on that information,

allows administrators either to rethink or to refine their initial, more general posture. It is at this specific stage, of course, that the role of consultation, especially with religious leaders, becomes important. Such consultation can shed light on both the diversity of religious beliefs within the community and the particular manifestations of those beliefs—Saturday Sabbaths, head coverings, religious holidays, dietary requirements, and so forth—that may later give rise to difficult conflicts if not addressed during the formulation of the rule. Administrators should note, however, that if an advisory committee is used and the committee formally includes clergy solely because of their status as clergy,[208] they should be drawn from a variety of faiths and under no circumstances should they be delegated actual rulemaking authority.[209]

CONCLUSION

As noted at the very outset of the article, athletic participation and religious observance appear to be two of Americans' most cherished endeavors. When these endeavors collide, and when the collision is due partly to a governmental regulation or policy, the Free Exercise Clause may very well dictate how this conflict between competition and conscience is resolved. The First Amendment's principal message in this regard is that regulations must be religiously neutral and generally applicable, and that religious requests for accommodation must be treated with at least the same solicitude that administrators display towards non-religious requests (although more favorable treatment is in many instances permissible as well). The government may also have to bend its regulations where the athlete's predicament implicates not only free exercise, but also a conjunctive constitutional claim such as free speech or the right of parents to direct their children's education. To the extent

208. It is not necessarily a violation of the Establishment Clause to provide for the inclusion of religious leaders—solely because of their status as such—on governmental advisory committees. New York State Sch. Bds. Ass'n v. Sobol, 591 N.E.2d 1146, 1147, 1148-52 (N.Y. 1992) (upholding a state regulation providing that an AIDS "advisory council shall consist of parents, school board members, appropriate school personnel, and community representatives, *including representatives from religious organizations*"), *cert. denied*, 506 U.S. 909 (1992). However, it would presumably be a violation to *exclude* them because of that status. *McDaniel*, 435 U.S. at 626-29 (plurality opinion) (holding that the Free Exercise Clause prohibits the exclusion of clergy from political office).

209. *Larkin*, 459 U.S. at 127 (explaining that the Establishment Clause prohibits "important, discretionary governmental powers" from being "delegated to or shared with religious institutions"); *Sobol*, 591 N.E.2d at 1150 (emphasizing the importance of the fact that the committee to which the religious representatives were appointed "serve[s] in a purely *advisory* role" and that the entities which it advises "retain the unfettered and nondelegable public responsibility and discretion to adopt or reject any advisory views in whole or in part").

that governments abide by these norms, the First Amendment otherwise permits them generally to regulate in any rational manner, and pursue any legitimate objectives, which they deem appropriate.

This is not to say that other federal and especially state laws might not also be implicated. In fact they might, depending on the jurisdiction, the legal status of the educational institution, the nature of the athletic regulation, and the particular circumstances of the alleged religious infringement. In some states, for example, strict scrutiny may apply to government regulations even if they are neutral and generally applicable. In others, the religious rights of students or student-athletes may be specifically protected. While in others, or in certain interscholastic venues, the regulations themselves may provide for certain forms of religious accommodation.

In addition to following the general guidelines set forth in this article, therefore, administrators and athletic personnel must keep apprised of the religious freedom laws within their own jurisdiction. This is an unusually dynamic area of law at present, and the overall trajectory is one of enhancing the protections afforded to religious practices, particularly in relation to the actions of government. By keeping so apprised, and by respecting the First Amendment norms discussed in this article, administrators and athletic personnel who are confronted by requests for religious accommodation can hopefully prevent these requests from mushrooming into full-blown conflicts, thereby minimizing friction within their athletic programs, poor public relations, and, of course, potential legal liability.