AN ANALYSIS OF FEDERAL AND STATE LAW GOVERNING PUBLIC SCHOOLTEACHERS' RELIGIOUS GARB IN PENNSYLVANIA AND NEBRASKA UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE PENNSYLVANIA RELIGIOUS FREEDOM PROTECTION ACT

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ABSTRACT

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This study is based on a narrow legal examination of the two contemporary state bans on public schoolteachers' religious garb in Pennsylvania and Nebraska. *Legal research* and *legal analysis* are the primary methods used to investigate whether these two statutory bans meet the judicial and legislative tests under the Free Exercise Clause of the First Amendment to the U.S. Constitution and the Pennsylvania Religious Freedom Protection Act. The study applies the *Sherbert* standard as articulated by the U.S. Supreme Court—a three-part judicial test that courts use to apply the *strict scrutiny* standard to Free Exercise cases. The study also applies the U.S. Supreme Court's *Smith* standard, also known as the *general applicability* test, which requires that government regulations involving religion must be "neutral and generally applicable," and cannot "target religious conduct for distinctive treatment."

This study examines the 123-year history of legal bans on public schoolteachers' religious garb, with special attention to Pennsylvania's current anti-religious-garb statute

was the first of its kind in the United States. It was enacted in 1895 in response to the Pennsylvania Supreme Court ruling that held Catholic nuns were permitted to wear religious garb (habits) while teaching in public schools. Nebraska's anti-religious-garb law, a replica of Pennsylvania's ban, was first enacted in 1919 and repealed in 2017. Although at the time this study was published (May 2018), the study notes that earlier attempts to repeal it failed. The study uses Pennsylvania's anti-religious-garb statute to legally define religious garb as "any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."

The study concludes the following: Pennsylvania's and Nebraska's statutory bans on teachers wearing religious garb in public schools (1) failed the *general applicability test* under *Smith* and (2) *substantially burdened* religions, as defined under the provisions in *Sherbert* and the Religious Freedom Protection Act (RFPA). The statutes (3) partially met the *rational basis* test, but when faced with *strict scrutiny*, the statutes (4) failed to meet the *compelling interest* and (5) *narrowly tailored* tests.

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I – INTRODUCTION

The following study is based on a narrow legal examination of the two contemporary state bans on public schoolteachers' religious garb in Pennsylvania and Nebraska. *Legal research* and *legal analysis* are the primary methods used to investigate whether these two statutory bans meet the judicial and legislative tests under the Free Exercise Clause of the First Amendment to the U.S. Constitution and the Pennsylvania Religious Freedom Protection Act.

Pennsylvania's current anti-religious-garb statute was the first of its kind in the United States.[1] It was enacted in 1895 in response to the Pennsylvania Supreme Court decision[2] to permit Catholic nuns to wear religious garb (habits)[3] while teaching in public schools. Nebraska's anti-religious-garb law, a replica of Pennsylvania's ban, was first enacted in 1919[4] and repealed on March 27, 2017.[5] According to Attorney Darrel

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[1] The Pennsylvania General Assembly first enacted the Pennsylvania Statute 24, § 11-1112 in 1895, in response to the Pennsylvania Supreme Court's affirmation of Catholic nuns from wearing habits while teaching in state public schools. The Pennsylvania General Assembly in 1949 and 1982.

[2] *Hysong v. Gallitzin School District*, 164 Pa. 629, 30 A. 482 (1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910).

[3] In this context, the religious garb in question were the habits of the order of the Sisters of St. Joseph.

[4] Neb. Code § 79-898 (2016). This statute was first enacted in 1919 (c. 248, § 1, p. 1018) and reaffirmed in 1922, 1929, 1943, 1949, and 1994 and repealed in 2017.

[5] On January 5, 2017, Nebraska State Senator Jim Scheer from District 19 introduced bill NE LB62, designed to repeal the prohibition on the "wearing of religious garb by teachers in public schools." The bill was passed the Education Committee by a vote of 36 to 1, with its last hearing occurring on January 17, 2017. The bill passed on final reading with thirty-nine in favor and five against. Nebraska LB62 2017 was signed by the Governor on Mar. 27, 2017 and reads "A Bill for an Act relating to schools; to eliminate provisions prohibiting the wearing of religious garb by teachers in public schools; to eliminate penalties; and to outright repeal sections 79-898 and 79-899, Reissue Revised Statutes of Nebraska. Be it enacted by

Huenergardt of Lincoln, Nebraska, there is no record of any prosecutions under Nebraska's state's statute,[6] which was first passed in 1919; however, other data shows that public schoolteachers were wearing religious garb while teaching but the statute was not enforced.[7] Pennsylvania has a history of prosecutions (see Chapter II – Relevant Case Law) and its anti-religious-garb statute is still active today. Similar to Nebraska, in Pennsylvania there have been contemporary attempts to repeal the anti-religious-garb statute; however, Pennsylvania was not successful.[8] The recent legislative activities in these two states suggest that the subject of public schoolteachers' religious garb is still an active legal question.

Because Nebraska repealed its anti-religious-garb law midway through this study, research timeline was limited from 1894 to 2016. This research project, therefore, predated Nebraska's repeal, giving me the chance to keep intact the research design of

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the people of the State of Nebraska, Section 1. The following sections are outright repealed: Sections 79-898 and 79-899, Reissue Revised Statutes of Nebraska."

[6] There was evidence of religious-garb-wearing teachers but no prosecution of them. See: C. A. Sorensen, Attorney General of Nebraska and George W. Ayres, Assistant Attorney General of Nebraska. Letter to Mr. P. F. O'Gara, Attorney at Law, Harington, Nebraska. Regarding "Schools—Sectarian Schools Not Entitled to Share in State School Funds." Office of the Attorney General, State of Nebraska, March 15, 1930. ("I am… of the opinion that the law forbidding the wearing of a sectarian garb in the school room by a teacher in the public schools of this state is a valid enactment… The fact that the State Superintendent did not revoke [teachers'] certificates [who]… knowingly violated a state law and committed an act which was a crime against the state… and that neither they nor the members of the district school board were prosecuted by the local authorities as they might have been, for a gross violation of a state law, does not in my opinion absolutely bar the State Superintendent from asserting that the school over which they presided was not entitled to a share of the state school funds.")

[7] Mark A. Kellner. "Pennsylvania teachers can't wear 'religious garb' to class but a repeal effort may be possible." *Desert News*, December 12, 2014.

[8] In May 2011, Pennsylvania Representatives DePasquale (D-York) and Tallman (R-Adams/York), along with 17 Representatives, introduced House Bill, No. 1581, designed to repeal Pennsylvania anti-religious-garb law. It was referred to the Committee on Education, on May 24, 2011 and reintroduced in the 2012.

using two case studies—Nebraska and Pennsylvania—from which to conduct my legal analysis, beginning with defining "religious garb."

The legal definition of this prohibited type of religious expression on the language is based on Pennsylvania's statute, which defines religious garb as "any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination" (Appendix A. Glossary of Legal Terms).[9] Similarly, Nebraska's statute defined religious garb as "any dress or garb indicating the fact that such teacher is a member or an adherent of any religious order, sect, or denomination."[10]

Overview of Research Questions

In this context, I use two research questions to drive my study: first, whether the anti-religious-garb laws in Pennsylvania and Nebraska are permissible under federal law; and second, whether Pennsylvania's anti-religious-garb law is permissible under Pennsylvania state law. I focus this second question narrowly on a single state because the Pennsylvania General Assembly enacted the Religious Freedom Protection Act in 2002, a state statute that "prescribes the conditions under which government may substantially burden a person's free exercise of religion,"[11] whereas Nebraska has no such state statute.

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[9] Pennsylvania Statute 24, § 11-1112 (2016). This statute was the first in the United States, enacted in 1895. It was reaffirmed in 1949 and 1982.
[10] Neb. Code § 79-898 (2017). This statute was first enacted in 1919 (c. 248, § 1, p. 1018) and reaffirmed in 1922, 1929, 1943, 1949, 1994, and 1996 and repealed in 2017.
[11] Pennsylvania Religious Freedom Protection Act of Dec. 9, 2002, P.L. 1701, No. 214.

Primary Line of Inquiry: Free Exercise Standards

To elaborate, my primary research question focuses on whether these two contemporary state statutes are permissible under the Free Exercise Clause of the First Amendment to the United States Constitution, which declares that "Congress shall make no law… prohibiting the free exercise" [of religion].[12] The U.S. Supreme Court applied the constitutional guarantee to one's free exercise of religion to all state laws in 1940[13] through the Fourteenth Amendment, which proclaims that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[14] Therefore, I use my primary research question to analyze whether Pennsylvania and Nebraska's anti-religious-garb laws are permissible under the Free Exercise Clause of the First Amendment to the United States Constitution.

I use legal research methods to examine two standards that federal courts have used to analyze the constitutionality of Free Exercise claims: the *strict scrutiny* and *general applicability* tests. *Strict scrutiny* means that a state must *narrowly tailor* regulations that may substantially burden one's free exercise of religion by using the *least restrictive means possible* to further a *compelling governmental interest*. I will refer to *strict scrutiny* as the *Sherbert* standard because of its prominent use in the landmark case

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[12] U.S. CONST. amend. I. Please note that I do not ask whether these state anti-garb laws violate the Establishment Clause of the First Amendment which states that "Congress shall make no law respecting the establishment of religion," which was applied to the states in 1947 in *Everson v. Board of Education*, 330 U.S. 1 (1947). Establishment Clause questions fall outside the scope of this study.
[13] *Cantwell v. Connecticut,* 310 U.S. 296 (1940).
[14] U.S. CONST. amend. XIV.

Sherbert v. Verner. [15] (See Chapter II for a complete discussion of these italicized phrases and the historical development and current use of *strict scrutiny* in Free Exercise cases.)

The *general applicability* test requires that government regulations must be "neutral and generally applicable," which I will refer to as the *Smith* standard because of its prominent use in the controversial case, *Employment Division v. Smith*.[16] (For a complete discussion see my literature review of Free Exercise standards in Chapter II.) [17]

In further clarifying the meaning of the *general neutrality* standard, the U.S. Supreme Court made explicit in *Church of Lukumi Babalu Aye v. City of Hialeah* (1993) that "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt."[18] Laws that are hostile toward or suppress religious beliefs or practices are not neutral nor generally applicable.[19]

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[15] *Sherbert v. Verner*, 374 U.S. 398 (1963). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) for a somewhat looser application of the *Sherbert* standard.

[16] *Employment Division v. Smith*, 494 U.S. 872 (1990).

[17] As I detail later, the general neutral provision was affirmed in *Employment Division v. Smith*, 494 U.S. 872 (1990), which denied unemployment benefits to drug counselors who used peyote as part of a Native American ritual. In response, Congress sought to restore the strict scrutiny standard when passing the Religious Freedom Restoration Act of 1993 (RFRA). In *City of Boerne v. Flores*, 521 U.S. 507 (1997) the U.S. Supreme Court found that Congress overstepped its constitutional enforcement powers when seeking to apply RFRA to the states, thus limiting the strict scrutiny test to federal laws. As a result, state legislatures began to pass their own "mini-RFRAs."

[18] See the unanimous decision, *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 at 28 (1993).

[19] In discussing the bans on public schoolteachers' religious garb, Thomas C. Berg writes, "One might think that because the statutes single out religiously motivated conduct for restriction, they should be subject to strict scrutiny - and likely invalidation - under the Free Exercise Clause as interpreted in *Church of the Lukumi Babalu Aye*, or under Title VII, the federal statute prohibiting employment discrimination on the basis of, among other things, religion. But this situation is complicated by the fact that teachers are state employees with authority over children in the classroom." Thomas C. Berg, *On the Permissible Scope of*

The *Smith* decision supports this line of thinking. In speaking for the majority, Justice Scalia held that "a State would be 'prohibiting the free exercise [of religion] if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."[20] As I demonstrate in Chapter IV, the state bans on public schoolteachers' religious garb in Pennsylvania and Nebraska were designed to regulate specific activity ("wearing any dress, mark, emblem or insignia") because the nature of the activity was explicitly religious ("indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination").[21]

Given this statutory language, I use the U.S. Supreme Court's rationale in *Smith*[22] to justify that the *Sherbert* standard applies to the question of anti-religious-garb laws in Pennsylvania and Nebraska because these statutes were designed to target and suppress particular forms of religious expression.[23]

Legal Limitations on the Freedom of Religion or Belief in the United States, 19 EMORY INT'L L. REV. 1277 (2005), p. 19. Also see: *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993) in which the U.S. Supreme Court unanimously held that the City of Hialeah violated the Free Exercise Clause of the First Amendment when banning the religious practice of animal sacrifice, when the city permitted the killing of animals for other purposes, such as food production.

[20] In *Smith*, the Court makes the caveat that "no cases of ours have involved [this] point." *Employment Division v. Smith*, 494 U.S. 872 (1990), at 877-78. This argument is further advanced in the "Historical and Legislative Background of the Pennsylvania Religious Freedom Protection Act" section of *Combs v. Dubois*, 468 F.Supp.2d 738, 37 (W.D. Pa. 2006).

[21] Pennsylvania Statute 24, § 11-1112 (2018).

[22] *Employment Division v. Smith*, 494 U.S. 872 (1990), at 877-78.

[23] As I will discuss in Chapter IV – Presentation and Analysis of Findings, the Oregon Supreme Court, when upholding Oregon's anti-religious-garb law, admitted that "the religious significance of the teacher's dress is the specific target of this law. The law singles out a teacher's religious dress because it is religious and to the extent that its religious significance is apparent when the wearer is engaged in teaching." The Oregon Supreme Court explicitly stated that Oregon's anti-religious-garb law was "not a general regulation, neutral toward religion on its face and in its policy, like the unemployment benefits standards that we sustained against attack under the Oregon Constitution (though not under the First Amendment) by claimants who had been discharged for religiously motivated conduct in *Smith v. Employment Division*, 301 Or 209, 721 P2d 445 (1986), and *Black v. Employment Division*, 301 Or 221, 721 P2d 451 (1986)."

Therefore, in my primary research question about federal law, I apply both the *Smith* (neutral and general applicability) and *Sherbert* (strict scrutiny) standards to ask whether the contemporary anti-religious-garb laws in Pennsylvania and Nebraska violate the Free Exercise Clause of the First Amendment, as applied to the states via the Fourteenth Amendment to the United States Constitution.

Specifically, I use the *Smith* standard to ask whether these particular state bans on public schoolteachers' religious garb are *neutral and generally applicable* laws. Because I find in Chapter IV that the answer is "no," I then proceed to ask whether these anti-garb statutes pass the three parts of the *strict scrutiny* test: (a) do the statutes *substantially burden* public schoolteachers' free exercise of religion, regardless of whether they are *incidental* or *fundamental* burdens? (b) Are these burdens justified by serving a *compelling government interest*? (c) If so, did the legislative bodies in Pennsylvania and Nebraska *narrowly tailor* the regulation by using the *least restrictive means* possible? These judicial standards allow me to analyze whether the anti-religious-garb laws in Pennsylvania and Nebraska are permissible under the Free Exercise Clause of the First Amendment of the U.S. Constitution.

Secondary Line of Inquiry

My secondary research question is based on a distinct legal jurisdiction: Pennsylvania state law. Specifically, I ask whether Pennsylvania's 1895 statutory ban on public schoolteachers' religious garb violates the Pennsylvania Religious Freedom Protection Act of 2002 (RFPA, pronounced *riff-pa*).[24]

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[24] P.L. 1701, No. 214, Dec. 9, 2002, 71 Pa. Stat. Ann. §§ 2401-2407.

In seeking to mirror the federal standards used to test the validity of Free Exercise claims under the First Amendment to the U.S. Constitution, Pennsylvania's RFPA uses the same language as the federal *general applicability* and *strict scrutiny* standards. This will prove convenient in conducting both a federal- and state-based analysis of Pennsylvania's anti-religious-garb law. Specifically, RFPA states that "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability."[25] It further stipulates that "An agency may substantially burden a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following: (1) In furtherance of a *compelling interest* of the agency; (2) The *least restrictive means* of furthering the compelling interest."[26]

Twenty states have enacted similar religious freedom protection statutes.[27] Pennsylvania is unique in that it is the only legal body in the United States, in both federal and state law, that uses a four-part test to determine whether a government agency "substantially burdens" a person's religious freedom. This becomes the first line of inquiry used by a court; meaning, similar to the *Sherbert* standard, if the plaintiff demonstrates their religion is burdened then the state must articulate a compelling state interest and illustrate how it is achieved in the least restrictive means possible. Unique to Pennsylvania is the Four-Part Substantial Burden Test in the RFPA, which clarifies that an agency substantially burdens a person's religion when the state's action:

> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; (2) Significantly curtails a

[25] 71 Pa. Stat. Ann. §2404, section 4a.
[26] *Ibid.,* §2404, section 4b.
[27] For a complete discussion, see section about statutory developments in Chapter II.

> person's ability to express adherence to the person's religious faith; (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion; (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

It is important to note that RFPA stipulates that a plaintiff need only prove, with "clear and convincing evidence," one of these four substantial burdens exist in order to trigger RFPA's *strict scrutiny* standard.[28]

Pennsylvania's Religious Freedom Protection Act includes an additional complexity that is important to note in this introduction. It begins with a "Definitions" section that legally defines religious exercise as the "practice or observance of religion under section 3 of Article I of the Constitution of Pennsylvania."[29] This means that the Pennsylvania General Assembly required its state courts draw upon state court interpretations of the Pennsylvania Constitution to define religious exercise and not rely on federal definitions of "free exercise" as interpreted under the federal constitution.

The reasons for this stipulation, which I further explain in Chapter II – Literature Review, are straightforward: first, these religious freedom protections in Pennsylvania's Constitution predate the First Amendment to the U.S. Constitution;[30] second, the religious freedom protections in the Pennsylvania Constitution are unlike any other state or federal laws; and, third, RFPA and other state religious freedom protection statutes were designed to empower states to expand Free Exercise protections by using state

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[28] For example, the plaintiffs in *Combs v. Dubois*, 468 F.Supp.2d 738 (W.D. Pa. 2006) only claim that the state violated one of the four-part substantial burdens listed in RFPA, the *No Constraining Conduct Based on Religious Tenets* principle. Although they failed to prevail, the federal District Court of the Western District of Pennsylvania did not require that they prove more than one or all of the substantial burdens. Affirmed in *Combs v. Dubois*, 540 F.3d 231 (3rd Cir. 2008).

[29] *Ibid.,* § 2403. Definitions, P.L. 1701, No. 214.

[30] The PA. CONST. was enacted on Sept. 28, 1776; fifteen years later, on Dec. 15, 1791, the states ratified the Bill of Rights, the first ten amendments to the U.S. CONST.

constitutions. For a complete discussion of this last point, see my examination of the "Increased Reliance on State Religion Clauses" and in Chapter II – Literature Review.

These are the state-based provisions I will use to ask in my secondary question, whether Pennsylvania's anti-religious-garb law violates Pennsylvania's RFPA. In my primary research question, I will use the previously discussed *Smith* and *Sherbert* federal standards to ask whether Pennsylvania and Nebraska's anti-religious-garb laws are permissible under the Free Exercise Clause of the U.S. Constitution. Together, these two questions create the scaffolding for my two-part study of anti-religious-garb laws under federal and state law.

Significance

Having introduced my legal questions and the standards by which I will answer them, the next part of this introductory chapter is dedicated to demonstrate that scholars consider the legal question of anti-religious-garb laws to be one worth studying and that this research project has real-world significance.

I begin this next section by surveying the historical context for the 123-year old debate in the United States, which started when the Pennsylvania General Assembly passed the first anti-religious-garb law[31] in response to the 1894 decision of the Pennsylvania Supreme Court to permit Catholic teachers to wear religious habits in the public classroom.[32] Legislators and State Superintendents in twenty-one states followed

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[31] *Ibid.*, Pennsylvania Statute 24, § 11-1112 (2016), originally passed as P.L. 395 on June 27, 1895.
[32] *Hysong v. Gallitzin School District*, 164 Pa. 629, 30 A. 482 (1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910).

Pennsylvania's lead in banning public schoolteachers from wearing religious garb throughout their states, through either state statutes or administrative regulations.

I analyze these historic origins and subsequent developments in relation to the relevance of contemporary legal challenges to state anti-religious-garb laws in the United States that have recently been used to deny employment to Catholic,[33] Muslim,[34] and Sikh[35] public schoolteachers for wearing head coverings.

In doing so, I demonstrate that the current dilemma over whether teachers can wear religious garb in the public classroom in the United States is neither an isolated problem nor unique to one time and place.[36] It is a historical quandary with contemporary significance—domestically and globally.[37]

The significance of my contribution to these debates broadly, and to the literature on education law more specifically, comes in three forms. First, I demonstrate that there are substantial and unresolved legal questions as to the constitutionality of state garb statutes under the Free Exercise Clause of the First Amendment to the United States Constitution and the Pennsylvania Religious Freedom Protection Act. These questions include whether the state bans violate federal *neutral and generally applicable* and *strict*

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[33] In 2016, Sister Madeleine Miller was denied employment as a substitute teacher because she sought to wear a Catholic habit while teaching. Grant Shulte (2017) "Nebraska targets ban on religious garb worn by teachers," *Associated Press*, Jan. 17, 2017; Michael Shively (2017) "Legislative Bill Would Eliminate 100-Year-Old Religious Garb Law," *KWBE Nebraska News Chanel,* Jan. 18, 2017.
[34] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).
[35] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 (1986), app. Dismissed, 480 U.S. 942 (1987).
[36] *Liberty and Freedom of Conscience: Right to Wear a Religious Garb in Public Schools*. 9 MICH. L. REV., (1911), pp. 352-353; Virgil C Blum, *Religious Liberty and the Religious Garb, and Religious Garb in the Public Schools: A Study in Conflicting Liberties*. 22 U. CHI. L. REV. 22, (1955), 875-88 and 888-95; Edmund E. Reutter, *Teachers' Religious Dress: A Century of Litigation*. WEST'S EDUCATION LAW REPORTER (1992); Caitlin S. Kerr, *Teachers' Religious Garb as an Instrument for Globalization in Education*. 18 IND. J. GLOBAL LEGAL STUD. (Winter 2011), p. 539-561.
[37] Lyal S. Sunga and Nathan C. Walker, *Freedom of Religion or Belief through Law: Current Dilemmas and Lessons Learned*, Section A: "Global Bans on Religious Garb," INT'L DEV. L. ORG. (2014) pp. 42-43.

scrutiny standards and whether they violate Pennsylvania's unique, four-part substantial burden test.

Second, I identify and correct the factual errors in the literature about the historical bans on teachers' garb, such as how many U.S. states previously had similar regulations and the legal outcomes of these laws.

Third, I briefly situate this historical and contemporary conflict in the United States within the current discussion in the United Nations and in the European Union about government bans on religious garb in public schools. Specifically, I review how the question of government regulation of religious garb worn by both teachers and students in public schools has recently erupted in six countries and in the European Court of Human Rights.[38] These cases illustrate how the historic conflicts in the United States mirror the current legal disputes around the globe today. Taken together, this introductory material demonstrates the real-world significance of this research topic, one that scholars have long since determined is an unresolved legal issue.

Scholarship on Anti-Religious-Garb Laws

The interdisciplinary scholarship on regulating public schoolteachers' religious garb in America is vast for the mere fact that this legal problem spans 123-years and has

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[38] The European Court of Human Rights used Article 9 of the European Convention of Human Rights to justify legal restrictions on religious expression. The first part of Article 9 uses the language from Article 18 of the UDHR, and the second part guarantees that "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." Cases include *Dahlab v. Switzerland*, No. 42393/98, 15 Jan. 2001; *Leyla Sahin v. Turkey* No. 44774/98, 10 Nov. 2008; *El Morsli v. France*, No. 15585/06, 4 Mar. 2008; *Dogru v. France*, No. 27058/05, 4 Dec. 2008; *Kervanci v. France*, No. 31645/04, 4 Dec. 2008; *Aktas v. France*, No. 43563/08, 17 July 2009; *Bayrak v. France*, No. 14308/08, 17 July 2009; *Gamaleddyn v. France*, No. 18527/08, 17 July 2009; *Ghazal v. France*, No.29134/08, 17 July 2009; *J. Singh v. France*, No. 25463/08, 17 July 2009; and *R. Singh v. France*, No. 27561/08, 17 July 2009.

impacted, at some point, schools in twenty-two U.S. states. Scholars from the fields of law and education as well as religious and civic leaders and journalists have all contributed to this body of knowledge. Their collective contributions reveal that the question of public schoolteachers' religious garb is significant, historic and relevant today, as noted in the following five bodies of literature.

In Chapter II – Literature Review and References, I first will show that nation's leading law and religion scholars have drawn upon the conflicting case law on public schoolteachers' religious garb. This scholarship demonstrates that this is an important, longstanding and unresolved legal matter. Second, I will demonstrate that elected and appointed officials from various levels of government have made formal statements or issued regulatory policies to address this matter. Third, I will illustrate how educators and education associations have published studies, commentaries, and manuals to guide teachers and policymakers on this legal question. Fourth, I will show how religious and civic liberty groups have consistently asserted themselves in the public debate on this complicated church/state issue. And fifth, I will detail how journalists have been reporting on this topic for over 13 decades, suggesting that the subject of public schoolteachers' religious garb is one worth reporting and one that captures the public's attention. These five areas have helped me understand the historical significance of this longstanding legal question.

Historical Context

Since 1894, there have been eleven U.S. cases that have directly addressed the question of public schoolteachers' religious garb, nine of which were heard by state

supreme courts that applied state laws.[39] Cases filed under these state laws were based on a variety of causes of action derived from state constitutional clauses and state statutes.[40] As a result, the historical context for this set of case law is quite complex.

For instance, only two state courts took up the federal question of religious garb under the U.S. Constitution's Establishment Clause: The New Mexico Supreme Court (1951) issued a negative ruling against Catholic teachers because of strong evidence of sectarian instruction and indoctrination,[41] whereas the Kentucky Court of Appeals (1956) used the federal *Establishment Clause* to issue a positive ruling for Catholic teachers because the trial court found no evidence of sectarian teaching.[42]

The Mississippi Supreme Court was the only state court in the United States 123-year history on public schoolteachers' religious garb that took up the federal question of the U.S. Constitution's Free Exercise Clause. The Mississippi Supreme Court relied on the U.S. Supreme Court decisions[43] to apply the standard of *strict scrutiny* to affirm an

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[39] Six cases involved Catholic nuns: *Hysong v. Gallitzin School District*, 164 Pa. 629, 30 A. 482 (1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910); *O'Connor v. Hendrick*, 184 N.Y. 421 (N.Y. Ct. App. 1906); *Gerhardt v. Heid*, 66 N.D. 444 (1936); *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940); *Zellers v. Huff*, 55 N.M. 501; 236 P.2d 949 (1951); and *Rawlings v. Butler,* 290 S.W.2d 801 (1956). Other cases involved a Mennonite teacher in *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910); a Sikh teacher in *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 (1986), app. Dismissed, 480 U.S. 942 (1987); an African Hebrew Israelite teacher in *Mississippi Employment Security v. McGlothin,* 556 So.2d 324 (1990); a Muslim teacher in *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990); and a Protestant Christian in *Nichol v. Arin*, 268 F.Supp 2d 536 (W.D. Pa. 2003).

[40] Cases filed under a variety of clauses under state constitutions, such as, "right of conscience" clauses, "establishment" clauses, "no preference" clauses, "no aid to religion" clauses, "no sectarian teaching" clauses, "no diversion" of funds clauses, "authority" of legislature clauses; as well as under "authority" of superintendent statutes. For a complete discussion, see the "Case Law" section in Chapter II. Literature Review.

[41] *Zellers v. Huff*, 55 N.M. 501; 236 P.2d 949 (1951).

[42] *Rawlings v. Butler,* 290 S.W.2d 801 (1956).

[43] *Cantwell v. Connecticut,* 310 U.S. 296 (1940) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

African Hebrew Israelite teacher's petition to periodically wear an Ethiopian headdress (January 1990).[44] It is noteworthy to mention that Mississippi did not at the time have and never did have a state ban on religious garb—the teacher's employment was simply denied because of the school's decision not to permit religious garb. This is important because it highlights a consistent legal trend in case law regarding religious garb: "Where no such statute or regulation is involved, the case usually turns on the applicability and effect of constitutional or statutory provisions, variously phrased, which, in effect, prohibit sectarianism in public schools."[45]

In April 1990, three months after the Mississippi Supreme Court had issued its positive ruling for the teacher, the U.S. Supreme Court issued the controversial *Employment Division v. Smith,* in which drug counselors were denied unemployment benefits after being fired for using peyote for sacramental purposes[46] (See the section on "Evolution of Free Exercise Standards" in Chapter II – Literature Review for a complete discussion of *Smith* and its implications for this study.) The *Smith* decision quickly eclipsed the Mississippi Supreme Court's ruling that provided exemptions for the African Hebrew Israelite teacher to wear a headdress while teaching in a public school.

Four months later, in August 1990, a Philadelphia public schoolteacher sought employment accommodations to wear a hijab (Muslim headscarf) under Title VII of the Civil Rights Act of 1964. The Third Circuit Court of Appeals ruled against her,[47] further reinforcing the *Smith*-era trend of courts' denying accommodations for religious

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[44] *Mississippi Employment Security v. McGlothin,* 556 So.2d 324 (1990).
[45] AMERICAN LAW REPORT, 60 A.L.R.2d 300, 1a.
[46] *Employment Division v. Smith*, 494 U.S. 872 (1990).
[47] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).

minorities, as explained in detail in Chapter II – Literature Review. Since then, the legal landscape has changed dramatically.

In reaction to *Smith,* and in a unique moment of bipartisanship, members of Congress passed the *Religious Freedom Restoration Act of 1993*.[48] Known as RFRA (pronounced *riff-ra*), it received the unanimous support of members of the House of Representatives, and 97 of 100 U.S. Senators voted for the bill; President Bill Clinton then signed it into law. Four years later, the U.S. Supreme Court limited the effect of RFRA to federal laws,[49] leading state legislatures to create their own state RFRAs. The purpose of the federal and state RFRAs was to mandate that governments use the standard of *strict scrutiny* when balancing the Free Exercise of individuals against the government's compelling interests. Currently, twenty states have adopted RFRA legislation,[50] and four states have pending RFRA bills.[51] Thirteen additional states have "RFRA-like protections provided by state court decisions,"[52] which I detail in Chapter II – Literature Review.

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[48] 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.
[49] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[50] Conn. Gen. Stat. Ann. §§ 52-571b (1993); R.I. Gen. Laws §§42-80.1-1 to -4 (1998); Ill. Comp. Stat. Ann. 35/1-99 (1998); Fla. Stat. Ann. §§761.01-.05 (1998); ALA. CONST. art. I, § 3.01 (ratified in 1999); Ariz. Rev. Stat. Ann §§41-1493-1439.02 (1999); S.C. Code Ann.§§1-32-10 to -60 (1999); Tex. Civ. Prac. & Rem. Code. Ann §§110.001-0.12 (1999); Idaho Code Ann. §§73-401 to -404 (2000); N.M. Stat. §§28-22-1 to -5 (2000); Okla. Stat. Ann. Tit. 51, §§251-258 (2000); 71 Pa. Stat. Ann §§2401-2407 (2002); Mo. Ann. Stat. §§1.302-.307 (2003); Va. Code Ann. §§57-1 to -2.02 (2007); Utah Code Ann. §§63L-5-101 to -403 (2008); Tenn. Code Ann. §4-1-407 (2009); La. Rev. Stat §§ 13:5231-5242 (2010); Kentucky – H.B. 279, 2013 Reg. Sess. (Ky. 2013) Kansas Ch. 60 Procedure, Civil Article 53, §§ 60-5301 to -5305 (2013); Mississippi. Source: Marci A. Hamilton, www.rfraperils.com.
[51] Georgia's *Preventing Government Overreach on Religious Expression Act* (H.B. 29); Indiana's *Religious Freedom Restoration Act* (H.B. 568); Michigan's *Religious Freedom Restoration Ac*t (S.B. 0004); and Wyoming's *Religious Freedom Restoration Act* (H.B. 0083).
[52] Juliet Eilperin, "31 States Have Heightened Religious Liberty Protections," *The Washington Post*, Mar. 1, 2014.

Of the two states with anti-religious-garb laws—Pennsylvania and Nebraska—Pennsylvania was the only legislature to enact a state RFRA, the Pennsylvania Religious Freedom Protection Act of 2002. Nebraska is only one of four states with no *strict scrutiny* provision in state law, which is why I turn to the Free Exercise and jurisprudence to test the legality of Nebraska's anti-religious-garb law.

Chapter II – Relevant Case Law illustrates that, to date, no court has applied *strict scrutiny* to a state ban on religious garb—neither in a federal Free Exercise case nor in a state RFRA case. As a result, no court has determined (1) whether public schoolteachers are substantially burdened by these laws, (2) whether the state has a compelling interest for denying employment to teachers who wear religious garb, and (3) whether that interest is narrowly tailored and achieved by the least restrictive means possible. In addition, no court since the U.S. Supreme Court issued its *Smith* ruling has ruled on the question of whether an anti-religious-garb statute is a "neutral law of general applicability."[53] These issues serve as the scaffolding for my legal analysis in Chapter IV – Presentation and Analysis of Findings.

Global Context

To demonstrate the contemporary relevance of my study, I begin by showing precisely which kind of garb-wearing teacher is burdened by anti-religious-garb laws

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[53] Although, four years before the U.S. Supreme Court ruled on *Smith,* the Oregon Supreme Court did admit in 1986 that the state's anti-religiou-garb law "is not a general regulation, neutral toward religion on its face and in its policy, like the unemployment benefits standards in *Smith v. Employment Division*, 301 Or 209, 721 P2d 445 (1986), and *Black v. Employment Division*, 301 Or 221, 721 P2d 451 (1986)." *Cooper v. Eugene School District No. 4J,* 301 Ore. 358; 723 P.2d 298; 1986 Ore., at 19.

today (Appendix C). Throughout Chapter II – Literature Review, I provide examples of how state and federal courts have heard grievances from a diverse group of public schoolteachers who use identified as African Hebrew Israelite (headdress),[54] Catholic (habit),[55] Mennonite (bonnet),[56] Muslim (hijab/headscarf),[57] Protestant Christian (cross necklace)[58] and Sikh (turban).[59]

Although these examples derive from real teachers who have challenged anti-religious-garb laws, such laws impact a wide range of religious adherents. We can turn to other forms of religious garb for examples, some of which derive from cases involving the students in public schools as well as military personnel and police officers: Buddhist (dharma wheel insignia), Catholic (rosaries,[60] devotional scapular/two rectangular pieces of cloth,[61] or an Ash Wednesday marking,), Church of the Brethren (hair covering and long dress),[62] Daoist (*yin yang*), Hindu (bindi/red dot or Om symbol), Jewish

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[54] *Mississippi Employment Security v. McGlothin,* 556 So.2d 324 (1990).
[55] *Hysong v. Gallitzin School District*, 164 Pa. 629, 30 A. 482 (1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910); *O'Connor v. Hendrick*, 184 N.Y. 421 (N.Y. Ct. App. 1906); *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940); *Zellers v. Huff*, 55 N.M. 501; 236 P.2d 949 (1951); *Rawlings v. Buttler,* 290 S.W.2d 801 (1956). See also Grant Shulte (2017) "Nebraska targets ban on religious garb worn by teachers," *Associated Press*, Jan. 17, 2017; Michael Shively (2017) "Legislative Bill Would Eliminate 100-Year-Old Religious Garb Law," *KWBE Nebraska News Chanel,* Jan. 18, 2017.
[56] *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910).
[57] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).
[58] *Nichol v. Arin*, 268 F.Supp 2d 536 (W.D. Pa. 2003).
[59] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 (1986), app. Dismissed, 480 U.S. 942 (1987).
[60] Student case: *Chalifoux v. New Caney*, 976 F.Supp. 659 (S.D. Tex. 1997).
[61] An example highlighted by Justice Brennan in his dissent in *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[62] *Kennedy v. St. Joseph's Ministries,* 657 F.3d 189 (4th Cir. 2011).

(yarmulke/skullcap,[63] beard,[64] tzitzit/knotted tassel,[65] mezuzah pendant,[66] tichel/headscarf), Native American (hair length),[67] Nazirite (hair length),[68] Rastafarian (dreadlocks),[69] Shriner (fezz, hat), Sikh (kirpan),[70] Wiccan (pentacle), Yogi (saffron robe),[71] and so on.

I share these examples to make the point that the contemporary legal question of statutory bans on religious garb in Pennsylvania and Nebraska may burden a variety of garb-wearing teachers in public schools. Given the diversity of the religious expressions, the contemporary relevance of the study of bans on religious garb has real-world consequences on public schoolteachers both domestically and globally.

As of 2006, at least thirty-two countries throughout the world prohibit some kind of private acts of devotion in public places.[72] Studies demonstrate that countries with high restrictions on religion have greater increases in social hostilities and violence.[73] The

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[63] Student case: *Menora v. Illinois,* 683 F.2d 1030 (7th Cir. 1982).
[64] Student case on religious garb: Rocco Parascandola, "Hasidic NYPD Recruit Fired Over Beard." *New York Daily News*, June 9, 2012. See also, "Lawyer for defendant claims the 'city has come up with an after-the-fact rationalization' by saying facial hair would prevent him wearing a gas mask with a proper fit." Rocco Parascandola, "Hasid cop recruit Fishel Litzman bashes NYPD's terror claim in firing over refusal to trim beard," *New York Daily News*, 27 June 2013.
[65] An example highlighted by Justice Brennan in his dissent in *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[66] An example highlighted by Justice Ackerman's concurrence in *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).
[67] Student cases: *Coushatta v. Big Sandy*, 817 F.Supp. 1319 (E.D., Tex. 1993); *Betenbaugh v. Needville Independent School District,* 611 F.3d 248 (5th Cir. 2010).
[68] EEOC, "Taco Bell Operator Pays $27,000 to Resolve EEOC Religious Discrimination Lawsuit: Fayetteville Restaurant Fired Worker Over Religion-Mandated Long Hair, Federal Agency Charged." U.S. Equal Employment Opportunity Commission, Press Release, 27 Apr. 2012.
[69] *Flowers v. Columbia College Chicago,* 397 F.3d 532, 535 (7th Cir. 2005).
[70] Student case: *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).
[71] An example highlighted by Justice Stevens concurrence in *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[72] Michael Wiener, *Prohibition of Wearing Religious Symbols.* (Germany: Universität Trier, 2006).
[73] Pew Research Center, *Religious Hostilities Reach Six-Year High.* (Washington, DC: Pew Research Center, Jan. 2014); Sandra Stencel and Brian J. Grim, "Headscarf Incident in Sudan Highlight a Global

effects are seen in all areas of society, from the public square to private workplaces. For instance, throughout much of the world, individuals are currently experiencing discrimination in employment by either not being able to find jobs because of their religious dress, for wearing religious symbols on the job, or for requesting days off for religious observance. These laws have a significant effect on the earning power of families given that regulations on religious expression disproportionately harm women.

The Pew Research Center found that thirty-nine countries have enacted laws or issued policies "limiting women's ability to wear religious attire" in 2012-2013,[74] which is blatant gender-discrimination. This study further reinforced earlier studies that correlate increases in regulation of religion with increases in social hostilities. Take for instance the continent of Europe. In 2012–2013, nearly half of the region's countries (twenty-one of forty-five) had at least one report of women being harassed for wearing religious attire. This is higher than four other regions surveyed (Americas, Asia-Pacific, Middle East and North Africa, and Sub-Saharan Africa).

Turkey, where Muslims make up approximately ninety-eight percent of the population[75], "was the first country [in the European Union][76] to ban hijab through a

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Trend," (Washington, DC: Pew Research Center, Sept. 18, 2013); and Brian J. Grim, *Religion, Law and Social Conflict in the 21st Century: Findings from Sociological Research*, OXFORD J.L. & RELIG., pp. 249–271.

[74] Alan Cooperman, Peter Henne, Dennis R. Quinn, *Restrictions on Women's Religious Attire: More countries restrict women's ability to wear religious symbols or attire than require women to dress a certain way*. (Washington, DC: Pew Research Center, Apr. 5, 2016).

[75] Pew Research Center, *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population*. (Washington, DC: Pew Research Center, Oct. 2009), p. 5.

[76] Turkey became a member of the Council of Europe in 1949. In 1987, Turkey applied to join the European Union and signed the Customs Union agreement in 1995, resulting in full membership in 1999.

sweeping prohibition applicable to public schools, universities, and in the workplace for official employees."[77] Under the secular constitution, by 2001, over 37,000 girls had been expelled from school, and over 24,000 teachers had been fired for wearing the hijab, an Islamic headscarf.[78] Under the leadership of Prime Minister Recep Tayyip Erdogan, in 2008 the Parliament sought to rescinded the ban on the hijab,[79] citing that this law had substantially harmed girls in completing their schooling and adult women for being able to work in public institutions. In 2008, the Constitutional Court overturned the Parliament, citing the founding secular provisions in the constitution. The BBC reported that this ruling could have "foreshadow[ed] a separate court case in which the ruling AK Party (AKP) could be banned for anti-secular activities. Some seventy-one members of the party, including the prime minister and the president, could also be banned from belonging to a political party for five years."[80] This threat did not manifest. By 2013, the parliament prevailed by permitting students, teachers, and other government workers (but not military or judiciary personnel) to wear the hijab. In a parliamentary address, Prime Minister Erdogan said, "A dark time eventually comes to an end. Headscarf-wearing woman are full members of the republic, as well as those who do not wear it."[81]

Turkey's "full member" status was negotiated in 2005 and then suspended in 2016 as a result of political unrest and over EU members' concerns about the lack of rule of law and human rights abuses.

[77] Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, *5* HASTINGS RACE & POVERTY L.J. *441,* p. 453.

[78] Faisal Kutty, *Ousted Turkish M.P. Merver Kavakci Calls on Canada to Help Hijab-Wearing Muslim Women*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS*,* Jan./Feb. 2001, pp. 44, 113.

[79] *Ibid.*

[80] "Court Annuls Turkish Scarf Reform," *BBC News*, June 5, 2008.

[81] Roff Smith, "Why Turkey Lifted Its Ban on the Islamic Headscarf: Woman Who Work in Civil Service or Government Can Now Wear a Hijab," *National Geographic,* Oct. 12, 2013.

To prevent these types of legal and political conflicts, a variety of state, non-governmental, and religious actors are making clear that restrictions on religious expression violate two fundamental human rights. First, Article 18 of the Universal Declaration of Human Rights (UDHR)[82] ensures that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Second, article 23 §1 of the UDHR proclaims, "Everyone has the right to work . . ." and §2 states, "Everyone, without any discrimination, has the right to equal pay for equal work."[83] In connecting the two human rights, employers cannot make religion or nonreligion a prerequisite for employment—a legal principle that, as of 2016, was not being honored in fifty of the world's countries.[84] All of these countries have affirmed these human rights principles by signing either the United Nation's Universal Declaration of Human Rights

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[82] *Universal Declaration of Human Rights*, United Nations General Assembly, 10 Dec. 1948, Palais de Chaillot, Paris. Currently, 193 countries are represented in the United Nations; however, 56 of which are also members of the Organization of Islamic Cooperation. The OIC rejected the UDHR framework when issuing the *Cairo Declaration of Human Rights in Islam* during the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt, from 9–14 Muharram 1411H (July 31–Aug. 5, 1990). This declaration uses Islamic sharia law to affirm human rights from a non-Western perspective.

[83] As enacted at the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt, from 9–14 Muharram 1411H (July 31–Aug. 5, 1990).

[84] The Pew Research Center found that "50 of the 198 countries and territories included in the study had at least one law or policy regulating women's religious attire in 2012 and 2013… About three-quarters of those countries (39 of the 50, or 78%) had a law or policy *limiting women's ability* to wear religious attire, while about a quarter (12 of the 50, or 24%) had at least one law or policy *requiring women* to wear particular attire." Alan Cooperman, Peter Henne, Dennis R. Quinn, *Restrictions on Women's Religious Attire.* (Washington, DC: Pew Research Center, Apr. 5, 2016.)

or the Organisation of the Islamic Conference's Cairo Declaration on Human Rights in Islam.[85]

Throughout Europe, for example, current bans on religious garb remain a highly-contested topic, affecting employees, students, and teachers. In 2011, the British Prime Minister David Cameron publicly announced his support for employees' wearing crosses in the workplace months before the European Court of Human Rights (ECHR) ruled against British Airways for banning the practice.[86] In contrast, the same court, with the same justices, affirmed France and Turkey's decisions to expel pupils for wearing religious garb while in public schools.[87] In the British Airways case, the ECHR

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[85] The 1990 Cairo Declaration on Human Rights in Islam provides (my italics for emphasis): "All human beings form one family whose members are united by their subordination to Allah and descent from Adam. *All men are equal* in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, color, language, *belief, sex, religion*, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity" (Art. 1a). It further states that: "All human beings are Allah's subjects, and the most loved by Him are those who are most beneficial to His subjects, and *no one has superiority over* another except on the basis of piety and good deeds" (Art. 1b). Article 13 states, "Work is a right guaranteed by the State and the Society for each person with capability to work…without any discrimination between males and females… [and access] to fair wages for his work without delay, as well as to the holidays allowances and promotions which he deserves." Adopted at the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Egypt, 9–14 Muharram 1411H (31 July to 5 Aug. 1990).

[86] In *Eweida v. United Kingdom* (nos. 48420/10, 59842/10, 51671/10 and 36516/10) the European Court of Human Rights, in a five-to-two decision, ruled that the UK violated Article 9 (freedom of religion) when they banned Christians from wearing crosses while at work. The case was brought forth by a British Airways employee, a geriatric nurse, a registrar of wills (births, deaths, marriages), and a Relate counselor.

[87] In *Dogru v. France*, (ECHR, no. 27058/05 Dec. 4, 2008) the European Court of Human Rights unanimously affirmed France's decision to expel Muslim students who "attended physical education classes wearing their headscarves" and found no violation of Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights. In 2008, *Leyla Şahin v. Turkey*, "the Court held by sixteen votes to one, that there had been no violation of Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights" when a Muslim medical student was prevented from wearing a headscarf because the ban was "necessary in a democratic society." See also the six cases issued in 2009 in which Muslim and Sikh students were expelled for wearing religious garb: *Aktas v. France (43563/08), Bayrak v. France (14308/08), Gamaleddyn v. France (18527/08), Ghazal v. France (29134/08), J. Singh v. France (25463/08)* and *R. Singh v. France (27561/08).*

characterized the employee's "desire to manifest her religious belief" as a "fundamental right" emphasizing that "a healthy democratic society needs to tolerate and sustain pluralism and diversity."[88] Meanwhile, the same justices in the same court characterize the Muslim student's wearing headscarves in Turkey and France was not only "an ostentatious act that would constitute a source of pressure and exclusion" but one that was inconsistent with the "requirements of secularism in state schools."[89] These contradictory rulings that privileged one religion over another sent the message that European states may ban Muslim students from wearing garb in public schools, even though the states cannot ban Christian employees from wearing religious garb while working in private corporations.

Additional patterns ensued. In 2011, the ECHR affirmed the decision of leaders of Italy's public schools to display crucifixes in state school classrooms, finding "no sectarian influence." Yet, in 2013, the ECHR Court affirmed Switzerland's decision to dismiss a Muslim convert for failing to remove her hijab while teaching in the state school because the students were "easily influenced."[90] Citing complaints of customers being disturbed by workers who wore Muslim headscarves, in March 2017, the ECHR

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[88] *Eweida and Others v. United Kingdom* (nos. 48420/10, 59842/10, 51671/10 and 36516/10, ECHR 4th Section, Jan. 15, 2013).
[89] §§ 61-78 of *Dogru v. France*, (ECHR, no. 27058/05 Dec. 4, 2008) and *Kervanci v. France*, (ECHR, no. 31645/04, Dec. 4, 2008).
[90] *Lautsi and Others v. Italy* (30814/06) and *Dahlab v. Switzerland* (42393/98).

issued two rulings in Belgium[91] and France[92] that upheld the policies of private employers to prohibit Muslim employees from wearing religious garb while working.

The judicial inconsistencies in allowing a Christians but not Muslims to wear religious garb, within the same courts, are just as prevalent as are the discrepancies found across government agencies and across European countries. As a result, leading human rights lawyers and human rights bodies have deemed these rulings against Muslims to be ineffective and discriminatory.[93] As a result of these lively debates, governments in Europe continue to be particularly entangled in controversies over religious garb.

Take the case of Fereshta Ludin, who moved to Germany at the age of fifteen. She previously lived in Saudi Arabia and was born in Afghanistan in 1972.[94] She attended the University of Baden-Württemberg and became a certified schoolteacher. In 1998, she applied for a teaching position but was denied by the *Oberschulamt* Stuttgart [English: Supervisory School Authority of Stuttgart] because she sought to wear a hijab

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[91] *Achbita v. G4S Secure Solutions, C-157/15* (Court of Justice of the European Union, Mar. 14, 2017). states, "the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive."

[92] *Bougnaoui v. Micropole*, (Court of Justice of the European, Mar. 14, 2017) states, "the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement."

[93] *Rapporteur's Digest on Freedom of Religion or Belief*: *Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications*. Special Rapporteurs: Mr. Heiner Bielefeldt (Germany) Aug. 2010–present; Ms. Asma Jahangir (Pakistan), Aug. 2004–July 2010; Mr. Abdelfattah Amor (Tunisia), Apr. 1993–July 2004; Mr. Angelo d'Almeida Ribeiro (Portugal), Mar. 1986–Mar. 1993. See also Lindholm, Tore, Durham, W. Cole Jr., and Tahzib-Lie, Bahia G., et al. *Facilitating Freedom of Religion or Belief: A Deskbook*, Leiden, The Netherlands: Martinus Nijhoff Publishers, 2004.

[94] Human Rights Watch, *Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany,* New York, Feb. 2009, p. 8.

while in the classroom. In 2003, the German Federal Constitutional Court, in a 5–8 decision, ruled in her favor.[95] The high court held that "neutrality" could also be interpreted as "open inclusive neutrality" designed to accept all citizens and to promote cultural integration. Germany's Federal Constitutional Court also concluded that the state legislatures did have the authority to regulate the religious dress of teachers in public schools, an echo of the decision the Pennsylvania Supreme Court gave in its 1894 decision in favor of Catholic nuns.[96] In both instances, the German and Pennsylvania state legislatures used the courts' decisions as permission to enact anti-religious-garb statutes. For instance, the legislature of the state of Baden-Württemberg enacted a statutory ban on teachers' religious garb, which was later affirmed in the Federal Administrative Court. Germany's anti-religious garb court rulings and legislation is of particular interest to this study because of the similar fact patterns and legal outcomes to that of Pennsylvania's bans on teachers' religious garb. Although she had the legal right to appeal, Ms. Lundin ultimately decided not to fight this new statutory ban; instead, she began teaching in a private Islamic elementary school in Berlin. Perhaps this was the court's desired outcome seeing that they ruled that "the effect was not excessive because

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[95] Germany's Federal Constitutional Court, 2 BvR 1436/02 of 24 Sept. 2003. The Court has two senates, of which both have eight members. A senate majority is required in most cases and a two-thirds vote in special cases (see § 15 IV 1 BVerfGG).

[96] *Hysong v. Gallitzin School District,* 164 Pa. 629, 30 A. 482 (1894), overturned in *Commonwealth v. Herr,* 299 Pa. 132, 78 A. 68 (1910).

Muslim teachers who wear the headscarf could still find employment in private schools."[97]

The outcome of her case led state legislatures in Germany to justify banning Muslims from teaching in public schools while continuing to permit garb-wearing Christians, exempting "the respective exhibition of Christian and occidental educational and cultural values or traditions."[98] To illustrate this point, by 2009, half of Germany's *Länders* (English: states) made it illegal for Muslim women to wear headscarves in public employment, specifically in public schools.[99] A majority of the German states with bans on religious garb grant exemptions to Christians. The state of Berlin, for instance, prohibited the wearing of religious garb by public officials but exempted those who wear small pieces of jewelry, which, yet again, privileged Christian expression. Similarly, in Bavaria, Muslim headscarves were prohibited; however, Catholic nuns were permitted to wear their habits while teaching.[100] Only recently were these bans found unconstitutional.

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[97] Erica Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education.* (New York, NY: Routledge, 2012), p. 167, citing *Ludin v. Baden-Württenberg* (*Ludin III*), Federal Administrative Court, Germany (BVerwGE), 24 June 2004, 2 C 450.03, 14.

[98] The Act Amending the School Code of Baden-Württemberg, supra note 19, asserts that "*the respective exhibition of Christian and occidental educational and cultural values or traditions does not contradict the duty of behavior according to sentence 1," which states, "Teachers at public schools . . . are not allowed to exercise political, religious, ideological or similar manifestations that may endanger or disturb the neutrality of the country towards pupils or parents or the political, religious or ideological peace of the school."* For a legal discussion see Ruben Seth Fogel, "Headscarves in German Public Schools: Religious Minorities are Welcome in Germany, Unless—God Forbid—They are Religious," 51 N.Y.L. SCH. L. REV. (2006-2007), notes 149-151, p. 638

[99] Eight German states prohibit public schoolteachers from wearing visible religious garb: Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia, and Saarland. In addition, Hesse and Berlin have enacted similar bans applied to many civil servants.

[100] GVBI, *Erstes Gesetzzur Änderung des Schulgesetzesfür das Land Nordrhein-Westfalen*, 13 June 2006, p. 270. (Law and Regulation Sheet: *First Law Amending the Education Act for the State of North Rhine-Westphalia*.)

In March 2015, Germany's Federal Constitutional Court, ruled in favor of two Muslim teachers from the state of North Rhine-Westphalia, holding that the state ban was discriminatory in nature, privileging Christians and penalizing people from other religions.[101] The Court held that a "blanket ban on religious expression . . . based on the outward appearance of educators" was incompatible with Germany's constitution,[102] thus striking down all state statutes banning public schoolteachers from wearing religious garb while teaching.

In summary, the 17-year legal struggle to resolve the question of teachers' religious garb in Germany's public schools has strong similarities to the historical dilemma of the 123-year-old saga in Pennsylvania. In both locations, courts initially ruled in favor of garb-wearing religious minorities yet permitted state legislatures to use the rule of the majority to decide whether a statutory ban was necessary. The legislative process was then used to enact anti-religious-garb laws, while garb-wearing public schoolteachers from majority religions continued to wear religious garb because of either legislative exemptions or inconsistent application of the law.

As I further assert in Chapter IV – Presentation and Analysis of Findings, this legal pattern reinforces the trend in the United States of relying on statutory provisions, such as state Religious Freedom Protection Acts, to protect religious minorities rather than relying on the Constitution itself. Although the origins of these trends are understandable given the controversies over the *Smith* decision, I will later argue that it

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[101] BVerfG, Order of the First Senate of 27 Jan. 2015 - 1 BvR 471/10 - paras. (1-31).
[102] Art. 1 Human dignity; Art. 2 Personal freedoms; Art. 3 Equality before the law; Art. 4 Freedom of faith and conscience; Art. 12 Occupational freedom; Art. 33 Equal citizenship in public service. Deutscher Bundestag, *Basic Law for the Federal Republic of Germany,* 23 May 1949, last amended on 23 Dec. 2014.

has a concerning effective because if religious liberty is truly a fundamental constitutional and human right, then it should not be granted or denied by representatives of a majority.

In contrast, several recent political, legislative, and judicial actions around the world are worth noting. In January 2016, more than 250 Islamic leaders published a historic declaration for majority-Muslim countries to protect the religious freedoms of non-Muslims because of the recognitions that religious minorities were often targets of discrimination.[103] This monumental statement rooted its authority in the Charter of Medina, a constitutional guarantee issued precisely 1,400 years ago earlier as a "constitutional contract between the Prophet Muhammad . . . and the people of Medina."[104] In this moment in time, members of the majority religion used theological and legal principles that were historically rooted in Islamic law to protect religious minorities in Islamic countries.

Similarly, in August 2012, Pakistani Muslim leaders petitioned lawmakers on behalf of a fourteen-year-old Christian girl who faced the death penalty for allegedly using pages of the Quran to cook food.[105] This was a profound turning point in Pakistan's history.[106] For the first time, leaders of the Muslim majority made a concerted effort to

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[103] Marrakesh Declaration: Executive Summary of the Marrakesh Declaration on the Rights of Religious Minorities in Predominantly Muslim Majority Communities, Jan. 25–27, 2016.
[104] *Ibid.*, p. 1.
[105] Shah, Saeed (2012) "Pakistani Muslim Leaders Support Christian Girl Accused of Blasphemy." *The Guardian,* 27 Aug. 2012.
[106] In 2007, Pakistan was rated the second most "social hostilities involving religion" in the world, and in 2010, it was the highest. See Brian J. Grim, *Rising Tide of Restrictions on Religion,* (Washington, DC: Pew Research Center, 2012). The actions of Islamic leaders in Pakistan in 2012 are especially significant, given their social context.

exempt a religious minority from a blasphemy law.[107] This became the first action to follow the historic words that Pakistan had expressed at the United Nations five months earlier. In March 2012, the Human Rights Council of the UN passed a proposal put forward by Pakistan on behalf of the Organization of the Islamic Conference, titled "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief."[108] The resolution explicitly omits the "defamation of religion," thus conceding that laws that ban the criticism of religion often result in increased violence. This is unprecedented. For the first time, leaders of an Islamic theocracy agreed to release the grip of blasphemy and defamation laws.

The irony, of course, is that Pakistan's "blasphemy statutes have their origins in the country's colonial past when British rulers first introduced penalties for insulting any religious beliefs. These laws remained in effect after Pakistan's independence in 1947 and have since increased in severity."[109] (The United States is not immune to such history; Pennsylvania blasphemy law was overturned in 2010.)[110]

These examples illustrate the turbulent and conflicted nature of the current global conversation about legal restrictions on religious expression. In some contexts, people learn from the ills of the past to counter human rights abuses in the present. In other

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[107] *Ibid.* Grim.
[108] Human Rights Council, *Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief.* United Nations General Assembly, A/HRC/22/L.40, 18 Mar. 2013.
[109] Angelina E. Theodorou, *Which countries still outlaw apostasy and blasphemy.* (Washington, DC: Pew Research Center), July 29, 2016.
[110] Compare *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824) with *Kalman v. Cortes,* 723 F.Supp 2d 766 (Pa. Sup. Ct. 2010). See also *Kalman v. Cortes, Brief Amici Curiae of the Jewish Social Policy Action Network, the Unitarian Universalist Association, Rev. Larry W. Smith, and Rev. Nathan C. Walker in support of plaintiff.* (No. 2:09-cv-00684-MMB, Doc. 23), December 24, 2009.

contexts, leaders emerge from countries whose majority rejects globalization. For these reasons, it is important for me to situate this brief survey of the global significance of the bans on religious garb within the current political trends occurring around the world and in the United States.

Research Design

Methodology

Throughout this study, I use both *legal research*[111] and *legal analysis*[112] methods to construct a study about the two contemporary state bans on religious garb worn by public schoolteachers in Pennsylvania and Nebraska.

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[111] Amy E. Sloan, *Basic Legal Research: Tools and Strategies.* (Frederick, MD: Wolters Kluwer Law & Business, 2012); Emily Finch and Stefan Fafinski, *Legal Skills,* Third Edition. (New York, NY: Oxford University Press, 2011), chapters 1-7; Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, pp. 2-12 (2000), pp. 2-12; Christina L. Kunz, Deborah A. Schmedemann, C. Peter Erlinder, Matthew P. Downs, Ann L. Bateson, *The Process of Legal Research: Successful Strategies*. (Boston, MA: Little, Brown and Company, 1989); Michael D. Murray and Christy H. DeSanctis, *Legal Research Methods: Legal Research and Writing.* (New York, NY: Thomson Reuters/Foundation Press, 2009).

[112] David S. Romantz and Kathleen Elliot Vinson, *Legal Analysis: The Fundamental skill* (2nd ed.). (North Carolina: Carolina Academic Press, 2009). A subset of this literature focuses on scholarly writing. See Eugene Volokh, *Academic legal writing: law review articles, student notes, seminar papers, and getting on law review.* (New York, NY: Foundation Press, 2010). Volokh attributes this formulation to Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law,* 100 YALE L.J. 2065, 2083 (1991); Chapter 11 "Developing a Research Plan" in Amy E. Sloan, *Basic Legal Research: Tools and Strategies.* (Frederick, MD: Wolters Kluwer Law & Business, 2012); Chapter 1, section C "The Process of Scholarly Writing" in Elizabeth Fjans & Mary R. Falk, *Scholarly Writing for Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers.* (New York, NY: Thomson West, 2000), pp. 11-12; Katie R. Guest Pryal, *Short Guide to Writing About Law.* (Harlow, United Kingdom: Longman/Pearson Education, 2010); Michael Salter and Julie Mason, *Writing law dissertations: An introduction and guide to the conduct of legal research.* (Harlow, England: Pearson/Longman, 2007). Although Salter & Mason focus on research in the United Kingdom, the following sections are interesting in the context of research done on U.S. Law: "What is Research?" (pp. 5-6) and "What is a [Legal] 'Dissertation'" and, most importantly, "Black-Letter Approaches to Doctoral Research" (pp. 44-99).

I gained exposure to these methods through law classes, independent study classes, and dissertation seminars[113] and by participating in training sessions with attorneys and law librarians about how to conduct research on United States law.[114] These educational experiences exposed me to two distinct bodies of literature: first, the textbooks and journal articles about best practices for directing *legal research* projects and second, publications about *legal writing and analysis.* Collectively, these tools prepared me to take the following five steps.

In the first step, under the advisement of my dissertation committee, I synthesized "judicial tests" by "cause of action." A judicial test is a legal standard or set of principles that judges use to measure the legitimacy of a person's petition before the court. Plaintiffs make these assertions by filing their case by cause of action or the law that they can use to bring a suit against a defendant or the legal right on which they want the court to affirm their case.[115] I organize sections of my literature review and methods chapter by the following causes of action. I examine the constitutional claims a public schoolteacher could use to challenge a state's anti-religious-garb law. I then analyze the origins, developments, and status of judicial tests under Free Exercise Clause of the First Amendment to the U.S. Constitution,[116] as well as under federal statutes, such as Congress's Religious Freedom Restoration Act and Title VII of the Civil Rights Act of

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[113] Teachers College Columbia University courses: Spring 2010, "Topics in Law and Education" with Professor Elana Sigall, Esq.,; Spring 2011 "Education Equality: Role of Law" with Professor Jay Heubert; Spring 2011 and Autumn 2011 "Research and Independent Study" classes with Professor Jay Heubert, Esq.; and dissertation advisement sessions with Professors Jay Heubert, Esq. and Janice Robinson, Esq. from 2012–2018.

[114] See Chapter III—Methodology for an overview of these educational experiences.

[115] "What is Cause of Action?' BLACK'S LAW DICTIONARY, Online Legal Dictionary 2nd ed.

[116] U.S. CONST. amend. I.

1964. I then examine similar laws and judicial tests under State Constitutions and comparable state-level Religious Freedom Restoration Acts. In taking this first step, I was able to discern which judicial tests and causes of action are directly related to or irrelevant to my topic or ones that have already received substantial attention in the academic literature on anti-religious-garb laws. Ultimately, I concluded that I would conduct my study using, solely, the most authoritative judicial tests under the Free Exercise clause—*strict scrutiny* and *neutral laws of general applicability*[117] (which I also refer to as the *Sherbert* and *Smith* standards). I also use the four-part "substantial burden" standard in Pennsylvania's Religious Freedom Protection Act of 2002[118] to test the legal validity of Pennsylvania's anti-religious-garb law of 1895.

In so doing, I was prepared to take the second step, to collect primary and secondary source documents. I used a variety of legal research tools[119] and research methods[120] to find and analyze primary text (i.e., cases, statutes, legislative documents) and secondary sources (i.e., academic articles, reports, and books; American Law Report; legal digests, encyclopedias, and dictionaries; news commentaries). Together, this step prepared me to test the legitimacy of sources and identify holes in the literature.

In the third step, I articulated narrow legal research questions that I could rigorously examine in Chapter IV – Presentation and Analysis of Findings. In my primary

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[117] The strict scrutiny test requires that the government narrowly tailor regulations that may substantially burden one's free exercise of religion by using the least restrictive means possible to further a compelling governmental interest. The *general applicability* test requires that government regulations must be "neutral and generally applicable" and cannot single-out particular religious practices.
[118] 71 Pa. Stat. Ann. §§ 2401-2407, approved Dec. 9, 2002.
[119] Examples include LexisNexis, legislative websites, U.S. REPORTS, *Code of Federal Regulations*, and so on. See Chapter III – Methodology for complete list.
[120] Examples include IRAC method (issue, rule, analysis, outcome) for briefing cases and using Shepard's citation system and Westlaw's KeyCite. See Chapter III – Methodology for complete list.

research question, I ask whether the state bans on public schoolteachers' religious garb violate the Free Exercise Clause of the First Amendment, as applied to the states via the Fourteenth Amendment to the United States Constitution. My two secondary questions are based on the judicial tests I analyzed in the second step. (A) Are the contemporary Pennsylvania and Nebraska statutes that ban public schoolteachers' religious garb *neutral and generally applicable* laws (the *Smith* standard)? (B) Do these two anti-religious-garb statutes pass the federal *strict scrutiny* test (the *Sherbert* standard), meaning (i) do the statutes *substantially burden* public schoolteachers' free exercise of religion; if so, are they *incidental or fundamental burdens*; (ii) are these burdens justified by serving a *compelling government interest*; and (iii) if so, did the Pennsylvania and Nebraska legislatures *narrowly tailor* the regulations by using the *least restrictive* means possible?[121]

In my secondary research question, I ask whether the 1895 Pennsylvania anti-religious-garb law is legally permissible under the Pennsylvania Religious Freedom Protection Act of 2002 (RFPA). Specifically, I ask whether the anti-religious-garb law passes RFPA's four-part "substantial burden" test, which states that an agency substantially burdens a person's religion when the states action: "(1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; (2) Significantly curtails a person's ability to express adherence to the person's religious faith; (3) Denies a person a reasonable opportunity to engage in

[121] See Appendix A and Chapter IV for definition and discussion of these italicized terms.

activities which are fundamental to the person's religion; (4) Compels conduct or expression [that] violates a specific tenet of a person's religious faith."

These two research questions prepared me to take the fourth step—to set the parameters of the facts. Similar to how a trial court reviews the "finding of facts,"[122] I will determine which precise information will allow me to most effectively answer my research questions and which information I will set aside.

In the final step, I will conduct a legal analysis in Chapter II – Literature Review and Chapter IV – Presentation and Analysis of Findings. In these chapters, I will employ a series of *legal analysis* methods, such as *deductive analysis, rule-based reasoning, analogical reasoning,* and *identifying logic fallacies.*[123]

In summary, I began by participating in training sessions with my doctoral committee and professors at Teachers College Columbia University as well as external attorneys and law librarians about how to conduct legal research. Then I examined the literature on *legal research* and *legal analysis and writing.* These experiences prepared me to take five steps in designing my research project: (1) synthesize judicial tests by cause of action, (2) collect primary and secondary material, (3) articulate narrow legal questions, (4) set the parameters of the facts, and (5) conduct a legal analysis. Together, these legal research methods and legal analysis techniques prepared me to construct my research design.

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[122] For definitions see *Findings and Conclusions by the Court*, FED. R. CIV. P. 52 and "Finding of Fact: This term applies to the conclusion reached by the court, arbitrators and is the determination of truth after consideration," BLACK'S LAW DICTIONARY, Online Legal Dictionary 2nd ed. Accessed at www.thelawdictionary.org/finding-of-fact. For a scholarly analysis of this legal method see George C. Christie, *Judicial Review of Findings of Fact,* NW. U. L. REV., 87:14 (1992).

[123] I fully define each of these terms in Chapter III—Methodology.

Audience

The questions surrounding the legality of public schoolteachers' wearing religious garb are of particular interest to four groups of civic leaders that serve as my primary audience: (1) legislators, judges, and attorneys who study bans on religious garb; (2) school boards and administrators who determine teacher dress codes along with hiring and termination policies; (3) public schoolteachers and leaders of teachers' unions who study the rights of civil servants and employment rights of educators; and (4) researchers in the fields of religion, law, and/or education who examine the cultural nature of religious expression, the legal protections for religious expression, and the intersection of religion in the public square.

Organization

In Chapter II – Literature Review, I survey the historical decisions issued by state courts regarding the perennial legal conflict of bans on public schoolteachers' religious garb, beginning in 1894. After reviewing this case law, I discuss the evolution of various judicial tests under distinct causes of action: The Free Exercise clause in the U.S. Constitution; federal statutes, such as the Religious Freedom Restoration Act and Title VII of the Civil Rights Act; and comparable state statutes and religion clauses in state constitutions.

In Chapter III – Methodology, I explain how my study is based on five steps based on established methods described in the literature on *legal research* and *legal analysis*. In step one, I synthesized "judicial tests" by "cause of action." Judicial tests are the legal standards used by the courts, and a cause of action is the law that gives a plaintiff the right to file a lawsuit. In step two, I collect primary and secondary source

documents. In step three, I articulate narrow legal questions. In step four, I conduct a legal analysis based on analytical reasoning techniques such as identifying logic fallacies and using deductive analysis.

In Chapter IV – Presentation and Analysis of Findings, I will use my research questions to conduct a legal analysis of the two anti-religious-garb statutes in Pennsylvania and Nebraska. I will start with an examination of the statutes under the Free Exercise standards: The *Smith* standard of *neutral and general applicability* and the *Sherbert* standard of *strict scrutiny* (substantial burdens, compelling state interests, and narrowly tailored, least restrictive regulations). I will use my findings and analysis in a concluding discussion of the constitutionality of these two anti-religious-garb laws. Then I will also conduct a legal analysis of 1895 Pennsylvania's anti-religious-garb law under Pennsylvania's Religious Freedom Protection Act of 2002, with special attention to the state statute's unique four-part *substantial burden* test.

In Chapter V – Conclusion, I will synthesize the analytical contributions this project makes to the legal study of these two state bans on religious garb and, more broadly, the study of legal restrictions on religious expression in the United States and around the globe. I will then examine the implications that this research may have on my primary audiences: (1) legislators, judges, and attorneys who study, create, and challenge bans on religious garb; (2) school boards and administrators who determine teacher dress codes, hiring, and termination policies; (3) public schoolteachers and leaders of teachers' unions who study the rights of civil and employment rights of educators; and (4) researchers in the fields of religion, law, and/or education who examine the nature of and legal protections for religious expression along with the intersection of religion and

public life. Then I will acknowledge the limitations of this study and propose a series of recommendations for future research. I conclude the dissertation with an overview of study's purpose, process, and analytical findings.

II – LITERATURE REVIEW

The purpose of this legal literature review is, first, to survey and analyze relevant case law, statutes, regulations, and secondary sources, as it relates to government regulation of religious garb worn by public schoolteachers. These regulations include statutory bans enacted by members of state legislatures, administrative bans introduced by superintendents, and, in one case, a statewide ban enacted through a public referendum.[1] This legal history reveals a contradictory legal picture, which further illustrates why this topic has been and remains a complicated religious liberty question—for the mere reason that public schoolteachers have "authority over children in the classroom" and are "representatives of the state.[2]

Another complication in this case law is found in the fact that midway into the history of bans on public schoolteachers' religious garb, the U.S. Supreme Court first incorporated the First Amendment to the U.S. Constitution to the states.[3] This was done

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[1] On June 29, 1948, the North Dakota voters passed Initiative 1, an "initiated state statute," led by Protestant ministers of the Committee for the Separation of Church and State to prohibit school teachers' religious dress (which only effected Catholic nuns at the time). According to the *Legislative Manual, Official Vote of North Dakota Primary Election, 1948*, 104,133 (53%) people voted in favor of the statute and 92,771 (47%) voted against. Linda Grathwohl (1993) "The North Dakota Anti-Religious-Garb Law: Constitutional Conflict and Religious Strive," *Great Plains Quarterly,* University of Nebraska, Lincoln.

[2] The question of regulating public schoolteachers' religious garb is "complicated by the fact that teachers are state employees with authority over children in the classroom," Thomas C. Berg, "On the Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States," 19 EMORY INT'L L. REV. 1277 (2005), p. 19. A legal analysis of public schoolteachers' religious garb "is complicated… by the fact that teachers are representatives of the state" Frederick Mark Gedicks (2005) "On the Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States," 19 EMORY INT'L L. REV. 1187., p. 28.

[3] The U.S. Supreme Court incrementally applied the five freedoms of the First Amendment to the U.S. Constitution over a 38 period (1925–1963): freedom of speech *in Gitlow v. New York*, 268 U.S. 652 (1925);

through the Fourteenth Amendment—a post-Civil War law that prohibited any state from depriving "any person of life, liberty, or property, without due process of law"; or denying "to any person within its jurisdiction the equal protection of the laws."[4] By applying the religion clauses in the First Amendment to the states, the Supreme Court fundamentally changed the legal system. Although it is clear that the federal Bill of Rights applies to state laws, the U.S. Supreme Court has not, yet, ruled on the perennial conflict of state bans on public schoolteachers' religious garb.

I proceed to analyze the evolution of the judicial tests used by the courts to examine Free Exercise claims. I pay particular attention to the fact that, to date, only one court has used a Free Exercise standard to test the constitutionality of state bans on teachers' religious garb under the Free Exercise Clause of the First Amendment, in a case that was quickly overturned by the U.S. Supreme Court's decision in *Employment Division v. Smith.*[5] This standard, *strict scrutiny*, was applied and developed in *Sherbert*[6] and applied in *Yoder.*[7] As defined in the first chapter, the *strict scrutiny* test requires that the government narrowly tailor regulations that may substantially burden one's free exercise of religion by using the least restrictive means possible to further a sufficiently compelling governmental interest. Then I turn to the *general applicability* test under

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freedom of the press in *Near v. Minnesota*, 283 U.S. 697 (1931); freedom of assembly in *De Jonge v. Oregon*, 299 U.S. 353 (1937); the free exercise of religion in *Cantwell v. Connecticut*, 310 U.S. 296 (1940); the disestablishment of religion in *Everson v. Board of Education*, 330 U.S. 1 (1947); and the right to "petition Government for a redress of grievances" in *Edwards v. South Carolina,* 372 U.S. 229 (1963).

[4] U.S. CONST. amend. XIV.

[5] *Employment Division v. Smith*, 494 U.S. 872 (1990).

[6] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[7] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Smith, which requires that government regulations must be "neutral and generally applicable."[8] I also consider the noncontroversial legal principle that prevents the government from targeting particular religious practices[9] for government regulation.

I analyze how, in response to *Smith*, when two Native American plaintiffs were denied unemployment benefits for having used peyote, Congress sought to restore the *strict scrutiny* standard when passing the Religious Freedom Restoration Act of 1993 (RFRA).[10] In *City of Boerne v. Flores* (1997),[11] the U.S. Supreme Court found that Congress overstepped its constitutional enforcement powers when seeking to apply RFRA to the states, thus limiting the *strict scrutiny* test to federal laws.[12] In response to this ruling, twenty states have since passed their own "mini-RFRAs," which restored the *Sherbert* (strict scrutiny) standard through state laws, such as the Pennsylvania Religious Freedom Protection Act of 2002. These significant legal conflicts between the judicial and legislative systems fundamentally changed the religious liberty jurisprudence at the federal and state level.

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[8] *Employment Division v. Smith*, 494 U.S. 872 (1990).
[9] In *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993) the U.S. Sup. Ct. unanimously held that the City of Hialeah violated the Free Exercise Clause when banning the religious practice of animal sacrifice while permitting the killing of animals for other purposes, such as food production.
[10] 42 USC. § 2000bb through 42 USC. § 2000bb-4.
[11] 521 U.S. 507.
[12] The strict scrutiny standard was affirmed in its application to federal laws in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). In seeking to clarify the Court's understanding of *Smith*, the U.S. Supreme Court unanimously determined in *Gonzales* that the federal government violated the federal RFRA when it failed to "narrowly tailor" its implementation of the Controlled Substance Act when prohibiting an indigenous religion to use hoasca, a narcotic, in religious rituals.

In this context, I conduct a survey of the legal evolution of religious liberty protections at multiple levels, beginning with federal statutes. I examine the recent developments in federal RFRA[13] case law as well as analyze how the cause of action changed since the *Smith* decision. For instance, plaintiffs who experienced religious-based discrimination in the workplace when wearing religious garb sought remedies under Title VII of the Civil Rights Act of 1964.[14] For these reasons, I briefly examine the impact of those cases, although Title VII ultimately falls outside the scope of this study.

Next, I analyze the religious freedom provisions in state constitutions[15] and state statutes. I demonstrate how, since *Smith,* state Supreme Courts have been using the religion clauses in state constitutions to expand religious liberty claims, thus building upon the established authority and protections in the U.S. Constitution.[16] In turning to state statutes, I summarize the status of "mini-RFRAs,"[17] which state legislatures began to pass in response to the U.S. Supreme Court limiting the federal RFRA to the federal government. I also look at comparable state-level employment statutes that prohibit religious-based discrimination.[18]

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[13] *Burwell v. Hobby Lobby*, 134 U.S. 2751 (2014).
[14] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 Sup. Ct. 2028 (2015).
[15] Specifically, NEB. CONST. *no compulsion* clause of art. I §16, the *no sectarian Instruction* clause of art. VI §11 and PA. CONST. *no compulsion* clause of art. II and the *no sectarian instruction* clause of art. VII §18.
[16] William J. Brennan, T*he Bill of rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986). See also Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence,* 1993 BYU L. REV. 275 (1993), which documents how state constitutions are "understood and invoked only in relation to the federal text and merely supplements the federal 'floor' of rights" (at 290).
[17] Juliet Eilperin, *31 States Have Heightened Religious Liberty Protections*, *The Washington Post*, Mar. 1, 2014. Eugene Volokh, *What Is the Religious Freedom Restoration Act?*, THE VOLOKH CONSPIRACY, Dec. 2, 2013. www.washingtonpost.com/news/volokh-conspiracy.
[18] Specifically, the *Pennsylvania Human Relations Act* and *Nebraska Fair Employment Act*, which prohibit employment discrimination based on religion.

In summary, the following literature review situates the history of state regulations of public schoolteachers' religious garb in the context of different laws that a plaintiff can currently use to bring suit against the two states that have anti-religious-garb laws: The Free Exercise Clause of the U.S. Constitution, the nondiscrimination provision in the federal workplace statute, Title VII, and comparable remedies in state constitutions and state statutes. In conducting this review, I became better prepared to apply legal research methods to determine the scope of my study. In Chapter III – Methodology, I explain why I focused my legal analysis in Chapter IV – Presentation and Analysis of Findings, on applying judicial standards under the Free Exercise clause to test the constitutionality of two state anti-religious-garb laws and analyzing whether Pennsylvania's 1895 anti-religious-garb law is valid under Pennsylvania's Religious Freedom Protection Act of 2002. In the final chapter, Chapter V – Conclusion, I make recommendations for future research.[19]

Literature on Teachers' Religious Garb

The interdisciplinary scholarship on regulating public schoolteachers' religious garb in the United States is vast for the mere fact that this legal problem spans 123 years and has affected, at some point, schools in twenty-two U.S. states. Scholars from the fields of law and education along with religious and civic leaders and journalists have all

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[19] Future studies may employ the judicial tests under (1) alternate constitutional claims under the No Establishment and Free Speech Clause of the First Amendment to the U.S. CONST.; (2) federal statutory claims under Title VII of the Civil Rights Act of 1964; (3) claims under state constitutions, such as NEB. CONST. *no compulsion* clause of art. I §16, the *no sectarian instruction* clause of art. VI §11 and PA. CONST. *no compulsion* clause of art. II and the *no sectarian instruction* clause of art. VII §18; as well as (4) claims under state statutes, such as the Pennsylvania Religious Freedom Restoration Act, the Pennsylvania Human Relations Act and Nebraska Fair Employment Act, the latter two of which prohibit employment discrimination based on religion.

contributed to this body of knowledge. Their collective contributions reveal that the question of public schoolteachers' religious garb is significant, historic, and relevant today, as noted in the following five bodies of literature.

Five Bodies of Literature

First, the nation's leading law and religion scholars have drawn upon the conflicting case law on public schoolteachers' religious garb to demonstrate that this is an important, longstanding, and still unresolved legal matter. Second, elected and appointed officials from various levels of government have made formal statements or issued regulatory policies to address this matter. Third, educators and education associations have published studies, commentaries, and manuals to guide teachers and policy makers on this legal question. Fourth, religious and civic liberty groups have consistently asserted themselves in the public debate on this complicated church/state issue. And fifth, journalists have been reporting on this topic for over twelve decades, suggesting that the subject of public schoolteachers' religious garb is one worth reporting and one that has and continues to capture the public's attention. These five bodies of literature have informed my study.

Legal scholars. More than 150 legal journals, books, casebooks, and commentaries have dedicated sections to analyzing laws and regulations that ban educators from wearing religious garb while teaching in public schools (see References). As illustrated in the backmatter and referenced throughout Chapter IV – Presentation and Analysis of Findings, we know the importance of this subject for the mere fact that leading attorneys and law professors have commented on this question: Heiner Bielefeldt, Thomas C. Berg, Virgil C. Blum, Kim Colby, Derek H. Davis, W. Cole Durham Jr.,

Edward McGlynn Gaffney, Frederick Mark Gedicks, Sarah Barringer Gordon, T. Jeremy Gunn, Kent Greenawalt, Alvin W. Johnson, Steven D. Jamar, Leonard A. Krug, Philip B. Kurland, Douglas Laycock, Daniel Mach, John T. Noonan, Jr., Martha C. Nussbaum, Leo Pfeffer, Charles J. Russo, Brett G. Scharffs, Oliver S. Thomas, Frank H. Yost, and Eugene Volokh, to name a few.

The common themes that emerge from these commentaries, and from legal scholars as a whole, are that (1) the question of public schoolteachers' religious garb is a complicated legal question; however, (2) it is not so complicated that it cannot be resolved. For the most part, there is consensus among legal experts from a wide range of ideological perspectives that public schools should not single out teachers' religious garb for government regulation. There are, however, some disagreements on how best to balance the interests of garb-wearing teachers, their students, and the state. However, most agree that although this question is not now as vitriolic in the U.S. as the debate occurring in European countries, it does remain an important, unresolved legal issue in the United States.

Government officials. Elected and appointed agents of the state have also been engaged in this debate in the United States for more than twelve decades. As illustrated throughout this study, some of these government actors were state superintendents or school boards that had issued regulatory provisions either banning schoolteachers from or permitting public schoolteachers to wear religious garb. Others were state attorneys general who had issued legal commentaries or elected officials who had made political statements. Some state agencies have recently issued model policies, such as the Oregon's Bureau of Labor and Industries and Oregon's Department of Education. Even

federal government agencies[20] have weighed into the debate, such as the Equal Employment Opportunity Commission (EEOC), the U.S. Department of the Interior, and even the U.S. State Department (see backmatter for a complete list). This second body of literature demonstrates that this longstanding issue has received the attention of an array of civil servants.

Educators and education associations. Similarly, the question of public schoolteacher's religious garb has received the attention of, naturally, those most affected: educators. As a result, education journals and professors of education have regularly contributed to this body of knowledge, as have professional associations that have published studies, commentaries, and manuals to guide teachers and policy makers on this legal question. These include the Association for Supervision and Curriculum Development, the National Association of Elementary School Principals, the National Education Association, the National School Board Association and Council of School Attorneys, and the National Council for the Social Studies. As cited throughout this

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[20] President Ulysses S. Grant's "Quaker Policy," inspired by Friends' assimilation of Indians in Pennsylvania, used public funds to hire Christian missionaries whose church boards would govern the federal education of Indians. President Grant hired nuns from the Bureau of Catholic Indian Missions to convert indigenous Americans to Christianity while serving as teachers in federal schools—and who did so while wearing religious garb. The federal government also hired garb-wearing teachers to teach in "Indian prison schools" designed "to teach the Indian prisoners European dress, the English language, and Christianity." The goal was to "kill the Indian but save the man," a phrase coined by Captain Richard H. Pratt. For more details, see Ulysses S. Grant, *Second Inaugural Address,* Mar. 4, 1873; Dee Brown, *Burry My Heart at Wounded Knee: An Indian History of the American West.* (Dumfries, NC: Holt, Rinehard and Winston 1971); Francis Paul Prucha, *Americanizing the American Indians: Writings by the "Friends of the Indian" 1880–1900.* (Cambridge, MA: Harvard University Press, 1973); Takaki, Ronald, *Iron Cages: Race and Culture in 19th-Century America.* (New York: Oxford University Press 1979); Wolfgang Mieder, "'The Only Good Indian Is a Dead Indian': History and Meaning of a Proverbial Stereotype." *The Journal of American Folklore*, Vol. 106, No. 419; David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875–1928.* (Laurence, KS: U. Press of Kansas, 1995).

study, educators and education associations have contributed to this third body of literature by either studying the implications of these bans, issuing critiques or warnings, or developing training materials to equip teachers to understand the laws in their local school districts.

Religious and civil liberties groups. It has been said that "all politics is local."[21] Local religious groups throughout the last thirteen decades have voiced their opinions about public schools' employing teachers who wear religious garb. For instance, in 1886, the *New York Evangelist* reassured its Protestant constituents that the synod of New York's Committee on Religion and Public Education recommended that "everything sectarian, such as a particular religious garb, should be avoided."[22] Similarly, *Christian Union,* another Protestant publication, reported in 1891 the Minnesota's State Superintendent of Public Instruction's saying that the Sisters of Charity's "presence [in public schools] is obnoxious [and] unacceptable by reason of the significance of their religious garb, [therefore] the board must either retire them or require" them to remove their habits.[23]

In response to the ruling on the first anti-religious-garb lawsuit in 1894, *New York Evangelist* published a letter by a Catholic resident critiquing the Catholic nuns for teaching in public schools saying, "There is no doubt that the Gallitzin [Pennsylvania] venture has proven a mistake; it is the hope of most Catholics that it may never be repeated."[24] Meanwhile, *The Herald of Truth*, another Protestant publication, reported

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[21] Attributed to the former Speaker of the United States House of Representatives Tip O'Neill.
[22] "Meeting of the Synod of New York," *New York Evangelist,* Oct. 28, 1886.
[23] Wayland Hoyt, "That Fairbault School," *Christian Union* (Nov. 7, 1891) 44, 19.
[24] *New York Evangelist,* Dec. 13, 1894.

that Pennsylvania's proposed anti-religious garb bill will "unfortunately include other classes of religious people of the Protestant faith, such as the Mennonites, the River Brethren, the Quakers and the Drunkards, among whom are many of our best and most active and acceptable teachers."[25]

Denominational publications not only reveal what is at stake for various religious communities but also show the historical tensions between Protestant and Catholics. They also demonstrate that the political problem of teachers' religious garb predated the first anti-religious-garb case in 1894. Over the years, many other denominational publications covered this debate, including *The American Sentinel*, *Catholic Bulletin, The Christian Century, Christian Post, Christian Science Monitor,* the Islamic Schools League of America, the journal for *Jewish Family & Children's Services,* the *Liberty Magazine,* the *Sikh Coalition,* and *SikhNet,* to name a few.

Many of these religious groups received support from a wide variety of religious and civic liberty groups. Daniel Mach, the director of the American Civil Liberties Union's *Program on Freedom of Religion and Belief* explained in an interview with Humanist.com that "although public schoolteachers don't shed their constitutional rights at the schoolhouse gate, when they are in class they act as representatives of the government and must take care not to promote, endorse, or denigrate any religious viewpoint, or religion in general."[26] Similarly nuanced statements have been made by other civil liberties and legal education nonprofit organizations, such as the Anti-

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[25] "The Religious Garb," *Herald of Truth,* May 1, 1895.
[26] Joan Reisman-Brill, "The Ethical Dilemma: Can Teachers Wear a Cross to School?" *TheHumanist.com,* Apr. 17, 2013. Referencing the line, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," expressed by Justice Fortas, who wrote for the majority in *Tinker v. Des Moines School District*, 393 U.S. 503, at 506.

Defamation League, Council on American-Islamic Relations, the First Amendment Center, Human Rights Watch, the Institute for Social Policy and Understanding at Georgetown University, and so on.

Journalists. The fifth body of literature came from journalists who influenced public opinion regarding this legal question. Their reports, spanning twelve decades, affirm this subject's importance by archiving various political and legal conflicts. The consistency by which the media has and continues to report on these developments suggests that this is a perennial and unsettled issue that captures the public's attention.

Dozens of articles were written about Pennsylvania's religious garb controversy in the fourteen months between the time the Pittsburg Board of Education terminated the employment of the Sisters of Mercy for wearing habits while teaching (March 14, 1894), to the time the Pennsylvania Supreme Court ruled in favor of the nuns (November 12, 1894), to the time the Pennsylvania General Assembly enacted the nation's first anti-religious-garb law (May 29, 1895). During this brief period, this case became a national story—as evidenced by its being published in *The Chicago Daily News, The Chicago Tribune*, *The Baltimore Sun*, *The Indianapolis Journal*, *The Indianapolis News, The Maine Farmer*, *The New York Times*, *Owosso Times [Michigan], Pittsburg Interior*, *The Pittsburg Press*, *Pittsburg Post-Gazette*, *Plattsburgh Daily Press, Reno Evening Gazette [Nevada], The Washington Post*, *The Washington Times,* and other periodicals. In contemporary terms, the story went viral. This media attention may have influenced leaders who ultimately issued anti-religious-garb statutes or regulatory policies in twenty-two additional states, as discussed in Chapter I – Introduction.

The most recent cases over the regulations of teachers' religious garb have also received national attention. For example, the Associated Press, published throughout the nation's newspapers, reported on the teacher's aide in Pennsylvania who was fired in 2002 for wearing a cross necklace.[27] The AP published articles about the 2010 repeal of Oregon's anti-religious-garb law "originally enacted for [the] KKK to keep Catholics out of public schools" and the statute's contemporary use to terminate the employment of a Sikh teacher.[28] Moreover, in January 2017, the AP reported on the new legislative proposal to repeal Nebraska's anti-religious garb ban because a Catholic nun was denied employment at a public school in 2016.[29]

The narrow question of public schoolteachers' religious garb in the United States is one drop in the ocean of world headlines about regulations on religious attire. As noted earlier, the Pew Research Center reported in 2016 that "more countries restrict women's ability to wear religious symbols or attire than require [them] to dress a certain way." Controversies over the burka, the "burkini," garb-wearing Olympic athletes, and so on have dominated the headlines while a dozen countries still require women to wear religious attire in certain circumstances. These laws, news reports, and religious commentaries all highlight the fact that the regulation of religious garb remains an unsettled, complicated legal and cultural question.

My hope is that my study on the narrow question of public schoolteachers' religious garb in the United States may meaningfully contribute to this ageless debate.

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[27] "Teacher's Aide Suspended for Wearing Cross," *Associated Press*, Apr. 24, 2003.
[28] "Three states still prohibit religious clothing for teachers," *Associated Press*, Sept. 5, 2009.
[29] Grant Schulte, "Nebraska targets ban on religious garb worn by teachers," *Associated Press*, Jan. 17, 2018

Relevant Case Law

Historical Decisions in State Courts

In this section, I examine the evolution and treatment of state anti-religious-garb laws and subsequent rulings on them in state courts, starting in 1894. I will demonstrate that during this 123-year history, there have been eleven substantive cases about bans on public schoolteachers' religious garb, nine of which were state Supreme Court decisions. Cases filed in state courts were based on causes of action that derived from state constitutional clauses and state statutes, which explains why there remains an unresolved federal question as to the constitutionality of these state bans under the Free Exercise Clause of the First Amendment to the U.S. Constitution.[30] I survey these court decisions while citing scholars who demonstrate the anti-Catholic origins[31] of legal restrictions on religion in the late nineteenth century and into the early twentieth century. I pay particular attention to the anti-religious-garb cases out of Pennsylvania—specifically the

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[30] Examples include the *no religious tests for office; no religious tests for public teachers; free exercise of religion; right to worship; right of conscience; no establishment; no preference; no aid to religion; no sectarian teaching*; *no diversion of public funds; no authority of legislature;* as well as *authority of superintendent statutes.*

[31] The Third Circuit Court of Appeals admitted in 1990, that the Pennsylvania General Assembly of 1895 enacted this anti-religious-garb law with a "putatively anti-Catholic motivation." *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990). For a general discussion of anti-Catholic developments in the United States in the 19th and 20th centuries see Philip Hamburger, *Separation of Church and State.* (Cambridge, MA: Harvard University Press, 2002); E. Digby Baltzell, *The Protestant Establishment: Aristocracy & Cast in America.* (New Haven, CT: Yale University Press, 1964). Regarding state-based *no sectarian laws* that banned public funding for private religious schooling, Professor Douglas Laycock argued that "'sectarian' initially meant something like denominational; the term arose in the early-nineteenth-century legal battles between liberal and conservative Protestants. But Protestants closed ranks in response to Catholic immigration, and for the most of the ninetieth century, 'sectarian' was a code word for Catholic." Laycock states, "Much of the American tradition of refusing to fund private schools is derived from nineteenth-century anti-Catholicism." Douglas Laycock, *Religious Liberty: Overviews and History,* Vol. 1. (Grand Rapids, MI: Eerdmans Publishing, 2010), p. 161.

two issued by the Pennsylvania Supreme Court in 1894 and 1909.[32] I explain that these cases dominate the legal rationales used in other court decisions and the legal scholarship on the subject of bans on religious garb worn by public schoolteachers in the United States. This sets the stage for my analysis in the *Examination of Findings* section of Chapter IV, where I track lines of arguments and judicial opinions, to further illustrate the strong influence that these four Pennsylvania cases had on other cases. In doing so, I further demonstrate the significance of why it is necessary to study Pennsylvania's 123-year-old anti-religious-garb law and to ask whether it is valid under the Pennsylvania Religious Freedom Protection Act of 2002 (RFPA), which requires general applicable laws to meet the *strict standard* level of judicial review with special attention to the unique four-part "substantial burden" standards introduced in RFPA.

Enumerating causes of action in anti-religious-garb cases. Before chronicling the origin and evolution of anti-religious-garb laws and their legal challenges, let us take a birds-eye view of the various causes of action used in anti-religious-garb cases. This 123-year old case law is particularly complicated because there have been thirty-two different causes of action that have been used in state and federal courts to challenge regulations of public schoolteachers' religious garb. Throughout this history no court, in both the state and federal systems, use another case's cause of action, other than a 1910 case in Pennsylvania; otherwise, each legal challenge was unique (see Table 1).

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[32] *Hysong v. Gallitzin School District,* 164 Pa. 629, 30 A. 482 (1894); *Commonwealth v. Herr,* 229 Pa. 132, 78 A. 68 (1910); *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).

As I explain in Chapter III – Methodology, a "cause of action" is a legal theory that plaintiffs can use to bring suit against another/others, also known as a statement of claim or complaint.[33] For example plaintiffs may claim their rights under the federal constitution has been violated when filing their case under the Free Exercise Clause of the First Amendment. Other plaintiffs may claim their rights are violated under a state constitution, and file under, for example, a "no preference in religion" clause in a state constitution. A *cause of action* is simply a legal term referring to "the ground on which an action may be sustained" or a "right to bring a suit."[34]

As illustrated in the following table there have been thirty-two unique causes of action that teachers have used to challenge anti-religious-garb laws and regulations. Each of these statements of claim have their own set of judicial tests (i.e., federal Free Exercise cases are tested using the *Sherbert* and *Smith* standards, as discussed earlier).

[33] "What is Cause of Action?' BLACK'S LAW DICTIONARY, Online Legal Dictionary 2nd ed. Accessed at www.thelawdictionary.org/cause-of-action.
[34] "What is Cause of Action?' BLACK'S LAW DICTIONARY, Online Legal Dictionary 2nd ed. Accessed at www.thelawdictionary.org/cause-of-action.

Table 1

Enumerating Causes of Action

Case, Court, Year	State-Based Causes of Action	Federal-Based Causes of Action
Pennsylvania		
Hysong v. Gallitzin Pa. Sup. Ct. 1894	The Pa. Sup. Ct. held that terminating Catholic Nuns for wearing habits while teaching in a public school violated their rights under the PA. CONST. **(1)** "no preference" and **(2)** "no religious tests" for office clauses. The high court also rejected the state's claim that employing garb-wearing nuns violated the **(3)** "no aid to religion" clause of the PA. CONST.	
Commonwealth v. Herr Pa. Sup. Ct. 1910	Pa. Sup. Ct. held that the 1895 anti-religious-garb law did not violate a Mennonite woman's rights under the state constitution's **(4)** "right to worship," **(5)** "right of conscience," **(6)** "no interference," and **(1)** "no preference," **(2)** and "no religious tests" for office clauses, thus overturning *Hysong*.	Pa. Sup. Ct. also held that the state's anti-religious-garb law did not violate her **(7)** Due Process Clauses of the Fifth and Fourteenth Amendment to the U.S. CONST. (Note: this occurred before the U.S. Sup. Ct. incorporated the federal Bill of Rights to state laws.)
U.S. v. Board of Ed. [Reardon] Federal Third Cir. Ct. App. 1990		The Third Circuit held that Alima Delores Reardon's rights under **(8)** Title VII of the Civil Rights Act of 1964 were not violated when the Philadelphia school district terminated her employment for wearing a hijab (Muslim headscarf) while teaching.

Case, Court, Year	State-Based Causes of Action	Federal-Based Causes of Action
Pennsylvania continued		
EEOC v. READS, Federal Western Dist. Ct. of Pa. 1991		(A federal district judge held that an employer engaged in "religious discrimination" under **(8)** Title VII for denying employment to a Muslim woman who wore a headscarf while also ruling that her dress could not be considered "religious garb" under the law because not "many" third-grade children would perceive it as religious.)
Nichol v. Arin Federal Western Dist. Ct. of Pa. 2003		(A federal district judge held that a female "teachers' assistant" was not a "teacher" under Pennsylvania's education laws, therefore, not bound by the state's anti-religious-garb law and was permitted to wear a cross neckless while teaching.)[35]
New York		
O'Connor v. Hendrick N.Y. Ct. App. 1906 (highest court)	The NY Ct. App., the highest court in the state, held a state superintendent's termination of Catholic Nuns from teaching in public schools was consistent with the **(9)** "no aid to religion" clause of the NY CONST.	
North Dakota		
Gerhardt v. Heid N.D. S.Ct. 1936	Public schools employing Catholic nuns who wore habits while teaching did not violate the **(10)** "no establishment," **(11)** no "sectarian control," **(12)** "no aid to religion," and **(13)** "no diversion of funds from public schools" clauses of the N.D. CONST.	

[35] The district judge issued an extensive nonbinding opinion about the unconstitutionality of the anti-garb statute under the Free Exercise, Free Speech, Establishment clauses of the First Amendment and Title VII of the Civil Rights Act of 1964. Given its non-binding nature, I do not enumerate these causes of action.

Case, Court, Year	State-Based Causes of Action	Federal-Based Causes of Action
Indiana		
Johnson v. Boyd Ind. Sup. Ct. 1940	Ind. Sup. Ct. relied on the **(14)** "right to worship," **(15)** "free exercise," **(16)** "right of conscience," **(17)** "no religious test," and **(18)** "no preference" clauses of the Indiana Constitution to rule that employing Catholic nuns who wore religious garb while teaching did not make public schools parochial schools.	
New Mexico		
Zellers v. Huff N.M. Sup. Ct. 1951	In primary reliance of the **(19)** "free from sectarian control" clause of the N.M. CONST., the state supreme court upheld the State School Board's ban on public schoolteachers' religious garb. The N.M. Sup. Ct. also rejected the claim that the anti-religious-garb law violated the New Mexico's **(20)** "no religious test for teachers" clause. The court held that "all nuns…wearing clothing of religious significance, should be removed from the public school."	In citing the U.S. Sup. Ct. decision in *Everson v. Board* of Education, the New Mexico Sup. Ct. held that the hiring of Catholic nuns who wore religious garb while teaching violated the **(21)** Establishment Clause of the First Amendment to the U.S. CONST.
Missouri		
Berghorn v. Reorganized School District Mo. Sup. Ct. 1953	The Mo. Sup. Ct. relied on the state constitution's **(22)** "right to worship," **(23)** "no maintenance" of religion, **(24)** "no direct or indirect public money for religion," **(25)** "no preference," **(26)** "no public funds for education controlled by religion" clauses to rule that "teacher-nuns" (e.g., Roman Catholics) are "disqualified from teaching in any public school in the State of Missouri."	

Case, Court, Year	State-Based Causes of Action	Federal-Based Causes of Action
Kentucky		
Rawlings v. Butler Ky. Ct. of App. 1956	The state Court of Appeals held that the Kentucky Constitution's **(27)** "no aid to religion" clause was not violated when employing habit wearing Catholic nuns.	
Oregon		
Cooper v. Eugene School District Or. Sup. Ct. 1986	The Oregon Sup. Ct. found that a female Sikh teachers' right to **(28)** free exercise of religion under the OR. CONST. was "reasonably denied" when her employment was terminated and teaching license revoked for wearing a turban while teaching.	(The Third Circuit claims in *Reardon* that the U.S. Sup. Ct. denied Cooper's appeal for "lack of a substantial federal question.")
Mississippi		
Mississippi Employment Security v. McGlothin Miss. Sup. Ct. 1990	The Miss. Sup. Ct. affirmed a female public schoolteacher's right to wear an African Hebrew Israelite headdress under the **(29)** "no religious tests," **(30)** "no preference," and **(31)** "free enjoyment of all religious sentiments" clauses of the MISS. CONST.	The Miss. Sup. Ct. also held that the school violated the teachers **(32)** Free Exercise rights under the First Amendment to the U.S. CONST., as incorporated by the Fourteen Amendment.[36]

[36] *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990), cert. denied, 498 U.S. 879. Three months after the Mississippi Supreme Court issued *McGlothin* the U.S. Supreme Court issued *Smith* (1990), thus overturning McGlothin's federal Free Exercise claim.

In this study, I make a distinction between no-aid-to-religion cases and religious-garb cases. The no-aid-to-religion-cases included the evidence of teachers wearing religious garb in the statement of facts for cases that take up the larger questions of public funding of private religious schools. More often than not,[37] these cases do not isolate the question of public schoolteachers wearing religious garb in publics schools but, instead, rely on state constitutions to justify no public funds being used by private schools that are controlled by religious organizations.

Table 1, therefore, does not include a cluster of associated no-aid-to-religion cases that focused on the question of whether either (1) a private religious school was receiving public funds[38] or whether (2) a public school that was, in effect, being controlled and administered by a particular religious organization.[39] In these cases, the courts "consider[ed] the total effect of all of the facts and circumstances in evidence in determining whether the school in question [was] in fact [a] free public school." The practice of teachers wearing religious garb while teaching was but one part of a larger question in these cases and, as a result, this precise question was not singled-out and dissected for judicial review like the ones highlighted here.

Table 1 illustrates the complex lineage of case law regarding regulations of teachers' religious garb in public schools, controlled and managed by public authorities

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[37] For example, in *Zellers v. Huff* (1951), the New Mexico Supreme Court conducted a special analysis of teachers' religious garb; however, this was done in the context of a larger Establishment Clause question about public funds being used to operate private Catholic schools. This study separates the two so as not to confuse "religious instruction with public funds" and teachers' religious garb worn in public schools, where there is no evidence of religious instruction. See Table 3.

[38] *Knowlton v. Baumhover,* 182 Iowa 691 (Iowa Sup. Ct. 1918); *State v. Taylor*, 122 Neb. 454 (Neb. Sup. Ct. 1932).

[39] *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940); *Harftst v. Hoegen* 349 Mo. 808, 163 S.W.2d 609 (1942); *New Haven v. Torrington* 132 Conn. 194 (1945).

with the use of public funds. These thirty-two different causes of action—anchored in a variety of state and federal laws—illustrate the diversity of claims presented before state or federal courts. The only consistent pattern is found in the states that did not have an anti-religious-garb statute at the time of a legal challenge—in this context, every single court ruled in favor of the religious-garb-wearing public schoolteacher. Whereas, the teachers consistently failed when challenging states whose legislatures had enacted anti-religious-garb statutes. Only one state had both such cases: Pennsylvania.

Origins of anti-religious-garb laws and cases: 1894–1910. The 123-year-old debate over public schoolteachers' religious garb in the United States originated in 1894, when the Pennsylvania Supreme Court ruled in favor of Catholic nuns who were dismissed for wearing habits while teaching at a public school (*Hyson v. Gallitzin*).[40] In a 7–1 ruling, the Pennsylvania Supreme Court applied the *no preference*[41] and the *no religious test for office* (section 4)[42] clauses of the Pennsylvania constitution to affirm the lower court's ruling that it is not sectarian teaching for a devout teacher to "appear in a schoolroom in a dress peculiar to a religious order." It also dismissed the claim by the state that garb-wearing teachers violated the *no aid to religion* clause[43] of the

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[40] *Hysong v. Gallitzin School District*, 164 Pa. 629, 30 A. 482 (1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910).
[41] "No preference shall ever be given by law to any religious establishments or modes of worship," PA. CONST. art. 1, §3
[42] "No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." PA. CONST. art. 1 §4. The U.S. Supreme Court held that the strikethrough text (my emphasis) was unconstitutional. See: *Torcaso v. Watkins*, 367 U.S. 488 (1961).
[43] "No appropriations… shall be made… to any denominational or sectarian institution, corporation, or association." PA. CONST. art. 3, §18.

Pennsylvania constitution. Then, in one sentence, the majority issued its final ruling, which was to set the 123-year-old saga into motion: "*The legislature may, by statute, enact that all teachers shall wear in the schoolroom a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals*." In modern legal terms, the court issued a call for a "neutral law of general applicability"[44] that did not single out religion for regulation. In swift response to this immensely unpopular ruling, the Pennsylvania General Assembly took the authority affirmed by the court but not the court's advice. The legislators enacted an anti-religious-garb statute prohibiting public schoolteachers from wearing "any dress, mark, emblem or insignia indicating . . . that such teacher is a member or adherent of any religious order, sect or denomination."[45] The anti-religious-garb law also entailed criminal penalties for any public-school administrator who failed to suspend or terminate the offending teacher after notice of a violation.

This state-wide action, mirrored the earlier actions of a Municipal Board of Education in Pittsburg, Pennsylvania. In anticipation of the Supreme Court's ruling on *Hysong,* these education leaders took their own action on March 13, 1894, seven months before the *Hysong* decision issued on November 12, 1894. In a vote of twenty-nine to three,[46] the Municipal Board passed the following resolution,[47] the language of which is

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[44] *Employment Division v. Smith*, 494 U.S. 872 (1990)
[45] Pennsylvania Statute 24, § 11-1112 (2016). This statute was the first in the United States, enacted in 1895. It was reaffirmed in 1949 and 1982 and remains active today.
[46] In *Indianapolis News* reported that "Colonel McCandless presented as resolution… [which was] adopted by a vote of 31 to 3." "The Pittsburg School Row: Cutting Off the Sisters' Salaries—The Nuns Will Remain." *Indianapolis News,* March 14, 1894.
[47] "No Distinctively Religious Garb in the Pittsburg Schools." *American Sentinel*, March 22, 1894, 95.

strikingly similar to Pennsylvania's anti-religious-garb statute passed by the legislature a year later (Appendix B):

> *Resolved*—That the wearing by any of the teachers in the schools of this city during school hours in the school rooms of any garb or dress distinctive of and indicating any religious order, or any attachments or adornment on their person symbolic of any such order, or of any of the teachings of any particular religion or creed, is sectarian within the spirit and meaning of section 2, article 10, of the constitution of this State. Viz: 'No Money raised for the support of the public schools in the commonwealth shall be appropriated to or used for the support of any sectarian school.'[48]

In response, the *American Sentinel*, a newspaper based in New York City wrote, "This action is right… permit the wearing, in public schools, of distinctive garbs and symbols, which have, and are designed to have, a distinctively religious and sectarian influence, is clearly contrary to the spirit of American institutions."[49]

Fourteen years later, in 1910, the Pennsylvania state's anti-religious-garb statute was challenged in *Commonwealth v. Herr*.[50] This time, the Pennsylvania Supreme Court was comprised of *none* of the same members who had heard the previous case.[51] This

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[48] *Ibid., American Sentinel*, 95.
[49] *Ibid., American Sentinel*, 95.
[50] *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910); Judge Rice opinion, *Commonwealth v. Herr*, 39 Pa. Super. 454 (1909); Judge Landis opinion in *Commonwealth v. Herr*, Court of Quarter Sessions of Lancaster County, No. 26 (1908).
[51] An unusual set of unknown circumstances—from possibly the timing of judicial elections and deaths—led none of the justices in *Hysong* (1894) to also hear *Herr* (1910). The *Hysong* court consisted of a seven-member bench: Chief Justice James P. Sterrett (serving on the court from 1878 to 1899 and as C.J. from 1893 to 1899), Henry Green (1879 to 1900; C.J. 1899 to 1900), Henry W. Williams (1868 to 1877 and again in an unconnected term from 1887 to 1899), J. Brewster McCollum (1888 to 1903; C.J. 1900 to 1903), James T. Mitchell (1888 to Jan. 1, 1910; C.J. 1903 to Jan. 1, 1910), John Dean (1892 to 1896), and David Newlin Fell (1894 to 1914; C.J. from 1910 to 1914). Chief Justice Fell was the only justice from *Hysong* court still serving when *Herr* came before the Pennsylvania Supreme Court; however, for an unknown reason, he did not participate in the ruling. The *Herr* court heard the case on May 16, 1910 and issued the ruling on July 1, 1910. The decision lists only a five-justice panel—Jacob Hay Brown (1900 to 1921; C.J. from 1914 to 1921), Stephen Leslie Mestrezat (1900 to 1918), William P. Potter (1900 to 1918),

entirely new court panel of five justices unanimously denied the petition of a Mennonite teacher who was fired for wearing "usual plain dress" in the classroom.[52] The *Herr* court affirmed the lower court's decision that the statute did not violate the Due Process clause of the U.S. Constitution or the freedom of conscience provisions of the state constitution. Rather, it found persuasive the arguments offered by New York's highest court.

In between these two Pennsylvania cases—*Hysong* 1894 and *Herr* 1910—the Court of Appeals of New York (the highest court in the state) issued a negative ruling against Catholic nuns who wore habits while teaching in public schools in 1906. In *O'Connor v. Hendrick*,[53] members of the Order of the Sisterhood of S. Joseph of the Roman Catholic Church were discharged for refusing to comply with the New York superintendent's regulation that prohibited teachers from wearing "distinctive religious garb" in the public classroom. In this case, the court asked whether the superintendent's regulation was a reasonable and valid exercise of his power and whether the regulation was consistent with the New York Constitution. The court answered both questions in the affirmative. In a 7–0 opinion with one concurrence, the court upheld the superintendent's regulation and thus prohibited Catholic nuns from teaching in public schools while in religious garb. The justices argued that the apparel was distinctly sectarian and that the

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John P. Elkin (1905 to 1915), and Robert von Moschzisker (Jan. 3, 1910 to 1930; C.J. from 1921 to 1930). These five justices issued a single-paragraph affirmation of the lower court's 7–0 decision to affirm Pennsylvania's 1895 anti-religious-garb statute, which is still in effect today. Citation for judicial terms: John J. Hare, *The Supreme Court of Pennsylvania: Life and Law in the Commonwealth, 1684–2017* (University Park, Pennsylvania: Pennsylvania State University Press, 2018), Appendix B: Historical List of Supreme Court Justices.

[52] Four decades later, the Pennsylvania General Assembly reaffirmed the anti-religious-garb statute in 1949 and reenacted it again in 1982. It is the only anti-garb law in the U.S. that remains in effect today.

[53] *O'Connor v. Hendrick*, 184 N.Y. 421 (N.Y. Ct. App. 1906).

prohibition was in accord with the public policy of the state as declared in the New York Constitution, which forbade the use of the property or credit of the state in "aid of sectarian influences."[54]

While quoting a lengthy passage in Justice William's dissenting opinion in *Hysong,* the justices asserted, "There can be little doubt that the effect of the costume worn by these Sisters of St. Joseph at all times in the presence of their pupils would be to inspire respect if not sympathy for the religious denomination to which they so manifestly belong. To this extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine." He argued that when the teachers refused to comply with the regulation after being notified, the court argued that the teachers had "forfeit[ed] their right to further compensation under their contract of employment." The court also held that the superintendent needed "some control over the habiliments of teachers" to preserve "proper conduct of such schools." In further evidence of the anti-Catholic sentiment of the time, the court asserted, "grotesque vagaries in costume could not be permitted without being destructive of good order and discipline."[55]

Expansion of statutes and policies: 1910–1946. By the end of World War II, twenty-two states, either through state statutes or administrative policies, banned public schoolteachers from wearing religious garb in the classroom (Table 2).

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[54] NY CONST. Art IX § 4.

[55] In a broader case about the use of public funding for private religious education, the Supreme Court of Iowa discussed the narrow question of teachers' religious garb. In a 5–2 decision, the court found persuasive the rulings of *O'Connor,* stating "We united with the New York court in the view that the [dissenting] opinion by [Justice] Williams…" in *Hysong.* See *Knowlton v. Baumhover,* 182 Iowa 691 (Iowa Sup. Ct. 1918).

Table 2

States Employing Public Schoolteachers Wearing Religious Garb in 1946[56]

Yes	No	Law Silent or No Comment
1. Alabama	1. Alaska (territory)	1. Delaware
2. Arkansas	2. Arizona ^	2. Kentucky
3. Colorado ^	3. California	3. Massachusetts
4. Hawaii (territory)	4. Connecticut	4. Montana ^
5. Illinois	5. District of Columbia	5. Nevada
6. Kansas	6. Florida	6. New Hampshire
7. Maine	7. Georgia	7. New Jersey
8. Michigan	8. Idaho ^	8. Rhode Island
9. Missouri	**9. Indiana**	9. Utah ^
10. New Mexico ^	**10. Iowa**	10. Vermont
11. North Dakota	11. Louisiana	11. Virginia
12. Ohio	12. Maryland	12. Wisconsin
13. Oklahoma	13. Minnesota	13. Wyoming ^
14. South Dakota	14. Mississippi	
15. Tennessee	**15. Nebraska * ^**	
16. Texas	**16. New York**	
	17. North Carolina	
	18. Oregon *	
	19. Pennsylvania *	
	20. South Carolina	
	21. Washington	
	22. West Virginia	

[56] Source: National Education Association (1946) "Practice and Usage in Aid to Sectarian Schools and Sectarianism in Public Schools as Reported by State Superintendents" in "The State and Sectarian Education," *Research Bulletin.* (Washington, DC: National Education Association of the United States), Vol. XXIV, No. 1, Feb. 1946, p. 24–25, 36. Notes: States in **bold only** are ones with state or federal courts that prohibited public schoolteachers from wearing religious garb at one point from 1894–2011. The underlined states received positive treatment by the courts. The remaining states did not litigate this question. **Bold and underlined** are states with courts with both negative and positive treatment. * Of the states with superintendents that reported that no employment is granted to public schoolteachers for wearing religious garb, only three states had statutory bans on teachers' religious garb in 1946: Nebraska (enacted in 1919 and repealed in 2017), Oregon (enacted in 1923 and repealed in 2010), and Pennsylvania. In 1948, North Dakota enacted an anti-religious-garb law through a public ballot initiative (repealed in 1999). In 1959, the Ohio legislature failed to pass H.B. No. 41 (1959) to prohibit "the wearing of religious garb by teachers in public schools." ^ States with constitutions that include "*no religious tests for teachers"* clauses: Nebraska (1875), Colorado (1876), Montana (1889), Wyoming (1890), Idaho (1889), Utah (1889), New Mexico (1911), and Arizona (1912).

In conducting this literature review on this topic, I found that a majority of scholars claim that twenty-two states *banned* teachers' religious garb by 1946, implying state statutory bans—which is not accurate. I traced this claim to citations that point to a single study conducted by the National Education Association (NEA) in 1946, which I have replicated in Table 2. This data was created from a survey of superintendents; meaning, some superintendents were operating from their own employment policies, whereas others were administering laws enacted by the state legislature.

The National Education Association study of 1946 (Table 2) revealed a divided country: state superintendents in sixteen states confirmed that they employ public schoolteachers who wear religious garb, and state superintendents in twenty-two states responded that they did not, whereas thirteen states either did not comment or reported that their laws were silent on the matter. One can interpret this to mean that these were statewide regulations. Of the states whose superintendents reported that they did not employ public schoolteachers wearing religious garb, my research reveals that only three of the twenty-two states actually had statutory bans on teachers' religious garb in 1946: Nebraska, Oregon, and Pennsylvania. This means that in 1946, nineteen of them must have been enacted by the state superintendents or state school boards.

Arizona is a special case. Its anti-religious garb regulation predates its statehood date of February 14, 1912. Previously, teachers in the federal territory of Arizona were

prohibited from wearing religious garb in federal schools.[57] This study demonstrates that there is no evidence of a statutory ban enacted after statehood,[58] even though the two sources[59] falsely reference "Ariz. Code Annotated, 1939, sec. 54:1006." However, this code makes no mention of religious garb.[60] The NEA study does indicate, however, that the state superintendent reported that Arizona, in 1946, did not employ public schoolteachers who wore religious garb. This study assumes this practice was a result of either a local policy or an organizational custom that carried over from its time as a

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[57] In 1912, President William Taft (1909–1913) was faced with a political crisis when the residents of the new state objected to Catholic nuns wearing habits while teaching in federal Indian schools in Arizona. Taft, who later served as the Chief Justice of the United States (1921–1930), as President signed an executive order banning public schoolteachers in federal schools in federal territories from wearing religious garb while teaching. Although the scope of my study is about state public schools this primary document was an important finding. It had statutory authority for the jurisdiction of federal Indian schools and would not serve as an enforceable statute for state public schools. Regardless, this finding led me to no longer assume that the historical issue of teachers' religious garb was limited to state schools. Taft's order, however, does provide more evidence of anti-Catholic legislation.

[58] There is no evidence of an anti-religious-garb statute in the state Arizona, as confirmed in the following documents: *The School Laws of the Territory of Arizona as approved March 10, 1887* (Tucson, AZ: Daily Star Book and Job Print, 1893); Samuel L. Patte, code commissioner, *The Revised Statutes of Arizona 1913* (Phoenix, Arizona, The McNeil Company, 1913); C.O.Case, superintendent of public instruction, *The School Laws of Arizona 1919* (State of Arizona, 1919); F.C. Struckmeyer, code commissioner, *The Revised Code of Arizona 1928* (Bancroft-Whitney Company, 1930); Henry D. Ross, chief justice, *The Arizona Code 1939* (Bobbs-Merrill Company, 1939); as well as *School Laws of Arizona 1941–1949* (Phoenix, Arizona: M.L. Brooks, 1949).

[59] The first reference is National Education Association, "Practice and Usage in Aid to Sectarian Schools and Sectarianism in Public Schools as Reported by State Superintendents" in "The State and Sectarian Education," *Research Bulletin* (Washington, DC: National Education Association of the United States, (1946), Vol. XXIV, No. 1, Feb. 1946, p. 24–25, 36. The second reference is Leo Pfeffer (1953) *Church, State, and Freedom*, p. 774. Pfeffer references Arizona, Henry D. Ross, Alfred C. Lockwood, and Archibald G. McAlister (1940). *Arizona code, 1939: containing the General laws of Arizona, annotated*. Indianapolis: Bobbs-Merrill.

[60] The precise language reads as follows: "Teachers 54-1006. Instruction to be non-sectarian—Penalty.—Any teacher who shall use any sectarian or denominational books, or teach any sectarian doctrine, or conduct any religious exercises in his school, or who fails to comply with any provisions of this chapter [article], shall be guilty of unprofessional conduct, and the proper authority shall revoke his certificate. [Laws 1912, ch. 77, §95, p. 364; R. S. 1913, §2808; rev., R.C. 1928, §1044.] Compiler's Note. The bracketed word 'article' was inserted by the compiler. Collateral References. Sectarianism in schools 5 A. L. R. 886; 20 A.L.R. 1351; 31 A.L.R. 1125; 57 A.L.R. 195. See 23 Cal. Jur. 159."

federal territory, but not as a result of a statutory ban. For these reasons, Arizona is included in the twenty-two states that banned public schoolteachers from wearing religious garb, only three of which did so with state statutes: Nebraska, Oregon, and Pennsylvania.

Two years after the 1946 NEA study was published, North Dakota passed an anti-religious-garb law via public referendum,[61] illustrating a new kind of anti-religious-garb law: one enacted through a state-wide ballot measure.[62] Fifty-one years later, in 1999, North Dakota's Legislative Assembly repealed its anti-religious-garb law.[63] Oregon's legislature repealed its anti-religious-garb law in 2010.[64] Nebraska's legislature repealed its anti-religious-garb law in 2017.[65] Currently, Pennsylvania is the only remaining state with an anti-religious-garb law.[66] In the remaining states there is no current evidence of policies or regulations, suggesting that either state superintendents or state school boards rescinded or let expire their policies.

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[61] Linda Grathwohl, "The North Dakota Anti-Religious-Garb Law: Constitutional Conflict and Religious Strife," 766 *Great Plains Quarterly.* (Lincoln, Nebraska: Digital Commons, University of Nebraska, 1993).
[62] N.D. Chapter 15 General Provisions, 15-4729. "Wearing of Religious Garb by Teachers in Public School Prohibited. No teacher in any public school in this state shall wear in said school or while engaged in the performance of his or her duties as such teacher any dress or garb indicating the fact that such teacher is a member of or an adherent of any religious order, sect or denomination." June 29, 1948, S.L. 1949, c. 356, §1. N.D. Chapter 15 General Provisions, 15-4730. "Suspension and Revocation of Teachers Certificates for Wearing Religious Garb. Any public school teacher who shall violate any of the provisions of this Act (section 15-4729) shall have his or her certificate suspected by the state superintendent of public instruction for one year, and upon the conviction of such teacher for a second such offense, his or her teacher's certificate shall be permanently revoked and annulled by the state superintendent of public instruction as provided by law." June 29, 1948, S.L. 1949, c. 356, §2.
[63] N.D. Bill No. 1034, introduced by the Education Services Committee, repealed N.D. Cent. Code § 15-47-29; 15-47-30, Mar. 3, 1999.
[64] Or. HB 3686 (2010) amended ORS 659A.033 and repealed ORS 342.650 and 342.655. N.
[65] Neb. LB62 2017 (2017) repealed section 79-898 and §79-899.
[66] Pennsylvania Statute 24, § 11-1112, first enacted in 1895. (Appendix B. Glossary of Statutes in Question.)

I find it curious that the superintendents from Nebraska and Idaho would report to the NEA in 1946 that their respective states did not employ public schoolteachers wearing religious garb when their state constitutions had *no religious tests for teacher* clauses.[67] I make this point in the context of the fact that as western territories became states many adopted *no religious tests for teacher* clauses, as noted in the following state constitutions: Nebraska[68] was the first (1875), followed by Colorado[69] (1876), Montana[70] (1889), Wyoming[71] (1890), Idaho[72] (1889), Utah[73] (1889), New Mexico[74] (1911), and Arizona[75] (1912).

The authors of the 1946 NEA report addressed this issue directly: "The constitutional provision which prohibits religious belief as a qualification for public

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[67] NEB. CONST. of 1875, art. VI §11 and IDAHO CONST. of 1890, art. IX §6.
[68] NEB. CONST., 2 Oct.1875, art. VI §11, "A religious test or qualification shall not be required of any teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation. . ."
[69] COLO. CONST., 14 Mar. 1876, art. IX §8, "No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student. . ."
[70] MONT. CONST., 8 Nov. 1889, art. XI §9, "No religious or partisan qualifications shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student. . ."
[71] WYO. CONST., 10 July 1890, art. VII §12, "No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the state. . ."
[72] IDAHO CONST., 3 July 1890, art. IX §6, "No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student."
[73] UTAH CONST., 5 Nov. 1895, art. X §12, "Neither religious nor partisan test or qualification shall be required of any person, as a condition of admission, as teacher or student, into any public educational institution of the State. . ."
[74] N.M. CONST., 21 Jan. 1911, art. XII §9, "No religious test shall ever be required as a condition of admission into the public schools or any educational institution of this state, either as a teacher or student. . ."
[75] ARIZ. CONST., 5 Nov. 1912, art. XI §7, "No religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil…"

office has no bearing upon the decision, since these teachers are not excluded from the public schools merely because they are Catholic. The question then becomes whether the religious dress is a sectarian influence such as is prohibited in the public schools." The precise question of whether an anti-religious-garb law makes non-religious-garb-wearing religions a prerequisite for employment is outside the scope of this study.

The religious garb statutes in Arkansas and Tennessee also fall outside my research question but are worth mentioning because both states have active state statutes that explicitly permit the voluntary wearing of religious garb by public schoolteachers.[76] Arkansas' law, first enacted in 1947, states, "No person shall be prohibited from teaching in state institutions of higher learning for the reason that the person wears the clothing of any established and recognized religion while teaching."[77] The Tennessee School Employee Religious Liberty Act of 1999 allows school employees to voluntarily "wear religious garb or jewelry that does not disrupt the school environment."[78] The study of these statutes would require a legal analysis under the Establishment Clause of the First Amendment to the U.S. Constitution. I later recommend this analysis be conducted in future studies.

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[76] *The First Amendment in schools: A guide from the First Amendment Center,* Association for Supervision and Curriculum Development, p. 100.

[77] The 2010 "Authority for teachers to wear religious clothing" statute, Arkansas Code Title 6, Education Subtitle 5, Postsecondary and Higher Education Generally Chapter 63, Employees of State Institutions Subchapter 1, General Provisions § 6-63-101. Acts 1973, No. 196, § 1; A.S.A. 1947, § 80-1261.

[78] It also states, in section 49-6-9002(a)(4) "Neutrality to religion does not require hostility to religion. The establishment clause does not prohibit reasonable accommodation of religion, nor does the clause bar appropriate teaching about religion…" It goes on to permit school employees to voluntarily "read a religious book during non-instructional time; quietly say grace before a meal; and meet with other school employees for prayer or scriptural study before or after school or during the employee's lunch" (49-6-8004.b.1, 2, 4).

In the meantime, I return to discussing the conflicting legal developments that occurred in states that sought to prevent public schoolteachers from wearing religious garb, either through state statute or administrative regulations.

Conflicting legal developments: 1936–1956. In continuation of the discussion of the origins and evolution of anti-religious-garb laws and case laws, I now move to four state cases that solely focused on the question of public schoolteachers' religious garb from 1936 to 1956, one of which ruled against and three in favor of Catholic nuns' wearing habits while teaching in public schools.

In *Gerhardt v. Heid*[79] (1936), the North Dakota Supreme Court affirmed the trial court's decision, saying, "wearing of the religious habit… does not convert the school into a sectarian school, or create sectarian control within the purview of the constitution." Similar to the Pennsylvania Supreme Court in 1894, the North Dakota Supreme Court closed this case by leaving the ultimate question to the legislative process: "Whether it is wise or unwise to regulate the style of dress to be worn by teachers in our public schools or to inhibit the wearing of dress or insignia indicating religious belief is not a matter for the courts to determine. The limit of our inquiry is to determine whether what has been done infringes upon and violates the provisions of the constitution." It held that the wearing of religious garb did not violate the "no establishment," "no sectarian control," "no aid to religion," and "no diversion" of funds from public schools clauses.[80] As a

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[79] *Gerhardt v. Heid*, 66 N.D. 44 (N.D. Sup. Ct. 1936).
[80] N.D. CONST., Sec. 4 and 147.

result, the practice continued. For instance, in 1945, the Attorney General of North Dakota reported that 20 school districts in eleven counties were employing 74 nuns and eight priests.[81]

On June 29, 1948, North Dakota voters passed Initiative 1, an "initiated state statute," led by Protestant ministers of the Committee for the Separation of Church and State, to prohibit school teachers' religious dress (which only affected Catholic nuns at the time). The results were close: 104,133 (53 percent) voted in favor of the statute and 92,771 (47 percent) voted against it.[82] This anti-religious-garb statute[83] is the only one in U.S. history enacted by the voters. Five decades later, in 1999, North Dakota's Legislative Assembly repealed this public referendum.[84]

In *Johnson v. Boyd*[85] (1940), the Indiana Supreme Court issued a positive treatment of teachers' religious garb just one month after the U.S. Supreme Court

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[81] Alvin W. Johnson and Frank H. Yost, *Separation of Church and State in the United States.* (New York, NY: Greenwood Press, 1948), p. 123; "Schools—Teachers—Wearing Religious Garb," Report of the Attorney General of North Dakota, Aug. 25, 1945, pp. 262-63.
[82] *Legislative Manual, Official Vote of North Dakota Primary Election, 1948*; and Linda Grathwohl, "The North Dakota Anti-Religious-Garb Law: Constitutional Conflict and Religious Strive," *Great Plains Quarterly*, (Lincoln: University of Nebraska, 1993).
[83] N.D. Chapter 15 General Provisions, 15-4729. "Wearing of Religious Garb by Teachers in Public School Prohibited. No teacher in any public school in this state shall wear in said school or while engaged in the performance of his or her duties as such teacher any dress or garb indicating the fact that such teacher is a member of or an adherent of any religious order, sect or denomination." June 29, 1948, S.L. 1949, c. 356, §1. N.D. Chapter 15 General Provisions, 15-4730. "Suspension and Revocation of Teachers Certificates for Wearing Religious Garb. Any public school teacher who shall violate any of the provisions of this Act (section 15-4729) shall have his or her certificate suspected by the state superintendent of public instruction for one year, and upon the conviction of such teacher for a second such offense, his or her teacher's certificate shall be permanently revoked and annulled by the state superintendent of public instruction as provided by law." June 29, 1948, S.L. 1949, c. 356, §2.
[84] N.D. Bill No. 1034, introduced by the Education Services Committee, repealed N.D. Cent. Code § 15-47-29; 15-47-30, Mar. 3, 1999. For rationale for the repeal, see North Dakota Legislative Management (1998) *Minutes of the Educational Services Committee.* Feb. 23-24, 1998. Bismarck, North Dakota, p. 8.
[85] *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940).

incorporated the First Amendment to the states in *Cantwell v. Connecticut.* Interestingly, the Indiana Supreme Court bypassed the U.S. Constitution and relied on clauses in the state constitution—"right to worship," "free exercise," "right of conscience," "no religious test," and "no preference"[86]—to rule that public schools that operate in "Catholic churches, display religious pictures, and employ monks and nuns as teachers did not make the schools parochial schools."

The New Mexico Supreme Court took a different approach. In *Zellers v. Huff* (1951),[87] the New Mexico Supreme Court upheld New Mexico State Board of Education's resolution which read: "It Is Hereby Resolved and Adopted as the policy of this board that all nuns, brothers, or priests of the Catholic Church, or any members of any other sectarian religious group, wearing clothing of religious significance, should be removed from the public schools throughout the state as expeditiously as circumstances (of) each locality allows…"[88] The New Mexico Supreme Court relied on the U.S. Supreme Court's landmark decision in *Everson v. Board of Education*[89] that incorporated the Establishment Clause of the First Amendment of the U.S. Constitution to the states. The New Mexico Supreme Court held that under *Everson*, public schools that employed Catholic garb-wearing teachers violated the "separation of church and state" principle of the No Establishment Clause. The state supreme court also used the "free from sectarian

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[86] Art. 1 Sec. 2, 3, 4, and 5.
[87] *Zellers v. Huff*, 55 N.M. 501 (N.M. Sup. Ct. 1951).
[88] New Mexico State Board of Education resolution, Mar. 6, 1951, cited in *Zellers v. Huff*, 55 N.M. 501 (N.M. Sup. Ct. 1951) at 29.
[89] *Everson v. Board of Education*, 330 U.S. 1 (1947).

control" clause of the New Mexico constitution[90] to definitively bar Catholic nuns from wearing religious garb and religious insignia while teaching in public classrooms. Their intent was to prevent a "propagandizing effect" for the teachers' church and preempt any possible introduction of "sectarian religion into the public school."[91]

In *Rawlings v. Butler*[92] (1956), the Court of Appeals of Kentucky (a lower court to Kentucky's state supreme court) ruled in favor of the 84 Catholic nuns who taught while wearing habits and religious emblems. The court clarified, "The Garb does not teach. It is the woman within who teaches." The court warned that should the legislature pass an anti-religious-garb law, as other states had, lawmakers would be denying teachers "equal protection" under the law to freely exercise their religion as incorporated by the U.S. Supreme Court in *Cantwell v. State of Connecticut.*[93] The court made explicit that the "*Everson* opinion has no bearing on the question of Sisters teaching in schools while wearing their habiliments."

Summary: 1894–1956. Up to this point, there have been two seasons of legal developments between 1894 and 1956. In the first season, we saw Pennsylvania and New York set the legal foundation for banning public schoolteachers from wearing religious garb while teaching. Pennsylvania's Supreme Court initially ruled in favor of garb-wearing teachers but explained that the authority rests with the legislative branch to

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[90] In this case, the New Mexico Supreme Court relied on many different clauses in the New Mexico Constitution but narrowly focused on the "free from sectarian control" clause. In other challenges within the case they relied on the ""freedom of conscience," "no aid to religion," "no support of any sectarian, denominational" school, "no religious test" for teachers and students, and "free from sectarian control" clauses in the N.M. CONST. See: art. 2, Sec. 11; art. 9, Sec. 14; art. 12, Sec. 3; art. 12, Sec. 9; art. 21. Sec. 4.
[91] *Zellers v. Huff*, 55 N.M. 501 (N.M. Sup. Ct. 1951).
[92] *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956).
[93] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

require all teachers to abide by a general uniform dress code. The Pennsylvania General Assembly then created a law that singled out religious garb for state regulation, which was upheld by the same justices in the Pennsylvania Supreme Court who had previously favored the educators. The highest court in New York relied on the state superintendent's regulatory authority to ban teachers' religious garb, further reinforced by New York's constitutional requirement not to use public property to aid "sectarian influences." These three cases set into motion the first season of anti-religious garb regulation, in which by the end of World War II, twenty-two states prohibited public schoolteachers from wearing religious garb, through a state statute, public referendum, or administrative policies.

In the second season, from 1936 to 1956, state courts in Indiana, Kentucky, and North Dakota ruled in favor of religious-garb-wearing teachers; however, voters in North Dakota passed a statewide referendum, thus enacting the first and only anti-religious-garb law that was born from the ballot box. Soon after, the New Mexico Supreme Court issued a scathing ruling against Catholic educators. Together, these scenes reveal that the question of teachers' religious garb remained a contentious, unresolved legal issue.

In both of these seasons, state courts relied on state laws and state constitutions to interpret the anti-religious-garb cases, which were brought forth using a variety of causes of action. The contemporary cases see an increasing reliance on federal causes of action, which proved to be ineffective for the public schoolteachers who had lost their jobs for wearing religious garb. As I examine in the next section, the problem, however, is that

throughout this 123-year history, there was only one case[94] that was filed under the Free Exercise Clause of the First Amendment to the U.S. Constitution. How did it come to be that the highest law in the land designed to protect a person's free exercise of religion was not routinely used to address the question of public schoolteachers' religious garb? Three reasons may be helpful to consider as I move into an analysis of the contemporary developments.

First, the U.S. Constitution does not mention education.[95] The governance of public schools was often solely left to the states—that is, until the federal territories created federal schools in the nineteenth and early-twentieth centuries and the federal desegregation interventions in the mid-twentieth century. Second, because the First Amendment to the U.S. Constitution starts will the phrase, "Congress shall not . . . ," it was understood that states had the right to regulate religion, which is why state constitutions have unique religious liberty provisions. Third, the U.S. Supreme Court only began applying the federal Free Exercise Clause of the First Amendment to the states in 1940, as previously explained. Even the two anti-religious-garb cases in New Mexico in 1951 and Kentucky in 1956 continued to rely on state law, probably because education was considered to solely be a state right with state oversight.

The contemporary anti-religious-garb cases, from 1986 to today, alternatively, were entrenched in the conflicts between the federal judicial and legislative branches of government. In later sections in this chapter, I analyze how the controversial U.S.

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[94] *Mississippi v. McGlothin*, 556 So.2d 324 (MS Sup. Ct. 1990).
[95] Stephen Lurie notes that of the 11,000 proposed Amendments to the U.S. Constitution, "there have only been two proposals—one by Rep. Major Owens (D-NY) and repeated efforts by Rep. Jesse Jackson Jr. (D-IL)—for an education amendment, ever." Stephen Lurie, "Why Doesn't the Constitution Guarantee the Right to Education?" *The Atlantic,* Oct. 16, 2013.

Supreme Court's rulings against a Jewish military chaplain and Native American employment counselors were swiftly overturned through congressional legislation. The U.S. Supreme Court later held that Congress overstepped its bounds by applying certain religious liberty protections to all states, which led twenty states to enact their own religious freedom statutes—the new legal paradigm in which I conduct this study.

Contemporary Federal and State Developments: 1986–2017

More recent cases and legislative initiatives on teachers' religious garb are equally inconsistent in their application of federal and state law. For instance, in 1986 and 1992, respectively, the Third Circuit Court (Pennsylvania) and the Oregon State Supreme Court both upheld the dismissal of Sikh and Muslim teachers for wearing head coverings. In contrast, in 2003, a District Court for Western Pennsylvania overturned the decision to dismiss a teacher's aide for wearing a cross necklace. Interestingly, in 2010, the Oregon Legislative Assembly repealed its 87-year-old ban on religious garb in public classrooms,[96] whereas Arkansas[97] and Tennessee[98] enacted statutes that explicitly

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[96] The Oregon rev. statute enacted in 1923 and revised in 1965 and 1989 §§ 342.650, .655, stated, "Any teacher who wears religious dress while teaching in an Oregon public school shall be suspended from employment. Any teacher violating the[se] provisions shall be suspended from employment by the district school board. The board shall report its action to the Superintendent of Public Instruction who shall revoke the teacher's teaching certificate." In 2010, House Bill 3686 "repeal[ed] provisions prohibiting teachers in public school from wearing religious dress while engaged in duties as teachers and sanctioning teachers for doing so" (ORS 659A.033).

[97] Arkansas' law states, "No person shall be prohibited from teaching in state institutions of higher learning for the reason that the person wears the clothing of any established and recognized religion while teaching" (Authority for teachers to wear religious clothing, Arkansas Code Title 6, Education Subtitle 5, Postsecondary and Higher Education Generally Chapter 63, Employees of State Institutions Subchapter 1, General Provisions § 6-63-101). Acts 1973, No. 196, § 1; A.S.A. 1947, § 80-1261.

[98] The Tennessee School Employee Religious Liberty Act of 1999 allows school employees to voluntarily "wear religious garb or jewelry that does not disrupt the school environment." It also states, in section 49-6-9002(a)(4), "Neutrality to religion does not require hostility to religion. The establishment clause does not

permitted public schoolteachers to wear religious garb. Nebraska's anti-religious-garb law, was repealed in 2017.[99]

In this section, I will examine five modern religious-garb cases, in two of which courts ruled against schoolteachers who wore a Sikh turban (Oregon) and Muslim headscarf (Pennsylvania); in three cases, courts ruled in favor of schoolteachers who wore an African Hebrew Israelite headdress (Mississippi), a Muslim headscarf (Pennsylvania), and a Christian cross (Pennsylvania).

In *Cooper v. Eugene School District*[100] (1986), the Oregon Supreme Court upheld the termination of Janet Cooper,[101] a Sikh teacher who was fired for violating the state's anti-religious-garb statute. The statute in question was enacted by open members of the Ku Klux Klan in 1923.[102] The *Cooper* decision was issued four months after the U.S.

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prohibit reasonable accommodation of religion, nor does the clause bar appropriate teaching about religion…" It goes on to permit school employees to voluntarily "read a religious book during non-instructional time; quietly say grace before a meal; and meet with other school employees for prayer or scriptural study before or after school or during the employee's lunch" (49-6-8004.b.1, 2, 4).

[99] On January 5, 2017, Nebraska State Senator Jim Scheer from District 19 introduced bill NE LB62, designed to repeal the prohibition on the "wearing of religious garb by teachers in public schools." The bill was passed the Education Committee by a vote of 36 to 1, with its last hearing occurring on January 17, 2017. The bill passed on final reading with thirty-nine in favor and five against. Nebraska LB62 2017 was signed by the Governor on Mar. 27, 2017 and reads "A Bill for an Act relating to schools; to eliminate provisions prohibiting the wearing of religious garb by teachers in public schools; to eliminate penalties; and to outright repeal sections 79-898 and 79-899, Reissue Revised Statutes of Nebraska. Be it enacted by the people of the State of Nebraska, Section 1. The following sections are outright repealed: Sections 79-898 and 79-899, Reissue Revised Statutes of Nebraska."

[100] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).

[101] After marriage, Janet Cooper converted to Sikhism, began wearing religious garb, and changed her name to Karta Kaur Khalsa.

[102] The Oregon Supreme Court stated that "Oregon's 1923 predecessor to ORS 342.650 [the state's anti-religious-garb law] dates from the period of anti-Catholic intolerance that also gave us the initiative measure against private schools struck down in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)." *Cooper v. Eugene School District No. 4J,* 301 Ore. 358; 723 P.2d 298 at 26 (1986). For further discussion, see David B. Tyack (1968) "The Perils of Pluralism: The Background of the Pierce Case," The American Historical Review, The University of Chicago Press, Vol. 74, No. 1 (Oct., 1968), pp. 74–98; Paula Abrams

Supreme Court had ruled against Orthodox Rabbi S. Simcha Goldman in 1986 for wearing a yarmulke while in an Air Force uniform.[103] (Congress overturned *Goldman v. Weinberger*[104] in the 1988 National Defense Authorization Act.)

In reviewing the Sikh teacher's claim, the Oregon Supreme Court explicitly rejected the use of federal judicial tests under the Free Exercise clause of the U.S. Constitution.[105] Rather, the court focused on the Free Exercise Clause of the Oregon State Constitution and on earlier state court rulings against Native American teachers' use of peyote, which four years later would become the infamous U.S. Supreme Court decision of *Smith v. Employment Division*.[106] In *Cooper*, the Oregon Supreme Court found that the Sikh teacher's right to exercise her religion was "reasonably denied" because of the state's interest in preserving religious "neutrality" in public schools. The Oregon

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(2003) "The Little Red Schoolhouse: Pierce, State Monopoly of Education and the Politics of Intolerance," 20 Const. Comment. 61, Spring 2003.

[103] The Court of Appeals for the District of Columbia ruled and the U.S. Supreme Court affirmed that "the appropriate level of scrutiny of a military regulation that clashes with a constitutional right is neither strict scrutiny nor rational basis." *Goldman v. Secretary of Defense,* 236 U.S. App. D.C. 248, 734 F.2d 1531 at 1535-1536 (1984); *Goldman v. Weinberger,* 475 U.S. 503 (1986).

[104] *Goldman v. Weinberger,* 475 U.S. 503 (1986). For a detailed account of these developments, see Dwight H. Sullivan, *The Congressional Response to Goldman v. Weinberg*, 121 MILITARY LAW REVIEW (1988), 125–152. See also Pub. L. No. 100–180; 10 USC. §774 (Sup. 1987).

[105] The Oregon Supreme Court explained, "This court in fact has interpreted the meaning of these guarantees independently, sometimes with results contrary to those reached by the United States Supreme Court…The religion clauses of OR. CONST., art. I, sections 2, 3, 4, 5, 6 and 7, are more than a code. They are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and freedom from state-supported official faiths or modes of worship. The accumulation of guarantees, more numerous and more concrete than the opening clause of the First Amendment, reinforces the significance of the separate guarantees." The Oregon Supreme Court went on to apply the "double jeopardy protection" when explaining that "parties should specify the statutory or constitutional sources of their claims, but also a party cannot, by omitting a state-based claim, force an Oregon court to hold that the state has fallen below a nationwide constitutional standard, when in fact the state's law, when properly invoked, meets or exceeds that standard." For these reasons, the Oregon Supreme Court relied on the Free Exercise clause under the Oregon State Constitution.

[106] *Employment Division v. Smith*, 494 U.S. 872 (1990).

Supreme Court came to this conclusion by using a test similar to the "neutral and general applicable" test later used in *Smith*.[107] The state's high court found that the interest of preserving the "image of a nonsectarian public school" outweighed the infringements of her free exercise rights. It did, however, note that it would permit public schoolteachers to wear common decorations from a religious "heritage," such as a necklace with a small cross or Star of David. No definition of "small" was offered, and neither was a distinction made between "common decorations" and head coverings worn by Catholics, Sikhs, or Muslims.

In a peculiar turn of events, the U.S. Supreme Court dismissed Cooper's appeal for "lack of a substantial federal question."[108] This is highly suspect given that the religion clauses of the First Amendment had been extended to the states four decades earlier.[109]

In 2010, the Oregon state legislature repealed the state's anti-religious-garb law of 1923,[110] stating both that the original bill had been proposed by leaders of the Ku Klux

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[107] The Oregon Supreme Court acknowledged in 1986 that the state's anti-religious-garb law "is not a general regulation, neutral toward religion on its face and in its policy, like the unemployment benefits standards in *Smith v. Employment Division*, 301 Or 209, 721 P2d 445 (1986), and *Black v. Employment Division*, 301 Or 221, 721 P2d 451 (1986)." See: *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 19 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).

[108] The Third Circuit Court of Appeals, in reviewing *Cooper,* stated, "The Supreme Court dismissed Cooper's appeal for want of a substantial federal question." *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990), at 888. This may be because the Oregon Supreme Court held that "this case… should remain a case of ordinary administrative and statutory law before becoming a constitutional case." *Cooper* at 4 (1986). It may also be because the Oregon Supreme Court limited the legal inquiry to the free exercise provisions in the Oregon constitution, with explicit rejection of the use of the free exercise guarantees in the First Amendment to the U.S. Constitution.

[109] *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947).

[110] Oregon HB 3686 (2010) amended ORS 659A.033 and repealed the two-part anti-religious-garb law: ORS 342.650 and 342.655. N.

Klan to prevent Catholic teachers from being employed by public schools and that the anti-religious-garb law violated precedents set by the Oregon Supreme Court and the U.S. Supreme Court's guaranteeing one's free exercise of religion.

The second modern case was issued three months before the U.S. Supreme Court issued *Smith* in April 1990. In *Mississippi v. McGlothin*[111] (January 1990), the Mississippi Supreme Court held that a public schoolteacher's periodic wearing of a head wrap as a religious cultural expression of her identity as an African Hebrew Israelite from Ethiopia was constitutionally protected under both the Free Exercise clause of the U.S. Constitution's First Amendment, as incorporated by the Fourteenth Amendment, and the "no religious tests," "no preference," and "free enjoyment of all religious sentiments" clauses of Mississippi's Constitution.[112] The Mississippi Supreme Court applied the U.S. Supreme Court's *strict scrutiny* test[113] and did not find applicable the U.S. Supreme Court's decision in *Goldman v. Weinberger*, in part because Congress had overturned it two years earlier.[114] Three months after issuing the *McGlothin* decision, the U.S. Supreme Court issued *Smith,* eclipsing the *McGlothin* case and preempting another emerging garb case in Pennsylvania.

Four months after the April 1990 decision of *Smith,* the Third Circuit issued a negative ruling against a Philadelphia public schoolteacher.[115] In this case, decided in August 1990, Alima Delores Reardon was fired for wearing a hijab (Muslim headscarf)

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[111] *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990), cert. denied, 498 U.S. 879.
[112] Art. III §18
[113] *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[114] For a detailed account of why and how it was overturned, see Dwight H. Sullivan, *The Congressional Response to Goldman v. Weinberg*, 121 MILITARY L. REV. (1988), pp. 125–152.
[115] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).

and loose dress while teaching in the school district of Philadelphia. Earlier, the District Court for the Eastern District of Pennsylvania had held that the state's anti-religious-garb statute violated Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on religion (see the "Related Statutory Developments" section later in this chapter for a complete discussion of Title VII of the Civil Rights Act). The Third Circuit reversed the lower court, holding the garb statute valid under Title VII because the school district could experience an undue hardship to accommodate Reardon's religious expression. The Third Circuit reasoned that requiring the school board to violate a "reasonable" religious garb statute would make the school board vulnerable to a "substantial risk of criminal prosecution, fines, and expulsion from the [education] profession."[116] Although the court did not provide an explicit justification, I assume that its reason was that the anti-religious-garb statute threatens criminal penalties for administrators who do not comply with the law.[117] The appellate judges further claimed that the school district would not satisfy its compelling state interest in allowing to wear her religious apparel, failing to uphold the "appearance of a secular public school system."[118] The court asserted that the "Garb Statute permissibly advanced a compelling interest in maintaining the appearance of religious neutrality in the classroom" and that

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[116] *Ibid.*, at 24.
[117] "Any public school director who after notice of any such violation fails to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction of the first offense, shall be sentenced to pay a fine not exceeding one hundred dollars ($100), and on conviction of a second offense, the offending school director shall be sentenced to pay a fine not exceeding one hundred dollars and shall be deprived of his office as a public school director." Pa. Stat. 24, § 11-1112.
[118] 723 P.2d at 308.

while, admittedly, the statute "was enacted with a putatively anti-Catholic motivation, the commonwealth was not practicing discrimination in enforcing the statute."[119]

It is worth mentioning in this literature review two federal district court cases in Pennsylvania. They are quite odd because they involve teachers' religious garb, but the courts claimed that the cases are not about either religious garb or teachers. The first court held that a Muslim's headscarf did not meet the definition of "religious garb"; therefore, a Muslim counselor was exempt from Pennsylvania's anti-religious-garb law. The second court held that a teacher's aide is not a teacher according to the state's legal definition of a teacher; therefore, a Christian teaching assistant was permitted to wear a cross neckless while in a public classroom. I summarize these two peculiar cases here to document this history and to explain why I do not rely on them in my legal analysis in Chapter IV.

In 1991, a year after Reardon's Title VII case before the Third Circuit, the U.S. District Court of Eastern Pennsylvania used Title VII to rule in favor of Cynthia Moore, a Muslim teacher who was denied employment because she wore a two-toned green headscarf to an interview. She confirmed that she intended to wear—while teaching—similar head coverings, like a turban, a crochet cap, or differently tied scarves.[120] This case presents unique facts in comparison to the others. Moore's employment was denied by a READS, a private company that, via a contract with the Philadelphia School

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[119] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990) at 35.
[120] *EEOC v. READS*, Inc. 759 F.Supp. 1150 (U.S. Dist. Ct. of Pa. 1991).

District, provided "remedial education and diagnostic services" to students in private religious schools. Over seventy to seventy-five percent of the schools were Catholic, and the "remainder were affiliated with Jewish, Muslim, Lutheran, and Quaker"[121] organizations. Specifically, READS denied Moore employment as a third-grade counselor at two Catholic day schools, which is ironic considering the anti-Catholic origins of Pennsylvania's garb law. In an unusual application of common law, the District Court rejected the precedent in the Third Circuit's ruling against Reardon and instead rested its favorable ruling for Moore on a single word—*many*. The district court wrote, "In [*Reardon*], the Third Circuit stated in dicta that attire which may not clearly identify a teacher as an adherent of a particular religion is nevertheless 'religious garb' if it is apt to be perceived as religious by 'many' school children."[122] The word "many" originated from a footnote in a concurring (not the majority's) opinion in *Reardon* by one judge on the Third Circuit. He quoted U.S. Supreme Court Justice Brennan explaining how, in Establishment Clause cases (not Title VII cases), "the inquiry into [endorsement] must be conducted with particular care when *many* [my emphasis] of the citizens perceiving the governmental message are children in their formative years . . ."[123] The District Court used this quote to conclude that "Moore's head coverings are not 'religious garb'… because although worn for religious purposes they are not perceived as such." READS failed, the district court said, "to produce any probative evidence that children, such as

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[121] *Ibid.*, *EEOC v. READS* (1991).
[122] *Ibid.*, *EEOC v. READS* (1991).
[123] *Grand Rapids v. Ball*, 473 U.S. 373 (1985).

the third graders Moore applied to counsel, would perceive Moore's garb to be religious" (even though Moore herself testified of two children in other contexts inquiring about the religious nature of her headscarf).[124] The court stated that there was "no evidence that Moore's attire [was] facially religious" (even though during the interview she herself identified as religious and admitted to wearing garb for religious reasons). In what seem to be two contradictory statements, the District Court on one hand held that a Muslim's headscarf was not religious because "many" third grade children would not perceive it as such and on the other hand simultaneously ruled that READS was guilty of "religious discrimination" under Title VII. I am unclear how garb worn for religious purposes cannot be perceived as religious while at the same time serving as evidence of religious discrimination. The court also held that READS failed to provide any evidence of undue hardship "so as to relieve it of its duty to accommodate" Moore (a position I find reasonable). To illustrate what was at stake, the court ordered READS to issue Moore back pay and interest in the amount of $38,506.

The fifth and most recent contemporary religious garb case comes from another equally peculiar ruling issued by another lower federal court in Pennsylvania. In *Nichol v. Arin*[125] (W.D. Pa. 2003), a federal district court judge ruled that a teacher's assistant was

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[124] "On one occasion, a girl at an interfaith summer program told [Moore], 'You remind me of a Jewish woman.' To this, Moore 'just smiled and didn't add anything else or say anything to her.' On another occasion, Moore stated that a 'young gentleman' told her that she didn't have to dress as she did because he would protect her. Moore assumed that the remark was intended to reflect the boy's opinion concerning the dress requirements for Muslim women. Moore replied that she could take care of herself. On the final occasion, a child speculated that Moore covered her head, not for any religious purpose, but rather because she was bald."

[125] *Nichol v. Arin*, 268 F.Supp 2d 536 (W.D. Pa. 2003).

not a "teacher" under the definition of Pennsylvania's School Code;[126] therefore, Brenda Nichol was not bound by Pennsylvania's anti-religious-garb statute and could freely wear a cross necklace while assisting in the public classroom. The judge issued an extensive nonbinding opinion about the unconstitutionality of the statute, using judicial tests under the Free Exercise, Free Speech, Establishment, and Title VII provisions. I find it peculiar that the judge failed to mention the Free Exercise standards under *Sherbert.* He did not mention the judicial tests of *general applicability*, *strict scrutiny,* and the unique four-part *substantial-burden* standard as required under Pennsylvania's Religious Freedom Protection Act (RFPA), enacted a year earlier in 2002, because Nichol did not meet RFPA's notice requirement.[127]

I find the *READS* and *Nichol* court decisions to be uneven given the judges' rejection of legal precedent and failure to apply longstanding judicial standards. I will not rely on these cases to conduct my analysis in Chapter IV. Instead, I will use legal research methods to conduct a fact-pattern synthesis of legitimate religious-garb cases that will force me to study the heart of the matter, rather than, as these courts did, circumvent the merits of this important and unanswered constitutional question.

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[126] "'Teacher' shall include all professional employees and temporary professional employees, who devote fifty per centum (50%) of their time, or more, to teaching or other direct educational activities, such as classroom teachers, demonstration teachers, museum teachers, counsellors, librarians, school nurses, dental hygienists, home and school visitors, and other similar professional employees and temporary professional employees, certificated in accordance with the qualifications established by the State Board of Education." 24 Pa. Stat. Ann. § 11-1141.

[127] District Judge Arthur J. Schwab's justification: "The Pennsylvania Religious Freedom Protection Act of 2002 has not been judicially interpreted and this Court is hesitant to sail the uncharted waters within its reach. In any event, as defendants contend, it does not appear that plaintiff provided proper notice to the agency imposing the alleged substantial burden on the free exercise of religion (i.e., to ARIN), as required by section 5(b) of that Act, 71 Pa. Stat. Ann. §2405, and defendants do not suggest that the Court should address this state statutory claim first, in order to avoid the First Amendment issues. Accordingly, the Court does not address plaintiff's claim under Pennsylvania's Religious Freedom Protection Act." *Nichol v. Arin*, 268 F.Supp 2d 536 (W.D. Pa. 2003).

Summary

In summary, in the last 123 years, there have been eleven cases directly related to bans on public schoolteachers' religious garb, nine of which were state supreme court decisions. Collectively, all of these cases were filed using thirty-two different causes of action (Table 1) derived from a variety of state and federal religious liberty protections.

Although it is beyond the scope of this study, it is important to note that one state supreme court and one lower state appellate court took up the federal question of the U.S. Constitution's Establishment Clause.[128] The New Mexico Supreme Court (1951) relied on *Everson*[129] to issue a negative ruling against Catholic teachers because of strong evidence of sectarian instruction and indoctrination, whereas the Kentucky Court of Appeals (1956) relied on *Everson* to issue a positive ruling for Catholic teachers because there was no evidence of sectarian teaching. One state supreme court, in Mississippi (1990), took up the federal question of the U.S. Constitution's Free Exercise Clause and used *Cantwell*[130] and the *Sherbert* standard of *strict scrutiny* to affirm an African Hebrew Israelite teacher's petition to periodically wear an Ethiopian headdress. Three months later, the U.S. Supreme Court issued the controversial *Smith* decision, resulting in both

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[128] Twenty years before the U.S. Supreme Court, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), articulated the three-pronged "Lemon Test" to test an Establishment Clause claim: the law must have (1) a secular purpose; (2) its primary effect is neither to advance nor inhibit religion; and (3) it does not foster an excessive entanglement between government and religious institutions.

[129] The case that the U.S. Supreme Court used to incorporate the Establishment Clause of the First Amendment of the U.S. Constitution to the states. *Everson v. Board of Education,* 330 U.S. 1 (1947).

[130] The case that the U.S. Supreme Court used to incorporate the Free Exercise Clause of the First Amendment to the U.S. Constitution to the states. *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

the Mississippi Supreme Court's favorable ruling's being eclipsed and the Third Circuit's negative ruling's effectively being justified.

Put simply, in this 123-year legal history, only one court, a state court, applied *strict scrutiny* to the question of public schoolteachers' religious garb. No federal or state court since the U.S. Supreme Court's *Smith* decision has ruled on the question of whether anti-religious-garb statutes are neutral laws of general applicability;[131] nor has any federal or state court tested the legitimacy of Pennsylvania's anti-religious garb ban under Pennsylvania's Religious Freedom Restoration Act. As a result, the question of the legality of public schoolteachers' religious garb remains unresolved today.

One complicating factor in why it has taken so long to resolve this legal question has to do with the fact that midway into this 123-year-old saga, the U.S. Supreme Court incrementally incorporated the Free Exercise clauses of the First Amendment to the states, the opening subject of the following brief literature review.

Evolution of Free Exercise Standards

I began this literature review by surveying the relevant case law regarding religious garb worn by public schoolteachers in the United States. Because my study narrowly focuses on Free Exercise jurisprudence, I use this next section to analyze the

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[131] As discussed in *IV. A. General Applicability*, the Oregon Supreme Court did admit in 1986 that the state's anti-religious-garb law "is not a general regulation, neutral toward religion on its face and in its policy, like the unemployment benefits standards in *Smith v. Employment Division*, 301 Or 209, 721 P2d 445 (1986), and *Black v. Employment Division*, 301 Or 221, 721 P2d 451 (1986)." *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 19 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).

development of two sets of judicial tests: (1) the *Sherbert* test, which applied *strict scrutiny* to Free Exercise cases[132] by requiring that the government narrowly tailor regulations that burden one's free exercise of religion by using the least restrictive means possible to further a compelling governmental interest; and (2) the *Smith* standard, also known as the *general applicability* test, which requires that government regulations must be "neutral and generally applicable"[133] and not target religious practices.[134] I close this section with an analysis of how the federal and state Religious Freedom Restoration Acts sought to restore the *strict scrutiny* standards as applied in *Sherbert*, which further explains why my secondary research question focuses on the Pennsylvania Religious Freedom Protection Act (RFPA) of 2002. I focus my study in these ways because no federal or state court has ever tested the constitutionality of Pennsylvania and Nebraska's bans on teachers' religious garb with the *strict scrutiny* standard under the Free Exercise Clause of the First Amendment[135] or the Pennsylvania RFPA.

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[132] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[133] *Employment Division v. Smith*, 494 U.S. 872 (1990).
[134] In *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993) the U.S. Supreme Court unanimously held that the City of Hialeah violated the Free Exercise Clause of the First Amendment when banning the religious practice of animal sacrifice, when the city permitted the killing of animals for other purposes, such as food production.
[135] For example, in 1936, the Supreme Court of North Dakota held that the First Amendment to the U.S. Constitution "merely restricts the power of Congress, and is not restrictive of the states." *Gerhardt v. Heid*, 66 N.D. 44 (N.D. Sup. Ct. 1936). In *Cooper v. Eugene School District Ore.* Sup. Ct. 1986, the U.S. Sup. Ct. denied Cooper's appeal for "lack of a substantial federal question," according to the Third Circuit Court of Appeals. "The Supreme Court dismissed Cooper's appeal for want of a substantial federal question." *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990), at 888.

Origins and Evolution of Free Exercise Standards

In order to proceed with an analysis of federal and state law governing public schoolteachers' religious garb in Pennsylvania and Nebraska, I will first examine the origins and evolution of *strict scrutiny*—the highest standard of judicial review.

Currently, courts apply *strict scrutiny* in Free Exercise cases when the government fails the *general applicability* test under *Smith* by "target[ing] religious conduct for distinctive treatment."[136] Any "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[137] As further analyzed in Chapter IV—Presentation and Analysis of Findings, Pennsylvania and Nebraska's religious garb laws target religious conduct, therefore, must meet the *strict scrutiny* standard under both the federal Free Exercise Clause of the First Amendment to the U.S. Constitution and the Pennsylvania Religious Freedom Protection Act of 2002.

As I will demonstrate in this section, the U.S. Supreme Court first applied *strict scrutiny* to Free Exercise claims in the landmark case *Sherbert v. Verner* (1963),[138] which is why I refer to the following three-part test as the *Sherbert* standard. Applied in contemporary Free Exercise cases, the *Sherbert* test begins with courts asking the

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[136] See the unanimous decision, *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 at 29 (1993).
[137] *Ibid*., *Church of Lukumi Babalu Aye,* at 51.
[138] *Sherbert v. Verner*, 374 U.S. 398 (1963).

plaintiffs to demonstrate that (1) the regulation in question *burdens* their right to free exercise of religion, regardless of whether that burden was *incidental* or *fundamental* to their religion.[139] If adequately demonstrated, the *strict scrutiny* test is triggered: The court turns to the state to determine whether there is a (2) sufficiently *compelling government interest* to justify the burden.[140] If not, the plaintiffs prevail.[141] If so, the court then examines whether the state (3) *narrowly tailored* its regulation, meaning whether the government's ends were achieved in the *least restrictive* means possible. If the court finds the interests to be compelling and narrowly tailored, then the state prevails.

Courts and legal scholars use the terms "narrowly tailor" and "least restrictive means" interchangeably.[142] To illustrate this point, Professor Richard H. Fallon, Jr. explains that "The first element of the narrow tailoring requirement insists that infringements of protected rights must be necessary in order to be justified.[143] The Supreme court sometimes expresses essentially the same demand when it says that the government's chosen means must be the "the least restrictive alternative" that would

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[139] *Ibid.,* at 4-6.
[140] The *compelling government interest* prong, when asked in isolation from the other prongs of the *Sherbert* standard, is known as the *rational-basis test*—the least stringent form of judicial review. The rational-basis test originated in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
[141] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[142] *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280 n.6 (1986) ("The term 'narrowly tailored,' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used."); and Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 4 UCLA L. REV. 1267, 1326 (2006-2007).
[143] Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 4 UCLA L. REV. 1267, 1326 (2006-2007).

achieve its goal."[144] With these justifications in mind, I will use the terms "narrowly tailor" and "least restrictive means" as synonyms in this study.

The purpose of this section is twofold: to, first, illustrate how the *Sherbert* standard evolved and, second, to foreshadow how this judicial test became the scaffolding for my primary research question about the constitutionality of anti-religious-garb statutes in Pennsylvania and Nebraska.

Origins of the strict scrutiny test. The term *strict scrutiny* originated in state courts[145] in the nineteenth century. The U.S. Supreme Court used this trend to plant the seeds of *strict scrutiny* in the federal system in the early twentieth century in what would become the "most celebrated footnote in constitutional law."[146]

Justice Harlan F. Stone, in writing for the U.S. Supreme Court in *United States v. Carolene Products* (1938),[147] required that lawmakers have a "rational basis" for introducing economic legislation—the *rational basis* test being the lowest level of judicial review. Justice Stone then used "Footnote Four" to explain that the court may need a "more exacting judicial scrutiny" when laws burden protected classes of minorities, whether religious, ethnic, or racial. The footnote reads as follows (I italicize phrases that are relevant to this study):

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[144] *Ibid.*, Fallon. See also Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny,* 144 U. PA. L. REV. 2417, 2422. (1996).
[145] *Booher v. Worril,* 57 Ga. 235, 238 (1876); *Paddock v. Pulsifer,* 23 P. 1049, 1051 (Kan. 1890); *Altschuler v. Coburn,* 38 Neb. 881, 889 (1894); *Greer v. Altoona Warehouse Co.,* 20 So. 2d 513, 514-15 (Ala. 1945); *Gish v. Unruhan*, 165 P.2d 417 (Kan. 1946).
[146] Lewis F. Powell, Jr., *Carolene Products Revised,* 82 COLUM. L. REV. 1087, 1087 (1982).
[147] 304 U.S. 144.

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the *first ten amendments*,[148] which are deemed equally specific when held to be embraced within the *Fourteenth*.[149] It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more *exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment* than are most other types of legislation…. Nor need we enquire whether similar considerations enter into the review of statutes directed at *particular religious*,[150] *national*,[151] or *racial minorities*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly *more searching judicial inquiry*.[152]

Building upon this footnote, the U.S. Supreme Court began to develop judicial tests that would help incorporate the guarantees in the Bill of Rights to state laws. This explains why Footnote Four "symbolizes the end of one era of constitutional jurisprudence and the dawning of another."[153]

From rational basis to strict scrutiny. In *Carolene Products* the court applied the *rational basis* standard—a less stringent standard than *strict scrutiny*—to economic

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[148] The Free Exercise Clause of the First Amendment to the United States Constitution declares that "Congress shall make no law . . . prohibiting the free exercise" [of religion]. U.S. CONST. amend. I.
[149] The Fourteenth Amendment proclaims that "No State shall… deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.
[150] Justice Stone cited *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), in which the U.S. Supreme Court unanimously held that Oregon could not force parents to enroll students in public schools only, thus upholding the constitutionality of private religiously-affiliated schools.
[151] Justice Stone also cited *Meyer v. Nebraska*, 262 U.S. 390 (1923) in which the U.S. Supreme Court found unconstitutional a statute that restricted foreign-language education. This particular case involved fourth graders reading the bible in German at the Zion Parochial School, a one-room schoolhouse.
[152] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), Footnote 4.
[153] Footnote 4. (n.d.) *West's Encyclopedia of American Law*, edition 2. (2008).

legislation. The *rational basis* test required that a law must further any legitimate government interest as long as that interest is deemed reasonable to the court.[154] In search of another *judicial inquiry* to adjudicate laws regarding the fundamental rights of racial minorities, the U.S. Supreme Court first used the exact phrase "strict scrutiny" in 1942 in *Skinner v. Oklahoma.*[155] In this landmark case, the high court found unconstitutional a "three strikes" law that justified the sterilization of African Americans. Two years later, the U.S. Supreme Court fully articulated and applied the *strict scrutiny* standard in *Korematsu v. United States*,[156] in which the high court found constitutional the internment of Japanese Americans.

These cases served as the legal foundation for the U.S. Supreme Court to spend the next several decades to fortify the *strict scrutiny* standards for cases involving racial minorities. This meant that states were required to demonstrate a "compelling government interest" to justify infringing on a racial minority's fundamental constitutional rights. If deemed compelling, justices would ask whether the regulation had a "least restrictive alternative"—meaning a "narrowly tailored" law that requires "no more activity (or less) than is necessary to advance those compelling ends."[157] By the mid-twentieth century, *strict scrutiny* became the judicial standard used by the courts to dismantle laws that discriminated against minorities based on race.[158]

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[154] *Express Agency v. New York,* 336 U.S. 106 (1949).
[155] *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
[156] *Korematsu v. United States*, 323 U.S. 214 (1944).
[157] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 VAND. L. REV. 800, 793–871 (2006).
[158] For example: *Brown v. Board of Education,* 347 U.S. 483 (1953); *Loving v. Virginia,* 897 U.S. 113 (1967).

Extending strict scrutiny to religion. Under the leadership of Chief Justice Earl Warren, the U.S. Supreme Court began to apply the *strict scrutiny* standard to Free Exercise cases in the 1960s. As we will see in the following discussion, the primary difference between the race and religion cases was the Court's addition of a new question: Is the plaintiff's religion *burdened*? It is important to note, however, that "we need a frank recognition that a compelling interest test for exemption cases neither has been, nor should be, as *stringent* as the test is in other contexts,"[159] such as race. With this caveat, the history the application of *strict scrutiny* to religion shows how *burden* prong became the first part of what I reference throughout this study as the *Sherbert* standard (1963)—a judicial test used to overturn *Braunfeld v. Brown* (1953).[160]

In writing for a 5-4 majority in *Braunfeld*, Chief Justice Warren found that Abraham Braunfeld, an Orthodox Jew who wanted to keep his business open on Sundays and close on Saturdays for the Jewish Sabbath, experienced merely an "incidental" burden on his religion.[161] Therefore, the court held that Mr. Braunfeld failed to demonstrate the necessary level of burden—*fundamental* or *direct*—to show that Pennsylvania's blue law violated his Free Exercise rights. Chief Justice Warren asserted that the state had a compelling purpose for "providing for the general welfare by

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[159] Kent Greenawalt, *Religion and the Constitution: Volume 1, Free Exercise and Fairness* (Princeton, NJ: Princeton University Press, 2006), p. 215.
[160] *Braunfeld v. Brown,* 366 U.S. 599, 603 (1960).
[161] For another discussion of "incidental burdens," see *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). In this case, "Justice Brennan's opinion… shifts from 'centrality' to 'substantial threat' without a sense that the two inquires might vary in consequence." Kent Greenawalt, *Religion and the Constitution: Volume 1, Free Exercise and Fairness* (Princeton, NJ: Princeton University Press, 2006), p. 204.

establishing a day of rest," despite the laws "originally enacted for religious purposes."[162] Warren said that the state had the authority to "regulate conduct by enacting a general law" to "advance the State's secular goals" except when "the State may accomplish its purpose by means which do not impose such a burden."[163] Seeing no less burdensome alternative, the high court upheld Pennsylvania's blue laws, which required Jewish merchants to close their businesses on Sundays.

The Sherbert standard. Three years later, the U.S. Supreme Court overturned itself in the landmark case, *Sherbert v. Verner*,[164] which granted an accommodation for an employee who did not work on Saturdays for religious reasons. This dramatic change was a result of two factors: First, in this short period of time, Chief Justice Warren and justices Black and Clark changed their views on what constituted a "burden" to religion under the *strict scrutiny* test. No longer did a plaintiff need to prove that the burden was fundamental or direct; the court was satisfied if the burden was incidental or indirect.[165] Second, President Kennedy replaced retiring judge Felix Frankfurter (who ruled against Abraham Braunfeld) with Justice Goldberg who joined the plurality in *Sherbert*. This worked in favor of the three dissenters in *Braunfeld* who remained on the court—justices Douglas and Stewart and, the most passionate dissenter, Justice Brennan.

In writing for the new 7-to-3 majority, Justice Brennan used his dissent in *Braunfeld* as the legal framework for *Sherbert.* He began with an explanation of why the

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[162] *Braunfeld* at 602-603, citing *McGowan v. Maryland*, 366 U.S. 420 (1961) at 437-440.
[163] *Braunfeld* at 607. This phrasing echoes the *least restrictive means* prong of the *strict scrutiny* standard.
[164] *Sherbert v. Verner*, 374 U.S. 398 (1963) at 4-6.
[165] *Sherbert* at 4-6.

U.S. Supreme Court applies *strict scrutiny*—the most rigorous standard of judicial review—to Free Exercise cases. "The door of the *Free Exercise Clause* stands tightly closed against any governmental regulation of religious beliefs."[166] In making a distinction between religious *beliefs* and *actions*, he clarified that the U.S. Supreme Court "rejected challenges under the Free Exercise Clause to government regulation of certain overt acts prompted by religious beliefs or principles," explaining that "even when the action is in accord with one's religious convictions, [religiously-motivated actions are] not totally free from legislative restrictions" (e.g., "human sacrifices").[167] Justice Brennan reaffirmed the high court's long standing view that religious conduct can and should be regulated by the state if it posed a "threat to public safety, peace or order."[168]

Justice Brennan then relied on *NAACP v. Button*,[169] the first case in which the U.S. applied the *strict scrutiny* standard to the First Amendment[170] protection of freedom of association to pose a legal question about the First Amendment protection of free

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[166] Brennan cites *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), in which the U.S. Supreme Court first incorporated the Free Exercise Clause to state laws through the Fourteenth Amendment. He also cites *Torcaso v. Watkins,* 367 U.S. 488 (1961), in which the U.S. Supreme Court found unconstitutional state constitutions that required religious tests for office.

[167] *Ibid.*, *Braunfeld* at 603. Justice Brennan relies upon the U.S. Supreme Court's first Free Exercise case, *Reynolds v. United States,* 98 U.S. 145 (1878). In *Reynolds,* court held that, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?. . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

[168] *Ibid.,* Justice Brennan cites *Reynolds v. United States*, 98 U.S. 145 (1878); *Jacobson v. Massachusetts,* 197 U.S. 11 (1905); *Prince v. Massachusetts,* 321 U.S. 158 (1944); and *Cleveland v. United States,* 329 U.S. 14 (1946).

[169] *NAACP v. Button*, 371 U.S. 415 (1963).

[170] There are five freedoms in the First Amendment: religion, speech, press, petition, and assembly. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

exercise of religion: Can "any incidental burden on the free exercise of [an] appellant's religion… be justified by a 'compelling state interest in regulation of a subject within the State's constitutional power to regulate'"?

To contextualize this question, it is important to note the facts in the *Sherbert* case. The state of South Carolina denied unemployment benefits to Adeil Sherbert after she was fired for refusing to work on Saturday, the Sabbath Day for Seventh-day Adventists. Justice Brennan began by determining the degree of burden placed on Mrs. Sherbert: "We turn first to the question of whether the disqualification for benefits imposes *any* burden [emphasis added] on the free exercise of appellant's religion. We think it is clear that it does."

In starting with this question, Justice Brennan set the order of the *strict scrutiny* test for Free Exercise cases: first, determine whether a government regulation places *any* burden on a person's religious beliefs or actions. He classified Mrs. Sherbert's burden as *indirect* and *incidental* because the state is not singling out her religion for regulation and ruled that even an *indirect* burden is substantive. He explained: "Governmental imposition of such a choice [between religion and work] puts the same kind of burden on the free exercise of religion as would a fine imposed against appellant for her Saturday worship" (a fine being an example of a *direct* or *fundamental* burden, according to Justice Brennan). The court held that a person's burden can be either indirect/incidental or direct/fundamental in order to proceed with a Free Exercise claim.[171]

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[171] "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, then the law is constitutionally invalid even though the burden may be characterized by being only indirect." *Braunfeld v. Brown*, 366 U.S. 599 (1960) at 607.

The *Sherbert* case laid the foundation for three decades of constitutionally protected religious exemptions. In summarizing these developments, and foreshadowing what would come, Eugene Volokh writes:

> In *Braunfeld* (1961) the U.S. Supreme Court seemed to suggest that the Free Exercise Clause might sometimes constitutionally mandate exemptions. And in *Sherbert* (1963), the Court expressly adopted the constitutional exemption model, under which sincere religious objectors had a presumptive constitutional right to an exemption. *Wisconsin v. Yoder* (1972) reaffirmed this, and the period from 1963 to 1990 is often labeled the *Sherbert/Yoder era of Free Exercise Clause law*.[172]

The Yoder exemption. In *Wisconsin v. Yoder* (1972),[173] the Court unanimously held that the state could not compel Amish and Mennonite parents to send their children to school through the age of 16, as doing so would violate their right to freely practice their religions. The Court reached this conclusion by determining that the Amish parents had a "sincere and longstanding religious belief,"[174] then began to apply the *Sherbert* test. First, the *Yoder* court held that Wisconsin's compulsory-education law "unduly burdened" the free exercise of religion of Amish and Mennonite families and threatened their way of life. Second, the Court held that the state's interest in school attendance until the age of 16 was not compelling, given the vocational and peaceful nature of the religions and the families' willingness to enroll their children in all but two of the required years. In validating this claim, the Court indirectly recognized the third part of the *Sherbert* test, implying that they had evidence of a *least restrictive* alternative.

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[172] Eugene Volokh, "Some Background on Religious Exemption Law." *The Volokh Conspiracy*, June 12, 2010.
[173] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[174] For analysis of the conflicts that arise from legally defining religion, see Nathan C. Walker, "A Legal Approach to Questions about Religious Diversity" in Chad Meister, ed. *The Oxford Handbook of Religious Diversity*, Oxford Handbooks Online. (New York: Oxford University Press, 2013).

Having failed the compelling interest question, the U.S. Supreme Court justices did not need to, nor did they, explicitly explain whether the state *narrowly tailored* that particular law. The Court did, however, make explicit that the *strict scrutiny* standard prevails: "…only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[175]

This decision was significant because *Yoder* reaffirmed the application of the *Sherbert* test, which is why "the period from 1963 to 1990 is often labeled the Sherbert/Yoder era of Free Exercise Clause law."[176]

The *Yoder* affirmation of the *Sherbert* standard decisions solidified the use of the *strict scrutiny* test involving not simply religious beliefs, but religious actions—a distinction that is at the heart of all Free Exercise cases. Put simply, the government is permitted to regulate religiously motivated conduct if it can pass the *Sherbert* test, but it cannot in any circumstance regulate belief.[177]

This contrast between beliefs and actions originated from the first Free Exercise case in U.S. history, *Reynolds v. United States* (1879).[178] In upholding the Morril Anti-Bigamy Act, which was signed into law by President Abraham Lincoln in 1862, the U.S. Supreme Court upheld the criminal prosecution of polygamists in the federal territory of

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[175] *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). This was again affirmed in *Thomas v. Review Board of Indiana,* 450 U.S. 707 (1981) (the state "may justify an inroad on religious liberty only by showing that it is the least restrictive means of achieving some compelling state interest").
[176] Eugene Volokh, "Some Background on Religious Exemption Law." *The Volokh Conspiracy*, June 12, 2010.
[177] *Torcaso v. Watkins,* 367 U.S. 488 (1961), in which the U.S. Supreme Court found unconstitutional state constitutions that required religious tests for office.
[178] *Reynolds v. United States*, 98 U.S. 145 (1878).

Utah because, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[179] The *Reynolds* court drew upon the words of Thomas Jefferson: "The legislative powers of the government reach actions only, and not opinions."[180] Regulation of religious conduct, the Court held, can be constitutionally justified; however, the *Sherbert* and *Yoder* courts clarified that in regulating religious actions, the state must meet the *strict scrutiny* standard and demonstrate a compelling government interest and pursue this interest through the least restrictive means possible.

Specific to this study, the wearing of religious garb in public classrooms by public employees is, therefore, a form of religiously motivated conduct that can be regulated, but only after passing the *strictest of scrutiny*—a test that no court in the 123-year saga of anti-religious-garb laws have ever applied.

It is important to note that this case law makes explicit that religious accommodations are not automatic; the request for an exemption must go through the process of meeting *strict scrutiny.* We know this to be the case because, two decades after *Sherbert,* the U.S. Supreme Court, in *Thornton v. Caldor* (1985),[181] found unconstitutional a Connecticut law that gave employees an "absolute right" not to work on their chosen Sabbath without taking into consideration the "convenience or interests of the employer or those of other employees who do not observe a Sabbath."[182] The Court rejected the idea that religiously motivated action is an "absolute right." In some

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[179] *Reynolds*, at 41.
[180] Thomas Jefferson, *Letter to the Danbury Baptist Association in the State of Connecticut*. Jan. 1, 1802.
[181] *Thornton v. Caldor, Inc*. 472 U.S. 703 (1985).
[182] *Ibid. Thorton v. Caldor* (1985).

instances, the state may be justified to regulate religion, which is why the Constitution restrains the government's regulatory power by requiring the state to pass the *strict scrutiny* test as upheld in *Sherbert.*

The *Thornton* court clarified that, just as laws cannot target religion for government restrictions, the state cannot single out one religion or all religions for special privileges. This means that religious exemptions are not automatic—they must meet the highest standard of judicial review. In helping to make meaning of the scope of religious exemption cases, Professor Douglas Laycock writes,

> [N]othing in these [accommodation] cases support any version of the claim that regulatory exemptions are facially, generally, or usually invalid. To the contrary, in two of the cases limiting the reach of exemptions, large majorities made a point of reaffirming the constitutionality of legislation exempting religious practices from burdensome regulation—eight justices in *Texas Monthly v. Bullock*[183] and nine justices in . . . *Kiryas.*[184] Every Justice said it again in *Employment Division v. Smith*,[185] the case that limited free exercise claims to exemptions.[186]

I now turn to the *Smith* decision to explain how the U.S. Supreme Court in 1990 fundamentally altered the religious liberty jurisprudence in the United States, leading Congress and state legislatures to embed the *Sherbert* standard in religious freedom statutes that inform this study.

The general applicability test in Smith. In a 6–3 decision in *Employment Division v. Smith*[187] (1990), the U.S. Supreme Court used the legal standard of "neutral

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[183] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).
[184] *Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994), which limited a school district's ability to create boundaries that mirrored that of religiously-concentrated neighborhood.
[185] 512 U.S. 687, 705 (1994).
[186] Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME LAW REVIEW 1793 (2006) as published in "Religious Liberty: Vol. 1 Overviews and History" (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2006), pp. 756-758.
[187] 494 U.S. 872 (1990).

and general applicability" to affirm laws that prohibited illegal drug use, even though the laws were used to terminate the employment of Native American teachers who used peyote for sacramental purposes. In speaking for the majority in *Smith*, Justice Scalia made clear that the compelling government interest standard is "used in the context of, for example, racial discrimination and free speech." Furthermore, "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling,' would permit him by virtue of his beliefs to become a law unto himself, contradicting both constitutional tradition and common sense."[188]

Justice Scalia argued that by applying the *Sherbert* test, justices would need to determine the "centrality of religious beliefs," which was not practical or appropriate given "society's diversity of religious beliefs."[189] As a result, the *Sherbert* standard, as applied to *neutral and generally applicable* laws, was therefore (temporarily)[190] replaced with the new *Smith* standard.[191] Specific to this study, the *Smith* decision made explicit that the longstanding *strict scrutiny* standard used in Free Exercise cases was overturned, unless—as I emphasize throughout this study—the law in question explicitly targeted religion for government regulation.[192] Justice Scalia wrote:

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[188] Justice Scalia in *Smith,* at 26.
[189] *Ibid.*
[190] Until *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[191] A precursor to this case was *United States v. Lee*, 455 U.S. 252 (1982) where an Amish employee was not exempt from paying Social Security taxes because it was a neutral, generally applicable law.
[192] A decision reinforced three years later in *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993).

> It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the *religious belief that they display* [emphasis added]. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.[193]

Laws that target state employees' religious garb are not neutral or generally applicable, I argue in Chapter IV. An analogous scenario of general neutrality would be for a public school to enact a generic dress code for all teachers, such as mandating a particular uniform. As I illustrate in Chapter IV, the general neutrality test can be used to demonstrate the unconstitutionality of the garb laws in two ways. First, the 1895 legislatures of Pennsylvania and Nebraska did not enact a general neutral dress code statute; rather, the legislatures fixated on religious dress, marks, emblems, and insignia. These statutes, by design, were neither neutral to religion nor a universally applicable dress code applied to all public schoolteachers. To counter this effect, policymakers may develop an impartial standard of professional attire in public schools by requiring teachers to wear uniforms, as do workers in hospitals, stores, and restaurants.[194] If no such attempt were made to enact neutral regulations, teachers who wear religious garb could argue that the *Smith* standard of generally applicable laws does not apply. If so, the accommodation standards in *Sherbert* would most likely be used in a Free Exercise case regarding public teachers' religious garb. This argument is strengthened by the concerted efforts that federal and state legislative bodies have made to overturn *Smith,* which held

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[193] Justice Scalia in *Smith,* at 12.
[194] Even employee dress codes must take into consideration religious garb. See EEOC (2014) *Religious Garb and Grooming in the Workplace: Rights and Responsibilities* and an accompanying fact sheet.

that there is no burden on the Free Exercise of religion if a law is "neutral" and "generally applicable."

It is important to note that after the introduction of the *general applicability* standard in *Smith*, the U.S. Supreme Court later clarified that federal statutes that are "neutral and generally applicable" must also meet *strict scrutiny.*[195] As I explain in this next section, local actors followed suit and began to incorporate the *Sherbert* standard to state laws.[196]

Related Federal Statutory Developments

Religious Freedom Restoration Act. In response to the *Smith* ruling, Congress overwhelmingly passed the 1993 *Religious Freedom Restoration Act* (RFRA). In its declaration of purpose, it found that "laws *neutral* toward religion may burden religious exercise . . . and governments should not substantially burden religious exercise without compelling justification."[197] If that was not explicit enough, Congress continued:

> [I]n *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and the compelling interest test as set forth in prior Federal court rulings is a

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[195] *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).
[196] Professor Eugene Volokh provides three categories of these state actions: (1) state religious freedom restoration acts (RFRAs) that explicitly make *strict scrutiny* as the required standard of judicial review; (2) state constitutional religious freedom provisions interpreted by courts to require strict scrutiny (or in the case of New York, *intermediate scrutiny*); and, as in the case of Alabama, (3) a constitutional amendment that included a voter affirmed religious freedom restoration clause (ALA. CONST. AMEND. 622, art. I, § 3.01 (1999). Eugene Volokh, *What Is the Religious Freedom Restoration Act?*, THE VOLOKH CONSPIRACY, Dec. 2, 2013.
[197] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 USC. § 2000bb through 42 USC. § 2000bb-4.

> workable test for striking sensible balances between religious liberty and competing prior governmental interests.

Congress therefore concluded that the purpose of the RFRA was "to restore the compelling interest test as set forth in *Sherbert* and *Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[198]

Four years later, the Supreme Court invalidated the reach of RFRA in *City of Boerne v. Flores.*[199] The Court found Congress to have overstepped the separation of powers outlined in section five of the Fourteenth Amendment by applying federal regulations to state/local ordinances.

In 2000, Congress passed a less stringent version of the RFRA named the Religious Land Use and Institutionalized Persons Act (RLUIPA),[200] which forbids the government to impose a substantial burden on religious exercise unless the government demonstrates that the imposition furthers a compelling governmental interest through the least restrictive means possible. In 2015, the U.S. Supreme Court applied RLUIPA's *strict scrutiny* standard when granting a prisoner the right to grow a one-half inch long beard in accordance with his religious practices as a Salafi Muslim.[201] This was the first

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[198] *Ibid.*
[199] 521 U.S. 507 (1997).
[200] 114 Stat. 804, 42 USC. §2000cc–(1)(a)(1)–(2).
[201] *Holt v. Hobbs*, 574 U.S. ___ (2015).

time in U.S. history that a Muslim won a free exercise of religion case before the U.S. Supreme Court.

Similar to its integration of the *strict scrutiny* standard in RLUIPA, Congress also included, in the Religious Freedom Restoration Act, that the federal government, not state government or all government, "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[202] Regulations of religious expression could be permitted if the burden is justified by the "furtherance of a compelling government interest" through a narrowly tailored policy that achieves the interest in the least restrictive means possible.

Although the federal RFRA no longer applies to state governments, *state level* statutes resembling RFRA have continued to flourish—to date, twenty states have enacted RFRAs, although 31 states have some form of *strict scrutiny* provision in either authoritative case law or state constitutional clauses.[203] For instance, in 2002, the Pennsylvania General Assembly enacted the Religious Freedom Protection Act, formally titled, "An Act protecting the free exercise of religion; and prescribing the conditions under which government may substantially burden a person's free exercise of religion."[204] Similar to language used in the federal Religious Freedom Restoration Act, this

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[202] *Ibid.*, Religious Freedom Restoration Act.
[203] Juliet Eilperin, "31 States Have Heightened Religious Liberty Protections," *The Washington Post*, Mar. 1, 2014.
[204] The Pennsylvania Religious Freedom Protection Act states, "Laws and governmental actions which are facially neutral toward religion, as well as laws and governmental actions intended to interfere with religious exercise, may have the effect of substantially burdening the free exercise of religion. However, neither State nor local government should substantially burden the free exercise of religion without compelling justification." The Pennsylvania has a unique four-part test to define "substantial burden." See 71 Pa. Stat. Ann. §§ 2401-2407, approved Dec. 9, 2002.

Pennsylvania statute represents the twenty states that have successfully reinstated the *Sherbert* standard.

By 2006, the Supreme Court issued two unanimous decisions in *Cutter*[205] and *Gonzales,*[206] which affirmed the constitutionality of the RLUIPA and RFRA, respectively. In reflecting upon the decision to uphold the Religious Land Use and Institutionalized Persons Act, Chief Justice Roberts wrote, "We had 'no cause to believe' that the compelling interest test 'would not be applied in an appropriately balanced way' to specific claims for exemptions as they arose."[207] He went on to acknowledge Congress's intent to apply the *compelling interest* test to ensure that the courts will strike a "sensible balance between religious liberty and competing prior governmental interests."[208] He went so far as to connect religious diversity to racial diversity, saying, *"*The Court has noted that '[c]ontext matters' in applying the compelling interest test, *Grutter v. Bollinger*,[209] and has emphasized that the fundamental purpose of *strict scrutiny* is to take 'relevant differences' into account."[210]

The most recent affirmation of the federal RFRA came before the court in 2014 in the controversial split decision in *Burwell v. Hobby Lobby*.[211] Historically, religious liberty protections were granted to religious organizations, religious individuals, and even conscientious objectors who did not affiliate with a religion. In *Hobby Lobby*, the Court expanded the legal definition of "religion" to include a new type of "person": closely-

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[205] *Cutter v. Wilkinson* 544 U.S. 709 (2005).
[206] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).
[207] *Ibid. Gonzales* (2006).
[208] 42 USC. §§2000bb(a)(2), (5).
[209] *Grutter v. Bollinger*, 539 U.S. 306, 327.
[210] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) pp. 9-10.
[211] *Burwell v. Hobby Lobby*, 134 U.S. 2751 (2014).

held, for-profit corporations. Owners of Hobby Lobby Stores and Conestoga Wood Specialties objected to the federal requirement that employment-based health care plans must cover FDA-approved contraceptive services. The owners argued that the contraception mandate in the Patient Protection and Affordable Care Act violated their religious liberty because, as owners who had built their business on Biblical principles, they objected to subsidizing particular forms of contraception that they found immoral. Previously, the Third Circuit Court of Appeals held that Conestoga Wood Specialties were not legally protected "persons" under the Religious Freedom Restoration Act of 1993; whereas, the Tenth Circuit held that Hobby Lobby Stores was protected under RFRA and the Free Exercise Clause of the First Amendment. In agreeing with the Tenth Circuit, the U.S. Supreme Court held that "the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees." In writing for the 5–4 majority, Justice Alito stated, "Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them." He rejected the idea that the plaintiffs were disqualified from religious liberty protections simply because they earned money from their business. Justice Alito argued: "Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law." He explained that for-profit corporations "exercise religion" just as much as non-profit organizations. As a result of this landmark decision, the legal definition of exercising religion was, for the first time in U.S. history, expanded to include for-profit, closely held corporations.

It is worth noting that Hobby Lobby, which was filed under the federal RFRA, does not have direct relevance to the question of the constitutionality of state anti-religious-garb laws. Hobby Lobby is a case about a federal statute's relationship to a federal executive regulation that sought to mandate that owners of closely held corporations provide health insurance that includes contraceptive services. The federal RFRA does not apply to state laws, as ruled by the U.S. Supreme Court in *City of Boerne*.[212]

Title VII of the Civil Rights Act of 1964. Another recent case worth noting, which also does not have substantive authority over state bans on religious garb, is *EEOC v. Abercrombie & Fitch Stores, Inc.*[213] (which came before the U.S. Supreme Court in 2015). In seeking to uphold the clothing store's "look policy" that required a "preppy look of the Ivy League," a district manager directed an interviewer to lower a job applicant's rating on the "appearance and sense of style" category because she wore a hijab (a Muslim headscarf) to the interview. As a result, the applicant was not offered employment. The Equal Employment Opportunity Commission filed her case under Title VII of the Civil Rights Act of 1964, which prohibits religion-based discrimination in employment, in both the public and private business.[214] The U.S. Supreme Court did not rule on the merits of the case—whether Abercrombie & Fitch Stores was motivated by discriminatory intent (disparate treatment) or that the denial of the applicant's employment had a disproportionate adverse effect (disparate impact). Rather, the Court

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[212] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[213] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 Sup. Ct. 2028 (2015).
[214] Nondiscrimination laws in education is governed under Title IX, which are not applicable to private schools governed by a religious organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12.

ruled that the burden was on the employer to notify the applicant of their dress policy and ask if they need an accommodation.

As a result, this became a "notice" case rather than one about religious-based discrimination in employment. It, therefore, had little impact on the age-old question of exemptions for employees who wear religious garb. For instance, the *Abercrombie* case had no impact on the one Title VII case related to this research project—the case of Mrs. Reardon, whose employment was terminated after working 12 years in Philadelphia's public schools because, after converting to Islam, she started wearing a hijab while teaching.[215] As previously mentioned, Reardon's August 1990 case before the Third Circuit Court of Appeals was an indirect casualty of *Smith*, which was issued four months earlier in April 1990. In other words, the *Smith* decision, which determined Native American's use of peyote to be a crime, set the stage for the Third Circuit to rule in a Title VII case that a Philadelphia school district was justified in terminating the employment of a teacher who wore a Muslim headscarf and loose dress while teaching.

Increased Reliance on State Religion Clauses

In the two decades since the U.S. Supreme Court issued *Smith* in 1990, lower courts trying to reconcile these distinctions have attempted to interpret the legal standards surrounding this constitutional controversy. According to Christine M. Durham, Chief Justice of the Utah Supreme Court:

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[215] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).

> Almost immediately after *Smith,* several state courts began to discard their history of reliance on federal precedent and turn to the language of their state constitutions in religious liberty cases. [As of 2004] at least ten state supreme court cases have used a heightened scrutiny standard in their state constitutional analysis, either reaffirming that the *Sherbert* standard reflects the proper standard under their own religion clauses, or applying those religion clauses without considering federal precedent at all.[216]

Durham clarified that issues of religious liberty could be resolved solely on state constitutional grounds, which is interesting, given the long history of anti-religious-garb cases in state courts. State courts would have to maintain a minimum standard as guaranteed by the federal constitutions, but the states could, and currently do, understand their own constitutions as able to grant additional religious freedoms.[217] Said another way, the religion clauses of state constitutions have been used to expand religious liberties; as compared to being used to challenge or limit the authority of the religion clauses of the First Amendment to the U.S. Constitution.

State religious freedom statutes brought similar expansions, as illustrated in the Pennsylvania Religious Freedom Protection Act.

Pennsylvania Religious Freedom Protection Act

The Pennsylvania Religious Freedom Protection Act of 2002 (RFPA) prohibits a state agency, such as a public school, from "substantially burden[ing] a person's free exercise of religion, including any burden which results from a rule of general

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[216] Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, BYU L. REV. 275, pp. 275–276 (1993); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, p. 846 (1992); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, BYU L. REV. 269 (1993).

[217] "So long as state courts do not restrict individual rights below the minimum standard provided by federal protection, state courts are unconstrained in their power to interpret their own constitutions to provide greater protections of individual rights." William J. Brennan, "State Constitutions and the Protections of Individual Rights" 90 HARV. L. REV. 489 (1977), p. 495.

applicability." The Pennsylvania RFPA allows the following exceptions: "An agency may substantially burden a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden… [furthers] a compelling interest of the agency [and uses] the least restrictive means of furthering the compelling interest."

When challenging laws and government actions that are facially neutral toward religion, as well as laws and governmental actions intended to interfere with religious exercise, a person must demonstrate that his or her practice or observance of religion—as defined under Section 3 of Article I of the Constitution of Pennsylvania—is substantially burdened as measured in Pennsylvania's unique four-part test.

Pennsylvania's Four-Part Substantial Burden Test

The four-part "substantial burden" test is used to assess:

> an agency action which does any of the following: (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; (2) Significantly curtails a person's ability to express adherence to the person's religious faith; (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion; (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

Pennsylvania's RFPA not only restrains the state in these particular ways but also requires plaintiffs to demonstrate "with clear and convincing evidence" that their religious beliefs are "sincere" and that their actions are either "fundamental" to their religious beliefs or mandated by a "specific tenet" of their religion.

It is important to stress that, to date, there have been no judicial interpretations of the RFPA statute. In 2006, for instance, a federal district court ruled that, "the RFPA of 2002 has not been interpreted by any court in the Commonwealth of Pennsylvania, state

or federal, and its applicability and effect are this case is a matter of first impression.[218] In reviewing the appeal of this case, the U.S. Court of Appeals for the Third Circuit ruled in 2008 that homeschooling parents failed to demonstrate under both the federal *Smith* and *Sherbert* standards how their belief that "education is religion" prevents Pennsylvania from issuing reporting requirements for parents who homeschool their children.[219] The Third Circuit also held that the parents' claim under the state RFPA required an "interpretation of a state statute on which there is no Pennsylvania precedent."[220] The Court stated that because the parent's "RFPA claim raises a novel and potentially complex issue of State law, we will decline to exercise supplemental jurisdiction over Parents' pendant state law claim."[221] The Third Circuit court cited an earlier case in which they found that "where the underlying issue of state law is a question of *first impression* [emphasis added] with important implications for public education in Pennsylvania, factors weighing in favor of state court adjudication certainly predominate."[222] As a result, there has not yet been a court, federal or state, that has interpreted Pennsylvania's RFPA.

Without judicial interpretations to use in my analysis of the RPFA's four-part *substantial burden* test, I will do what the court instructs and "consider the plain meaning

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[218] *Combs v. Dubois*, 468 F.Supp.2d 738 (W.D. Pa. 2006).
[219] *Combs v. Dubois*, 540 F.3d 231 (3rd Cir. 2008).
[220] *Combs v. Dubois*, 540 F.3d 231 (3rd Cir. 2008).
[221] *Combs v. Dubois*, 540 F.3d 231 (3rd Cir. 2008).
[222] *Shaffer v. Albert Gallatin*, 730 F.2d 910 (3rd Cir. 1984), at 913.

of the statute" and "absent ambiguity, [use] the plain meaning of the statute controls."[223] Said another way, I will employ in my study a "plain meaning" legal method to interpret the four-part *substantial burden* test in RFPA.[224] (See Chapter III – Methodology for my discussion of the "plain meaning rule."[225])

Relationship Between RFPA and Pennsylvania Constitution

Pennsylvania's RFPA begins with a "Definitions" section that narrowly defines religious exercise as the "practice or observance of religion under section 3 of Article I of the Constitution of Pennsylvania."[226] As a result, state courts are required to use state court interpretations of the Pennsylvania Constitution to define religious exercise—distinct from relying on the federal constitution.

I understand there to be three reasons for this stipulation. First, as noted earlier, the state Religious Freedom Restoration Acts (RFRAs) were designed to reinstate the *strict scrutiny* standard in state laws. This occurred at a time when an increased number of state courts relied more on their own state constitutions to expand religious liberty

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[223] *DeVeaux v. City of Philadelphia*, Docket #2005-3103, Control #021818 (Phila. Ct. Com. Pl. 2005), at 318-319. Justifications for using the "plain meaning" legal methods with new or non-interpreted statutes can be found in the following Pennsylvania cases: *In re Canvass of Absentee Ballots of November 4, 2004,* 577 Pa. 231, 843 A.2d 1223 (Pa. 2004); *Sternlicht v. Sternlicht*, 583 Pa. 149 (Pa. Sup. Ct. 2005).
[224] *DeVeaux v. City of Philadelphia*, Docket #2005-3103, Control #021818 (Phila. Ct. Com. Pl. 2005), at 318-319.
[225] David S. Romantz and Kathleen Elliot Vinson, *Legal Analysis: The Fundamental skill* (2nd ed.). (North Carolina: Carolina Academic Press, 2009), pp. 87-88.
[226] *Ibid.,* § 2403. Definitions, P.L. 1701, No. 214

protections. Put simply, state constitutions, as Justice Brennan explains, "flourish in the space above" the "federal floor of protection" guaranteed by the U.S. Constitution.[227]

Second, the unique religious freedom principles in Pennsylvania's Constitution predate the First Amendment to the U.S. Constitution.[228] It was enacted on September 28, 1776, fifteen years before the states ratified the Bill of Rights, the first ten amendments to the U.S. Constitution.

Justice Flaherty of the Supreme Court of Pennsylvania emphasizes this point: "Pennsylvania, more than any other sovereignty in history, traces its origins directly to the principle that the fundamental right of conscience is inviolate."[229] He is referring to the fact that the Pennsylvania Constitution of 1776 was inspired by the words and deeds of William Penn[230] and co-authored by Benjamin Franklin.[231] Both Penn and Franklin

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[227] William J. Brennan, T*he Bill of rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986). See also Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence,* 1993 BYU L. REV. 275 (1993), which documents how state constitutions are "understood and invoked only in relation to the federal text and merely supplements the federal 'floor' of rights" (at 290).

[228] The Pennsylvania Constitution was enacted on Sept. 28, 1776; fifteen years later, on Dec. 15, 1791, the states ratified the Bill of Rights, the first ten amendments to the U.S. Constitution.

[229] Justice Flaherty of the Supreme Court of Pennsylvania clarified in *Commonwealth v. Eubanks*, 511 Pa. 201, 206 (Pa. Sup. Ct. 1986) cites "*The Papers of William Penn*, Vol. I (Dunn & Dunn, University of Pennsylvania Press), pp. 51-52, 90-93, 268, 280, 452, 511."

[230] William Penn and William Mead (1670) "The Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly: 22 Charles II. A.D. 1670" from Howells' State Trials, Vol. 6; Penn, William (1670) "The Great Case of Liberty of Conscience debated and defended by the Authority of Reason, Scripture, and Antiquity," in The Select Works of William Penn in Five Volumes. Volume III. Third Edition. London: James Phillips; Sanford H. Cobb (1902) *The Rise of Religious Liberty in America: A History,* Chapter VII. The Free Colonies, §2 Pennsylvania (pp. 440-453); Edwin S. Gaustad and Mark A. Noll (2003) *A Documentary History of Religion in America to 1877*. Wm. B. Eerdmans Publishing Co., 3rd edition, pp. 80-82.

[231] Robert F. Williams, "The Influences of Pennsylvania's 1776 Constitution on American Constitutionalism During the Founding Decade," *The Pennsylvania Magazine of History & Biography,* Vol. CXII, No. 1 (Jan. 1988): 25-48; Rosalind A. Branning, *Pennsylvania Constitutional Development* (Pittsburgh, 1960), 14; David Hawke, *In the Midst of a Revolution* (Philadelphia, 1961): 191-92; Gary S. Gildin, "Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution," *University of Pennsylvania Journal of Constitutional Law*, Vol. 4., No. 81 (2001).

intellectually influenced emerging constitutional framers, such as James Madison, a contributing author to the U.S. Constitution (1786) and primary author of the federal Bill of Rights (1791).

This history helps explain why the Pennsylvania Constitution of 1776 included a unique set of religious freedom protections, which were at the time and remain today unlike any other state or federal law. I understand this uniqueness factor to be the third reason that Pennsylvania's RFPA of 2002 grounds its authority in the state's longstanding commitment to religious liberty.

The Pennsylvania Constitution begins with a proclamation: "We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution." The constitution opens with Article I, Declaration of Rights, which dedicates Section 3 to "Religious Freedom." The italicized and numbered text correspond to the causes of action that are previously mentioned in Table 1.

> That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare that … all men have a natural and indefeasible *(1) right to worship* Almighty God according to the *(2) dictates of their own consciences*; no man can of right be *(3) compelled* to attend, erect or support any place of worship or to *(4) maintain* any ministry against his consent; no human authority can, in any case whatever, *(5) control or interfere* with the *(2) rights of conscience*, and *(6) no preference* shall ever be given by law to any religious establishments or modes of worship.[232]

In essence, the Religious Freedom section of the Pennsylvania Constitution articulates principles that both protect the people and restrain the state. People have the

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[232] Pa. Const. Art. I, § 3.

Right to Worship because one's practice of religion is an innate, unwavering right. They also have the Right of Conscience, as emphasized twice in Article I, § 3: first, a person has the right to worship according to the dictates of his or her own conscience and, second, that no human authority, no government, can restrain or impede a person's right of conscience.

The Pennsylvania Constitution articulates three religious freedom principles that restrain the state. The No Preference Principle prohibits the state from privileging one religious establishment or "mode of worship" over another. The No Compulsion principle prohibits the state from compelling a person to attend or erect any place of worship. And the No Maintenance or the No Aid to Religion principle prohibits the state from compelling a person to "maintain" or finance any place of worship or ministry.[233]

I rely on two cases that came before the Pennsylvania Supreme Court to understand the Religion Clauses of the Pennsylvania Constitution in relationship to the question of whether the state can prevent a public schoolteacher from wearing religious garb while teaching. In Chapter II – Literature Review, I analyze the 1894 case *Hyson v. Gallitzin*,[234] in which the Pennsylvania Supreme Court applied the *no preference* (section 3) and the *no religious test for office* (section 4) clauses of the Pennsylvania Constitution to permit Catholic nuns to continue to wear habits while teaching at a public school. In reaction to this case, the Pennsylvania General Assembly enacted its anti-religious-garb

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[233] The *no aid to religion* principle has been historically used to challenge the public financing of religion; therefore, just as I do not rely on the federal Establishment Clause of the First Amendment to the U.S. Constitution, I do not rely on the *no aid to religion* principle in my analysis.
[234] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894).

law in 1895. An entirely new set of justices joined the state's supreme court and overturned *Hyson* in *Commonwealth v. Herr* (1910),[235] where they denied a Mennonite teacher the right to wear a bonnet while teaching in a public school. In Chapter IV – Presentations of Findings and Analysis, I examine the Pennsylvania Supreme Court's interpretation of the state constitution in relationship to the state's anti-religious-garb law as ruled in the conflicting *Hyson* and *Herr* cases.

Although I am able to analyze the Pennsylvania Supreme Court's 1894 and 1910 interpretations of the state constitution in relationship to the state's anti-religious-garb laws, I am not able to rely on contemporary decisions because no court has yet interpreted the relationship between the Religion Clauses of the Pennsylvania Constitution, which predate the U.S. Bill of Rights,[236] and the Pennsylvania Religious Freedom Protection Act of 2002 (RFPA). Therefore, without a legal framework by which to interpret this relationship,[237] I will continue to use a "plain meaning" legal method[238] to interpret the "Definitions" section of RFPA that legally defines religious exercise as the "practice or observance of religion under section 3 of Article I of the Constitution of Pennsylvania."[239] In plain wording, I understand this to mean that the Pennsylvania Constitution affirms a person's right to worship and conscience while also restraining

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[235] *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).
[236] The Pennsylvania Constitution went into effect on Sept. 28, 1776, as emphasized in *Combs v. Dubois*, 468 F.Supp.2d 738 (W.D. Pa. 2006). The U.S. CONST. was ratified on June 21, 1788; the first ten amendments, known in modern terms as the Bill of Rights, was ratified on Dec. 15, 1791.
[237] *DeVeaux v. City of Philadelphia*, Docket #2005-3103, Control #021818 (Phila. Ct. Com. Pl. 2005), at 318-319. Justifications for using the "plain meaning" legal methods with new or non-interpreted statutes can be found in the following Pennsylvania cases: *In re Canvass of Absentee Ballots of November 4, 2004,* 577 Pa. 231, 843 A.2d 1223 (Pa. 2004); *Sternlicht v. Sternlicht*, 583 Pa. 149 (Pa. Sup. Ct. 2005).
[238] "It has always been held in Pennsylvania that, unless it clearly appears that words are used in a technical sense in the constitution, they are to have their plain, natural, and obvious meaning." *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).
[239] *Ibid.,* § 2403. Definitions, P.L. 1701, No. 214

state agencies from interfering with these rights or privileging any particular religious group or any forms of worship. I further analyze the RFPA's relationship to these clauses in Pennsylvania's Constitution in Chapter II – Literature Review.

To simplify, I will now summarize the components of my secondary research question in which I use one state law to examine another: the Pennsylvania Religious Freedom Protection Act of 2002 versus Pennsylvania's 1895 anti-religious-garb statute.

As noted earlier, Pennsylvania's RFPA requires that I apply the *general applicability* and *strict scrutiny* standards, similar to federal law; however, the Pennsylvania RFPA is unique in that it includes a four-part substantial burden test to examine state laws. This test prohibits a state agency from constraining conduct based on belief or religious tenets or curtailing a person's expression of their religious identity, or denying someone reasonable opportunities to engage in religious activities. In demonstrating at least one of these burdens, a plaintiff must also show that either their beliefs are sincerely held, or that said religious activities are fundamental to their religion, or that the state's regulation compels their conduct in such a way that it violates the tenets of their religion.

RFPA also requires that I use the Religion Clauses in section 3 of Article I of the Pennsylvania Constitution to interpret the meaning of RFPA's reference of any "practice or observance of religion."[240] Given the absence of judicial review of the relationship between Pennsylvania's RFPA and its state constitution, I use a plain meaning legal method to interpret the state constitution's Religion Clauses to protect a person's right to

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[240] *Ibid.,* § 2403. Definitions, P.L. 1701, No. 214.

worship and right of conscience. These clauses also prohibit state agencies from interfering with a person's rights of conscience and require that the state not prefer any religions or forms of worship.

According to the RFPA, these stipulations impacting both the state and plaintiffs are uniquely tied to the religious liberty principles outlined in the Pennsylvania Constitution.

Relevant RFPA Cases

In returning to the discussion of the Religious Freedom Protection Act of 2002, to date, there have been only three RFPA lawsuits relevant to the study of Pennsylvania's anti-religious-garb law. In "the first case in Pennsylvania which alleges a violation of the RFPA,"[241] the Common Pleas Court of Philadelphia ruled in 2005 that a fire department substantially burdened a firefighter's free exercise of religion when "suspending his job without pay for refusing to shave his beard."[242] Although the case law on auxiliary personnel is distinct from that of public schoolteachers, this case is helpful in that the court applied a "plain meaning" method to interpret RFPA because they lacked "guidance from prior precedents." I will do the same in my analysis.

Similarly, the U.S. District Court for Western Pennsylvania and the U.S. Court of Appeals for the Third Circuit acknowledged that not one state or federal court in the Commonwealth of Pennsylvania had interpreted RFPA, leading them to also use a *plain*

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[241] *DeVeaux v. City of Philadelphia*, Docket #2005-3103, Control #021818 (Phila. Ct. Com. Pl. 2005), at 4.
[242] *Ibid.*, at 1.

meaning rule clarifying that the statute before them "is a matter of first impression."[243] This was stated in a case brought forward by parents who homeschool their children. Both courts ruled denied the parents claim that *education is religion*;[244] therefore, the state could not regulate homeschools. The merits of this case have no direct relation to the question of regulating public schoolteachers' religious garb; however, the courts' articulation of the "historical and legislative background" of the RPFA[245] and the courts' application of the plain meaning rule have informed the methodology of this study.

The only other relevant RFPA lawsuit worth mentioning is *Webb v. City of Philadelphia*.[246] In this case, Officer Webb was fired for wearing a tight Muslim neck scarf while serving as a Philadelphia police officer.[247] She failed to prevail under the employment/religious discrimination protections under Title VII of the 1964 Civil Rights Act. As ruled by the U.S. District Court and affirmed by the U.S. Court of Appeals for the Third Circuit, Officer Webb also "failed to meet the statutory notice requirements for the RFPA claim."[248] The court came to this decision by using a plain-reading methodology of the notice requirement.

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[243] *Combs v. Dubois*, 540 F.3d 231 (3rd Cir. 2008); *Combs v. Dubois*, 468 F.Supp.2d 738 (W.D. Pa. 2006).
[244] "On appeal," the parents claimed that state oversight of homeschooling programs "violated a 'specific tenet' of their religion that 'education of their children, no merely religious education, is religion and is assigned by God to the jurisdiction of the family" (n273).
[245] *Combs v. Dubois*, 468 F.Supp.2d 738 (W.D. Pa. 2006).
[246] *Webb v. City of Philadelphia*, 562 F.3d 256 (3rd Cir. 2009); *Web v. City of Philadelphia*, U.S. Dist., No. 05-5238 (E.D. Pa. 2007).
[247] As of December 31, 2017, at least eight major police departments permit Muslims to wear a neck covering while on duty: Atlanta, Baltimore, Charlotte, Los Angeles, Memphis, New York, San Francisco, and Washington, DC.
[248] *Webb v. City of Philadelphia*, 562 F.3d 256, 4 (3rd Cir. 2009).

The RFPA requires that a person issue "written notice to the agency" at least 30 days prior to bringing the action. The notice needs to explain that person's "free exercise of religion has been or is about to be substantially burdened by an exercise of the agency's governmental authority." It must provide "a description of the act or refusal to act which has burdened or will burden the person's free exercise of religion, and it must "describe the manner in which the exercise of the governmental authority burdens the person's free exercise of religion."[249]

These three cases provide me with a methodological strategy by which to apply the "plain meaning" rule to analyze whether Pennsylvania's 1894 anti-religious-garb law violates Pennsylvania's 2002 RFPA. I will simply take at face value the language of the *general neutrality* and *strict scrutiny* standards as well as RFPA's unique four-part *substantial burden test*.

I also respect how this language rests upon a 242-year-old state constitution that rose from unique religious liberty contributions made by William Penn and Benjamin Franklin. In this study, however, I will not conduct a robust analysis of the state jurisprudence on the six religious liberty principles in the Pennsylvania Constitution; rather, I will narrowly use the Religious Freedom section of Article I of Pennsylvania's Constitution to define "the practice or observance of religion," as directed by the RFPA.

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[249] The state excepts a person from this notice requirement if "the exercise of governmental authority which threatens to substantially burden the person's free exercise of religion is imminent; the person was not informed and did not otherwise have knowledge of the exercise of the governmental authority in time to reasonably provide notice; the provision of the notice would delay an action to the extent that the action would be dismissed as untimely; or the claim or defense is asserted as a counterclaim in a pending proceeding." P.L. 1701, No. 214, § 2405 b, c. In addition to the *Webb* case, teaching assistant Brenda Nichol also failed to meet RFPA's notice requirement. *Nichol v. Arin*, 268 F.Supp 2d 536 (W.D. Pa. 2003).

Summary

In closing, I have come to see that Pennsylvania's constitutional and statutory laws regarding religion are unique in several ways. First, the state constitution includes six distinct principles that protect the rights of the people while restraining the state. Second, the state's Religious Freedom Protection Act of 2002 affirms the *general neutrality* and *strict scrutiny* standards used in federal law, while issuing a four-part "substantial burden" test, which not only places restraints on state actions that may encumber religion but also places stipulations on how precisely a plaintiff must demonstrate that his or her religion is substantially burdened. Third, the Pennsylvania General Assembly enacted a law in 1895 that terminates the employment of any public schoolteacher for wearing "any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."[250] This law has criminal implications because the anti-religious-garb statute threatens criminal penalties for administrators who do not comply with the law.[251] This particular anti-religious-garb law not only survived three court cases—one before the Pennsylvania Supreme Court in 1910 and two before federal courts in 1990 and 2003—but it was also replicated in twenty-two additional states, either through regulatory action, legislative statutes, or, in one case, a public referendum.

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[250] Pa. Stat. 24, § 11-1112.

[251] "Any public school director who after notice of any such violation fails to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction of the first offense, shall be sentenced to pay a fine not exceeding one hundred dollars ($100), and on conviction of a second offense, the offending school director shall be sentenced to pay a fine not exceeding one hundred dollars and shall be deprived of his office as a public school director." Pa. Stat. 24, § 11-1112.

As a result, anti-religious-garb laws were challenged before eleven different courts, nine of which were state Supreme Courts. Collectively, these plaintiffs claimed thirty-two different causes of action. In only one case before the Mississippi Supreme Court did a plaintiff claim her Free Exercise rights under the First Amendment to the U.S. Constitution were violated. Although this teacher prevailed, three months later, the U.S. Supreme Court issued the landmark *Smith* decision, which fundamentally altered the federal religious liberty jurisprudence in the United States, leading Congress and state legislatures to enact the religious freedom statutes that inform this study.

In particular, Pennsylvania's Religious Freedom Protection Act of 2002 (RFPA) integrated the *general applicability* and *strict scrutiny* standards with state law and created a unique four-prong "substantial burden" test. I will use these as the basis for my analysis of whether Pennsylvania's 1894 anti-religious-garb law is valid under state law.

Synopsis

I began this literature review with a survey of the legal scholarship on teachers' religious garb, demonstrating that this is an important, unresolved legal matter. I drew upon commentaries found in both legal journals, casebooks, and official statements made by state agencies and elected officials. I also drew upon the literature in the fields of education, religion, and civil liberties, to further demonstrate that this is an important topic discussed by the education, religious and legal community. I then close with a summary of the news coverage about anti-religious-garb laws and cases, which illustrates how the interest of the general public. These bodies of literature helped prepared me to conduct a narrow review of the case law.

I proceeded to analyze the historical decisions issued by state courts regarding the perennial legal conflict of bans on public schoolteachers' religious garb, beginning in 1894. I demonstrated that twenty-two states had some form of anti-religious garb regulation at some point in the last 123-years, through either state legislative actions or administrative directives. In all but one of the historical cases (1894 to 1956), Catholic nuns lost their jobs for wearing habits while teaching in public schools. The one exception was a Mennonite teacher who wore a bonnet.

Of the four contemporary garb cases (1986 to 2002), two cases were brought forward by a Muslim and a Sikh teacher. They were denied remedies by the Third Circuit Court of Appeals and the Oregon Supreme Court, respectively. An African Hebrew Israelite teacher won her case before the Mississippi Supreme Court; however, three months later, the U.S. Supreme Court issued the controversial *Smith* decision, which overturned this case and uprooted nearly thirty years of consensus about Free Exercise jurisprudence. *Smith* negatively, albeit indirectly, effected the outcome of all three of these contemporary garb cases. The only recent case that has a longstanding positive result was in a federal district court that held that a teacher's aide did not meet a statutory definition of "teacher," thus permitting the plaintiff to continue to wear her cross necklace in the public classroom. This decision reinforced the historic trend that the law privileged Protestant Christians.

After reviewing this case law, I surveyed the evolution of various judicial tests under distinct causes of action: The Free Exercise clause in the U.S. Constitution; federal statutes, such as the Religious Freedom Restoration Act and Title VII of the Civil Rights Act; as well as comparable state statutes and religion clauses in state constitutions. I

began this review of judicial tests by showing the tortuous history of the Free Exercise standards, which, today means that the *strict scrutiny* standard must be applied when examining challenges to "neutral laws of general applicability." This, however, only applies to federal laws, unless (1) a state law singles out religion for regulation, making the *strict scrutiny* standard still relevant; or (2) a state legislature or a state court has determined that strict scrutiny is applicable in that jurisdiction. To date, thirty-one states have some form of *strict scrutiny* standard, but not Nebraska, one of two states, along with Pennsylvania, that still have anti-religious-garb laws. For this reason, I find it necessary to do in this research project what no federal court has definitively determined in the last 123 years, and that is to test the constitutionality of state anti-religious-garb laws under the Free Exercise Clause.

I then examined the provisions in the Pennsylvania Religious Freedom Protection Act of 2002 (RFPA), which a state agency from "substantially burden[ing] a person's free exercise of religion, including any burden which results from a rule of general applicability." The state permits some level of burden on the condition that the agency meet the *strict scrutiny* standard by demonstrating a compelling government interest and "uses the least restrictive means of furthering the compelling interest." I then survey how in order for plaintiffs to prevail they must demonstrate that that their practice or observance of religion—as defined under Section 3 of Article I of the Constitution of Pennsylvania—is substantially burdened as measured in Pennsylvania's four-part test. This test to determine whether a person's burden is substantial is a unique contribution to the study of religious liberty, especially in an era evolving legal standards and tectonic shifts in the political landscape of the United States.

In the next chapter, I explain the systematic methods by which I use to test whether the Free Exercise Clause of the First Amendment and Pennsylvania's Religious Freedom Protection Act have the legal authority to end the perennial conflict of statutory bans on public schoolteachers' religious garb.

III – METHODOLOGY

In the following discussion of my research methodology, I use the literature on how to conduct legal research and engage in legal analysis to take five steps in designing my study. First, I synthesized judicial tests by cause of action. Second, I collected primary and secondary source documents, and then, third, I articulated legal research questions. Fourth, I set the parameters of the facts for my study. Finally, I conduct this legal analysis. I gained exposure to these methods by participating in legal training seminars and studying literature on legal research and the academic study of law.

Training and Textbooks

In preparation to develop and execute this research proposal, I received training in the academic study of law from attorneys on faculty at Teachers College Columbia University, with teaching and mentorship from my dissertation sponsors, Professors Jay Heubert, Esq. and Janice Robinson, Esq. and from Professor Kent Greenawalt at Columbia Law School.[1] This specialized legal education prepared me to design and conduct this study.

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[1] Dissertation advisement sessions with Professors Jay P. Heubert, Esq. and Janice S. Robinson, Esq. from 2012–2018; literature review advisement session with Professor Kent Greenawalt 2013; "Research and Independent Study classes with Professor Jay P. Heubert, Esq. in the Spring 2011 and Autumn 2011 terms; "Education Equality: Role of Law" with Professor Jay P. Heubert in the Spring 2011 semester; "Topics in Law and Education" with Professor Elana Sigall, Esq. in the Spring 2010 term.

In addition, I also participated in a series of education sessions to learn how to conduct research on United States law with librarians and instructors at the Harvard Law School Library in Cambridge, Massachusetts;[2] the Biddle Law Library at the University of Pennsylvania;[3] and the Jenkins Law Library in Philadelphia[4] along with online webcasts with faculty at LexisNexis.com.[5]

Although international law is outside the scope of my proposal, I also learned how to find human-rights and religious-garb cases originating from other countries so that I could conduct a global literature review of legal restrictions on religious expression. This was made possible because of research sessions I had had with librarians at the Library of the United Nations Office in Geneva, Switzerland,[6] and the Arthur W. Diamond Law Library at Columbia Law School in New York City.[7]

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[2] *Lexis/ Westlaw 1L Intro to Research* with instructor Kimberley Kenneally, Harvard Law School Library seminar, Sept. 11, 2012; One-on-one sessions with Meg Kribble, Research Librarian & Outreach Coordinator at the Harvard Law School Library.

[3] Correspondence and one-on-one conversations with Edwin J. Greenlee (PhD, JD), Associate Director for Public Services and Adjunct Professor of Law at the Biddle Law Library at the University of Pennsylvania, who also teaches *Legal Research and Writing* at UPenn and Drexel law schools.

[4] *Effective Brief Writing,* an approved Continuing Legal Education (CLE) course with instructor Theodore C. Forrence, Jenkins Law Library, Feb. 20, 2013; *The ABC's of Education Law,* an approved CLE course with Sarah B. Dragotta, Jenkins Law Library, Mar. 6, 2013. Additional one-on-one sessions with Jenkins Law librarians included discussions about Jenkins Law Library publications: Research Services *Pennsylvania Legal Research–Getting Started* (2013)*;* M. Sweeney Michelle Buhalo, *Pennsylvania Legislative History–A How To Guide* (2013)*;* Michelle Buhalo, *Pennsylvania Constitution* (2013).

[5] *On-Demand Learning* tutorials and videos about using *Lexis Advance.*

[6] One-on-one sessions with librarians at the Library of the United Nations Office at Geneva, Switzerland, Mar. 10-14, 2014.

[7] One-on-one discussions with librarians at Columbia Law School regarding the following research guides: (1) Human Rights (*European Human Rights System and the European Court of Human Rights* by Dana Neacşu, *Human Rights Research* by Silke Sahl, *Human Rights Research Guide* by Ashihan Bulut, updated by Alice Izumo; (2) Organizations (*European Union Legal Matters* by Jennifer Wertikin, *United Nations* by Silke Sahl, and *The International Court of Justice* by Dana Neacşu); and (3) Foreign Law (*Guides to Foreign Legal Research* by Silke Sahl, *Finding Foreign Legal Research on the Internet* by Silke Sahl, and *Islamic Law* by Ashlihan Bulut). Online http://library.law.columbia.edu/guides.

Together, these sessions exposed me to two distinct bodies of literature: first, the textbooks and journal articles about best practices for directing *legal research* projects and, second, publications about *legal writing and analysis*. For instance, in the first area, *legal research,* I discovered a broad consensus in law textbooks[8] about what steps researchers can take to study the law (i.e., collecting statutes and cases, briefing cases, identifying appropriate sources of law). These textbooks came with a variety of recommendations about which tools to use (i.e., public and private law indices, online search tools) for which there was no consensus.[9]

In the second body of literature, *legal writing and analysis*, Professors David Romantz and Kathleen Elliott Vinson suggest that researchers and lawyers begin by using methods of legal analysis to apply judicial tests to narrow legal questions.[10] A subset of this literature focuses on scholarly writing related to the academic study of law.[11] For

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[8] Christina L. Kunz, Deborah A. Schmedemann, C. Peter Erlinder, Matthew P. Downs, Ann L. Bateson, *The Process of Legal Research: Successful Strategies*. (Boston, MA: Little, Brown and Company, 1989); Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, pp. 2-12 (2000); Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization*, 4th ed. (New York: Aspen Publishers, 2006), pp. 106–118; David S. Romantz and Kathleen Elliot Vinson, *Legal Analysis: The Fundamental skill*, 2nd ed. (North Carolina: Carolina Academic Press, 2009), pp. 30–31; Michael D. Murray and Christy H. DeSanctis, *Legal Research Methods: Legal Research and Writing.* (New York, NY: Thomson Reuters/Foundation Press, 2009); Emily Finch and Stefan Fafinski, *Legal Skills,* Third Edition. (New York, NY: Oxford University Press, 2011), chapters 1-7; and Amy E. Sloan, *Basic Legal Research: Tools and Strategies.* (Frederick, MD: Wolters Kluwer Law & Business, 2012).

[9] For instance, Sloan urges students to evaluate search options (pp. 33-42) and to "research with citators" (pp. 143-172); Rowe distinguishes legal research in print and online; Finch and Fafinski distinguish "official" from "unofficial" publications; Kunz, et. al. emphasizes the using problem sets to teach legal research with educational scenarios about best and worst practices when using glossaries, legal periodicals, A.L.R. Annotations, case digests, *Shepard's Citations,* statutes and constitutions, and so on (pp. 331-416).

[10] David S. Romantz and Kathleen Elliot Vinson, *Legal Analysis: The Fundamental Skill*, 2nd ed. (North Carolina: Carolina Academic Press, 2009), pp. 30–31.

[11] See Chapter 11 "Developing a Research Plan" in Amy E. Sloan, *Basic Legal Research: Tools and Strategies.* (Frederick, MD: Wolters Kluwer Law & Business, 2012); Chapter 1, section C "The Process of Scholarly Writing" in Elizabeth Fjans & Mary R. Falk, *Scholarly Writing for Students: Seminar Papers,*

instance, Professor Eugene Volokh recommends that lawyers and non-lawyers who conduct academic legal research begin by choosing "(1) a claim that is (2) novel, (3) non-obvious, (4) useful, (5) sound, and (6) seen by the reader to be novel, nonobvious, useful, and sound."[12] Volokh encourages academic legal researchers to first "get the big picture," such as learning the structure of Free Exercise law, for instance; and then, second, to "get the details," by reading treatise chapters on your narrow topic paying close attention to footnotes and statutory provisions; and then, third, to "find other works on the topic," by conducting an extensive literature review using, for example, the *Index to Legal Periodicals* and the *Legal Resource Index*.[13]

Together, these trainings sessions and textbooks equipped me to develop a five-step methodological approach to design this legal research plan. I integrated the advice from my dissertation committee and drew on the literature on how to direct legal research projects to justify taking the following five steps. These steps serve as the scaffolding for the methodology I used in this research project.

Law Review Notes, and Law Review Competition Papers. (New York, NY: Thomson West, 2000), pp. 11–12; Katie R. Guest Pryal, *Short Guide to Writing About Law.* (Harlow, United Kingdom: Longman/Pearson Education, 2010); Michael Salter and Julie Mason, *Writing law dissertations: An introduction and guide to the conduct of legal research.* (Harlow, England: Pearson/Longman, 2007). Although Salter & Mason focus on research in the United Kingdom, the following sections are interesting in the context of research done on U.S. Law: "What is Research?" (pp. 5–6) and "What is a [Legal] 'Dissertation'" and, most importantly, "Black-Letter Approaches to Doctoral Research" (pp. 44–99).

[12] Eugene Volokh, *Academic legal writing: law review articles, student notes, seminar papers, and getting on law review.* (New York, NY: Foundation Press, 2010). Volokh attributes this formulation to Carter, S. L. (1991) *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law,* 100 YALE L.J. 2065, 2083.

[13] *Ibid.*, Volokh, pp. 91–93.

Legal Methods

Step 1: Synthesize Judicial Tests by Cause of Action

Through my legal coursework, I was exposed to religious liberty claims brought forward under a variety of laws from the religious clauses in the federal and state constitutions and religious freedom protections in federal and state statutes. In doing so, I took the first step and created a rubric of the various tests that individual courts, at the federal and state levels, used to justify their decisions based on distinct causes of action. A cause of action is a law that a plaintiff can use to bring suit against another/others, also known as a statement of claim or complaint. It is a legal term referring to "the ground on which an action may be sustained" or a "right to bring a suit."[14]

Given that religious freedom is a fundamental constitutional right in the First Amendment[15] these were the first causes of action for which I synthesized judicial tests. I then proceeded to use this step to examine the legitimacy of whether I could use in my research alternate causes of action, such as religion clauses in state constitutions, federal and state religious freedom restoration statutes, federal and state nondiscrimination-in-employment laws.

When studying new laws that do not have a case history in which judges interpret a statute, like in the case of the Pennsylvania Religious Freedom Restoration Act of 2002,

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[14] "What is Cause of Action?' *Black's Law Dictionary*, Online Legal Dictionary 2nd ed. Accessed at www.thelawdictionary.org/cause-of-action.

[15] "Congress shall not make no law respecting an establishment of religion or prohibit the free exercise thereof…." U.S. CONST. amend. I.

I use the Plain Meaning Rule[16] to examine statute's text: when examining a statute that has not yet been interpreted, I use "the ordinary meaning of the language of the statute" which "requires that words are given their ordinary meaning, technical terms are given their technical meaning, and local, cultural terms are recognized as applicable."[17] If a term has both an ordinary and a technical meaning, "a court will favor the technical meaning" (e.g., Appendix A. Glossary of Legal Terms and Chapter III – Step 4. Defining Teacher). In addressing the Plain Meaning Rule, the U.S. Supreme Court held that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."[18]

Step 2. Collect Primary and Secondary Source Documents

After synthesizing judicial tests by causes of action and using the "plain meaning rule," as needed, I was prepared to take the second step: collecting primary and secondary source documents. I began by collecting state-level statutes that banned teachers from wearing religious garb in the public classroom and then conducted a legislative history on those statutes. This included collecting legislative documents, such as reports and hearing briefings. I then created a timeline in relation to cases that challenged the statutes.

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[16] David S. Romantz and Kathleen Elliot Vinson, *Legal Analysis: The Fundamental skill* (2nd ed.). (North Carolina: Carolina Academic Press, 2009), pp. 87-88.
[17] "Plain Meaning Rule," U.S. LEGAL DICTIONARY, www.uslegal.com.
[18] *Caminetti v. U.S.,* 242 U.S. 470, 37 S. Ct. 192 (1917).

I reviewed cases that challenged anti-religious-garb laws against teachers along with cases that challenged policies restricting the religious garb of students, public safety officers, and military personnel. I organized these cases according to causes of action under the U.S. Constitution and federal statutes and under state constitutions and state statutes.[19]

To collect these source documents, I used online programs to research the statutes and cases, such as WestLaw, LexisNexis, Lexis Advance, Bloomberg and Thomas, the Library of Congress legislative website, and the websites of state legislatures. I also discovered additional sources in law libraries, such as *US Reports*.

I used the Code of Federal Regulations to collect the legal language regarding Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on religion (a subject that ultimately fell outside the scope of my study). To understand how the Third Circuit Court of Appeals used Title VII to deny a public schoolteacher's claim to wear religious garb while working in a public school, I visited the Third Circuit and combed through boxes of unpublished litigation documents and archival records. I used these two primary sources—the Code of Federal Regulations and the archives at the Third Circuit—to classify the legal rationales and outcomes of the only Title VII case involving public schoolteachers' religious garb.

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[19] Parenthetically, in doing this research, I discovered the 1912 executive order issued by President Taft regarding religious garb worn by Catholic nuns who taught in the federal Indian Schools. Although the scope of my study is about state public schools this primary document was an important finding. It had statutory authority for the jurisdiction of federal Indian schools and would not serve as an enforceable statute for state public schools; therefore, when later analyzing state cases, I used this document to be persuasive material but not mandatory law. Regardless, this finding led me to no longer assume that the historical issue of teachers' religious garb was limited to state schools.

I also briefed each case for my records using the IRAC method (issue, rule, analysis, conclusion). Each brief included the formal name of the case and date of the decision; a summary of the case history (lower court decisions, appeals, etc.); a summary of the facts; the legal issues/questions presented by the case that would elicit a "yes" or "no" answer; a one- or two-sentence summary of the holding; a brief analysis, which included the legal rules/standards used by the majority, along with a summary of its analysis/rationale, and if applicable, a summary of the dissenting opinions; and a summary of the outcome/conclusion of the case.

I then used the Shepard's citation system and Westlaw's KeyCite to determine which statutes or cases had been overturned, reaffirmed, questioned, and cited by later cases. This was essential to understand which law was relevant to my study. I used this system to create custom tables, to illustrate the evolution of the case law, and to articulate which statutes and cases remained applicable.

My sources were limited to the bills passed by state legislatures. Additional materials included administrative policies created by state boards of education and commentaries issued by state district attorneys. This included advisory opinions, no-action letters, and regulatory decisions. I found that these documents were considered by some courts to be compelling statements, but they did not have the same authority as mandatory laws, such as statutes adopted by state legislatures or orders issued by state supreme courts or appellate courts.

I also collected a number of secondary sources. I read peer-review articles on the subject of law, education, and religion and books sections and journal articles in trade publications for teachers and religious groups. I also reviewed American Law Report

(A.L.R.) on teachers' religious garb, which gave a preliminary legal summary of the relevant cases that I cross-referenced with the literature. Together these gave me a broad understanding of how legal scholars framed the issue of regulating the religious expression of public schoolteachers.

Collectively these sources allowed me to identify holes in the literature. I discovered missing information in research on this topic previously published in law review articles, law reports, legal digests, legal encyclopedias, and legal dictionaries. Some were substantive in nature and spoke to my topic, while others were outside the scope of my study. I also found some legal information to be absent in some court decisions, specifically when judges attempted to construct a chronological summary of bans on teachers' religious garb. These findings suggested to me that this study could contribute to the literature. It also gave me the confidence to define the narrow scope of my research and to formally design this study based on specific judicial tests.

Step 3. Articulate Narrow Legal Questions

My primary legal question limits my study to testing the constitutionality of two contemporary state bans on teachers' religious garb in Pennsylvania and Nebraska public schools. Generally, I ask whether these bans are consistent with federal law under the Free Exercise clause of the First Amendment of the U.S. Constitution. Precisely, I ask:

1. Primary Research Question: Do the state bans on public schoolteachers' religious garb in Pennsylvania and Nebraska violate the Free Exercise Clause of the First Amendment, as applied to the states via the Fourteenth Amendment to the United States Constitution?

a. Legal Standard A – Federal *neutral and generally applicable* test under *Smith*: Do plaintiffs prevail under *Smith*; meaning, are these state bans on public schoolteachers' religious garb *neutral and generally applicable* laws?[20]

b. Legal Standard B – Federal *strict scrutiny* test under *Sherbert*: Do plaintiffs prevail under *Sherbert*; meaning, do anti-religious-garb statutes pass the three-part *strict scrutiny* test?[21]

   i. Do the statutes *substantially burden* public schoolteachers' free exercise of religion?

   ii. Are these burdens justified by serving a *compelling government interest*?

   iii. If so, did the legislative bodies in Pennsylvania and Nebraska *narrowly tailor* the regulation by using the *least restrictive means* possible?

2. Secondary Research Question: Does Pennsylvania's 1894 state ban on public schoolteachers' religious garb violate the Pennsylvania Religious Freedom Protection Act of 2002 (RFPA) as defined under the "practice or observance of religion" section 3 of Article I of the Constitution of Pennsylvania?[22]

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[20] *Employment Division v. Smith,* 494 U.S. 872 (1990).
[21] Introduced in *Sherbert v. Verner*, 374 U.S. 398 (1963) and expanded in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The *strict scrutiny* standard was affirmed in its application to federal laws in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).
[22] Section 2403. Definitions section of the Pennsylvania Religious Freedom Protection act defines "Free Exercise of Religion," not by using the "Free Exercise Clause of the First Amendment to the U.S. CONST. but by the "practice or observance of religion undersection 3 of art. I of the PA. CONST."

a. Legal Standard A – General Applicability rule under RFPA: Do plaintiffs prevail under the General Applicability Rule clause of RFPA, which prevents an "agency from substantially burdening a person's free exercise of religion, including any burden which results from a rule of general applicability?"

b. Legal Standard B – Exceptions under RFPA: Do plaintiffs prevail under the Exceptions clause of RFPA; meaning, did the agency fail to prove by a preponderance of the evidence that the substantial burden of a person's free exercise of religion:

    i. Furthered a *compelling interest* of the agency

    ii. By the *lease restrictive means* of furthering the compelling interest?

c. Legal Standard C – RFPA's unique Substantial Burden test: Do plaintiffs prevail under RFPA's four-part substantial burden test which forbids any agency action which does any of the following:

    i. Significantly constrains or inhibit conduct or expression mandated by a person's sincerely held religious beliefs;

    ii. Significantly curtails a person's ability to express adherence to the person's religious faith;

    iii. Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion;

    iv. Compels conduct or expression which violates a specific tenet of a person's religious faith.

In the first two chapters, I reviewed the origins and applications of these standards, determined their current legitimacy and relevancy, and surveyed the religious-garb case law, all of which I will use in Chapter IV to conduct a legal analysis.

Before doing so, I will now set the parameters of the facts, which I will detail more thoroughly than I did in the previous steps. I offer the following integrated discussion of the methods I used to find facts (the "how") with a presentation of the results of those findings (to explain "what" facts I found). This sets the stage for my closing discussion in this chapter about the methodologies I used to conduct the legal analysis in Chapter IV – Presentation and Analysis of Findings.

Step 4. Set Factual Parameters

Having articulated my research questions, I took the fourth step in my five-part legal methodology to review the common fact patterns in the 123-year history of legal challenges involving public schoolteachers' religious garb in the United States. I used these patterns to apply a legal research method involving setting the factual parameters; in other words, articulating the verifiable assumptions to be used in analyzing a hypothetical case. Similar to how a trial court reviews the "finding of facts,"[23] I determined which precise information would allow me to most effectively answer my research questions and which information I would set aside.

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[23] For definitions see *Findings and Conclusions by the Court*, FED. R. CIV. P. 52 and "Finding of Fact: This term applies to the conclusion reached by the court, arbitrators and is the determination of truth after consideration," BLACK'S LAW DICTIONARY, Online Legal Dictionary 2nd ed. Accessed at www.thelawdictionary.org/finding-of-fact. For a scholarly analysis of this legal method see George C. Christie, *Judicial Review of Findings of Fact,* NW. U. L. REV., 87:14 (1992).

The fact patterns in this case law fell into various thematic-based factual parameters, which I translated into the following nine questions: (a) Of the various types of laws that address the public schoolteachers' religious garb, which ones will I include in this study—the two contemporary states that ban religious garb and/or the two current states that encourage teachers to wear religious garb? (b) Who has standing to challenge these laws—a teacher or a religious organization or a taxpayer? (c) How is the teacher paid, and how may that relate to the question of taxpayers' standing to file a related suit? (d) What is the nature of the employment in the public school and the required qualifications? (e) In what type of public school is the teacher employed—will I analyze the current state-run public schools and/or the historical examples of federal schools in federal territories? (f) Which type of educator is being employed in the public schools—full-time employees, substitute, or assistant teachers? (g) What precisely does the state, school, or supervisor find objectionable about the teacher, and is this objection related to other job-performance issues? (h) What is the precise nature of the religious garb—what is it and what is it not? (i) And finally, is there any evidence of the teacher engaging in "religious instruction" in addition to the wearing of religious garb? By answering these questions, which emerged from the fact patterns in the literature, I was prepared to set the factual parameters of my study, which I justify here.

State anti-garb statutes. As I illustrated in Chapter II – Literature, state actors regulated the religious garb of public schoolteachers in a variety of ways. This led me to ask which type of garb law I would study. Three state legislatures passed statutory bans: Nebraska (enacted in 1919 and repealed in 2017), Oregon (enacted in 1923 and repealed in 2010), and Pennsylvania (enacted in 1895 and still in effect today). North Dakota

enacted an anti-religious-garb law through a public ballot initiative in 1948[24] (repealed by its legislature in 1999).[25] An additional eighteen state superintendents reported in 1946 (Table 2) that no employment was granted to public schoolteachers who wore religious garb. These types of regulations included school boards issuing a policy, superintendents or principals issuing a directive, or state attorneys-general issuing a commentary. This resulted in twenty-two states, by the end of World War II, banning public schoolteachers from wearing religious garb in the classroom either through state statutes, a public ballot initiative, or administrative regulations (Table 2).

To determine which laws I would study, I turned to one of the prominent fact patterns in the case law: "In the absence of a statute or regulation," state courts have routinely held that teachers "may wear their religious garb while teaching in public schools."[26] I determined that a study of public schoolteachers in states without a statutory ban on religious garb would not allow me to directly address my research questions, nor would that line of inquiry allow me to fill the gap in the literature; as detailed in Chapter II – Literature Review, a court has yet to conduct a comprehensive analysis of state statutory bans on public schoolteachers' religious garb under the post-*Smith* jurisprudence under the Free Exercise clause of the First Amendment to the U.S. Constitution or the Religious Freedom Protection Act of Pennsylvania. Given these fact

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[24] *Legislative Manual, Official Vote of North Dakota Primary Election, 1948*; and Linda Grathwohl, "The North Dakota Anti-Garb Law: Constitutional Conflict and Religious Strive," Great Plains Quarterly, (Lincoln: University of Nebraska, 1993).
[25] N.D. Bill No. 1034, introduced by the Education Services Committee, repealed N.D. Cent. Code § 15-47-29; 15-47-30, Mar. 3, 1999. For rationale for the repeal, see North Dakota Legislative Management (1998) *Minutes of the Educational Services Committee.* Feb. 23-24, 1998. Bismarck, North Dakota, p. 8.
[26] *Moore v. Board of Education*, 4 Ohio Misc. 257 (Ohio Ct. Com. Pl. 1965); *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894); *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956); *Gerhardt v. Heid* 66 N.D. 44 (N.D. Sup. Ct. 1936); *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940); and *New Haven v. Torrington*, 132 Conn. 194 (1945).

patterns in the case law, I determined the primary subject of my study would be the two contemporary state statutes that ban public schoolteachers' religious garb in Pennsylvania and Nebraska.

I also decided not to address whether it is constitutional for state legislatures to *encourage* public schoolteachers to wear religious garb. As noted in Chapter II, education laws in Arkansas[27] and Tennessee[28] currently single out the voluntary wearing of religious garb by teachers in public schools for positive protections. These statutes call forth Establishment Clause questions about state advancement or endorsement of religion that fall outside the factual parameters of my analysis.

Standing. Having determined the primary subject of my study—contemporary anti-religious-garb statutes in Pennsylvania and Nebraska—I then turned to the question of who has the legal authority to challenge these laws. The case law shows that a teacher who is refused employment, disciplined, or terminated for wearing religious garb in a public school has the legal standing to challenge an anti-religious garb regulation. This authority derives from the teacher, as the plaintiff in a case, meeting the U.S. Supreme Court's three-part *standing test*[29]:

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[27] "No person shall be prohibited from teaching in state institutions of higher learning for the reason that the person wears the clothing of any established and recognized religion while teaching." The 2010 "Authority for teachers to wear religious clothing" statute, Arkansas Code Title 6, Education Subtitle 5, Postsecondary and Higher Education Generally Chapter 63, Employees of State Institutions Subchapter 1, General Provisions § 6-63-101. Acts 1973, No. 196, § 1; A.S.A. 1947, § 80-1261.

[28] The Tennessee School Employee Religious Liberty Act of 1999 allows school employees to voluntarily "wear religious garb or jewelry that does not disrupt the school environment." It also states, in section 49-6-9002(a)(4), "Neutrality to religion does not require hostility to religion. The establishment clause does not prohibit reasonable accommodation of religion, nor does the clause bar appropriate teaching about religion…" It goes on to permit school employees to voluntarily "read a religious book during non-instructional time; quietly say grace before a meal; and meet with other school employees for prayer or scriptural study before or after school or during the employee's lunch" (49-6-8004.b.1, 2, 4).

[29] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

The primary cases I will rely on to conduct my analysis involve public schoolteachers who meet these standing qualifications. This is an important parameter to set in order to distinguish between cases that involve plaintiffs using their status as taxpayers to challenge school districts who employ religious-garb-wearing teachers.[30] In those Establishment Clause cases, the primary question was whether public funds can be used to advance religion, which is outside the scope of this examination. My research focuses narrowly on the Free Exercise protections of public schoolteachers under federal and state laws.

Teachers are paid like all other teachers. In a similar line of thinking, I also determined that my study would rest on the fact that religious-garb-wearing teachers "are

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[30] Outside the scope of this study, cases are classified as Establishment Clause cases because they center on the larger question of the use of public funds for religion. A Kentucky taxpayer, J.C. Rawlings, uses his standing as a taxpayer to challenge the decision of Superintendent Wendell P. Butler to hire religious-garb-wearing teachers. *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956). It is important to note that the U.S. Supreme Court no longer permits taxpayers to have standing to challenge the use of public funds for private religious schools. See *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), which overturned the taxpayers' standing as narrowly defined in *Flast v. Cohen*, 392 U.S. 83 (1968). Additional Establishment Clause cases in the religious-garb case law include: *Knowlton v. Baumhover,* 182 Iowa 691 (Iowa Sup. Ct. 1918); *State v. Taylor*, 122 Neb. 454 (Neb. Sup. Ct. 1932); *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940); *Harfst v. Hoegen*, 349 Mo. 808 (Mo. Sup. Ct. 1941); *Zellers v. Huff*, 55 N.M. 501 (N.M. Sup. Ct. 1951); *Berghorn v. District No. 8*, 364 Mo. 121 (Mo. Sup. Ct. 1953); *Moore v. Board of Education*, 4 Ohio Misc. 257 (Ohio Ct. Com. Pl. 1965).

paid like all other teachers,"[31] through direct payment from the school to the individual teacher. I make this explicit because there was a case[32] in which the court received complaints about the salaries of garb-wearing nuns being paid to their Catholic order, not to the nuns directly.[33] Again, such Establishment Clause questions are outside the scope of my study.

State-employed, state-examined, state-certified teachers. The locus of my study is public schools, not private schools.[34] This parameter allows me to define the nature of, and the required qualifications for, employment. Therefore, I assume in this study that the plaintiffs have successfully completed the necessary state-issued examinations and teacher certification required to be eligible for employment in a state-funded public school. This is important to note because, in some of the historical cases

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[31] "Sisters are paid like other teachers, and after providing for their living expenses, they contribute the balance of their compensation to the orders to which they belong. Their vow of poverty is not controlling from a legal angle. Many people are poverty stricken without taking such vows. The vow of obedience to ecclesiastical and secular authorities is not uncommon in the lives of people. No one can object to the vow of chastity." *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956). The *Rawlings* court stated, "The United States Supreme Court in the *Slaughterhouse Cases*, 83 U.S. 36 (1872) wrote that labor is property and one has the right to dispose of property according to the will of the owner. The salaries paid these Sisters are theirs and they may do therewith as they choose."

[32] The "earnings as teachers are paid to the sister in charge of the house where they are at the time residing." *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).

[33] I interpreted this to mean that the order provided the state with services, a situation like that of private education agencies that pay their employees after receiving a government contract.

[34] In *Knowlton v. Baumhover*, 182 Iowa 691 (Iowa Sup. Ct. 1918), the Iowa Supreme Court denied public funding to a private religious school whose students were transferred from a recently closed public school and who, incidentally, employed teachers who wore religious garb. These fact patterns are distinct from a district that employs a teacher who wears religious garb while teaching in a public school.

cited, teachers were previously serving private religious schools and then transferred to public schools or received their training and exams in religious settings.[35]

The Indiana Supreme Court set similar boundaries when stating, "The fact that these teachers were recommended by various Catholic normal schools cannot be considered an important factor."[36] The court held, as I assume in my line of questioning, that the teachers were employed by or seeking employment in a public school. I also rest my analysis on the fact that the teachers "were chosen from persons regularly qualified and licensed to teach" under the laws of the state, making it "the duty of school trustees to investigate the character and fitness of teachers."[37] I found a similar agreement of facts in the 1936 decision of the North Dakota Supreme Court.[38] These facts in the Indiana and North Dakota cases mirror the other major religious-garb cases (Table 1). As a result, I

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[35] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894). Judge Williams' dissent in *Hysong* pointed out that "the sisters employed as teachers had regular certificates granted to them in their religious names by the county superintendent, after a private or special examination given them at the Mother House in Ebensburg." Non-state examiners fall outside the scope of this study; therefore, this contemporary analysis rests on the assumption that the state is the one both examining and certifying the teachers.

[36] *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940).

[37] *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940).

[38] *Gerhardt v. Heid*, 66 N.D. 44, 14 (N.D. Sup. Ct. 1936). "Obviously the school in question here is not a 'sectarian school' within the meaning of § 152 of the [North Dakota] constitution. It is not affiliated with any particular religious sect or denomination. It is not governed or managed, nor are its policies directed or controlled, by such sect or denomination. It is one of the public schools of North Dakota, operated under the supervision, direction and control of the public officers of the state, county and district who, under the constitution and laws of the state, are charged with the administration, management and government of such public schools. The courses of study therein are prescribed by public officers and employees whose duty it is under our laws to prescribe such courses. The teachers in the school have received the certificates authorizing them to teach in the public schools of North Dakota upon compliance with the laws of the state; and they are as much subject to the control and direction of the superintendent of the school in which they teach, and of the county superintendent of schools and the state superintendent of public instruction as are other teachers in similar schools in the state."

proceed to set the factual parameters of my study around state-employed, state-examined, and state-certified teachers.

State schools, not federal schools. Because I am conducting an analysis of the two contemporary anti-religious-garb statutes, I naturally focus on state-run schools that are governed and funded by Pennsylvania and Nebraska (Appendix B). The literature, however, reveals a nineteenth-century legal controversy involving the use of federal funds to employ religious-garb-wearing teachers in schools run by the federal government. Ironically, Thomas Jefferson—who famously advocated for the "separation of church and state"[39]—helped set these policies in motion. A brief review of this history is worth noting in order to explain how I came to set the factual parameters of my study.

After purchasing the Louisiana Territory from France in 1803, President Jefferson continued George Washington's initiative to educate Native Americans with federal funds. Education historian Lawrence Cremin characterized this contradiction: "In effect—and paradoxically, given the Jeffersonian penchant for secularism—the [federal] government ended up in patent partnership with several Christian denominations."[40] During Thomas Jefferson's administration, writes education historian James Fowler, "the majority of the federal monies went to Protestant missionaries… whom [Jefferson] otherwise distrusted."[41] The trend of using federal funds to hire missionaries to educate indigenous people continued through 1928. A notable change in strategy occurred after

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[39] Thomas Jefferson, "Letter to the Baptists of Danbury, Connecticut, Jan. 1, 1802," *The Papers of Thomas Jefferson.* Vol. 35:1. (Princeton, New Jersey: Princeton University Press, 2008), 407-9.
[40] Lawrence A. Cremin, *American Education: The National Experience 1783-1876.* (Harper Colophon Books, 1980), 234-235.
[41] James W. Fraser, *Between Church and State: Religion and Public Education in a Multicultural America.* (St. Martin Press, New York, 1999), 89.

President Ulysses Grant took office in 1869. He replaced the "national removal strategy" with an assimilation plan called the "Quaker Policy," inspired by the Religious Society of Friends' assimilation of Indians in Pennsylvania who used public funds to hire Christian missionaries whose church boards would govern the federal education of Indians. In his second inaugural address, President Grant made explicit his intent: "to bring the aborigines of the country under the benign influences of education and civilization." He said that it was either education "or war of extermination."[42] A year later, President Grant installed the Bureau of Catholic Indian Missions, whose nuns were contracted to convert Indians to Christianity while serving as teachers in federal schools—and who did so while wearing religious garb. In this same vein, the federal government established "Indian prison schools" designed "to teach the Indian prisoners European dress, the English language, and Christianity."[43] The objective was severe: to "kill the Indian but save the man."[44]

I briefly detail these legal trends not only to document this disturbing history[45] but to explain why I make the distinction in my study between state-run public schools and federal-run public schools. Given my focus on the two contemporary anti-religious-garb

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[42] Ulysses S. Grant, *Second Inaugural Address,* 4 Mar. 1873.
[43] See Pratt and Mather study in Fraser, p. 94.
[44] In 1892 Captain Richard H. Pratt said, "A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man. We are just now making a great pretence [*sic*] of anxiety to civilize the Indians." Official proceedings of the annual meeting of the Conference of Boards of Public Charities: 1892, 46–47. Reprinted in Francis Paul Prucha (1973) *Americanizing the American Indians: Writings by the "Friends of the Indian" 1880–1900*. (Cambridge, MA: Harvard University Press), 260–271.
[45] David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875–1928.* Laurence, KS: University Press of Kansas, (1995). See also *Quick Bear v. Leupp,* 210 U.S. 50 (1908), in which the U.S. Supreme Court upheld in a 9 – 0 decision the use of federal funds for a Catholic school to educate American Indians.

statutes and the absence of federal schools today, I do not examine the constitutionality of the historical federally-run schools that employed religious-garb-wearing teachers.

Defining teacher. A public school funded and governed by the state has authority over its teachers. I was surprised to learn the case law on religious garb reveals a lack of consistency in defining what constitutes a teacher. As a result, I had set the factual parameters that would determine a legal definition of "teacher." In Mississippi, for instance, an *assistant teacher* won her case after being fired for occasionally wearing African headdresses.[46] In Nebraska, the state Attorney General permitted *student teachers* to wear religious garb on the grounds that the statute "does not apply to those who are being trained" because they are not receiving compensation and are meeting students for only "short periods of time."[47] In Nebraska, a Catholic nun was denied employment as a *substitute teacher* because she sought to wear a habit while teaching in a public school.[48] Three cases in Pennsylvania are worth noting. First, a *substitute teacher* lost her case

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[46] My emphasis in italics: "Claimant was employed four years as an *assistant teacher* with the Jackson Public Schools, Jackson, Mississippi, ending Mar. 17, 1987, when discharged for insubordination. She was discharged because she continued to wear head-wraps after numerous discussions with her advising that her attire was not considered appropriate professional dress for *teachers and assistant teachers*." *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990), cert. denied, 498 U.S. 879.

[47] Report of the Neb. Attorney General, *Schools-Teachers-Wearing of Religious Garb,* addressed to Hon. John M. Matzen, State Superintendent, Aug. 24, 1926. "I am of the opinion that the word "teacher" as used in the [anti-garb statute] applies only to those who hold certificates to teach in Nebraska and are employed to teach in some of the publics schools of the state. I do not think it applies to those who are merely being trained to teach in some one of the several state normal schools, and as an incident to said training, but without compensation are giving instruction (under the direct supervision of a member of the faculty of a state normal school) for short periods of time to pupils in a public school of the state." Signed, GWA.

[48] Grant Shulte, "Nebraska targets ban on religious garb worn by teachers," *Associated Press*, Jan. 17, 2017; Michael Shively, "Legislative Bill Would Eliminate 100-Year-Old Religious Garb Law," *KWBE Nebraska News Chanel*, Jan. 18, 2017.

after being fired for wearing a Muslim hijab (headscarf) while substituting three times.[49] Second, an *instructional assistant* won her case after being fired for wearing a Protestant cross necklace *solely* because she did not meet the legal definition of "teacher" and therefore was not bound by the anti-garb law.[50] And third, an *auxiliary services counselor* won her case after being denied employment by a state-funded private remedial education company that refused to hire her because she wore an Islamic headscarf.[51] Given the diversity of these facts, I chose to base my legal analysis on Pennsylvania's legal definition of "teacher" as found in the state's education code:

> 'Teacher' shall include all professional employees and temporary professional employees who devote fifty per centum (50%) of their time, or more, to teaching or other direct educational activities, such as classroom teachers, demonstration teachers, museum teachers, counsellors, librarians, school nurses, dental hygienists, home and school visitors, and other similar professional employees and temporary professional employees, certificated in accordance with the qualifications established by the State Board of Education.[52]

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[49] My emphasis in italics: "Alima Delores Reardon is a devout Muslim with a religiously held conviction that Muslim women should, when in public, cover their entire body save face and hands. Since 1970, Reardon had from time to time worked as a *substitute and full-time teacher* in the Philadelphia School District, positions for which she held the necessary certificate and other qualifications. Reardon first embraced her religious conviction regarding dress in 1982, and pursuant to her belief 'she wore while teaching . . . a head scarf which covered her head, neck, and bosom leaving her face visible and a long loose dress which covered her arms to her wrists.' Reardon taught in this attire without incident until 1984. Towards the end of 1984, on *three separate occasions* Reardon reported to various schools for duty as a *substitute teacher* and was informed by the principals of those schools that, pursuant to state law, she could not teach in her religious clothing. These actions were taken in compliance with what is commonly referred to as Pennsylvania's Garb Statute, enacted in 1895." *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).

[50] In a peculiar ruling, a federal district court held that a *teaching assistant* does not meet the state's definition of a teacher. See my earlier discussion in Chapter II – Literature Review about *Nichol v. Arin*, 268 F.Supp 2d 536 (W.D. Pa. 2003).

[51] In another peculiar ruling, the court held that, although the applicant was Muslim and wore headscarves for religious purposes, "many" children would not perceive her dress as "religious," so it could not be classified as "religious garb." See my earlier discussion in Chapter II – Literature Review about *EEOC v. READS*, Inc. 759 F.Supp. 1150 (U.S. Dist. Ct. of Pa. 1991).

[52] 24 Pa. Stat. P.S. Education § 11-1141, Definitions section (1).

Satisfactory performance. Given that these teachers are under the "control and direction" of the state, I also decided to set another parameter: the plaintiff's performance as a public teacher is "essentially satisfactory."[53] In doing so, I eliminate any question of whether religious garb is merely a pretext used by the supervisor to justify terminating a poorly performing teacher. It also removes any implication that a teacher is wearing religious garb merely as an act of insubordination, rather than as a sincere religious expression.

The nature of religious garb. The act in question is the teachers' wearing of religious garb in the public school—but what is "religious garb" exactly? I rely on the first anti-religious-garb law in the United States, enacted by the Pennsylvania General Assembly in 1895, to define religious garb as "any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination" (Appendix A).[54]A historic example of this is found in the first case on the matter: "The Sisters of St. Joseph, of the Roman Catholic Church, while teaching in said public schools, wear the garb, insignia, and emblems of their order."[55] Moreover, "they are required to wear the garb of the order, and are not allowed to take it off 'during the day, either on account of their work or the heat of the day.'"[56] A contemporary

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[53] "McGlothin's work was essentially satisfactory." *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990), cert. denied, 498 U.S. 879.
[54] Pennsylvania Statute 24, § 11-1112 (2017). This anti-religious-garb statute, enacted in 1895, was the first in the United States. It was reaffirmed in 1949 and 1982 and remains active today.
[55] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).
[56] *Hysong* at 18.

example of religious garb is the case of Alima Delores Reardon, who was fired for wearing a hijab and loose dress while teaching in the school district of Philadelphia.[57] I previously reference additional examples (Appendix C and the "Global Context" section of Chapter II – Literature) to illustrate that this legal question is far broader than merely the headdresses of Catholic nuns and Muslim women.

No evidence of religious instruction. The fact patterns in the case law on religious garb can overlap with another set of cases about the use of public funds for religious instruction. This occurs when proponents of anti-religious garb question the motives of teachers who wear religious garb, suggesting that because of the exceptionally pious attitude indicated by their clothing, they are more likely than non-religious-garb-wearing teachers to indoctrinate children. A related view is that such teachers do not need to engage in direct religious instruction because religious garb, by its nature, is a form of indirect religious instruction. This view implies that exposing children to the religious identity of a public official is just as suspect as forcing children to read from scriptures or to engage in worship or spiritual practices with or in front of students (For further discussion see *IV. E. 9 Religious Garb Cannot Be Used for Religious Instruction*).

To create a clean line of inquiry, I use the fact patterns presented in various trial courts that found that there was *no evidence* of religious instruction or proselytization (Table 3). In separating out the question of religious instruction and religious garb, I focus on the legal merits of the state statute. I test the limits of the states' authority to regulate the religious expression of schoolteachers. These are important questions that

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[57] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).

strike at the heart of the two most contemporary anti-religious-garb statutes in Pennsylvania and Nebraska, the primary subject of my inquiry.

Table 3

No Evidence of Religious Instruction

1894 Pennsylvania: "[T]here was no sufficient evidence that [teachers] used the garb or insignia mentioned in such a manner as to attract particular attention to them or their signification, or endeavored to so use them as to impart sectarian or religious instruction." *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894).

1906 New York: No evidence was provided of Nora O'Connor and Elizabeth Dowd, Catholic nuns who wore habits, engaging in religious instruction while teaching in a public school. *O'Connor v. Hendrick*, 184 N.Y. 421 at 13 (N.Y. Ct. App. 1906).

1908 Pennsylvania: No evidence was provided of Lillie Risser, a Mennonite religious-garb-wearing teacher, engaging in religious instruction in a public school. *Commonwealth v. Herr*, Court of Quarter Sessions of Lancaster County, No. 26 at (Lancaster Mun. Ct. 1908).

1936 North Dakota: "There is no claim and no evidence that any religious instruction was given, or that any religious exercises were conducted." *Gerhardt v. Heid*, 66 N.D. 44 at 2 (N.D. Sup. Ct. 1936).

1940 Indiana: "Since the children in question were children of Catholic parents and the service was voluntary and not within the school hours we fail to see that this amounts to sectarian teaching…" *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940).

1956 Kentucky: No evidence provided of religious instruction. "The garb does not teach. It is the woman within who teaches." *Rawlings v. Butler*, 290 S.W.2d 801 at 7 (Ky. Ct. App., 1956).

1986 Oregon: No evidence was provided of Janet Cooper, a turban-wearing Sikh teacher, engaging in religious instruction in her sixth and eighth grade classes. *Cooper v. Eugene School District No. 41*, 301 Ore. 358 (Or. Sup. Ct. 1986).

1990 Mississippi: No evidence was provided of Debora McGlothin, who periodically wore an African Hebrew Israelite head-wrap, engaging in religious instruction. *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990).

1990 Pennsylvania: "Ms. Reardon never attempted to convert any student to Islam." *United States* [Reardon] *v. Board of Education*, 1989 U.S. Dist. LEXIS 5437 at 7 (E.D. Pa. 1989).

2003 Pennsylvania: "There was no evidence introduced or offered that" an instructional assistant who wore a cross neckless "proselytized, preached or taught her religious beliefs to students… while teaching" her fourth, fifth, and sixth grade students. *Nichol v. Arin*, 268 F.Supp 2d 536 (W.D. Pa. 2003).

Overview of factual parameters. In summary, my study is bound by the following factual parameters: Teachers who have been refused employment, disciplined, or terminated for wearing religious garb while teaching in a public school have legal standing to challenge anti-religious garb regulations. The plaintiffs in my study are state-employed, state-examined, and state-certificated educators who meet the definition of "teacher" under Pennsylvania's education code. Their job performance is satisfactory, and they are paid like all other teachers. The religious expression in question is defined by Pennsylvania's anti-religious-garb law and is not, in itself, evidence of direct or indirect religious instruction.

Having set the factual parameters, I am prepared to take step five of my research methodology: conducting the legal analysis.

Step 5. Conduct Legal Analysis

My legal analysis in the next chapter relies on the legal method of "rule synthesis"[58] that I conducted in the legal standards section of Chapter II, which serves as a composite of the authoritative summary of judicial tests used across similar cases. I prepared this "rule synthesis" in conjunction with preparing a "case synthesis"[59] on the subject of bans on public schoolteachers' religious garb. I did so to employ best practices conducting a legal analysis.

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[58] David S. Romantz and Kathleen Elliot Vinson, *Legal Analysis: The Fundamental Skill*, 2nd ed. (North Carolina: Carolina Academic Press, 2009), pp. 30–31; and Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization*, 4th ed. (New York: Aspen Publishers, 2006), pp. 106–118.
[59] *Ibid.*, Romantz, pp. 45-48.

For example, in Chapter IV – Presentation and Analysis of Findings, I will use the *deductive analysis* and *rule-based reasoning* methods to concisely state and explain the rule and apply that law to the facts. Likewise, I used the *analogical reasoning* method when making distinctions between broad/persuasive arguments and ones that are narrow/authoritative. In examining these two forms of reasoning by analogy, I seek to construct a case synthesis that is based on similar jurisdictions addressing similar legal issues.[60]

In addition to deciding which types of analogical reasoning methods I would employ, I also sought to identify logic fallacies—another common method for conducting legal analysis. Fallacies may include the straw man (making arguments that were not initially advanced); argument ad hominem (discrediting an argument based on who articulates it), sufficiency/necessity conditions (e.g., air may be necessary for life but is, alone, not sufficient to sustain life), slippery slope (an extreme hypothetical that discredits an initial position because of the fear of the hypothetical).[61] In this vein, I seek to apply Volokh's rubric for studying *logic variants*, such as looking for categorical assertions (i.e., "never," "always"), false alternatives (i.e., unnecessary dualisms such as "Is pornography free speech or hate speech?"), criticisms that could apply to everything (i.e., "the rule of law has a chilling effect"), incomplete logic in metaphors (i.e., "laws do not literally chill speech"), and undefended assertions (i.e., "that law is troubling").[62]

In this final step, I applied these five methods for conducting a legal analysis. I began by conducting (a) rule and case syntheses. Then I prepared myself to use (b)

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[60] *Ibid.*, Romantz pp. 37–64.
[61] "Logic Games" and "Logic Reasoning" exercises, *LSAT Courses*, Kaplan Test Prep.
[62] *Ibid.,* Volokh, pp. 76–83.

deductive analysis and *rule-based reasoning* techniques in my forthcoming analysis. Next, I used (c) *analogical reasoning* strategies to distinguish broad and narrow comparisons in the law and finally, I (d) identified *logic fallacies* and *logic variants* that I can use to strengthen my upcoming legal analysis.

Summary of Five-Step Legal Methods

In conclusion, my participation in training sessions about legal research methods and my review of related textbooks prepared me to use a five-step process to conduct my legal research and analysis. In Step 1, I began by synthesizing judicial tests, which equipped me to narrow my analysis to two legal causes of action under the Free Exercise Clause of the First Amendment[63] and under the Pennsylvania Religious Freedom Protection Act of 2002 (RFPA). This process gave me the framework to analyze how judges reached their previous conclusions, including by using the "plain meaning rule" to interpret RFPA which has not yet been substantively interpreted by any court. In taking Step 2, I collected primary and secondary documents to help me determine the historical fact patterns in the anti-religious-garb cases. In Step 3, I combined what I had learned in the first steps when articulating my legal research questions. In Step 4, I set the factual parameters of my study, which serve as the verifiable assumptions that I use to take Step 5 in the next chapter—conducting a legal analysis. In this final step, I will use various

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[63] Additional causes of action, which have their own unique set of judicial tests, include (1) alternate constitutional claims under the No Establishment and Free Speech Clause of the First Amendment to the U.S. CONST.; (2) federal statutory claims under Title VII of the Civil Rights Act of 1964; (3) claims under state constitutions, such as NEB. CONST. *no compulsion* clause of art. I §16, the *no sectarian instruction* clause of art. VI §11 and PA. CONST. *no compulsion* clause of art. II and the *no sectarian instruction* clause of art. VII §18; along with (4) claims under state statutes, such as the Pennsylvania Religious Freedom Restoration Act, the Pennsylvania Human Relations Act and Nebraska Fair Employment Act, the latter two of which prohibit employment discrimination based on religion.

legal methods to strengthen my analysis, such as *deductive analysis, rule-based reasoning* techniques, *analogical reasoning* strategies, and identifying *logic fallacies.* Together, these legal research methods and legal analysis techniques prepared me to construct my research design.

In the next chapter, Presentation and Analysis of Findings, I will analyze the merits of plaintiff's and defendant's lines of arguments and the justice's majority, concurring, and dissenting opinions. Then I will conduct a legal analysis of the two anti-religious-garb statutes in Pennsylvania and Nebraska under the Free Exercise standards—*neutral and general applicability* and *strict scrutiny* (substantial burden on religion, compelling state interests, and regulations that are *narrowly tailored* to have the *least restrictive* burden on religion). I will use my findings and analysis in a concluding discussion of the constitutionality of these two anti-religious-garb laws.

Then I will examine whether Pennsylvania's 1894 anti-religious-garb law violates Pennsylvania's Religious Freedom Protection Act of 2002, which also applies the *general applicability* and *strict scrutiny* standards. I also use RFPA's unique four-part "substantial burden" test to assess the nature of a plaintiff's burden on their religion and to assess whether the state exercised restraint in the ways mandated in the test.

In Chapter V—Conclusion, I will summarize the contributions that this project makes to the legal study of these two state bans on religious garb, and, more broadly, the study of legal restrictions on religious expression in the United States and around the globe. I will then discuss the implications that this research may have on my four primary audiences: (1) legislators, judges, and attorneys who examine bans on religious garb; (2) school boards and administrators who determine teacher dress codes, hiring, and

termination policies; (3) public schoolteachers and leaders of teachers' unions who study the rights of civil and employment rights of educators; and (4) researchers in the fields of religion, law, and/or education who examine the nature of and legal protections for religious expression along with the intersection of religion and public life. Then I will acknowledge the limitations of this study and propose a series of recommendations for future research. My closing remarks will summarize this study's purpose, process, and findings.

IV – PRESENTATION AND ANALYSIS OF FINDINGS

The forthcoming presentation and analysis of my findings rest upon the factual parameters that I set in Chapter III – Methodology. In doing so, my legal analysis is built upon the following five assumptions. First, the hypothetical plaintiffs in this study have legal standing to challenge the anti-religious-garb statutes because they were refused employment, disciplined, or terminated for wearing religious garb while teaching in a public school in Pennsylvania or Nebraska. Second, these plaintiffs were state-employed, state-examined, and state-certified educators who met the definition of "teacher" under the states' education code. Third, the teachers' job performance was satisfactory. Fourth, they were paid like all other public schoolteachers, unlike some cases were paid by an auxiliary agency. Finally, there is no evidence of religious instruction (Table 3); in other words, the expression in question is only the wearing of religious garb while teaching in a public school.

Having set the factual parameters, I now use the following four judicial standards to conduct an analysis of federal and state law governing public schoolteachers' religious garb in Pennsylvania and Nebraska under the Free Exercise Clause of the First Amendment to the U.S. Constitution and the Pennsylvania Religious Freedom Protection Act of 2002:

A. General Applicability: Are Pennsylvania and Nebraska's bans on public schoolteachers' religious garb *neutral and generally applicable* laws?[1]

B. Burden: Do the statutes *burden* public schoolteachers' free exercise of religion?[2]

C. Compelling State Interest: Are these burdens justified by serving a *compelling government interest*?[3]

D. Narrowly Tailored: Did the legislative bodies in Pennsylvania and Nebraska *narrowly tailor* the regulation by using the *least restrictive means* possible?[4]

I dedicate the following sections of this chapter to answer these research questions.

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[1] The *Smith* test requires that government regulations involving religion must be "neutral and generally applicable" and cannot "target religious conduct for distinctive treatment." *Employment Division v. Smith,* 494 U.S. 872 (1990).

[2] As defined in the first of the three-part *Sherbert* test. See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[3] As defined in the second of the three-part *Sherbert* test, which defines "burden" as either incidental or fundamental, indirect or direct. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Four-Part "Substantial Burden" Test in Pennsylvania's RFPA explains that a state agency substantially burdens a person's religion when the state's action: "(1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; (2) Significantly curtails a person's ability to express adherence to the person's religious faith; (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion; (4) Compels conduct or expression which violates a specific tenet of a person's religious faith."

[4] As defined in the third of the three-part *Sherbert* test. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

General Applicability

In the field of religious liberty, federal narcotics legislation serves as a colorful example of "neutral and general applicable" laws. The criminal justice system is required to administer the government's "no drugs" policy in an unprejudiced fashion. Yet, even facially neutral policies can burden one's constitutional guarantee of the free exercise of religion, as explored in the *Smith* case brought forth by Native Americans who ingested peyote, a federally registered narcotic, for sacramental purposes.[5]

In the context of this study, an analogous scenario of legal neutrality and general applicability would be for a state legislature or school board to enact a generic dress code for all teachers, such as mandating a distinct uniform.[6] The policy would need to demonstrate an impartial standard of professional attire in public schools by requiring teachers to wear a fixed ensemble, as do workers in hospitals, stores, and restaurants.[7] The anti-religious-garb laws in Pennsylvania and Nebraska make no such attempt.

I will demonstrate that the anti-religious-garb statutes are not neutral because they target religious conduct for government regulation, and they were born from religious animus toward the suspect minority of the day. As a result, the anti-religious-garb statutes

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[5] *Employment Division v. Smith,* 494 U.S. 872 (1990).
[6] As mandated by the Pennsylvania Supreme Court in *Hysong* (1894): "[T]he legislature may, by statute, enact that all teachers shall wear in the schoolroom a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals." *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 57. The Pennsylvania General Assembly did not fulfill this mandate (Appendix B).
[7] In Title VII cases, which fall outside the scope of this study, the Civil Rights Act of 1964 requires that employee dress codes must accommodate religious garb. See EEOC *Religious Garb and Grooming in the Workplace: Rights and Responsibilities* and accompanying fact sheet (2014).

in Pennsylvania and Nebraska fail the *general applicability* test, thus triggering the *strict scrutiny* standards articulated in *Sherbert* and in Pennsylvania's Religious Freedom Protection Act.[8]

Anti-Religious-Garb Laws Target Religious Conduct

The 1895 General Assembly of Pennsylvania and the 1919 Nebraska Legislature did not enact a general neutral dress code statute; rather, the legislators in both states focused on religious dress, marks, emblems, and insignia. These statutes, by design, were neither neutral to religion nor a universally applicable dress code applied to all public schoolteachers. The statutes in question (Appendix B) make it unlawful for public schoolteachers to wear while performing their duties any "garb… dress, insignia, marks or emblems" (Pennsylvania's language)[9] or "dress, or garb" (Nebraska's language)[10] "indicating the fact that such teacher is an adherent or member of any religious order, sect or denomination" (language used in both statutes). Put simply, the wearing of religious

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[8] See Chapter II – Literature for a discussion of the evolution of this standard, as developed by the U.S. Supreme Court in *Employment Division v. Smith,* 494 U.S. 872 (1990) and clarified in *City of Boerne v. Flores*, 521 U.S. 507 (1997). See also *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), which clarified that federal statutes that are "neutral and generally applicable" must also meet *strict scrutiny*. Twenty-two states, including Pennsylvania, made the same requirement in their religious freedom restoration acts. See also *Grutter v. Bollinger* 539 U.S. 306 (2003) at 327, in which Chief Justice Roberts connected religious diversity to racial diversity, saying that "context matters" and that the fundamental purpose of *strict scrutiny* is to take "relevant differences" into account.

[9] The Pennsylvania General Assembly first enacted Pennsylvania Statute 24, Religious Garb § 11-1112 in 1895, in response to the Pennsylvania Supreme Court's affirmation of Catholic nuns wearing habits while teaching in state public schools in *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894). The Pennsylvania General Assembly reenacted the statute in 1949 and 1982. Two proposed repeals of the laws failed to get out of committee in 2011 and 2012. Pennsylvania's statute is the only anti-religious-garb law in the country that remains today.

[10] Neb. Code § 79-898 (2016) was first enacted in 1919 (c. 248, § 1, p. 1018) and reaffirmed in 1922, 1929, 1943, 1949, and 1994 and then repealed in 2017.

garb is the targeted practice that the state seeks to regulate. The Supreme Courts of Pennsylvania and Oregon agree.

In America's first religious garb case, *Hysong v. Gallitzin School District* (1894), the Pennsylvania Supreme Court stated that "the legislature may, by statute, enact that all teachers shall wear in the schoolroom a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals."[11] In modern legal terms, the court issued a call for a "neutral law of general applicability"[12] that did not single out religion for government regulation.

The General Assembly swiftly and decisively enacted the garb statute, which was challenged thirteen years later by a bonnet-wearing Mennonite teacher. In *Commonwealth v. Herr* (1908),[13] the Court of Quarter Sessions of Lancaster County held that "… the legislature did not see fit to make any universal rule. It adopted no general style of dress; but it did attempt to exclude certain persons, who, on account of their religious sentiments, saw fit to adopt a plain garb, from holding employment under the commonwealth."[14] This decision made explicit that the anti-religious-garb statute

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[11] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 57.
[12] *Employment Division v. Smith*, 494 U.S. 872 (1990).
[13] Judge Landis' opinion in *Commonwealth v. Herr*, Court of Quarter Sessions of Lancaster County, No. 26 (1908).
[14] Judge Landis, in *Commonwealth v. Herr*, Court of Quarter Sessions of Lancaster County, No. 26 (1908).

targeted religion for government regulation and did not create a, in contemporary terms, a *neutral* and *generally applicable* law.[15]

The Pennsylvania Supreme Court, with a bench made up entirely of new justices than in *Hysong* (1894), reviewed the Mennonite case in *Herr* (1910).[16] The court found that the question of the legislator's authority to be *obiter dictum*, defined as "incidental expression," would not be used as precedent. The court found the legislature's reasons for targeting public schoolteachers religious garb to be "supported by sound principle." I interpret this to mean that the court was implicitly admitting that the statute was not a "uniform style of dress." They rather found that the legislature had, in contemporary legal terms, a *rational basis* for the regulation,[17] thus excusing the previous Pennsylvania Supreme Court's orders in *Hysong*.

In *Cooper* (1986), the Oregon Supreme Court made a much more explicit admission:

> Oregon's religious garb statute 'is not a general regulation, neutral toward religion on its face and in its policy, like the unemployment benefits standards in *Smith*.[18] The cases would be comparable if a school regulation prescribed how teachers should dress while on duty without taking account of religious considerations. Then we would have only an issue of statutory authority to make such a regulation,[19] and an individual claim to

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[15] As previously mandated in *Hysong* (1894) "[T]he legislature may, by statute, enact that all teachers shall wear in the schoolroom a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals." *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 57.
[16] *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910); Judge Rice's opinion, *Commonwealth v. Herr*, 39 Pa. Super. 454 (1909).
[17] The *rational basis* standard is two degrees lower than that of the *compelling interest* standard in the *Sherbert* test (see Chapter II – Literature Review for a complete discussion).
[18] *Smith v. Employment Division*, 301 Or 209, 721 P2d 445 (1986), and *Black v. Employment Division*, 301 Or 221, 721 P2d 451 (1986).
[19] The Oregon Supreme Court cites *Hysong v. Gallitzin School District*, 164 Pa 629 (1894).

> exemption on religious grounds.'[20] Oregon's anti-religious-garb statute[21] 'is not neutral toward religion. On the contrary, the religious significance of the teacher's dress is the specific target of this law. The law singles out a teacher's religious dress because it is religious and to the extent that its religious significance is apparent when the wearer is engaged in teaching.'[22]

These decisions in Pennsylvania and Oregon courts illustrate the general understanding that these anti-religious-garb laws targeted religion for government regulation and, therefore, do not meet the *Smith* standard of *general applicability*. Additional evidence for this failed test include the fact that the courts did not question that these laws were born from anti-Catholic bias.

Anti-Religious-Garb Laws Originated from Anti-Catholic Bias

Professor Douglas Laycock explained that anti-religious-garb statutes targeting teachers in public schools in the United States "were enacted in the late nineteenth and early twentieth centuries to prevent Catholic nuns from teaching public schools." In a speech given in 2010, Laycock asserted that "[s]cholars and activists in the field now generally view them as an embarrassing relic of anti-Catholicism."[23]

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[20] The Oregon Supreme Court offered the following citations: "*Goldman v. Weinberger*, 475 U.S., 106 S Ct 1310, 89 L Ed 2d 478 (1986) (military regulation prohibiting headgear indoors applied to Jewish servicemen's yarmulkes); *Menora v. Illinois,* 683 F.2d 1030 (7th Cir. 1982) (rule forbidding [students to wear] headwear while playing basketball applied to yarmulkes)."

[21] Oregon HB 3686 (2010) amended ORS 659A.033 and repealed the two-part anti-religious-garb law: ORS 342.650 and 342.655. N.

[22] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 19 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).

[23] Douglas Laycock, "Conference Introduction: American Religious Liberty, French Laicite, and the Veil." *Journal of Catholic Legal Studies* Vol. 49, Issue 1 (2010): 21–52.

The Oregon Supreme Court agreed with this narrow point. The court stated that the Oregon's anti-religious-garb law of 1923 "dates from the period of anti-Catholic intolerance that also gave us the initiative measure against private schools struck down in *Pierce v. Society of Sisters* (1925)."[24] Contemporary legislators, in repealing Oregon's anti-religious-garb law in 2010, stated that it was "originally enacted for [the] KKK to keep Catholics out of public schools."[25]

Both Oregon and Indiana's anti-religious-garb bills were proposed by leaders who were open members of the Ku Klux Klan (Oregon's 1923 bill became law and Indiana's 1925 bill did not).[26] The anti-Catholic origins of these such bills helped persuade contemporary Oregon legislators to repeal its state statute in 2010. Seven years later, the Nebraska legislature used similar arguments when repealing its anti-religious-garb law in 2017. They recognized that the law, first enacted in 1919, originated from political "pressure from the Ku Klux Klan amid a national wave of anti-Catholic sentiment."[27]

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[24] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 26 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987), citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). For related analysis, see David B. Tyack (1968) "The Perils of Pluralism: The Background of the Pierce Case," *The American Historical Review*, The University of Chicago Press, Vol. 74, No. 1 (Oct., 1968), pp. 74–98; and Paula Abrams (2003) "The Little Red Schoolhouse: Pierce, State Monopoly of Education and the Politics of Intolerance," 20 *Const. Comment.* 61, Spring 2003.

[25] "Three states still prohibit religious clothing for teachers," *Associated Press*, Sept. 5, 2009.

[26] Kaspar K. Kubli, a known Klansman, was "elected speaker of the House by the Republican majority for the 1923 session," writes William G. Robbins in "The Rural-Urban Interface: A Tendency toward Conformity," *The Oregon History Project*, Oregon Historical Society, 2002. See also Eckard Toy, "Ku Klux Klan," *The Oregon Encyclopedia,* Oregon Historical Society, Sept. 15, 2017. In Indianapolis, Indiana, "By a vote of 64 to 27 the Indiana House accepted a minority report," which included an anti-religious-garb law, as reported in "Ku Klux Bill Passes." *Afro-American*, Feb. 14, 1925.

[27] Grant Schulte, "Nebraska targets ban on religious garb worn by teachers," *Associated Press,* Jan. 17, 2017.

The social context of these anti-Catholic sentiments are worth noting. The nation's first census in 1790 reported that seventy-five percent of the population consisted of White, Anglo-Saxon Protestants (WASP).[28] Vincent Parrillo noted, "If we include all the people living in what was the United States in 1790 – African, European, and Native American – we find that about forty percent were not Anglo Americans."[29] However, it was the WASP political majority that made up that seventy-five percent and used their power to pass discriminatory laws against the Irish and Germans, who were primarily responsible for bringing Catholicism to the new republic founded on principles of religious freedom. Political groups like the Supreme Order of the Star Spangled Banner began to organize violent hate campaigns against "alien riffraff"[30] by "raiding Irish and German homes, churches, schools, and businesses." Professor Parrillo noted that "arson, vandalism, beatings and murders occurred throughout the 1850s, with virtually every large northeastern city experiencing major disturbances. Organizing as the American Party, they elected seventy-five congressmen in 1854. By the next year they had elected six governors and many local officials."[31]

In the context of this political mobilization, Catholics began to self-segregate. For instance, the Gallitzin Borough in south-central Pennsylvania named itself after Prince Demetrius Augustine Gallitzin, "a Russian *émigré* who converted to Roman Catholicism

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[28] The remaining distinguishable ethnicities included the Dutch, French, German, Irish, and Swedish, and in smaller numbers, Belgian, Danish, Flemish, Italian, Norwegian, Polish, and Swiss.
[29] Vincen N. Parillo, *Diversity in America*, 3rd Edition, SAGE Publications (2008).
[30] David M. Kennedy, Lizabeth Cohen, Thomas A. Bailey, *The American Pageant, Volume I: A History of the American People: To 1877*, 14th revised ed. (Cengage Learning, 2009), p. 314.
[31] Vincen N. Parillo, *Diversity in America*, 3rd Edition, SAGE Publications (2008).

and became a missionary in the Pennsylvania frontier in the 1790s. One hundred years later, the Roman Catholic community that he founded, and the public school it operated, became the center of a legal controversy"—the nation's first religious garb case.[32] By the 1890s, all but fifty of the four to five hundred voters in the borough identified as Catholics and elected only Catholics to their public school board.[33] Eight teachers were appointed at the time, all of whom were Catholic, and six of whom were habit-wearing nuns in the order of St. Joseph.

In response to this highly unpopular ruling in favor of the nuns, the Pennsylvania General Assembly enacted the 1895 religious garb statute. From the House floor, Mr. Seyfert painted the bill as "the most vicious, atrocious, outrageous, and un-American measure ever offered."[34] Seyfert said the bill was "aimed at the great Roman Catholic Church in this State, and declared that, although he is not a member of the Catholic Church, he is in favor of the fullest liberty. He reasoned, 'Many of the best citizens of the country are Protestants, who wear a peculiar garb. There are only twenty-five Catholic teachers in Lancaster country, and their religion is not indicated by their garb, but there are Mennonites who wear in the schools a garb that distinguishes them from all others, as

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[32] T. Jeremy Gunn, *Neutrality, Expression, and Oppression: A Response to Professor Schachter*. 23 J.L. & EDUC. 391 (1994), p. 394.
[33] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).
[34] "Religious Garb in Public Schools: Discussion in the Pennsylvania House of a Bill to Regulate the Attire of All the Teachers of the State," *The New York Times*, Mar. 7, 1895.

also do the German Baptists. The bill is a blow at these people and [the bill] should be killed.'"[35] Despite Seyfert's impassioned dissent, the bill was adopted 191 to 38.

In 1990, the Third Circuit Court of Appeals, in reviewing this history, accepted "for the sake of argument the district court's finding of fact that 'anti-Catholicism was a significant factor' in the passage of [Pennsylvania's anti-religious garb] statute."[36] The Third Circuit countered that finding with the view that "the statute bans *all* religious attire and is being enforced by the Commonwealth in a non-discriminatory manner with respect to the Muslim teachers [in 1990] as well as Catholics" in 1895 and for Mennonites in 1910. Therefore, the Third Circuit concluded that "it is irrelevant whether a portion of those who voted for the statute in 1895 were motivated by a desire to bar Catholic habit[s] from the classroom." The court used the legislature's reenactment of the garb statute to claim that "the parties in this case tendered no evidence, and the district court made no finding, regarding the circumstances surrounding the reenactment of the statute in 1949" [and 1982].[37]

Although the evidence of hostility toward Catholics in 1895 was not persuasive to the Third Circuit in 1990 given their challenge in wake of the *Smith* decision, the district court's finding that "anti-Catholicism was a significant factor" in the passage of Pennsylvania's statute is very much relevant to this study. This precise legal finding points to the fact that the legislators did target religion with this statute, further

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[35] *Ibid.*
[36] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).
[37] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990) at 36. It was also reenacted in 1982, eight years before this case, but the Third Circuit only cites the 1949 authorization.

demonstrating that the anti-religious-garb law is not and has never attempted to be a neutral and generally applicable regulation. The Third Circuit may have concluded the same, had they applied the *Smith* standard of *general applicability*, a controversial case that was handed down four months before the *Reardon* case was issued.[38]

Anti-Religious-Garb Laws Fail the General Applicability Test

In summary, I find that the anti-garb statutes in Pennsylvania and Nebraska fail the *general applicability* test. The statutes target religious practice for government regulation and therefore are not "facially neutral." It is undisputed that the laws originated from lawmakers' anti-Catholic bias, further demonstrating that the legislatures were acting upon religious animosity.[39] The fact remains: in the 123-year-old history only religious minorities have been impacted, proving that anti-religious-garb statutes are discriminatory in design as well as effect.[40]

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[38] There are obvious reasons for this, which I discuss in Chapter II – Literature Review. The *Smith* decision was a highly disruptive ruling that challenged three decades of consensus about the use of the *Sherbert* standard in Free Exercise Cases.

[39] The question of "religious animosity" in political rhetoric, as evidence of politicians' legal motivations, has recently received newfound attention. On February 15, 2018, the Fourth Circuit Court of Appeals, arguably the most conservative circuit court in the country, ruled that President Trump's third proposed travel ban is unconstitutional and a form of "religious animosity." The Court held that the President's attempts to restrict travel for people from eight countries, six of which are predominantly Muslim, would violate the Establishment Clause of the First Amendment to the U.S. Constitution. The court explained that "to the objective observer [President Trump's] Proclamation continues to exhibit a primarily religious anti-Muslim objective." The court stated that there is "undisputed evidence that the President of the United States has openly and often expressed his desire to ban [Muslims] from entering the United States." The court held that the President's directive "strikes at the basic notion that the government may not act based on religious animosity." *International Refugee Assistant Project v. Trump,* 857 F. 3d 554 (4th Cir. 2018).

[40] This particular argument is analogous to the *disparate treatment* and *disparate impact* standards used in workplace discrimination cases under Title VII of the Civil Rights Act of 1964. Although line of inquiry is outside the scope of my study, it is important to note that Reardon was a Title VII case. But again, in the wake of *Smith*, the Third Circuit accepted the disparate treatment/intent argument, conceding that the Pennsylvania General Assembly acted upon anti-Catholic bias in 1895 but rejected the argument that it had a disparate impact in 1990. A separate analysis will need to be conducted about the relationship of the

Having failed the *general neutrality* test under *Smith,* the statutes in question (Appendix B) a companion test is triggered: the statutes must meet *strict scrutiny*, as applied in *Sherbert* and in the Pennsylvania's Religious Freedom Protection Act. The U.S. Supreme Court set into motion this multi-layered judicial review in *Church of Lukumi Babalu Aye v. City of Hialeah*. Writing for a unanimous court, Justice Kennedy explained that "a law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive *strict scrutiny* only in rare cases."[41]

Having demonstrated that the anti-religious-garb laws in question are not "facially neutral" but rather "intend to interfere with religious exercise,"[42] I now examine the ways in which public schoolteachers' "free exercise of religion has been or is about to be substantially burdened by an exercise of the [school's] governmental authority."[43] Then I will examine whether the states have *compelling interests* to justify such a burden and, if so, whether the statutes are narrowly tailored so as achieve those interests in the *least restrictive means* possible.

Reardon decision (in which the Third Circuit justified the termination of a Muslim to wear a hijab while working in a Philadelphia public school) and *Smith* issued four months earlier (in which the U.S. Supreme Court ruled against the accommodation requests by Native Americans). As previously discussed in Chapter II – Literature Review, after the quake of *Smith*, Congress and the Courts weighed in on reorganizing the religious liberty standards. This process brought new understanding to both Title VII and Free Exercise cases, which I discuss in the "Related Federal Statutory Developments" section of Chapter II – Evolution of Free Exercise Standards.

[41] *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993).

[42] Pennsylvania's Religious Freedom Protection Act of 2002, 71 Pa. Stat. Ann. §2404, section 2(1).

[43] *Ibid.* 71 Pa. Stat. Ann. §2404, section 5(b)(1).

Substantial Burden Test

There are two sides to my application of the substantial burden test. The first is the use of the *Sherbert* test, which explains that the government's "burden" on religion cannot be incidental or fundamental, indirect or direct.[44] I will use this federal standard in my analysis of both Nebraska's and Pennsylvania's anti-religious-garb laws. I will also apply to Pennsylvania's anti-religious-garb statute the four-part substantial burden found in the state's Religious Freedom Protection Act (RFPA). The section explains that a state agency, such as a public school, substantially burdens a person's religion when the state's action:

- Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs;
- Significantly curtails a person's ability to express adherence to the person's religious faith;
- Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion;
- Compels conduct or expression which violates a specific tenet of a person's religious faith.

I will use these federal and state standards to demonstrate seven ways the anti-religious-garb laws substantially burden religion by asking whether the statutes (1) burden licensed teachers through legal penalties; (2) burden school directors for failing to

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[44] *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). For a complete discussion on this topic, see Mark Strasser, *Free Exercise and Substantial Burden under Federal Law*, 94 NEB. L. REV. (2016), pp. 633-684.

comply; (3) burden women disproportionately; (4) burden religious minorities disproportionately; (5) burden specific religions over other religions, due to visibility, size, and frequency of wear; (6) burden religion over non-religion; and (7) burden school districts by contributing to religious segregation.

My analysis demonstrates that there is broad consensus in the case law and literature that the government regulation of teachers' religious garb creates a substantial burden on religion, thus failing the *Sherbert* and RFPA burden standards. This triggers the next prong of *Sherbert* standards, which I will discuss in the following section—the *compelling interest* test is used to determine whether such burdens are justified and, if so, whether they are *narrowly tailored* in the *least restrictive means* possible to achieve those ends. In totality, these questions allow me to examine whether the anti-religious-garb laws will survive the strictest of judicial scrutiny.

Effects of Anti-Religious-Garb Statutes

Burden teachers with legal penalties. Janet Cooper, a Sikh teacher, was terminated for wearing a turban while teaching in an Oregon public school. Cooper moved to New Mexico after the Oregon Supreme Court upheld the decision to revoke her teaching certificate, as per Oregon's anti-religious-garb statute[45] (a law the legislature rescinded in 2010). The burden placed on her was so severe that it caused her to leave the state. I imagine that Cooper relocated to avoid both the civic stigma of having been found guilty of criminal activity and professional stigma for having her teaching license revoked. Having invested years in meeting Oregon's licensing requirements, she faced

[45] ORS 342.650 and 342.655, repealed in 2010.

the burden of relocation to continue her vocation as an educator somewhere that would not deny a fundamental part of her identity. Cooper experienced a financial burden from losing her employment as well as financial and personal hardships due to uprooting her family.

The Pennsylvania and Nebraska statutes are distinct from Oregon's. Rather than revoke a teacher's license, Pennsylvania's anti-religious-garb law has a two-part penalty: (1) upon the first offense, the religious garb-wearing teacher will be "suspended [from] employment in such school for the term of one year, and in case of a second offense by the same teacher (2) it shall be the duty of said school board to permanently disqualify such teacher from teaching in said school."[46] Nebraska, on the other hand, has a seesaw penalty: the said teacher will either (1) be "deemed guilty of a misdemeanor and fined in any sum not exceeding one hundred ($100) dollars and bear 'the cost of prosecution,' *or* (2) shall be committed to the county jail for a period not exceeding thirty days or both."[47] The Nebraska statute, which was repealed in 2017, makes no mention of suspension from employment or having one's teaching license revoked, although it is easy to imagine a teacher never finding work again in a Nebraska public school due to completing jail time for violating state law. Whether the penalty is a fine, suspension, disqualification, revocation of a teaching license, or jail sentence, it is clear that religious garb-wearing teachers are substantially burdened by criminal penalties.

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[46] *Ibid.*, RFPA.
[47] Neb. Revised Statute 79-898.

The Oregon Supreme Court rejected the characterization that revoking a teaching certificate under the anti-religious-garb law was a penalty by stating the following:

> It is not a penalty. It is not a withdrawal of a privilege by reason of hostility to a religious or political belief, as when some states disqualified Communists from driving or practicing pharmacy or from living in public housing.[48] It is a disqualification from teaching in public schools based on one's doing so in a manner incompatible with that function. We doubt that the First Amendment draws a line between a law that disqualifies a public schoolteacher by compelling her discharge and another law that disqualifies her by revoking her certificate to teach in the public schools. [The statute] does not forbid requalifying for a certificate, "if the teacher agrees to comply with the anti-religious-garb law."[49]

The language in Oregon's statute was distinct, whereas, Pennsylvania and Nebraska legislatures explicitly used the term "penalty" in the language of their anti-religious-garb statutes (Appendix B). This makes it clear that failing to abide by the statute is a criminal charge, with distinct penalties that supersede any qualifications for employment. (Making non-religion a requirement for employment is also a concerning argument that I will discuss later). The criminal penalties in Pennsylvania's and Nebraska's statutes demonstrate that the burden placed on religious garb-wearing teachers is substantial.

Burden school directors with fines and professional harm. The penalties for school directors who fail to implement the statute are equally burdensome.[50] In Nebraska,

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[48] The Oregon Supreme Court cites Thomas Irwin Emerson, *Emerson & Haber, Political and Civil Rights in the United States* (New York, NY: Dennis & Company), 547-552 (2nd ed 1958).

[49] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 45 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).

[50] This could quite possibly violate their Due Process rights under the Fourteenth Amendment—a legal cause of action that is outside the scope of my study. The Due Process argument was affirmed in *Commonwealth v. Herr,* Court of Quarter Sessions of Lancaster County, No. 26 (1908), issued by Judge Landis, Aug. 15, 1908. Judge Landis stated that the statute "subjects the individual school director to punishment for the acts of his associates as a corporate entity, when in fact he may not be in any way responsible for them." The Due Process argument was rejected in the appeals in *Commonwealth v. Herr*, 39 Pa. Super. 454 at 10–11 (1909) and *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).

a penalty by a board of directors or school board states that the school director "shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred ($100) dollars and costs of prosecution." The Pennsylvania statute includes the first two penalties mentioned above, but adds:

> In the case of a second conviction or the violation of the provisions of this act the offending director shall (be punished by [an additional] fine not exceeding one hundred dollars and shall be deprived of his or her office as a public-school director. A person thus twice convicted shall not be eligible to appointment or election as a director of any public school in this State within a period of five years from the date of his or her second conviction.

These penalties create substantial burdens on school administrators, which not only threaten their professional reputation and financial wellbeing, but also their livelihood.

Burden women disproportionately. The anti-religious-garb statutes also disproportionately burden women in three ways. First, three-quarters of public schoolteachers in the United States are women.[51] Second, most religious garb-wearing people in the United States are women.[52] And third, as shown in this study, every single case in the 123-year history of public schoolteachers wearing religious garb involved

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[51] "In 2011–12, some 76 percent of public schoolteachers were female," U.S. Department of Education, National Center for Education Statistics. Digest of Education Statistics, 2015 (NCES 2016-014), Introduction and Chapter 2.

[52] As detailed earlier: Protestant Christians (cross necklaces and jewelry), Catholic nuns (habits), Muslims (hijabs), Mennonites (bonnets), African Hebrew Israelites (headdresses), Church of the Brethern (hair covering and long dress), Hindus (*bindi*/red dot), and other jewelry worn by Daoists (yin yang), Buddhists (dharma wheel pendant), Wiccans (pentacles), and so on. In the indigenous American, Jewish, and Sikh traditions, men are the ones who predominately wear religious garb, but women, too, in those religions may wear a similar "dress, mark, emblem or insignia," such as the turban worn by Karta Kaur Khalsa (Janet Cooper) in *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).

women.[53] These three overlapping factors prove that anti-religious-garb laws substantially burden women—a protected class of people.[54]

As explained in the Global Context section of Chapter II, countries with restrictions on religion have greater increases in social hostilities and violence.[55] This disproportionately harms women who are not able to find jobs because of their religious dress, who wear religious symbols on the job, or who request days off for religious observance. These laws have a significant effect on the earning power of families, given that regulations on religious expression, such as the anti-religious-garb statutes in question, disproportionately harm women.

As previously cited, the Pew Research Center found that thirty-nine countries have enacted laws or issued policies "limiting women's ability to wear religious attire" in 2012–2013,[56] which is blatant gender discrimination. In 2012–2013, nearly half of the European Union's countries (twenty-one of forty-five) had at least one report of women being harassed for wearing religious attire.[57]

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[53] See Table 1 to note the gender of plaintiffs. Some cases mention religious-garb-wearing priests coming onto on school grounds as visitors but the fact patterns reveal these priests were not serving as teachers. Also the courts held unlawful under state constitutions the use of public funds to support these private religious schools.

[54] Pub. L. 88-352, SEC. 2000e-2., Sec. 703, Title VII of the Civil Rights Act of 1964.

[55] Pew Research Center, *Religious Hostilities Reach Six-Year High.* (Washington, DC: Pew Research Center, Jan. 2014); Sandra Stencel and Brian J. Grim, "Headscarf Incident in Sudan Highlight a Global Trend," (Pew Research Center, Sept. 18, 2013); and Brian J. Grim, "Religion, Law and Social Conflict in the 21st Century: Findings from Sociological Research," OXFORD JOURNAL OF LAW AND RELIGION (2012), pp. 249–271.

[56] Alan Cooperman, Peter Henne, Dennis R. Quinn, *Restrictions on Women's Religious Attire: More countries restrict women's ability to wear religious symbols or attire than require women to dress a certain way.* (Washington, DC: Pew Research Center, Apr. 5, 2016).

[57] Some hostilities arise from those who view the wearing of Islamic dress as evidence of "oppression of women." For instance, in *Dahlab v. Switzerland*, No. 42393/98 (15 Jan. 2001, the European Court of Human Rights held that a public schoolteacher's hijab was a "powerful external symbol" that was

Turkey, where Muslims make up approximately 98% of the population,[58] "was the first country [in the European Union][59] to ban hijab through a sweeping prohibition applicable to public schools, universities, and in the workplace for official employees."[60] Under its secular constitution, by 2001, over 37,000 girls had been expelled from school, and over 24,000 female teachers had been fired for wearing the hijab, an Islamic headscarf.[61] As discussed in Chapter II – Literature, in 2013, Turkey rescinded its ban on the hijab. These global trends of legal restrictions on religious expression illustrate the drastic impact that bans on religious dress can have on girls and women.

In the United States, Muslim women disproportionately experienced high levels of religious-bias in the workplace. For instance, the federal Equal Employment Opportunity Commission reports that since September 11, 2001, the "the EEOC saw a 250% increase in the number of religion-based discrimination charges involving Muslims."[62] As a result of these trends, Muslims came to expect negative biases against

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irreconcilable with the state's commitment to gender equality. Although there were no complaints from parents or students, the court affirmed the school's ban on wearing Islamic garb.)

[58] Pew Research Center, *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population*. (Washington, DC: Pew Research Center, Oct. 2009), p. 5

[59] Turkey became a member of the Council of Europe in 1949. In 1987, Turkey applied to join the European Union and signed the Customs Union agreement in 1995, resulting in full membership in 1999. Turkey's "full member" status was negotiated in 2005 and then suspended in 2016 as a result of political unrest and over EU members' concerns about the lack of rule of law and human rights abuses.

[60] Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, p. 453.

[61] Faisal Kutty, *Ousted Turkish M.P. Merver Kavakci Calls on Canada to Help Hijab-Wearing Muslim Women*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, Jan./Feb. 2001, pp. 44, 113.

[62] EEOC, *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities*. (Washington, DC: Equal Employment Opportunity Commission, 2018).

them in the workplace.[63] This has affected them not only professionally but psychologically. Social psychologists Sonia Ghumman and Linda Jackson conducted research on 219 American Muslims and found that religious-garb-wearing Muslim women experienced increased levels of "stereotype threat" when seeking employment.[64] Stereotype threat[65] is a person's experience in certain situations that they may display or be viewed as the negative stereotypes associated with their social group—in this case, Muslims as "terrorists" or "extremists." In other words, "Being in a situation where one is underrepresented, and thus in the demographic minority, has been shown to be a factor leading to the experience of stereotype threat—the expectation that one will be judged or perceived on the basis of social identity group membership rather than actual performance and potential."[66] In Ghumman and Jackson find in their study that "Muslim women who wear the headscarf [hijab] had lower expectations of receiving a job offer than Muslim women who did not wear the hijab."[67] In the context of this study, the anti-religious-garb statutes make explicit that they should not expect to receive a job as a public schoolteacher. The psychological experience of *stereotype threat*, which is validated by substantial evidence of widespread religious bias in the workplace, coupled

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[63] Society of Human Resource Management, *Religious Bias in the Workplace: An Employee Perspective.* Alexandria, VA: Society of Human Resource Management.
[64] Sonia Ghumman and Linda Jackson, "Muslim Headscarf and Expectations of Obtaining Employment." *Journal of Organizational Behavior.* 31 (2010): 4–23.
[65] This theory originated from Claud M. Steel and Joshua Aronson, "Stereotype Threat and the Intellectual Test Performance of African-Americans." *Journal of Personality and Social Psychology*, 69 (1995), 797–811; Claud M. Steel, "A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance." *American Psychologist,* 52 (1997), 613–629; Claud M. Steel, Steven J. Spencer, Joshua Aronson, "Contending with group image: The Psychology of Stereotype and Social Identity Treat." In M. P. Zanna, ed., *Advances in Experimental Social Psychology* Vol. 34. San Diego, CA: Academic Press, 379–440.
[66] Caryn J. Block, Sandy M. Kock, Benjamin E. Liberman, Tarani J. Merriweather, and Loriann Roberson, "Contending with Stereotype Threat at Work: A Model of Long-Term Responses." *The Counseling Psychologist* Vol. 39, No. 4 (2001): 570–600.
[67] *Ibid.* Ghumman and Jackson, p. 4.

with statutory evidence of the state targeting religion for regulation, results in a chilling effect for women, in particular, who wear religious garb and seek employment as teachers in public schools. The fact that seventy-six percent of teachers are women, that most garb-wearing people in the United States are women, and that every single case demonstrated in this study involved women demonstrate that the anti-religious-garb statutes create substantial burdens on women.

Burden religious minorities disproportionately. In the United States, the anti-religious-garb laws have also disproportionately burdened religious minorities. In all but one of the cases presented, all the plaintiffs who challenged the anti-religious garb regulations were religious minorities—Catholics, Mennonites, Muslims, Sikhs, and African Hebrew Israelites. In the related military and police cases, religious garb regulations were challenged by Jews, Muslims, and Sikhs. In related student cases, the anti-religious garb policies were challenged by Jews, Muslims, Sikhs, and Native Americans.

This pattern reflects the legal trends in invidious discrimination in the U.S. judicial system. Since the religion clauses of the First Amendment to the U.S. Constitution were incorporated in the states in the 1940s, religious minorities have had high rates of involvement in the courts yet reaped a very small number of victories.[68] In a landmark study, John Wybraniec and Roger Finke reveal that "Protestants seldom

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[68] John Wybraniec and Roger Finke, "Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule," in James T. Richardson, ed. *Regulating Religion: Case Studies from Around the Globe.* (New York: Kluwer Academic/ Plenum Publishers, 2004), pp. 535–553.

appeared in the courts and their rate of favorable rulings towered over [that of] all other religious groups."[69] They found that mainline Protestants were "involved in approximately 4% of cases" and received favorable decisions 70% of the time—specifically 65% for Free Exercise claims. Conversely, cases brought forth by Native Americans, Jews, and Catholics altogether accounted for 20% of Free Exercise cases, less of half of which were ruled in their favor (ranging from 40–47%). Wybraniec & Finke found that the trends continue to decline: Muslims make up less than 1% of the American population and filed 7% of the Free Exercise cases, of which only one third (33%) of these cases received a favorable court ruling. (Sikhs were not detailed in this study, although I wonder, given my exposure to their cases, if their returns would be similar to that of Muslims.)

In fact, to date, no Native American, Jew, or Sikh has won a Free Exercise claim before the U.S. Supreme Court. Muslims won their first cases in 2015, both of which were on statutory claims.[70] The above data reveals that religious minorities do win some of their cases in lower cases, but it is important to document that the lack of approval from the highest court in the nation may be one reason why religious minorities have such a low return on their Free Exercise claims.

Specific to this study, the anti-religious-garb statutes disproportionately burden religious minorities, as demonstrated by the identities of those who brought forth their petitions.

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[69] *Ibid.*

[70] *Holt v. Hobbs*, 574 U.S. ___ (2015), filed under the Religious Land Use and Institutionalized Persons Act of 2000; *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 Sup. Ct. 2028 (2015), filed under the Title VII of the Civil Rights Act of 1964.

Burden particular religions over other religions. The statutes in question also substantially burden particular religions over others, regardless of their majority/minority status. To illustrate this point, I will examine three judicial tests that rise from the case law on religious garb: (1) the *visibility standard*, (2) *size standard*, (3) and *frequency standard*. In regards to size, it is important to note that Nebraska's legal definition of religious garb[71] is nearly an exact copy of Pennsylvania's,[72] except for the deletion of the terms "mark, emblem or insignia." This suggests that Nebraska was concerned about larger expressions of garb when emphasized the ban on religious "dress." This could indicate a legislative intent to burden particular religions over others, even more so than I document here through the lens of the *visibility*, *size*, and *frequency* standards.

In his dissent in *Goldman v. Weinberger*—the case involving a military psychologist who was not permitted to wear his yarmulke (skullcap) while on duty—Justice Brennan articulated the *visibility standard*:

> I am…perplexed by the related notion that for purposes of constitutional analysis religious faiths may be divided into two categories—those with visible dress and grooming requirements and those without. This dual category approach seems to incorporate an assumption that fairness, the First Amendment, and, perhaps, equal protection, require all faiths belonging to the same category to be treated alike, but permit a faith in one category to be treated differently from a faith belonging to the other category. The practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over

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[71] "Any *dress, or garb,* [emphasis added] indicating the fact that such teacher is an adherent or member of any religious order, sect or denomination," Neb. Code § 79-898 (2017). This statute was first enacted in 1919 (c. 248, § 1, p. 1018) and reaffirmed in 1922, 1929, 1943, 1949, 1994, and 1996 and repealed in 2017.
[72] "Any *dress, mark, emblem or insignia* [emphasis added] indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination." Pennsylvania Statute 24, Religious Garb § 11-1112 (1895–2018). This anti-religious-garb statute was the first in the United States, enacted in 1895. It was reaffirmed in 1949 and 1982 and remains active today.

> distinctive minority faiths. This dual category analysis is fundamentally flawed and leads to a result that the First Amendment was intended to prevent. Under the Constitution there is only *one* relevant category—*all* faiths. Burdens placed on the free exercise rights of members of one faith must be justified independently of burdens placed on the rights of members of another religion. It is not enough to say that Jews cannot wear yarmulkes simply because Rastafarians might not be able to wear dreadlocks.[73]

In his own dissent in *Goldman,* Justice Blackmun applies the *visibility standard*: "In general, I see no constitutional difficulty in distinguishing between religious practices based on how difficult it would be to accommodate them…" He makes clear that "favoritism based on how unobtrusive a practice appears to the majority could create serious problems of equal protection and religious establishment, problems the Air Force clearly has a strong interest in avoiding by drawing an objective line at *visibility* [my emphasis]. The problem with this argument, it seems to me, is not doctrinal but empirical."

Similar to the empirical data presented in the Wybraniec & Finke report, the identities of the plaintiffs in the religious garb cases presented in this study demonstrate that government regulations of religious garb, whether in the military or public school, substantially burden distinctive religions because of their uniqueness. The judicial measurement should not be, as Justice Brennan advanced, whether the religious garb is more or less visible. Instead, the court, should take "'relevant differences' into account."[74] The "relevant differences" standard was advanced by Chief Justice Roberts in

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[73] Justice Brennan's dissent in *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[74] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). In reflecting upon the decision to uphold the Religious Land Use and Institutionalized Persons Act, Chief Justice Roberts

a unanimous decision, which held that distinct identities, such as race and religion, may need to be considered to reach a balanced ruling. In my own words, colorblind policies can be just as blind to racial prejudices as no-religious-garb laws can be blind to religious inequalities.

The legal landscape of regulating religious garb in the United States tells a distinctive and important story. Collectively, the cases reveal that the legislative and judicial branches of state governments, in effect, penalized the suspect minority of the time by applying equally problematic standards such as the size and frequency tests.

To illustrate, a concurring opinion is worth briefly noting in the Pennsylvania case regarding Mrs. Reardon, who was fired for wearing an Islamic headscarf while teaching in a Philadelphia public school. Judge Ackerman rejected the Third Circuit's focus on Title VII; instead, he argued that the court should have used the *Lemon* test, an Establishment Clause standard, to demonstrate that accommodating large religious garb would become a form of state advancement and endorsement of religion *because of the size* of the Islamic headscarf.[75] (The Establishment Clause standard is outside the scope

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connected the themes of religious diversity with racial diversity, saying, "The Court has noted that '[c]ontext matters' in applying the compelling interest test (*Grutter v. Bollinger* [539 U.S. 306 (2003) at 327]) and has emphasized that the fundamental purpose of *strict scrutiny* is to take 'relevant differences' into account." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) pp. 9-10.

[75] "An argument could be made that [Oregon's anti-religious garb] statute might be read to encompass religious symbols such as mezuzahs, crucifixes, or mini-Buddhas, etc., worn, for instance, on necklaces. However, a case involving small-sized religious articles is not before this panel. Were such case to come before this court, then, the court would consider that case's specifics in view of *Lemon* and come to a determination. The difference from the instant case to the next case may simply be one of degree and effect. The United States Supreme Court, through its crafting of the flexible test in *Lemon* has indicated that it, and the inferior courts, will deal with these factors, making distinctions where appropriate. The articulation of the *Lemon* test itself demonstrates the Court's confidence in the judiciary's ability to make

of the study, but it is important to document how courts from coast to coast fixate on the size of religious garb as a unique judicial standard.)

The Oregon Supreme Court, for instance, made a similar claim when saying that "'religious dress' must be judged from the perspective both of the wearer and of the observer…" The court agreed that it was permissible for a public schoolteacher to wear "common decorations" that a teacher "might draw from a religious heritage, such as a necklace with a small cross or Star of David."[76] While in the same breath of giving differential treatment to Jews and Christians, the court justified terminating and revoking the teaching license of a Sikh teacher because turbans are "uncommon" and larger than necklaces. Justice Blackmun's dissent in *Goldman* serves as an adequate rebuttal:

> To allow noncombat personnel to wear yarmulkes but not turbans or dreadlocks because the latter seem more obtrusive—or, as Justice Brennan suggests, less "polished" and "professional,"—would be to discriminate in favor of this country's more established, mainstream religions, the practices of which are more familiar to the average observer. Not only would conventional faiths receive special treatment under such an approach; they would receive special treatment precisely *because* they are conventional.[77]

The application of visibility tests in religious garb cases are, by their nature, discriminatory toward particular religious groups. They are infused with assumptions about what is "common" or "conventional," arguments that, at best, reek of implicit bias and, at worst, reinforce white supremacy and Christian nationalism.

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distinctions. Hence cases involving smaller-sized religious symbols do not affect my analysis here. Their propriety awaits another day."

[76] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 41 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).

[77] Justice Blackmun's dissent in *Goldman v. Weinberger,* 475 U.S. 503 (1986).

In Mississippi, for example, Deborah McGlothin was discharged for insubordination for wearing an Africanist headdress during Black History month, during school skits relating to African culture. McGlothin said, "I'd dress on those particular days as just a program director of the particular skits. And also, I displayed the African folk lore and a number of things of that nature…" In protest of this expression, the principal issued a memorandum concerning her "inappropriate dress,"[78] claiming, "All children need positive role models, but especially do elementary-aged children because of their very impressionable young minds. I am concerned that your appearance is giving them a distorted view of what is appropriate."[79] In this case, the argument was not about the size of her dress but more about the social etiquette of Southern culture, which the Mississippi Supreme Court found to be unconvincing and held that McGlothin had Free Exercise protections to wear religious garb while teaching.[80] One of the distinct facts of the McGlothin case involved the frequency with which she wore her religious garb. Although it was only worn during the school's celebration of Black History month, the principal found that to be enough to justify her termination.

In contrast, the Oregon Supreme Court agreed it would permit, similar to permitting small jewelry, the wearing of religious garb, where "a teacher makes an occasional appearance in religious dress, for instance on her way to or from a seasonal

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[78] For a similar line of argument see *EEOC v. Catastrophe Mgmt. Sols.,* 852 F. 3d 1018 (11th Cir. 2016) in which the Eleventh Circuit ruled that dreadlocks were not protected by Title VII protections on race because "dreadlocks were not an immutable characteristic of black persons."
[79] *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990), cert. denied, 498 U.S. 879.
[80] As previously noted, three months later, the U.S. Supreme Court issued *Smith,* that ruled against Native Americans who used peyote for sacramental purposes.

ceremony." The court held that "Only wearing religious dress as a regular or frequently repeated practice while teaching is grounds for disqualification."[81] Similarly, Nebraska's attorney general permitted teachers-in-training to wear religious garb because they are in front of students for only "short periods of time."[82]

In Pennsylvania, however, Alima Reardon was a substitute teacher at the time her employment was terminated. The trial court found:

> Towards the end of 1984, on three separate occasions Reardon reported to various schools for duty as a substitute teacher and was informed by the principals of those schools that, pursuant to state law, she could not teach in her religious clothing.[83]

These inconsistencies reveal the problematic nature of the *frequency* standard. The question of whether a *substitute* teacher can wear an Islamic headscarf while teaching three times in a public school, as compared to children seeing a *student teacher* wear an Islamic headscarf most days for an entire semester, is purely subjective and arbitrary. Equally troubling is the idea that religious garb is merely "grotesque vagaries in

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[81] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 43 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987). The Oregon Supreme Court equated a teachers' expression with government establishment of religion when using this Establishment Clause analogy, "It is the same distinction as that between an occasional religious meeting, parade or brief display in a public park or building and the permanent erection of a religious symbol, as in *Lowe v. City of Eugene* [463 P.2d 360 (1969)]."

[82] Report of the Nebraska attorney general, "Schools-Teachers-Wearing of Religious Garb," as addressed to Hon. John M. Matzen, state superintendent, Aug. 24, 1926. "I am of the opinion that the word 'teacher' as used in the [anti-religious-garb statute] applies only to those who hold certificates to teach in Nebraska and are employed to teach in some of the publics schools of the state. I do not think it applies to those who are merely being trained to teach in some one of the several state normal schools, and as an incident to said training, but without compensation are giving instruction (under the direct supervision of a member of the faculty of a state normal school) for short periods of time to pupils in a public school of the state." Signed, GWA.

[83] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).

costume"[84] that can be taken on and off for the occasional "seasonal ceremony." These comments reveal more about the observer than what the court is called to observe.

For these reasons, the *visibility*, *size*, and *frequency* standards are highly problematic because the very nature of the question determines the result. The assumptions that lay behind these standards may be a symptom of a limitation in the legal system and in society at large: *religious illiteracy*. As I discuss in more detail in the final chapter, if the courts do not have measurable knowledge[85] about what legally constitutes religion[86] and how private acts of devotion manifest in public, then our public institutions will continue to perpetuate stereotypes about religious minorities, in particular, or misperceptions about religion in general. The *visibility*, *size*, and *frequency* standards are emblematic of these misperceptions, thus privileging some religious expressions over another.

This leads me to demonstrate how the anti-religious-garb laws in Pennsylvania and Nebraska preference non-religion over religion.

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[84] In a broader case about the use of public funding for private religious education, the Supreme Court of Iowa discussed the narrow question of teachers' religious garb. In a 5–2 decision, the court found persuasive the rulings of *O'Connor,* stating "We united with the New York court in the view that the [dissenting] opinion by [Justice] Williams…" in *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894). See *Knowlton v. Baumhover,* 182 Iowa 691 (Iowa Sup. Ct. 1918).

[85] For a discussion of the problems of religious illiteracy and the precise measurements of religious literacy see Diane L. Moore, Chair, et. al., "Guidelines for Teaching About Religion in K-12 Public Schools in the United States," American Academy of Religion, Religion in the Schools Task Force, Apr. 2010. Diane L. Moore, *Overcoming Religious Illiteracy: A Cultural Studies Approach to the Study of Religion*, (New York: Palgrave Macmillan, 2007); Stephen Prothero, *Religious Literacy: What Every American Needs to Know—and Doesn't*, (New York: HarperOne, 2007); Benjamin P. Marcus, "Religious Literacy in American Education," in Michael D. Waggoner and Nathan C. Walker, *The Oxford Handbook of Religion and American Education* (New York, NY: Oxford University Press, forthcoming 2018).

[86] Peñalver, Eduardo, *The Concept of Religion*, YALE L J, Vol. 791, (1997) p. 107. Peñalver builds upon the writings of Kent Greenawalt in *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV 753 (1984) and *The Concept of Religion in State Constitutions*, 8 Campbell L. Rev. 437. (1985–1986).

Burden religion over non-religion. It is widely understood that a public school cannot make either religion or non-religion a prerequisite for employment. Such attempts would violate the no-religious test principle found in the Pennsylvania,[87] Nebraska, and United States constitutions.[88] The question in this study is narrower: whether the teacher, in the line of his or her duties, can wear any "dress, mark, emblem, or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."

The fact that the religion is the subject of the regulation—specifically, garb that denotes a teacher's affiliation with any "order, sect or denomination"—makes the law particularly burdensome on religion. Even a generally applicable dress code that requires all teachers to wear a prescribed uniform would attempt to treat religion and non-religion equally but may have an effect that is, to some lesser degree, burdensome to religion.

To illustrate this dilemma, I turn to the colorful language in the 1908 opinion of the district court judge. Although his opinion was overturned,[89] it is worth noting the rationales he provided for ruled in favor of the bonnet-wearing Mennonite teacher:

> …as the [Pennsylvania anti-religious garb] statute stands, a teacher may cover himself with partisan political badges, or herself with the white ribbons of crusading Prohibitionists, or wear the red ribbon of personal

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[87] The *Hysong* court, in reinstating habit-wearing nuns to teach in the public classroom in 1894 held, "We cannot now, even if we wanted to, in view of our law, both fundamentally and statutory, go back a century or two to a darker age, and establish a religious test as a qualification for office." *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 52.

[88] The precise question of religious tests for office fall outside the scope of this study; however, it is important to note that five of the eleven major religious garb cases addressed this precise question (Table 1. Enumerating Causes of Action).

[89] Judge Landis's decision in *Commonwealth v. Herr,* Court of Quarter Sessions of Lancaster County, No. 26 (1908), Aug. 15, 1908. Overturned in *Commonwealth v. Herr*, 39 Pa. Super. 454 at 10–11 (1909) and *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).

> liberty; he or she may dress as fop or flirt, or may masquerade as clown or coquette, may display badges of Free Masonry, Odd Fellowship or Knights of Pythias, or may "sport" the Elk's tooth or the Eagle's talons, in the class room, and this law will not touch them; but, if they wear the plain iron cross of the Episcopal Order of St. Andrew, the modest button of the Society of Philip and Andrew, or of the Epworth League, or of the Society of Christian Endeavor, they are disqualified as school teachers. If they don the plain skirt and the straight bonnet of the Mennonite, or wear the straight coat and shaven upper lip of the Dunkard or the buttonless garb of the Amish, they are to be banished into outer professional darkness, stripped of their office and their rights.[90]

Although the Pennsylvania Supreme Court was not persuaded to strike down the legislature's popular anti-religious-garb statute, Justice Landis's opinion is helpful in answering the narrower question of whether the statute burdens religion over non-religion. The answer, as Justice Landis illustrates, is simple. By targeting religion, the state burdens religion. By failing to create a *neutral and generally applicable* dress code that is universally applied, the state privileges non-religion over religion. Of course, the state may have a compelling interest for justifying such a burden, the subject of a later inquiry, but, nonetheless, the burden on religion over non-religion is substantial.

Burden communities with religious segregation. The church-state battles of the twentieth century over the parents' right to choose a child's education,[91] the public school

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[90] *Ibid.* Judge Landis in *Herr* (1908).
[91] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); see also compulsory education case, *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

curriculum,[92] the flag salute,[93] school-sponsored prayers,[94] transportation,[95] public aid for private religious schools,[96] and religious groups' access to public school facilities[97] have one thing in common: the battles over religion and American public education have contributed to the rise of private religious schools in the United States.[98] When religious people did not feel welcomed or wanted in public schools, they created their own private alternatives.[99]

James W. Fraser, in *Between Church and State* (2016), [100] argues that the "failures of efforts to introduce more equal time for religiously inspired alternatives to the teaching of evolution" resulted in "a withdrawal on the part of some conservative religious people

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[92] Teaching creationism, *Edwards v. Aguillard*, 482 U.S. 578 (1987); teaching evolution, *Epperson v. Arkansas,* 393 U.S. 97 (1968); English-only instruction, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Scopes v. State*, 289 S.W. 363 (Tenn. Sup. Ct. 1927).
[93] *West Virginia v. Barnette,* 319 U.S. 624 (1943); *Minersville v. Gobitis* [sic, Gobitas], 310 U.S. 586 (1940).
[94] *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992). *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale,* 370 U.S. 421 (1962).
[95] *Everson v. Board of Education,* 330 U.S. 1 (1947); see also section on field trip services in *Wolman v. Walter*, 433 U.S. 229 (1977)
[96] Examples include vouchers, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); standing to challenge school vouchers, *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011); remedial services, *Agostini v. Felton*, 521 U.S. 203 (1997); shared time programs, *Grand Rapids v. Ball*, 473 U.S. 373 (1985); tax credits for school-related expense, *Mueller v. Allen*, 463 U.S. 388 (1983); textbooks, *Lemon v. Kurtzman,* 403 U.S. 602 (1971); textbooks, *Board of Education v. Allen,* 392 U.S. 236 (1968); textbooks, *Cochran v. Louisiana,* 281 U.S. 370 (1930).
[97] *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union*, 508 U.S. 384 (1993); *Westside Community v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).
[98] Charles J. Russo, Kate E. Soules, Adina Newman, Susan Douglas, "Private Religious Schools," in Michael D. Waggoner and Nathan C. Walker, eds., *The Oxford Handbook on Religion and American Education,* (New York: Oxford University Press, 2018); Milton Gaither, "Religion and Homeschooling," in ibid., Waggoner and Walker.
[99] *Ibid.*, Russo, et. al. and Gaither.
[100] James W. Fraser, *Between Church and State: Religion and Public Education in a Multicultural America*, 2nd ed. (Baltimore: John Hopkins University Press, 2016).

from the public school."[101] This contributed, Fraser argues, to a rise of faith-based education in the forms of private schools and homeschooling. He tracks these developments into the late twentieth century, when many leaders of white Evangelical schools rejected "a new mixture of the forms of private schools and homeschooling. He tracks these developments into the late twentieth century, when many leaders of white Evangelical schools rejected "a new mixture of issues—changing sexual mores, school integration, and what seemed like antireligious [public] school policies."[102] These culture wars—embroiled in issues of religion, race, and sexuality—resulted in the conservative religious misperception that "God was kicked out of public schools"[103] and the secular misperception that the academic study of religion is not welcome American education.

These trends contributed to religious segregation in American education. For example, as previously explained, twenty-two states had anti-religious-garb laws by the end of World War II. This national trend sent a strong legal message to Catholic nuns, in particular, that they were not allowed in the *de facto* Protestant public-school system. One of the survival strategies that Catholics adopted was to create their own private schools. As a result, 3.6 million students are currently enrolled in Catholic-affiliated schools, which is 41% of all private school students.[104]

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[101] *Ibid.*, Fraser, p. 212.
[102] *Ibid.*, Fraser, p. 173.
[103] *Ibid.*, Fraser, p. 177.
[104] Characteristics of Private Schools in the United States: Results From the 2013-14 Private School Universe Survey, NCES 2016-243 (Washington, DC: U.S. Department of Education, 2016).

Today, Muslim families are experiencing disproportionally high hostilities in public schools. In 2017, the Institute for Social Policy and Understanding reported the following:

- More than two in five (42%) Muslims with children in K-12 school report bullying of their children because of their faith, compared with 23% of Jews, 20% of Protestants, and 6% of Catholics.

- A teacher or other school official is reported to have been [the aggressor] in one in four bullying incidents involving Muslims.[105]

To illustrate the rise of "teacher-bullies," *Newsweek* reported that in May 2017, "a Bronx substitute teacher in New York City ripped off a second-grade student's hijab because the student was allegedly misbehaving. The teacher was later charged with a hate crime."[106] In detailing the national trend of teachers bullying Muslims students, *Newsweek* reported that a

> Virginia school district has placed a teacher on leave for removing a student's hijab from her head. The student took to Twitter after the incident Wednesday saying that her hijab was "ripped off her head" by a teacher she appreciated and valued… An account that appears to belong to the student said she was talking with her friend when the teacher pulled off her hijab from behind. To her shock, he [the teacher] then said: "Oh, your hair is so pretty," she said on Twitter.[107]

In another incident, a public schoolteacher in Nashville, Tennessee filmed and later posted on social media a Muslim girl who "is seen trying to cover up her hair as

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[105] Dalia Mogahed and Youssef Chouhoud, *American Muslim Poll 2017: Muslims at the Crossroads,* Institute for Social Policy and Understanding, (Washington, DC: ISPU, 2017).
[106] Beatrice Dupuy. "Muslim Students are Getting Their Hijabs Pulled Off by Teachers in Classrooms Across the Nation." *Newsweek*, November 16, 2017.
[107] *Ibid.*, *Newsweek* (2017)

someone tries to pull off her hijab and play with her hair. A Snapchat video of the incident showed students touching the student's hair with the caption 'pretty hair.'" Newsweek reports that "[t]he teacher was later suspended without pay."[108]

These social hostilities[109] in public classrooms—whether the aggressors are students or teachers—have politically contributed to the founding of nearly 300 new Islamic schools in the United States, which currently educate 40,000 students.[110] Muslim teachers and families who have faced discrimination for wearing religious garb in public schools or for affiliating with Islam have had to self-segregate as a survival strategy—the precise tactic used by Catholics when they were considered the suspect minority of the day. Similar stories can be shared about other religious minorities such as Jews,[111] Mormons,[112] Native Americans,[113] and so on.

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[108] *Ibid.*, *Newsweek* (2017)

[109] The U.S. Department of Education's *Stop Bullying* curriculum explicitly classifies religious minorities who wear garb as targets for bullying. "For example, Muslim girls who wear hijabs (head scarves), Sikh boys who wear patka or dastaar (turbans), and Jewish boys who wear yarmulkes report being targeted because of these visible symbols of their religions. These items are sometimes used as tools to bully Muslim, Sikh, and Jewish youth when they are forcefully removed by others. Several reports also indicate a rise in anti-Muslim and anti-Sikh bullying over the past decade that may have roots in a perceived association of their religious heritage and terrorism. When bullying based on religion is severe, pervasive, or persistent, the Department of Justice's Civil Rights Division may be able to intervene under Title IV of the Civil Rights Act. Often religious harassment is not based on the religion itself but on shared ethnic characteristics. When harassment is based on shared ethnic characteristics, the Department of Education's Office for Civil Rights may be able to intervene under Title VI of the Civil Rights Act." Accessed at www.stopbullying.gov

[110] Characteristics of Private Schools in the United States: Results From the 2013-14 Private School Universe Survey, NCES 2016-243 (Washington, DC: U.S. Department of Education, 2016).

[111] *Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994).

[112] Western expansion and self-segregation in Utah was, in part, motivated by the hostilities Mormons faced in Missouri. For example, Governor Lilburn Boggs issued an executive order stating, "The Mormons must be treated as enemies, and must be exterminated or driven from the state if necessary for the public peace—their outrages are beyond all description," Mo. Exec. Order No. 44, Oct. 27, 1838.

[113] The struggle between the strategies of self-segregation versus coerced integration is detailed in David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875–1928.* (Laurence, KS: U. Press of Kansas, 1995).

A compelling example of this point derives from the nation's first anti-religious-garb laws that were in response to a court ruling in favor of Catholic nuns who lived and taught in a minority-majority community. *Hysong v. Gallitzin*[114] arose from the Protestant majority in the state of Pennsylvania who disapproved of Gallitzin Borough, a Catholic-dominated community located in a rural area of the state between Pittsburg and Harrisburg. By the 1890s, all but 50 of the 400–500 voters in the borough identified as Catholics and elected only Catholics to their public school board. Eight teachers were appointed at the time, all of whom were Catholic and six of whom were habit-wearing nuns in the order of St. Joseph. Put simply, the teachers of the public school reflected the identities of those in the public at the time. The General Assembly of Pennsylvania disapproved of this practice and, in 1895, overwhelmingly enacted what is currently the nation's only remaining anti-religious-garb statute.

Twelve decades later, the Gallitzin area is now home to fourteen private Catholic schools that reside within twenty miles of one another.[115] I do not have empirical evidence that the Pennsylvania's anti-religious-garb statute directly created this effect, but it may be one of many factors. It is understandable that religious minorities who feel under attack may engage in institutional building so as to protect their way of life. These culture wars over public schools perpetuate the trend of creating religiously segregated communities. To be clear, there will always be a demand for faith-based schools, whether

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[114] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).

[115] All Saints Catholic School, Altoona Central Catholic School, Bishop Carrol High School, Bishop Gilfoyle High School, Cathedral Elementary School, Great Commission Schools, Hollidaysburg Catholic School, Holy Name Elementary School, Mt. Carmel Elementary School, Sacred Heart School, St. Demetrius School, St. Patrick's School, and St. Rose of Lima School.

there is evidence of invidious discrimination or not, but what this study reveals is that education laws that target religion for government regulation place a substantial, albeit indirect, burden on local communities because their schools become more and more religiously segregated.

The larger question that I am asking with this line of thinking is simply, "What happens when the public school fails to serve the public?" I will reflect more on this in my closing statements in Chapter V – Conclusion.

In the meantime, I will now summarize how the seven burdens that I have outlined here show that the anti-religious-garb laws fail both the substantial burden test under *Sherbert* and the substantial burden test under Pennsylvania's Religious Freedom Protection Act.

Statutes Fail the Substantial Burden Test under Sherbert

The burden test under the *Sherbert* standard is broad, in that it considers the weight of the government regulatory power to be indirect or incidental as well as direct or fundamental.[116] In other words, the court seeks to spend little time determining the degree of harm and more time scrutinizing whether the state has compelling interests to justify such burdens and whether those justifications are narrowly tailored to achieve the least restrictive means possible.

That said, the seven examples of burden that I examined demonstrate, without a doubt, that the anti-religious-garb laws in Pennsylvania and Nebraska burden religion

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[116] *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). For a complete discussion on this topic, see Mark Strasser, Free Exercise and Substantial Burden under Federal Law, 94 NEB. L. REV. 633 (2015).

substantially. The criminal, financial, and professional penalties are direct burdens on a teacher who wears religious garb while teaching in a public school. Nebraska's statute is particularly harsh, threatening teachers with up to thirty days in jail. The Pennsylvania law adds additional burdens on school directors who fail to implement the statute, including banning them from serving as an administrator or elected school board member in any district in the state, for up to five years. These directed penalties serve as the first sets of evidence of substantial burden.

The next cluster derives from a person's identity. There are three ways that the anti-religious-garb statutes disproportionately burden women: seventy-six percent of the nation's public schoolteachers are women, women are more likely than men to wear religious garb in the United States, every single case in the 123-year history of public schoolteachers wearing religious garb involved women (Table 1). These interlocking demographics demonstrate that these statutes indirectly burden women.

These laws also indirectly burden another identity group: religious minorities. The wearing of religious garb in many of these communities can be fundamental to their identity. Throughout the country, scores of Catholic nuns were targeted by these laws for wearing habits while teaching in public schools. Their habits were fundamental identity markers representing their ordination vows and commitment to chastity. What was originally designed to target Catholics in the nineteenth and early twentieth centuries have been used in the late twentieth century to justify removing religious garb-wearing Muslim and Sikh teachers from public schools.

Nebraska's statute, which used Pennsylvania's law as a blueprint, removed all mentions of "mark, emblem, or insignia," which may imply smaller, more discrete

expressions of one's adherence to any "religious order, sect or denomination." Instead, Nebraska used only the words "dress or garb," suggesting, possibly, that they meant to focus on larger, more visible acts. Although this interpretation is speculative, there is plenty of evidence of courts fixating on the *visibility*, *size*, and *frequency* of wear, which immediately targets particular religions over others. These inquiries are fraught with bias and perpetuate stereotypes.

The anti-religious-garb statutes not only burden religious minorities and particular religions over others, they also give preferential treatment to non-religion over religion. By failing to enact a universal dress code for all teachers and, instead, targeting religion for regulation, the state directly and substantially burdens religion over non-religion.

In a less direct fashion, the statutes place a burden on the community to recover from the effects of a religiously segregated school district. As illustrated in Gallitzin Borough, although eighty- to ninety-percent of the rural community identified as Catholic, the state legislature removed all religious garb-wearing Catholics from teaching in its public schools. This reveals the larger problem of leaders in public schools not reflecting the communities they serve—a burden the whole community bears.

For these seven reasons, the anti-garb laws in Pennsylvania and Nebraska fail the substantial burden test under *Sherbert.*

Statutes Fail the Substantial Burden Test under RFPA

Only one of the four types of substantial burden in the Religious Freedom Protection Act of 2002 needs to be demonstrated by a plaintiff in order to trigger a

judicial review under *strict scrutiny*.[117] Pennsylvania's current anti-religious-garb law violates *all four*.

The statute (1) "significantly constrains or inhibits conduct or expression mandated by a [teacher's] sincerely held religious beliefs." For example, the Mennonite's plain dress and bonnets are virtuous expressions of devotion; Muslims' head coverings represent modesty and discretion; Sikh turbans are expressions of equality and observance; the wearing of the Jewish yarmulke is an act of piety and reverence. These are just a few of the plethora of forms of "conduct or expression" of "sincerely held religious beliefs" that the anti-religious-garb law seeks to stifle. Furthermore, this is merely one side of the "conduct" discussion.

The other reveals that that the state seeks to (2) "compel conduct or expression which violates a specific tenet[118] of a [teacher's] religious faith." Requiring any of the teachers described here to remove their religious garb while teaching is an act of

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[117] *Combs v. Dubois*, 540 F.3d 231 (3rd Cir. 2008); *Combs v. Dubois*, 468 F.Supp.2d 738 (W.D. Pa. 2006).
[118] It is important to note that, in the context of the *Sherbert* standard, a burden need not rest on scriptural or doctrinal authority. Take the Mississippi case for example: "We are told that there is no specific tenet of the African Hebrew Israelites mandating that women wear headdress. First Amendment protections, however, do not turn on whether the claimant's conduct or form of expression has been mandated by doctrine or teaching of a particular religious organization or denomination, nor is it necessarily of concern that members of the particular faith may disagree with claimant's interpretation of church dogma. *Thomas v. Review Board of Indiana*, 450 U.S. 707 (1981). What and all that may be required are that the belief have a religious grounding and that the individual express 'sincerely held religious beliefs.' *Frazee*, 489 U.S. at 109 Sup. Ct. at 1517, 103 L.Ed.2d at 920. *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990) citing, "*State v. Hershberger,* 444 N.W.2d 282, 286-87 (Minn.1989) (Statute requiring display of slow-moving vehicle inapplicable to Amish defendants on grounds of violation of free exercise "although not all adherents regarded the display as violative of the Amish precepts.); *Dupont v. Employment Division,* 80 Or. App. 776 (Or. Ct. App. 1986) (Unemployment benefits could not be denied to woman discharged after missing work to attend religious convention important to her personal well-being on basis it was a sincere religiously motivated action.); *Key State Bank v. Adams,* 138 Mich.App. 607, 360 N.W.2d 909 (1984) (Although bank had legitimate business reason for employees to work on Saturday, state could not condition payment of unemployment benefits.)."

compulsion. For a Muslim or Sikh person, for example, for the state to force his or her hair to be shown to people outside his or her family can be as vulnerable as state-compelled public nudity. In these ways, the anti-religious-garb statutes (3) "denies a [teacher] a reasonable opportunity to engage in activities which are fundamental to the [teacher's] religion."

In violation of RFPA, the statute directly (4) "curtails a person's ability to express adherence[119] to the [teacher's] religious faith." The targeted activity is not simply religious garb, but garb that, by its nature, "indicates the fact that such teacher is an adherent or member of any religious order, sect, or denomination." This makes it even more explicit that the lawmakers, in wanting to prevent public school students from being exposed to their teachers' religious identities, targeted the teachers' religious garb.

I will scrutinize the reasons why the legislatures in Pennsylvania and Nebraska enacted these statutes in the next section about *compelling state interests*.

Compelling Interest Test

"Congress shall make no law respecting an establishment
of religion, or prohibiting the free exercise thereof."

~The First Amendment to the U.S. Constitution

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[119] In the *Sherbert standard,* the burden need not rest on membership or affiliation or attendance. The Mississippi Supreme Court stated, "It is no defense that McGlothin may not be a regular participant in the organized activities of a particular church, synagogue or other religious body, although there is such a group in Jackson House of Israel Hebrew Cultural Center. McGlothin testified, however, "I don't meet with a group on a regular basis." *Frazee* recognized a right to unemployment benefits by one who refused to work on Sunday, notwithstanding that claimant was not a member of any church congregation and did not attend worship services on Sunday." *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990), cert. denied, 498 U.S. 879.

The First Amendment makes inseparable two principles for the one right to religious freedom: the principles of *free exercise* and *no establishment* of religion. The history of religious liberty in the United States reveals that officials at all levels of government have struggled to balance these legal touchstones. This struggle is reasonable given the profound challenge the Constitution presents to its leaders.

The *free exercise* principle serves as a constitutional platform to uplift the fundamental and inalienable right to *liberty of conscience* for individuals and for groups, while the principle of *no establishment* shields this liberty from state interference. The Free Exercise Clause is an affirmation of a person's right to religious freedom, and the Establishment Clause is a limitation on government's power to regulate religion.

A limitation of this study is my narrow focus on the *free exercise* standards used by federal courts and their statutory companions in Pennsylvania's Religious Freedom Protection Act. As a result, I dedicate this next section to examining the various arguments that states use to justify burdening public schoolteachers' fundamental rights. What makes many of these positions compelling is the *no establishment* principle, best articulated in the landmark 1947 case *Everson v. Board of Education.* Although it was a 5–4 decision, the justices unanimously agreed on this point: all states are required to uphold the federal government's commitment to "separation of church and state."[120] They

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[120] "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or

disagreed on what constituted "separation" when it came to the narrow question of public funds for transporting children to private religious schools.

The states in this study rely on the "separation" doctrine to justify their regulation of religious garb worn by public schoolteachers. My analysis of their position may seem one-sided because my study is designed to apply one of the two principles of religious freedom: *free exercise.* A second study that relies on the Establishment Clause standards[121] may or may not result in similar legal conclusions; however, this is a study I intend to conduct at a later time.

With this caveat, I now use the *free exercise* principle to analyze the compelling interests that Pennsylvania and Nebraska have and may use to justify banning public schoolteachers' religious garb.

Justifications for Regulation

The case law and literature reveal that the state can rely on six thematic arguments to justify regulating public schoolteachers' religious garb: (1) It is compelling for the state to create a secular school culture; (2) it may sometimes be necessary for the state to prevent the school from using public funds to aid religion; (3) it may be important for the

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institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Everson v. Board of Education*, 330 U.S. 1 at 15-16 (1947).

[121] For example, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the U.S. Supreme Court articulated the three-pronged "Lemon Test" to test an Establishment Clause claim: (1) the law must have a secular purpose; (2) its primary effect is neither to advance *nor inhibit religion* [my emphasis]; and (3) it does not foster an excessive entanglement between government and religious institutions. See also the various Establishment principles in state constitutions, such as the *no preference,* the *no compelled aid*, the *no aid to religious education*, the *no religious test for education,* and the *no aid to sectarian education* (see Table 1. Enumerating the Thirty-Two Causes of Action in Teachers' Religious Garb Cases).

state to avoid the perception that the school approves of or favors religion; (4) the school may need to prepare for a "religious takeover"; (5) religious garb indoctrinates children held captive by compulsory education laws; (6) religious garb is an indirect form of religious instruction; (7) students, especially younger children, are highly impressionable and susceptible to religious persuasion by authority figures; and (8) forms of religious garb that cover the entire face could jeopardize school safety. Together, these serve as a list of the *compelling state interests* that governments and public officials have used to justify regulating religious garb.

In this section, I will present the findings of these justifications, and in section E. Discussion of this chapter, I will analyze these positions and articulate my responses. I will close this chapter with a summary of my legal conclusions.

Statutes create a secular school culture. In 1894, the Pennsylvania Supreme Court, as previously described, initially ruled in favor of Catholic nuns who sought to wear habits while teaching in public schools.[122] In a fateful line at the end of the ruling, the court affirmed the legislature's authority to create a universal dress code to be applied to all teachers, which they did not create (see Chapter IV – General Applicability). The legislature swiftly passed the statute in question, which was affirmed by the Pennsylvania Supreme Court in 1910[123] by an entirely new bench.[124] The justices used what we refer to

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[122] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).
[123] *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).
[124] For an explanation, see "Origins of Anti-Religious-Garb Laws & Cases: 1894 to 1910" in Chapter I – Relevant Case Law.

in modern terms as a *rational basis* test[125] to justify the state's interest in creating a secular school culture:

> As shown by the preamble of the act under consideration [Appendix B], the legislature deemed it "important that all appearances of *sectarianism* [my emphasis] should be avoided in the administration of the public schools of this commonwealth." This was the ostensible object of the legislation, and we can discover no substantial ground for concluding that it was not the sole object which the legislature had in contemplation.[126]

In *Hysong*, the Pennsylvania Supreme Court rejected the accusation that "sectarian control was exercised in [the plaintiffs'] management, and thereby these schools were transformed from public schools into sectarian schools."[127] The *Herr* court overturned *Hysong* on the grounds that the "system of common school education in this commonwealth is the creature of the state, and its perpetuity and freedom from sectarian control are guaranteed by [Pennsylvania's] constitutional provisions." The court held that the legislature, absent making "religious belief or church affiliation a test" for employment, *does have* the authority to "determine what regulations will promote the efficiency of the system and tend to the accomplishment of the object for which it was established." The object was made explicit in the preamble of the anti-religious-garb statute: "all appearances of sectarianism should be avoided" (Appendix B).

The historic justification of "avoiding sectarian influence" can sometimes be expressed with the contemporary phrase "religious neutrality." The Oregon Supreme

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[125] This test was originally developed three decades after *Herr* in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). The *rational basis* test requires that a law must further any legitimate government interest as long as that interest is deemed reasonable to the court, *Express Agency v. New York,* 336 U.S. 106 (1949).

[126] Judge Rice opinion, *Commonwealth v. Herr*, 39 Pa. Super. 454 at 25 (1909), affirmed in *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).

[127] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 20.

Court, for example, relied on the provisions in its state constitution to conclude, "This is what makes the otherwise privileged display of a teacher's religious commitment by her dress [Janet Cooper, a Sikh teacher who wore a white turban] incompatible with the atmosphere of *religious neutrality* [emphasis added] that [the Oregon anti-religious-garb law] aims to preserve …."

The Third Circuit Court of Appeals also affirmed the use of the term "religious neutrality." The Third Circuit found Oregon's dismissal of Janet Cooper to be persuasive and proceeded to apply the standards under Title VII to justify the termination of Alima Delores Reardon, a hijab-wearing Muslim teacher. The Third Circuit cited the U.S. Supreme Court's dismissal of the Oregon case "for want of a substantial federal question"—a surprising position given the U.S. Constitution's authority over state laws.[128] The Third Circuit interpreted the high court's dismissal as "an indication that the U.S. Supreme Court 'authoritatively established' the goal of preservation of an atmosphere of *religious neutrality* [emphasis added] a *compelling state interest* [emphasis added]."[129]

Together, the compelling interests of the state to create a secular school culture have come in the form of two arguments: the historic position, "avoiding sectarian influence," and the contemporary justification of "religious neutrality."

Statutes prevent use of public funds to aid religion. A related claim asserts that the anti-religious-garb statutes prevent the school from using public funds to aid religion. These Establishment Clause arguments, which are outside the scope of my study, can

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[128] The case that the U.S. Supreme Court used to incorporate the Free Exercise Clause of the First Amendment to the U.S. Constitution to the states. *Cantwell v. Connecticut,* 310 U.S. 296 (1940).
[129] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).

bleed into Free Exercise claims brought by those the statutes seek to target. Historically, these arguments center around the clergy status of Catholic nuns and their choice to dedicate their salaries to their religious orders. One complainant put it quite bluntly:

> With faces averted from the world they have renounced; wearing their peculiar robes which tell of their church, their order and their subordination to the guidance of their ecclesiastical superiors; using their religious names and addressed by the designation, "sister,"[130] they direct the studies and the deportment of the children under their care, as ecclesiastical persons.[131]

The Missouri Supreme Court, in building upon this same line of thinking, affirmed that Catholic nuns "by their oaths cease to exist as free citizens" and "cease to exist as individual economic units."[132] The district judge characterized the nuns as "instruments and agents of their religious orders," not only because of their personal commitment to donate their earnings to the church but also because of their loyalty to the church. The judge found them, by the nature of their ordinations, unable to supervise because, "by the very nature of their obligations and of the control to which they submit themselves, the final and absolute control of the secular or sectarian existence and personal actions of the nuns is vested in the Church authorities." The court claimed that,

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[130] The Pennsylvania Supreme Court had this to say about this concern: "It was the custom of the scholars attending schools taught by sisters to address them as 'Sister,' although there was no rule of the board or written or announced requirement by the directors or teachers that this should be done. The pupils, with very few exceptions, conformed to this custom and addressed them as 'Sister.' The same custom existed as to addressing Catholic priests as 'Father,' when they visited the schools; and the resident Catholic priests, as well as others who had formerly been located at Gallitzin, quite frequently visited the schools. We find no evidence that they conducted themselves in any manner different from any other person visiting the schools, either in the hearing of recitations or otherwise, nor that there was any difference observed in the treatment of them by the scholars from that accorded to any other visitor, the same custom being observed as to rising and saluting any other grown person who visited the schools; as, for instance, where a physician visited the schools, the scholars would rise and say, 'Good-morning, Doctor;' and as to any grown person not having a title, he would be addressed by his proper name when it was known." *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 17.

[131] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 63–64.

[132] *Berghorn v. Reorganized School District No. 8,* 364 Mo. 121 (Mo. Sup. Ct. 1953).

in case of a dispute between the school and the nuns, the nuns, "by virtue of their oaths of obedience would be required to ignore the orders of the secular school authorities and obey the orders of the religious superior and Church Hierarchy." The court held that the religious garb is evidence that "the character of their obligations" to the church "disqualified from teaching in any public school in the State of Missouri."

This concern about the use of public funds to hire religious garb-wearing teachers is an issue for the courts to examine not only under the Establishment Clause but also under the constitutional guarantee of *no religious tests for office*, both of which are inquiries outside the scope of this Free Exercise study.

Statutes avoid the perception of favoring religion. Another common justification for regulating teachers' religious garb is the view that "a rule against such religious dress is permissible to avoid the appearance of sectarian influence, favoritism, or official approval in the public school."[133] In building upon this position, the Oregon Supreme Court found that the state's statute was enacted with no other objective than "to avoid giving children or their parents the impression that the school, through its teacher, approves and shares the religious commitment of one group and perhaps finds that of others less worthy."[134]

A related argument was offered by the Third Circuit Court of Appeals, which ruled that because Pennsylvania had rejected the claims of Catholic, Mennonite, and Muslim teachers, the state was enforcing the anti-religious-garb law in a "non-discriminatory manner," thus not approving or favoring any particular religion.

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[133] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 27 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).
[134] *Ibid. Cooper* (1986).

Statutes avoid a religious takeover. Embedded in this way of thinking was the fear that some local districts, if left to their own devices, would have favored hiring religious garb-wearing teachers, resulting in a "religious takeover" of the public schools. Those who hold this view could point to these fact patterns in the case law.

- In North Dakota, "during the term opening in September, 1935, there were six teachers employed in [the public] school; four of these teachers were nuns, members of the Sisterhood of St. Benedict."[135] "In 1945, the Attorney General of North Dakota reported that 20 school districts in eleven counties were employing 74 nuns and eight priests."[136]

- In Kentucky, Superintendent Wendell P. Butler hired 84 religious garb-wearing [Catholic] teachers in public, tax-supported schools.[137]

- In Indiana, critics noted, "All five members of the Board of the School Corporation are Catholics; since approximately 80% of the voting population in the area is Catholic, Catholic domination of the Board will presumably persist."[138]

- In Ohio, there were "five teachers of the total of twenty-five in these three schools who are non-Catholic (two at St. Peter's and three at Sharpsburg), [and] six of the elementary school teachers in the Distinct are members of a religious order within the Roman Catholic Church, Sisters of the Precious Blood."[139]

At the time, many Protestant leaders in these states looked upon the minority-majority communities with fear and suspicion. Likewise, a large majority of Pennsylvania legislators were deeply concerned about the Catholic majority in Gallitzin Borough just as similar concerns were legislated by elected officials in Oregon, who were

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[135] *Gerhardt v. Heid*, 66 N.D. 44 (N.D. Sup. Ct. 1936).
[136] Alvin W. Johnson and Frank H. Yost, *Separation of Church and State in the United States.* (New York, NY: Greenwood Press, 1948), p. 123; "Schools—Teachers—Wearing Religious Garb," Report of the Attorney General of North Dakota, Aug. 25, 1945, pp. 262–63.
[137] "Casey County, 2 Sisters; Marion County, 43 Sisters; Washington County, 9 Sisters; Nelson County, 13 Sisters; Meade County, 14 Sisters; Grayson County, 3 Sisters." *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956) at 3.
[138] *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940).
[139] *Moore v. Board of Education*, 4 Ohio Misc. 257 (Ohio Ct. Com. Pl. 1965).

also open members of the Ku Klux Klan (see Chapter IV – Anti-Religious-Garb Laws Originated from Anti-Catholic Bias). These serve as examples of how the Protestant majority responsible for governing the public schools and state legislatures used anti-religious-garb statutes to "protect the children" from the religious "other"—Catholics.

In a contemporary legal context, this concern is not articulated in terms of a "religious takeover" but in the worry that a high number of religious garb-wearing teachers may create a "pervasively sectarian" school. Take, for instance, the case of *Grand Rapids v. Ball* (1985), a case in which the U.S. Supreme Court overturned "Shared Time" programs that used public funds to offer secular classes to private school students. Justice Brennan, in writing for the five to four majority, stated,

> Given that 40 of the 41 schools in this case are thus "pervasively sectarian," the challenged public school programs operating in the religious schools may impermissibly advance religion in three different ways. First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.[140]

In building upon *Ball*, contemporary proponents of anti-religious-garb statutes articulate three degrees of possible violations that they wish to avoid by banning public schoolteachers' religious garb. As previously mentioned, the statutes seek to create a secular culture and prevent the perception that there is a "symbolic link between

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[140] *Grand Rapids v. Ball*, 473 U.S. 373 (1985); overturned in *Zobrest v. Catalina Foothills School District,* 509 U.S. 1 (1993). The overturning of *Ball* was further reinforced in *Agostini v. Felton,* 521 U.S. 203 (1997). For further analysis see *IV. E. Discussion*.

government and religion" because there can be no form of public subsidy of religion, regardless of degree of directness.

Three additional concerns that build upon this fourth point are that the religious garb seen by students, day in and day out, may result in (5) *religious indoctrination* through intentional or inadvertent forms of (6) *religious instruction*, and the state has a compelling interest in protecting students, especially younger children,[141] because they are (7) highly *impressionable* and susceptible to the persuasion of authority figures, especially their teachers. The next three sections are dedicated to further articulating the three justifications of *indoctrination*, *instruction*, and *impression*.

Statutes prevent religious indoctrination. The U.S. Supreme Court has affirmed multiple times that it is both reasonable and compelling for schools to exercise their constitutional duty to ensure that publicly "subsidized teachers do not inculcate religion."[142] Currently, there is wide consensus between civil liberties and religious groups that public schoolteachers should not indoctrinate students in any religion.[143]

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[141] *Lemon v. Kurtzman*, 403 U.S. 602 (1971); "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination," *Tilton v. Richardson*, 403 U.S. 672 at 686 (1971); the *Tilton* court cites Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, pt. II, The Nonestablishment Principle*, 81 HARV. L. REV. 513, 574 (1968).
[142] *Meek v. Pittenger*, 421 U.S. 349 (1975), quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[143] Charles C. Haynes, *A Teachers' Guide to Religion in Public Schools*. (Washington, DC: Religious Freedom Center of the Newseum Institute, 2017). This statement was endorsed by the American Association of School Administrators, American Federation of Teachers, American Jewish Committee, American Jewish Congress, Association for Supervision and Curriculum Development, Baptist Joint Committee on Public Affairs, Christian Educators Association International, Christian Legal Society, Council on Islamic Education, National Association of Elementary School Principals, National Association of Evangelicals, National Association of Secondary School Principals, National Council of Churches of Christ in the U.S.A., National Council for the Social Studies, National Education Association, National PTA, National School Boards Association, Union of American Hebrew Congregations, and Union of Orthodox Jewish Congregations of America.

Some proponents of anti-religious-garb laws have argued that public schoolteachers violate this legal and political consensus when wearing religious garb because religious garb itself indoctrinates its observers. This position rests on the view that religious garb is a circuitous form of proselytization.

In this line of thinking, it is worth noting a related Free Speech case, *Downing v. West Haven.*[144] Classified as a case regarding a teacher's admitted proselytization, *Downing* involved not the wearing of religious garb (Appendix A and Appendix C) but a public schoolteacher wearing clothing with a printed religious message. In 2001, a federal district court in Connecticut affirmed a school's decision to terminate the employment of a public schoolteacher who wore a T-shirt that said, "Jesus 2000—J2K." The teacher had expressed the theological belief that people needed to be saved by Christ before the anticipated apocalypse at the turn of the millennium. The U.S. District court affirmed the school's response as "objectively reasonable in light of interest in avoiding an Establishment Clause violation."[145] The court cited rulings by the U.S. Supreme Court and the Eleventh Circuit Court of Appeals to affirm a public school's authority to "direct teachers to refrain from expression of religious viewpoints in the classroom and like settings; indeed, schools have a constitutional duty to make certain that subsidized teachers do not inculcate religion."[146]

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[144] *Downing v. West Haven,* 162 F.Supp 2d 19 (U.S. Dist. Ct., D. Conn. 2001).
[145] *Ibid.*, *Downing* (2001).
[146] *Ibid.*, *Downing,* citing *Lemon v. Kurtzman,* 403 U.S. 602 (1971) and *Bishop v. Aronov,* 926 F.2d 1066, 1077 (11th Cir. August 24, 1991).

Compare *Downing* (August 2001) to a Free Speech case handed down by the U.S. Supreme Court two months earlier: *Good News Club v. Milford Central School* (June 2001).[147] In *Good News Club*, the U.S. Supreme Court held, in a 6–3 decision, that a public school operates as a "limited public forum" and therefore cannot engage in "viewpoint discrimination." This means that the public school cannot prevent a private Evangelical Christian organization from engaging in religious speech on the school's campus during non-school hours to avoid violating the Establishment Clause.

Admittedly, *Good News Club* is not about a teacher's religious expression during the school day but about a community group gaining access to a "limited public forum" during non-school hours. *Downing*, however, is a case about the proselytizing message expressed during school by a teacher in her limited role as government official. Although the Free Speech inquiry that arises from *Downing* and *Good News* is outside the scope of this study, it is important to concern ourselves with the time and place restrictions placed on public schoolteachers' speech with special attention to the intended and unintended outcomes of the speech and the degree of religious inculcation or proselytization by an agent of the state.

This inquiry raises constitutional concerns that lie beyond Free Speech. For instance, would permitting a Muslim to wear a hijab while teaching in a public school that previously fired an Evangelical Christian for wearing a T-shirt with the words "Jesus 2000—J2K" result in that school privileging or even endorsing Islam? In this scenario, would not a reasonable student perceive the state as being hostile to Evangelical

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[147] *Good News Club v. Milford Central School*, 533 U.S. 98 (June 2001).

Christians and favorable to Muslims? Could not Evangelical Christians, in this hypothetical situation, bring Establishment and Equal Protection claims, arguing that the state favors some religious expressions over others? These are worthy legal questions best addressed in future studies focusing on the constitutional protections of Free Speech, No Establishment, and Equal Protection—all of which are beyond the narrow scope of this study about the Free Exercise rights of teachers who wear religious garb (see Appendix C for examples and see discussion in Chapter IV – Statutes Avoid the Perception of Favoring Religion).

Regardless of their form, proponents of the anti-religious-garb statutes argue that a public schoolteacher's religious garb may intentionally or inadvertently become a form of religious instruction, which the state has a compelling interest to prevent.

Statutes prevent religious instruction. The state's concern about *indoctrination* is closely related to the second characterization of religious garb as a form of *religious instruction*. At best, the garb is a benign form of instruction, in that it simply instructs observers to know the wearer's religious identity—"That's Ms. Reardon," a student may say, "and because she wears a hijab, I know she's a Muslim." At worst, a parent may say, "That's Ms. Reardon and because she wears a hijab, I suspect she's *propagandizing* Islam in my child's classroom." Said another way, religious garb may be characterized as a form of indirect instruction or a faith-formation pedagogy designed to tacitly alter a student's religious identity—"That's Ms. Reardon," a parent may suspect, "and because she wears a hijab, I suspect she is quietly teaching my child to *convert* to Islam," an echo of the *propagandizing* and *indoctrination* concerns.

These scenes are not mere hyperbole, as the contemporary and historical record proves. In 2011, after a Pennsylvania lawmaker introduced a bill to repeal the state's anti-religious-garb law, a mother and resident of York, Pennsylvania entered her state representative's office and asked, "Are you the one who wants terrorists teaching our children?"[148] She expressed concerns about "Muslims wearing turbans in public schools,"[149] unaware that American Muslims do not wear turbans: ninety-nine percent of people in the United States who wear turbans are Sikh,[150] Sikhism being the world's fifth-largest religion and distinct from Islam. This particular mother believed that Pennsylvania's anti-religious-garb statute would prevent terrorists (e.g., which she imagined as "turban-wearing Muslims") from using the public classroom to instruct students to become "Islamists," violent extremists.[151] These views expressed at the turn of the twenty-first century harken back to fears expressed at turn of the twentieth century. For example, the widely distributed publication *The Heathen Invasion* (1911) characterized Hindus as people who would use yoga to instruct children to become

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[148] My account of a conversation with a state representative in 2011.
[149] For a deeper understanding of the widespread misinformation about Muslims in America, see Wajahat Ali et al., *Fear, Inc.: The Roots of the Islamophobia Network in America.* (Washington, DC: Center for American Progress), Aug. 26, 2011. Accessed at www.americanprogress.org/issues/religion/reports/2011/08/26/10165/fear-inc.
[150]The Sikh Coalition, "Who are the Sikhs? High School/Adult Presentation." (New York: The Sikh Coalition, 2010), pp. 31, 38-39.
[151] Soner Cagaptay, "Muslims vs. Islamists: Islamism is not a form of the Muslim faith or an expression of Muslim piety; it is, rather, a political ideology that strives to derive legitimacy from Islam," *The Washington Institute,* Jan. 27, 2010.

violent: "Yoga is paving the way that leads to domestic infelicity and insanity and death."[152]

Not all legal justifications for wanting to prevent religious instruction are this extreme. But degrees of this concern are laced into the case law. In *Zellers* (1951), the New Mexico Supreme Court characterized the habit worn by Catholic nuns as follows: "Not only does the wearing of religious garb and insignia have a *propagandizing effect* for the church [emphasis added], but by its very nature it introduced sectarian religion into the school."[153] In *Rawlings* (1956), Judge Hogg said in his lone dissent, "The children who attend the public schools and their parents are, with rare exceptions, Protestants. But by the majority opinion these children and their parents are deprived of their constitutional right to be free from sectarian influence and *indirect teachings* [emphasis added] of the Catholic Church at public expense."[154] He understood the teachers' religious garb to be an indication of the public employee's membership in a religion, and as a result, it had a "sectarian influence" in the public classroom, a form of indirect *religious instruction*. In an earlier articulation of this view, the state's high court in New York ruled in *O'Connor v. Hendrick* (1906) that although no church doctrine was being taught, the sectarian nature of the teachers' garb was a form of instruction:

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[152] Mabel Potter Daggett, "The Heathen Invasion," *Hampton Columbian Magazine*, Vol. XXVII, No. 4, Oct. 1911.
[153] The court used this rationale to conclude that "if *the Religious* [emphasis added] are again employed as teachers in *our public schools* [emphasis added] they must not dress in religious garb or wear religious emblems while in the discharge of their duties as such teachers." *Zellers v. Huff*, 55 N.M. 501 (N.M. Sup. Ct. 1951).
[154] Judge Hogg's dissent in *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956) at 27.

> There can be little doubt that the effect of the costume worn by these Sisters of St. Joseph at all times in the presence of their pupils would be to *inspire respect if not sympathy* [emphasis added] for the religious denomination to which they so manifestly belong. To this extent the influence was *sectarian* [emphasis added], even if it did not amount to the teaching of denominational doctrine.[155]

The views expressed in *Zellers*, *Rawlings*, and *O'Connor* were informed by the words from the lone dissent of Judge Williams in the nation's first religious-garb case, *Hysong* (1894). Judge Williams said that Catholic nuns "wear, and must wear, at all times a prescribed unchangeable ecclesiastical dress which was plainly intended to proclaim their non-secular and religious character, their particular church and order, and their separation from the world."[156] He explained that their religious identity is not in question.[157] "It is the introduction into the schools as teachers of persons who are by their striking and distinctive ecclesiastical robes necessarily and constantly asserting their membership in a particular church, and in a religious order within that church, and the subjection of their lives to the direction and control of its officers," Judge Williams said. He viewed the habits worn by Catholic nuns as an impermissible, albeit indirect, form of religious instruction. He thought their "striking and distinctive ecclesiastical robes"

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[155] *O'Connor v. Hendrick*, 184 N.Y. 421 (N.Y. Ct. App. 1906).
[156] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).
[157] Judge Williams said, "They come into the schools not as common school teachers, or as civilians, but as the representatives of a particular order in a particular church whose lives have been dedicated to religious work under the direction of that church. Now the point of the objection is not that their religion disqualifies them. It does not. Nor is it thought that church membership disqualifies them. It does not. It is not that holding an ecclesiastical office or position disqualifies, for it does not." *Hysong,* at 62.

would result in students constantly having to observe and thus be influenced by their teachers' unfluctuating religious devotion.

Whether the degree of concern is about *indoctrination* or *instruction*, both positions rest upon the view that students are highly *impressionable*.

Statutes protect impressionable students. The U.S. Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," wrote Justice Brennan for the majority in *Edward v. Aguillard* (1987).[158] The Court gives particular attention to younger students because differences in maturity "warrants a difference in constitutional results," Justice Brennan wrote. For these reasons, the Court requires public schools to take great care in balancing the interests of the state, as limited by the Establishment Clause, with the freedoms of individuals, as guaranteed by the Free Exercise Clause of the First Amendment.

Specific to the question of religious garb, several lower courts have made explicit that exposing children to teachers' religious garb is a failure by the state to protect impressionable students. The concern is that children and young adults are easily

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[158] Justice William J. Brennan for 7–2 majority, *Edwards v. Aguillard*, 482 U.S. 578 (1987). See annotated description of the following cases in the bibliography: *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Aguilar v. Felton*, 473 U.S. 402 (1985), overturned in *Agostini v. Felton*, 521 U.S. 203 (1997); *Engel v. Vitale*, 370 U.S. 421 (1962); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Grand Rapids v. Ball*, 473 U.S. 373 (1985) overturned in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1. (1993); *Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994); *Lamb's Chapel v. Center Moriches Union*, 508 U.S. 384 (1993); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Minersville v. Gobitis* [sic, Gobitas], 310 U.S. 586 (1940), overturned in *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Mueller v. Allen*, 463 U.S. 388 (1983); *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Westside Community v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Wolman v. Walter*, 433 U.S. 229 (1977); *Zorach v. Clauson*, 343 U.S. 306 (1952).

influenced because of their fledgling moral and intellectual capacities. Students, especially those enrolled in elementary school, may not yet have the ability to prevent an adult from unwanted religious expression.

A historical perspective is worthy documenting. For instance, Judge Hogg, the dissenting voice in *Rawlings* (1956), stated, "Indeed, these good women are the Catholic Church in action in the most fertile field—the impressionable minds of the children."[159] He continued by coupling the *impressionability* and *sectarianism* arguments: The habit-wearing teachers "have a subtle influence upon the tender minds being taught . . . . In and of themselves they proclaim the Catholic Church… and silently promulgate sectarianism."[160] In further advocating that the state protect impressionable children, he characterized the teachers' habits as being "at all times in the presence of their pupils" (*frequency* argument), and as a result would "inspire respect, if not sympathy, for the religious denomination to which [their teachers] so manifestly belong."[161]

Three decades later, the U.S. Supreme Court in *Grand Rapids v. Ball* (1985)[162] held that a "public employee who works on a religious school's premises is presumed to inculcate religion in her work."[163] Early twentieth-century supporters of anti-religious-garb laws used a similar rationale to argue that because "teacher nuns," as they called them at the time, were ordained representatives of the Catholic Church, then a reasonable

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[159] Judge Hogg's dissent in *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956) at 26.
[160] *Ibid. Rawlings* (1956).
[161] 184 N.Y. 421, 77 N.E. 614.
[162] *Grand Rapids v. Ball*, 473 U.S. 373 (1985), which prevented the public schoolteachers from teaching students at private religious schools through a "Shared Time" supplemental program, was overturned in *Zobrest v. Catalina Foothills School District,* 509 U.S. 1 (1993). The overturning of *Ball* was further reinforced in *Agostini v. Felton,* 521 U.S. 203 (1997). For further analysis see *IV. E. Discussion*.
[163] Justice O'Connor's characterization of *Ball* in *Agostini v. Felton,* 521 U.S. 203 (1997).

student would not be able to distinguish between when the nuns were acting on behalf of the church and when they were acting on behalf of the state. Furthermore, proponents of anti-religious-garb statutes claim that Catholic nuns are not likely to be able to teach their subject in any other way than from a religious perspective. As a result, the teachers "may intentionally or inadvertently become involved in inculcating particular religious beliefs," an activity the state must prevent in order to protect impressionable students, the *Ball* court stated.

A similar line of thinking was embedded in the 1984 Equal Access Act, which required school administrators to give student-initiated clubs equal access to public schools because of their status as "limited open forums."[164] Congress was particularly concerned that teachers' sponsorship, advisement, or participation in student religious clubs would constitute a state endorsement of religion. To ensure teachers were not joining with students in religious activities, Congress mandated that "employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity."[165] Congress also limited their legislative protections to secondary schools, implying that middle- and elementary-school students are too immature to engage in voluntary, student-initiated religious-clubs.[166]

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[164] "'A *limited open forum* exists whenever a public secondary school 'grants an offering to or opportunity for one or more noncurriculum related *student* groups to meet on school premises during noninstructional time.' 20 U.S. Code § 4071 (b)." As summarized in *Westside Community v. Mergens*, 496 U.S. 226 (1990).
[165] 20 U.S. Code § 4071 (c)(3).
[166] However, in 2001 the U.S. Supreme Court ruled on Free Exercise grounds that religious groups were required to have equal access to elementary school facilities to host voluntary religious clubs *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

Given this long history of Congress, the Courts, and the public monitoring public schools for Establishment Clause violations, it is of particular concern teachers' religious garb worn for a "captive" classroom creates a "symbolic connection" between religion and the state.[167] These words were used in *Reardon,* the 1990 decision by the Third Circuit Court of Appeals, which coupled the *impressionability* concern with the *endorsement* and *favoritism* arguments when ruling against a Muslim woman who wore a hijab while teaching in a Philadelphia public school:

> Since the wearing of such garb occurs in the intense and "captive" classroom atmosphere, [permitting the wearing of religious garb] would further enhance the "symbolic connection" between religion and the state. In view of a child's delicate constitution and curiosity, the testimony by the defendants' expert concerning the children's *possible* [emphasis added][168] conclusion of endorsement, the fact that the students did indeed ask particular teachers about their garb (indicative of a child's curiosity), and the atmosphere where the garb is worn, it is clear to [the court] that the sought-after accommodation would have the effect of the state appearing to endorse religion over nonreligion.[169]

The question of children's impressions of teachers' religious garb was briefly mentioned by the U.S. Supreme Court in the landmark decision *Abington School District v. Schempp* (1963).[170] The Court ruled, in an 8–1 decision, that state-mandated prayers and Bible readings in public schools were unconstitutional. In justifying this case, the

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[167] In *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990) the Third Circuit cited these cases: *See Grand Rapids v. Ball*, 473 U.S. 373 (1985) at 390–91 (*comparing McCollum v. Board of Education*, 333 U.S. 203 (1948) with *Zorach v. Clauson*, 343 U.S. 306 (1952).
[168] The word "possible" is italicized to bring attention to an argument I make in Chapter IV; that is, in the context of this study, the impressionability claim is speculative. There are no known studies on students' impressions of public schoolteachers' religious garb.
[169] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).
[170] *Abington School District v. Schempp*, 374 U.S. 203 (1963).

Schempp court asked its readers to compare states that permitted public schoolteachers with courts that did not.[171] Specifically, the U.S. Supreme Court singled out *O'Connor* (1909), issued by the New York Appeals Court, the highest court in the state, which joined the *impressionability* and *frequency* arguments:

> … some state courts have enjoined the public schools from employing or accepting the services of members of religious orders even in the teaching of secular subjects. Over a half century ago, a New York court [in 1909] sustained a school board's exclusion from the public schools of teachers wearing religious garb on similar grounds: "Then, all through the school hours, these teachers [*frequency* argument]… were before the children as object lessons of the order and church of which they were members. It is within our common observation that young children … are very susceptible to the influence of their teachers [*impressionability* argument] and of the kind of object lessons continually before them in schools conducted under these circumstances and with these surroundings" [emphasis added].

These judicial and legislative acts demonstrate that states have a legal responsibility—a compelling government interest—to take preventative measures to ensure that students are protected for the mere fact they are "impressionable and their attendance is involuntary."[172]

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[171] The *Schempp* court also cites *O'Connor v. Hendrick*, 184 N.Y. 421 (N.Y. Ct. App. 1906); *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910); *Zellers v. Huff,* 55 N.M. 501, 236 P.2d 949; and *Berghorn v. Reorganized School District No. 8,* 364 Mo. 121 (Mo. Sup. Ct. 1953). The *Schempp* court also asks readers to compare those cases with the ruling of Texas Commissioner of Education. As noted in the Bibliography, the *American Jewish Year Book* reports that the Texas Supreme Court "upheld two lower-court decisions rejecting the suit on the ground that plaintiffs had not exhausted their administrative remedies." In response, J. W. Edgar, Education Commissioner of Texas, described himself as "powerless to stop nuns from teaching in public schools in religious garb or a local school board from leasing church-owned property for public-school use." He said doing so would require "the force of court action or of statute." In affirmation, "the state board upheld Commissioner Edgar's decision by a vote of 14–1" on January 25, 1961.

[172] Justice William J. Brennan for 7–2 majority, *Edwards v. Aguillard*, 482 U.S. 578 (1987).

Champions of anti-religious-garb laws argue that this commitment to protect society's most vulnerable is a government duty that extends beyond psychological protection to physical protection, too.

Statutes promote public safety in public schools. Another example of a *compelling state interest* used to justify anti-religious-garb laws is the contemporary argument that some forms of religious garb may be a threat to public safety. This is a position sometimes taken by public officials in Europe and, most recently, in Canada to justify regulating Muslim women's dress[173] (see Chapter I – Global Context). For example, public safety has become a predominant rationale used to target for government regulation the *burqa*, a loose garment that some Muslim women use to cover their entire bodies, and the *niqab*, a face veil that some Muslim women use to cover the nose and mouth but not the eyes.[174] Some advocates of these bans concede that if all religious garb is not banned then at least the government should create a *generally applicable* law that prohibits all face coverings.

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[173] "Global Context" section in Chapter II – Literature. Also see Alan Cooperman, Peter Henne, Dennis R. Quinn, *Restrictions on Women's Religious Attire: More Countries Restrict Women's Ability to Wear Religious Symbols or Attire Than Require Women to Dress a Certain Way* (Washington, DC: Pew Research Center, Apr. 5, 2016); Sahar F. Aziz, "The Muslim 'Veil' Post-9/11: Rethinking Women's Rights and Leadership," Institute for Social Policy and Understanding and the British Council, Policy Brief, Nov. 2012; John R. Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton, NJ: Princeton University Press, 2007); Mohammed Ayoob, *The Many Faces of Political Islam: Religion and Politics in the Muslim World* (University of Michigan Press, 2008).

[174] Veronica Rocha, "What's the Difference Between a Hijab, a Burka, a Chador and a Khimar?" *Los Angeles Times*, Aug. 10, 2017, video (0:00 – 0:55). Accessed at www.latimes.com/local/lanow/la-me-ln-muslim-woman-hijab-removed-settlement-20170810-story.html; H.A. Hellyer, "What's in a Niqab?" Institute for Social Policy and Understanding, Sept. 24, 2013.

In October 2017, the Canadian province of Québec did just that. The authors of the legislation framed "Bill 62" as a "religious neutrality" law,[175] as compared to the critics who characterized it as a "burqa ban."[176] The law currently requires employees of all government agencies, specifically public schools, to have "one's face uncovered when public services are provided [e.g., teachers] and received [e.g., students] so as to ensure quality communication between persons and allow their identity to be verified, and for security purposes."[177] The law mandates that all teachers and students in public schools must "exercise their functions with their face uncovered"[178] to promote school safety. Supporters of this law worry that if the faces of teachers and students are fully veiled while they are on school grounds, then administrators, other educators and students, and parents may not recognize them behind the veil, possibly jeopardizing the community's safety. This legal directive also applies to anyone elected to the National Assembly,[179] anyone employed by or any person using the government transit system,[180] or anyone employed by or receiving government-sponsored health and social services.[181] The law provides for some "accommodations on religious grounds," such as for a student enrolled in a state-accredited school, as long as the "request does not compromise" the laws that

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[175] Bill 62, "An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodation on religious grounds in certain bodies" (2017, chapter 19), introduced June 10, 2015, sponsored by Québec's minister of justice, Stéphanie Vallée, and passed on Oct. 18, 2017 by a 66 to 51 vote. Accessed at www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-62-41-1.html.
[176] Liam Stack, "Burqa Bans: Which Countries Outlaw Face Coverings?" *New York Times,* Oct. 19, 2017.
[177] Bill 62, Ch. I §1.
[178] *Id.*, Ch. III, Div. II, §10.
[179] *Id.*, Ch. I, §2(9).
[180] *Id.*, Ch. I, §2(6).
[181] *Id.*, Ch. II, §2(8).

mandate compulsory school attendance or the school's mission, regulations, or ability to provide educational services.[182] Put simply, the law targets a specific form of expression in public places throughout Québec.

With a similar concern for public safety, in 2016, a school district in Québec came before the Supreme Court of Canada to justify why the administrators banned a Sikh student from wearing a kirpan, a religious object resembling a small dagger worn under the student's clothes.[183] The kirpan—one of the foundational tenants of the 5Ks of Sikhism[184]—is a subject that I will examine in Chapter IV – Discussion because of a similar case in the United States in 1995.[185] In both cases, the courts ruled in favor of the Sikh students.

Summary. Eight "compelling state interests" have been articulated by advocates of anti-religious-garb laws. The public school must (1) create and maintain a secular school culture; (2) prevent its taxpayer-supported budget from being used to aid teachers' religious expression; (3) avoid the perception that the school advances, endorses, approves of, or favors religion; (4) ward off a possible "religious takeover"; (5) disallow all forms of religious indoctrination and (6) religious instruction of (7) highly impressionable children held captive by compulsory education laws; and, finally, (8) prioritize school safety.

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[182] *Id.*, Ch. III, Division III, §14.
[183] *Multani v Commission scolaire Marguerite-Bourgeoys*, 1 S.C.R. 256 (Sup. Ct. Canada 2006).
[184] The Ninth Circuit defined the Five Ks as "kes" (long hair), "kangha" (comb), "kachch" (sacred underwear), "kara" (steel bracelet), and "kirpan" (ceremonial knife). *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).
[185] *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).

Chapter IV – Discussion uses a Free Exercise lens to examine the merits of these claims. Chapter IV – Narrowly Tailored Test provides a brief presentation of the final prong of the strict scrutiny test, asking whether the statutes in question (Appendix B) are narrowly tailored to achieve the least restrictive means possible to achieve the aforementioned compelling state interests.

Narrowly Tailored Test

Justification

Having demonstrated that the above justifications of the states' *compelling interest*, a court would proceed with the *narrowly tailored test*. I do so here and in the next section *IV. E. Discussion* as an exercise in answering my final research question.

Statutes are limited, not absolute restrictions. The case law on this subject reveals a single justification for how states claim that anti-religious-garb statutes are already narrowly tailored. The government argues that there is no constitutional right to work in a public school; therefore, the restriction is not a violation of a person's right to free exercise of religion in general, it is simply "properly limited" to the "teaching function."[186]

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[186] "We conclude that ORS 342.650 does not impose an impermissible requirement for teaching in the public schools if it is properly limited to actual incompatibility with the teaching function."[186] It went on to say, "The statute, of course, does not forbid the wearing of religious dress outright, but it does forbid doing so while teaching." *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 38 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).

The Pennsylvania Supreme Court in 1910 affirmed this position: "The anti-garb law does not prevent the teacher from practicing his or her religion during breaks or before or after school or during the evenings or weekends. The teacher is simply asked to respect the time-place restriction placed on public employees who are serving as agents of the state."[187] In taking this position even further, the Federal Administrative Court in Germany made the claim that the effect of a similar ban "was not excessive because Muslim teachers who wear the headscarf could still find employment in private schools."[188]

The assumption made in these arguments is that a person's religious identity can be shed from the workplace, or something that should be relegated to the private sphere. This line of thinking fails to acknowledge that this "limited restriction" is intended to specifically prevent public schoolteachers from indicating that they are a "member or adherent of any religious order, sect, or denomination." Would the state also limit teachers' speech in the same way—banning all teachers from telling students about their religious identity while engaging in the teaching function? That, too, would be a "limited restriction," that would challenge teachers' fundamental right to free speech. The U.S. Supreme Court's ruling of a landmark Free Speech case in *Tinker* serves as an obvious rebuttal: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[189]

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[187] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 32.
[188] Erica Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education*. (New York, NY: Routledge, 2012), p. 167, citing *Ludin v. Baden-Württenberg* (*Ludin III*), Federal Administrative Court, Germany (BVerwGE), 24 June 2004, 2 C 450.03, 14.
[189] Justice Fortas, in writing for the majority in *Tinker v. Des Moines*, 393 U.S. 503 (1969), included the term "teachers" although the Tinkers were students.

The fact of the matter is that Pennsylvania's and Nebraska's anti-garb laws are not in fact *narrowly tailored* and fail all parts of the *Smith* and *Sherbert* tests, as I further substantiate in the following discussion.

Discussion

The study of legal restrictions on public educators' religious garb is a study of the struggle that public schools have to balance competing rights. It is a study in the interests of the state in relationship to the rights of the teacher, the parent, and the student. The backdrop, of course, is the fundamental purpose of public education, which is to better society—a society that has become more religiously diverse[190] and more politically polarized.[191] In this discussion, I respond to the arguments made earlier in this chapter that justify bans on religious garb. My analysis focuses on the legal rights of teachers and the legal limitations of the public schools they serve, as seen through the lenses of the Free Exercise Clause of the First Amendment to the U.S. Constitution and Pennsylvania's Religious Freedom Protection Act of 2002.

The following eleven-point analysis substantiates my conclusion that Pennsylvania's and Nebraska's anti-religious-garb statutes are unconstitutional. The following points serve as a response to the states' articulation of compelling interests (see Chapter IV). (1) The statutes provide no *least restrictive alternative* to the substantial

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[190] See Chapter IV – Prepare Students to Self-Govern a Nation of Religious Minorities.
[191] Pew Research Center. *The Partisan Divide on Political Values Grows Even Wider*. (Washington, DC: Pew Research Center, 2017).

burdens placed on religion. Safety is a *compelling state interest,* but any proposed regulation must be, at least, (2) rational and, at best, (3) *narrowly tailored*. (4) The reliance on pre-1963 decisions (*Sherbert*)[192] to justify banning religious garb does not pass *strict scrutiny* today because of the courts' previous application of the lowest standard of judicial review, *rational basis*. (5) The reliance on post-1990 court decisions (*Smith*)[193] to justify the continuation of anti-religious-garb statutes is flawed because they were issued in a time of uncertainty over the plight of judicial standards under the Free Exercise Clause, which I call *Smith's shadow.* (6) Courts have held that Establishment Clause questions about public funds being used to aid religion have "no bearing" on the question of Catholic nuns who serve as public schoolteachers donating their salaries to the Catholic church. (7) The statutes in question, and the cases used to support them, create a false dualism between sectarianism and secularism. (8) Public schoolteachers' religious garb cannot be used to *indoctrinate* students and (9) cannot be used for *religious instruction*, but the academic study of religious garb can become a tool for cultivating students' civic competency of religious literacy. (10) Yes, students of all ages are *impressionable*, but in what ways, for whom and to what degree? And finally, (11) could it be that the religious diversity in American requires that public schools prepare the next generation to self-govern a nation of religious minorities?

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[192] *Sherbert v. Verner*, 374 U.S. 398. (1963).
[193] *Employment Division v. Smith*, 494 U.S. 872 (1990).

Examination of Findings

Statutes provide no least restrictive alternative. Under *Sherbert*, it is not constitutionally permissible to conclude that a *least restrictive alternative* exists because a person can look for employment in companies that do not schedule work on their Sabbath.[194] Similarly, a state that tells sectors of the public—religious-garb-wearing people—that they can find employment in private religious schools, not public schools,[195] does not constitute a *least restrictive alternative* under *Sherbert*. These suggestions do not resolve a constitutional problem. They are dismissive of both the person and the law, suggesting that religion can be simplistically regulated to the private sphere. America's public schools have a unique constitutional obligation to model for the public—and especially for its students—how the law protects private acts of devotion in public places and how the constituting protects equally, religious liberty for people of all religions and of none.

It is true that the question of teachers' religious liberty rights as expressed in the narrow time/place of the public classroom is one of the more complicated case studies on the larger theme of legal restrictions on religious expression. However, First Amendment protections still apply to some degree.[196] These degrees are best understood when

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[194] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[195] For an example of this rationale, see the case of Ms. Lundin in Germany in Chapter II – Global Context.
[196] It is possible for the U.S. Supreme Court, however, to rule that public schoolteachers do not have the same constitutional protections as civilians. For instance, the Court of Appeals for the District of Columbia ruled and the U.S. Supreme Court affirmed that "the appropriate level of scrutiny of a military regulation that clashes with a constitutional right is neither strict scrutiny nor rational basis." *Goldman v. Secretary of Defense,* 236 U.S. App. D.C. 248, 734 F.2d 1531 at 1535-1536 (1984); *Goldman v. Weinberger,* 475 U.S. 503 (1986). As previously discussed in Chapter II, however, Congress overturned this decision when passing the 1988 National Defense Authorization Act, permitting accommodations of religious garb for military personnel. The question of the degree to which public schoolteachers' religious garb may be accommodated is untested by the U.S. Supreme Court, thus justifying the need for this study.

requiring that, in the context of this study, Pennsylvania's and Nebraska's anti-religious-garb statutes must pass all three prongs of *strict scrutiny*: The *narrowly tailored* test requires the state to be as accommodating as possible (which these statutes do not) when *neutral and generally applicable* laws (which these statutes are not) *substantially burden* religion (which these statutes do).

A good-faith attempt to propose a *least restrictive alternative* would be to, at least, offer religious-garb-wearing teachers employment in the school's administration or in the district's headquarters or another non-teaching job. But the logic in this proposal is flawed. Would a school that offered non-teaching jobs to certified teachers who wore religious garb have to take a cut in salary, or ensure that they never work at the front counter where they could be seen by students or teachers? Could these religious-garb-wearing non-teacher positions never drive a school bus or speak in front of a school assembly or coach an after-school program? What levels of authority would these professionals be able to reach? Would not a state that prevents teachers from wearing religious garb also penalize a religious-garb-wearing principal? A principal is position of authority that has even more influence over the school culture and even more power over impressionable students. Would not the same state also bar citizens from wearing religious garb while serving on the local school board to prevent the district as a whole from being perceived as endorsing religion? Would not the same state that bans public schoolteachers do the same for all government employees or for anyone using government services, as seen recently in Québec (see "Public Safety" section in Chapter IV). In the U.S. context, the answer is a resounding "no" because these regulations inevitably impact distinct religions based on *visibility*, *size*, and *frequency* (see

"Substantial Burden" section, Chapter IV. B.) and provide no *least restrictive alternative* that is truly feasible. The question presented in this study is narrower, but these lines of questions illustrate the slippery slope of regulating the religion of government employees. These questions illustrate that even proposals to offer teachers non-teaching positions can create more problems than they solve. Furthermore, school districts simply do not have the monetary or human resources to police public employees in this way, nor the resources to curtail the wave of lawsuits that would inevitably challenge the proposed regulations.

Because these particular statutes in Pennsylvania and Nebraska do not provide a *least restrictive alternative*, nor indicate that a *least restrictive alternative* is feasible, the statutes fail the third prong of the *strict scrutiny* test.

Safety regulations must be rational. As described in Chapter II – Global Context, countries around the world have used safety concerns to justify banning religious garb in public places. The most recent of these laws, enacted by the province of Québec in October 2017, prohibit the wearing of face coverings in not only public schools but in government agencies and the public transit system (see "Public Safety" section in Chapter IV – Compelling Interest Test). Some advocates of Pennsylvania's statute feel the regulations relating to teachers' religious garb similarly promote school safety.

This is a peculiar position for several reasons. First, it assumes that criminals want to bring more attention to themselves by wearing something that very few people wear when it is in the criminal's self-interest not to be noticed. Second, it implies that the absence of religious disguises will result in crime-rates falling. Third, it implies that if

criminals are prohibited from wearing religious garb (e.g. a face veil) to hide their criminal activity, then they will not use other disguises (e.g., winter scarf or ski mask). Fourth, in the context of school campuses, it assumes that no other form of face covering—a hoodie, scarf, football helmet, baseball catcher mask, medical mask, Halloween mask, welding mask, theater costume, and so on—could be used to achieve the same purpose. Fifth, the view that banning religious garb promotes school or public safety implies there is a verifiable, widespread problem of religious-garb-wearing criminals—or, in the context of this study, religious-garb-wearing criminals *who are also teachers*. There is, however, no evidence of such problem to solve.[197]

There is, in fact, longstanding evidence of criminal activity—burglary, trespassing, property damage, kidnapping—that occurs every December in the United States. These criminals have one thing in common: they wear a Santa Claus costume. They cover their face with big white fake beards and their only recognizable feature is their eyes. Given the predictable nature of these annual crimes, should the United States ban fake beards, red coats, and fluffy hats in the name of security? There is, after all, a verified trend of criminal activity—unlike the accusations made today of Muslim women.

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[197] In 1923, the Legislature of the federal Territory of Alaska passed a law prohibiting a person from "falsely represent[ing] or pretend[ing] to be a member or authorized agent or representative of any religious, or fraternal, or beneficial, or charitable society, or association, or organization of any kind…" The law made explicit that the wearing of "distinctive garb or emblem of any religious. . . organization" under false pretenses would be considered false representation. Said another way, this law distinguished the religious garb as clothing a criminal would wear, not religious expression to ban. S.B. 47, Chapter 24, *To Denounce False Pretense in Soliciting Money for Associations or Organizations,* Legislature of the Territory of Alaska, April 6, 1923. (Alaska became a state on January 3, 1959.)

"Banning Santa" would not be a serious policy position because people know how to differentiate between criminal behavior and the clothing that criminals wear.

Since the 1860s, a type of religious-garb-wearing criminal has haunted the United States: members of the Ku Klux Klan, who, while murdering people, wore "glory suits"—tall white hats with small eyeholes in a face covering that matches the white, full-bodied gown that is adorned with an embroidered insignia of a Christian cross.[198] Similar examples of full-body religious garb include a tall pointy hat that drapes over the face and neck with holes for the eyes, as expressed by Christian fraternities that participate in the procession of the "Exaltación de la Santa Cruz." [199] This religious garb, which is almost identical to the Klansman gown, is worn by Christians during Holy Week rituals in northern Spain. Should these "foreign" rituals occur in the United States, would the government ban Christians from wearing these full-body coverings in the name of public safety, even without evidence of any criminal activity?

There is no evidence of the United States regulating Klansmen's religious garb in its totality, even though there is undisputed evidence of decades of criminal activity. However, ten states and the District of Columbia have enacted anti-mask laws, most of which originated from mid-twentieth century criminal activity by the Ku Klux Klan.[200]

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[198] *The Ku Klux Klan: A Secret History*. Directed by Bill Brummel. New York, NY: History Chanel, 1998.
[199] "Penitents take part in the procession of the 'Exaltacion de La Santa Cruz' brotherhood, during Holy Week in Zaragoza, northern Spain, on March 29, 2018," in "Photos of the Week," *Religion News Service*, March 31, 2018.
[200] Melissa Kaplan, *State Codes Related to Wearing Masks*. Accessed at www.anapsid.org/cnd/mcs/maskcodes.html; Stephen J. Simoni. "Who Goes There?"—Proposing a Model Anti-Mask Act." 61 FORDHAM L. REV. 241 (1992): 241–274; *Collin v. Smith*, 578 F.2d (7th Cir. 1978) (invalidating regulating designed to prevent Nazis from marching in public protest); *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshipers*, 735 F. Supp. 745 (M.D. Tenn. 1990) (Primarily a permit-case

(These laws have recently been enforced in response to Occupy Movement protests.[201]) It is possible for public schools to use anti-mask laws to justify creating neutral, generally applicable dress codes that require that employees and students to show their faces at all times. Greater legitimacy would be given to such a proposal if there was evidence of crimes being committed by mask-wearing criminals and with consideration on how to implement anti-mask regulations in public schools.

In 2017, Austria passed a "burqa ban" that penalized anyone who covers they face,[202] which has proven difficult to administer. Police officers were pulling over bicyclists who used scarves or masks to cover their face on cold days. One officer "fined a man about $175 for wearing a shark costume for promotional purposes in Vienna's city center."[203] *The Washington Post* reported that "[w]hereas opposition to the ban was previously most vocal within Muslim communities, the outrage has now spread far

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that also ruled that the anti-mask ordinance was "unconstitutionally overbroad because it may be used to stifle symbolic political expression which is protected by the First Amendment"); *State v. Miller,* 260 Ga. 669 (Ga. Sup. Ct. 1990) (Not protected by the First Amendment because wearing the KKK hood/mask was "the communication of a threat"); *Hernandez v. Commonwealth*, 406 S.E.2d 398 (Va. Ct. App. 1991) ("The [KKK] robe and the hood may be such symbols, but the mask is not. . .. [the] mask adds nothing, save fear and intimidation, to the symbolic message expressed by the wearing of the robe and the hood."); *People v. Archibald,* 296 N.Y.S.2d 834 (N.Y. App. Term. 1968) (Man found guilty of anti-mask statute for wearing makeup, a woman's wig, and women's clothing while in public).

[201] Matthew Haag, "Is It Illegal to Wear Masks at a Protest? It Depends on the Place," *New York Times,* April 25, 2017.

[202] Integration Law, Anti-Face Disguise Act (1586 dB); "Foreign Affairs Committee adopts integration package with votes from SPÖ and ÖVP," Parliament Correspondence No. 540 (May 5, 2017). Accessed at www.parlament.gv.at/PAKT/PR/JAHR_2017/PK0540.

[203] Rick Noack, "Austria's New Anti-Burqa Law Isn't Quite Working as Intended," *Washington Post,* October 9, 2017.

beyond."[204] One community leader stated that "[t]he absurdity of the recent incidents shows how useless this law really is."[205]

As implied in these proposals to "ban the burqa," the public safety rationale can sometimes indicate irrational thinking that (1) perpetuates stereotypes[206] that can (2) harm vulnerable minorities,[207] and (3) encourage workplace discrimination,[208] and (4) fuel social hostilities[209] and (5) breed violence.[210] The rule of law, at best, can mitigate conflicts and maintain peace and order. One way to achieve this in the contexts of religion and public education is to ensure that any proposed solution is *narrowly tailored* and designed to achieve the *least restrictive means* possible. This is a policy position that

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[204] *Ibid.* Noack.
[205] *Ibid.* Noack.
[206] Tony Greenwald, Mahzarin Banaji, Brian Nosek, *Project Implicit,* 1998–2017. Accessed at www.projectimplicit.net.
[207] FBI, "Hate Crime Summary of 2016 Hate Crime Statistics," Federal Bureau of Investigation, Nov. 13, 2017; Katayoun Kishi, "Assaults against Muslims in U.S. surpass 2001 level," *Pew Research Center,* Nov. 15, 2017. See also Alan Cooperman, Peter Henne, Dennis R. Quinn, *Restrictions on Women's Religious Attire: More countries restrict women's ability to wear religious symbols or attire than require women to dress a certain way.* (Washington, DC: Pew Research Center, Apr. 5, 2016); Michael Wiener, *Prohibition of Wearing Religious Symbols.* (Germany: Universität Trier, 2006).
[208] The Equal Employment Opportunity Commission reports that since September 11, 2001, the "the EEOC saw a 250% increase in the number of religion-based discrimination charges involving Muslims." In response, the EEOC "filed nearly 90 lawsuits alleging religious and national origin discrimination involving Muslim, Sikh, Arab, Middle Eastern and South Asian communities, many of which involved harassment." EEOC, *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities.* (Washington, DC: Equal Employment Opportunity Commission, 2018).
[209] Pew Research Center, *Religious Hostilities Reach Six-Year High.* (Washington, DC: Pew Research Center, Jan. 2014); Sandra Stencel and Brian J. Grim, "Headscarf Incident in Sudan Highlight a Global Trend," (Pew Research Center, Sept. 18, 2013); Brian J. Grim, "Religion, Law and Social Conflict in the 21st Century: Findings from Sociological Research," OXFORD JOURNAL OF LAW AND RELIGION (2012a), pp. 249–271; and Brian J. Grim, *Rising Tide of Restrictions on Religion,* (Washington, DC: Pew Research Center, 2012b).
[210] *Ibid.*, FBI (2017); Cooperman, et. al. (2016); Pew Research Center (2014); Stencel and Brim (2013); Grim (2012a); Grim (2012b); Kishi (2017); Wiener (2006)

not only requires laws be reasonable in design but also requires that the proposed solution will effectively solve a verifiable problem.

Safety regulations must be narrowly tailored. The carrying of ritual daggers by students in public schools has arisen as another example of a contemporary safety concern regarding some forms of religious garb. Recent cases involve Sikh students in Canada and the United States.

A school board in the province of Québec, the same province that recently enacted the no-face-veil law, prohibited a student from wearing a metal kirpan, a small ritual dagger in a sheath worn under the student's clothing. In 2006, the Supreme Court of Canada[211] held that the school failed to meet the legal principle of *proportionality*—the requirement that there must be a legitimate reason for a regulation. The problem was based on the characterization of the kirpan as a weapon when "over the 100 years since Sikhs have been attending schools in Canada, not a single violent incident related to the presence of kirpans in schools [had] been reported."[212] The Court also held that the school board's interest in promoting the "highest degree of safety" was not *proportionate*, considering that the school allowed students to use scissors, pencils, and baseball bats.

A similar case arose in central California in 1995, when three Sikh students wore their kirpans to school—the kirpan is one of the "Five Ks," which are central tenets of

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[211] *Multani v Commission scolaire Marguerite-Bourgeoys*, 1 S.C.R. 256 (Sup. Ct. Canada 2006).
[212] *Ibid.*, *Multani,* para. 6.

Sikhism.[213] Livingston Union School District suspended the students from school for wearing the kirpan because of the school's "total ban of all weapons."[214] The trial court described the kirpan as a ceremonial knife with a "curved, steel blade . . . worn in a sheath held to the body by a leather strap." Specifically, the court stated that the "kirpans at issue here are roughly the size of an open Swiss Army knife, about 6–7 inches long with a blade of roughly 3½ inches." The Ninth Circuit Court of Appeals ruled in *Cheema v. Thompson*[215] that the suspension did not meet the *strict scrutiny* standard under the federal Religious Freedom Protection Act (which the U.S. Supreme Court later ruled in *City of Boerne v. Flores* (1997)[216] was applicable only to federal laws, not to state or local laws such as one in *Cheema*). Mirroring the research questions in this study, the Ninth Circuit held that: a) yes, the school had a *compelling interest* in banning weapons; b) yes, the school's ban on weapons was *neutral and generally applicable*; but c) the students' religion was *substantially burdened,* triggering the *narrowly tailored* test. The court held that the school had failed to enact a *least restrictive alternative*—the subject of the previously section, Chapter IV – Narrowly Tailored Test. The court pointed to an example of a *least restrictive alternative*: "The record included the policies of two California school districts, which allowed kirpans so long as the blades were dulled, no more than 2½ inches, and securely riveted to their sheaths."[217] This policy ensured that the kirpan could not be used as a weapon. An alternative would be to permit the wearing

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[213] The Ninth Circuit defined the Five Ks as "kes" (long hair), "kangha" (comb), "kachch" (sacred underwear), "kara" (steel bracelet), and "kirpan" (ceremonial knife). *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995)
[214] Cal. Penal Code § 626.10(a); Cal. Educ. Code § 48915(a).
[215] *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).
[216] *City of Boerne v. Flores,* 521 U.S. 507 (1997).
[217] *Cheema*, 667 F.3d at 884, n.3.

of a wooden or plastic kirpan, or a symbolic image of a kirpan to be displayed on a cloth print or medallion, or as a temporary henna tattoo.

The Ninth Circuit's kirpan decision describes an example of a no-weapons policy that is *neutral and generally applicable* (unlike the Canadian regulation discussed above that singled out kirpans for regulation) and advances a *compelling state interest*. But U.S. law requires that the school's interest must also be *narrowly tailored* to achieve the *least restrictive means* possible, which the Livingston Union School District did not.

Historic decisions made under the rational basis test. Many of the early religious-garb cases used what we now define as a *rational basis* test[218] to reach their conclusions[219]—the most forgiving form of judicial review (see Chapter II – From Rational Basis to Strict Scrutiny). The contemporary *Smith* and *Sherbert* tests, however, require laws targeting religion for regulation to meet the *strict scrutiny* standard—the highest form of judicial review.[220] Some states' objectives are reasonable (e.g., wanting to create a culture free of religious coercion and indoctrination, which I discuss later), which explains why some courts upheld anti-religious-garb statutes using the *rational*

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[218] The *rational basis* standard is two degrees lower than that of the *compelling interest* standard in the *Sherbert* test (see Chapter II – Literature Review). The *rational basis* test requires that a law must further any legitimate government interest deemed reasonable to the court. *Express Agency v. New York,* 336 U.S. 106 (1949).

[219] For example, the *Herr* court (1910) found the Pennsylvania General Assembly's reasons for targeting public schoolteachers' religious garb to be "supported by sound principle." I interpret this to mean that the court was implicitly admitting that the statute did not specify a "uniform style of dress." They rather found that the legislature had, in contemporary legal terms, a *rational basis* for the regulation, thus excusing the previous Pennsylvania Supreme Court's orders in *Hysong. Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910); Judge Rice's opinion, *Commonwealth v. Herr*, 39 Pa. Super. 454 (1909).

[220] The view that *strict scrutiny* applies to laws that target religion for regulation is further reinforced in *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 at 28 (1993) and *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). For a complete discussion, see the section "Evolution of Free Exercise Standards" in Chapter II – Literature Review.

basis test. This study demonstrates that it is not likely that a court today would reach the same conclusion using the *strict scrutiny* test, as I further explain in this chapter.

Contemporary decisions were caught in Smith's shadow. The contemporary religious-garb decisions issued by the Third Circuit (an employment discrimination case filed under Title VII) and the Oregon Supreme Court (a case filed under the state constitution) bypassed the First Amendment's Free Exercise Clause altogether. In doing so, these courts failed to examine the fundamental rights of Sikh and Muslim teachers under the Free Exercise standard of judicial review, *strict scrutiny*. This is somewhat understandable because these cases were decided in the shadow of *Smith,* a controversial religious liberty case that temporarily disrupted the longstanding consensus regarding Free Exercise doctrine.

For sixteen years,[221] federal legislative and judicial branches and many state courts and state legislatures acted under *Smith*'s shadow (see Chapter II – Evolution of Free Exercise Standards). Light was brought to the path through the checks-and-balance process. The result is the current agreement to apply *both* the *Smith* (*general applicability*) and the *Sherbert* (*strict scrutiny*) standards of judicial review to Free Exercise cases, as I do in this study. However, these tensions are not fully resolved, so the problem remains. One consequence of the conflicts that arose from *Smith* is that no court, to date, has yet examined state bans on religious garb under *strict scrutiny*, hence the need for this study.

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[221] From *Employment Division v. Smith,* 494 U.S. 872 (1990) to *Cutter v. Wilkinson* 544 U.S. 709 (2005) and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

One case that was uniquely caught in *Smith's* shadow was *Reardon,* in which the Third Circuit mistakenly interpreted the U.S. Supreme Court's decision in *Smith* to have "no bearing on cases concerning [religious garb] statutes." In upholding the termination of a Muslim teacher for wearing a hijab while teaching in a public school, the Third Circuit wrote,

> the *Smith* decision is restricted to situations where government action is not specifically addressed to religious practice. Religious garb statutes are, of course, addressed to certain behavior purely because it is religious in nature. Accordingly, *Smith* has no bearing on cases concerning such statutes.[222]

True, *Smith* is a case about general applicable laws that may burden religion (e.g., federal narcotic laws affecting Native Americans' use of peyote for sacramental purposes).[223] However, the Third Circuit's characterization of *Smith* as having "no bearing" is peculiar because the *Smith* decision said the opposite. The *Smith* court affirmed the longstanding view that laws cannot explicitly target religion for government regulation.[224] Justice Scalia, writing for the majority in *Smith*, stated,

> It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.[225]

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[222] *Reardon,* at Fn4.
[223] Specifically, the *Smith* court held that the longstanding *strict scrutiny* standard used in Free Exercise cases does not apply to *neutral and generally applicable* laws. Congress later overturned this decision. See Chapter II – Evolution of Free Exercise Standards.
[224] A decision reinforced three years later in *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993).
[225] Justice Scalia in *Smith,* at 12.

The religious garb-statutes in question plainly "ban such acts … only when they are engaged in for religious reasons" and "only because of the religious belief that they display." Consequently, it is correct to understand the *Smith* court to be affirming the longstanding use of the *Sherbert* standard when states target religion for regulation.[226]

In another perplexing turn, the Third Circuit claimed that the U.S. Supreme Court dismissed *Cooper* (1986)[227] "for want of a substantial federal question"—a surprising position given the U.S. Constitution's authority over state laws.[228] The Third Circuit interpreted the high court's dismissal as "an indication that the U.S. Supreme Court 'authoritatively established' the goal of preservation of an atmosphere of *religious neutrality* [emphasis added] and advancing a *compelling state interest* [emphasis added]."[229] This is puzzling. How can a statute that specifically targets religious practices for government regulation, which the *Smith* court protects against, be considered neutral to religion? (For further discussion, see "Effects of Anti-Religious-Garb Statutes" in Chapter IV – Substantial Burden Test.)

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[226] In reflecting upon the *Smith* decision, Chief Justice Roberts wrote in 2006, "We had 'no cause to believe' that the compelling interest test 'would not be applied in an appropriately balanced way' to specific claims for exemptions as they arose." He went on to acknowledge Congress's intent to apply the compelling interest test to ensure that the courts will strike a "sensible balance between religious liberty and competing prior governmental interests." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

[227] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 at 19 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987).

[228] The case that the U.S. Supreme Court used to incorporate the Free Exercise Clause of the First Amendment to the U.S. Constitution to the states. *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

[229] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).

A generous characterization of these contradictions is to say that the Third Circuit could not fully see the path forward while in the shadow of *Smith*. The lower court simply did not have the time to fully comprehend the impact of the high court's landmark decision—a decision made four months earlier.[230] This is especially understandable given that *Smith* shook the ground of three decades of consensus about the Free Exercise jurisprudence.

Public salaries have "no bearing" on private donations. Claims made under the Establishment Clause of the First Amendment and the No Religious Test for Office provision of the U.S. Constitution are outside the scope of this study. However, the justification that anti-religious-garb statutes prevent public schools from using public funds to aid religion is a question that can also be examined through the lens of the Free Exercise Clause. As discussed in Chapter IV – Statues Prevent Use of Public Funds to Aid Religion, taxpayers claimed that public funds were indirectly being used to aid religion when Catholic nuns employed by public schools donated their salaries to their church. These historic cases are worth documenting in this study, aware that taxpayers have less authority to make such challenges today.[231]

The Kentucky Appeals Court, for example, found in *Rawlings* (1956) that the "sole objection" to Catholic nuns teaching in public schools "is based upon the fact they wear their religious garb and emblems in the classrooms and donate their compensation

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[230] *Smith* was issued on April 17, 1990; *Reardon* was issued on August 9, 1990.
[231] The U.S. Supreme Court's ruling in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011) overturned the taxpayers' standing as narrowly defined in *Flast v. Cohen*, 392 U.S. 83 (1968).

to their respective religious orders after the payment of their living expenses."[232] The *Rawlings* court rejected the Establishment argument on state constitutional grounds of Free Exercise of religion.[233] The *Rawlings* court held: "salaries paid these Sisters are theirs and they may do therewith as they choose. … To deny such right of contribution would be a denial of religious liberty."[234]

The *Rawlings* decision reflects the thinking behind the Pennsylvania Supreme Court decision in *Hysong* (1894): "The fact that these teachers contributed all their earnings…" had no "bearing on the question." In restraining the powers of the state, the Pennsylvania Supreme Court asserted that "[it] is none of our business, nor that of these appellants, to inquire into this matter. American men and women, of sound mind and twenty-one years of age, can make such disposition of their surplus earnings as suits their own notions."[235] This point was not contradicted when the second Pennsylvania Supreme Court upheld the state's anti-religious-garb law in 1910.[236]

To further substantiate this point, the North Dakota Supreme Court stated in 1936, "the fact that the teachers contributed a material portion of their earnings to the religious order of which they are members is not violative of the constitution." The court concluded, "To deny the right to make such contribution would in itself constitute a denial of that right of religious liberty which the constitution guarantees."[237]

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[232] *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956).
[233] KY. CONST. §1 and 5.
[234] The Kentucky Supreme Court cites "*Hysong v. Gallitzin Borough School District*, 164 Pa. 629, 30 A. 482, 26 L.R.A. 203, 44 Am.St.Rep. 632; *Gerhardt v. Heid*, 66 N.D. 44 (N.D. Sup. Ct. 1936); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256."
[235] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 54.
[236] *Commonwealth v. Herr*, 229 Pa. 132 (Pa. Sup. Ct. 1910).
[237] *Gerhardt v. Heid*, 66 N.D. 44 (N.D. Sup. Ct. 1936) at 29.

For these reasons, the questions of public funds being used to hire religious garb-wearing teachers has no bearing on this Free Exercise analysis.

Distinguishing secularism, sectarianism, and separatism. In response to the previously articulated view that anti-religious-garb statutes create a "secular school culture" and avoid the "perception of favoring religion" (see Chapter IV – Compelling Interest Test), I now reflect on the legal meaning of the terms *secularism*, *sectarianism*, and *separatism*.

The legal question in this study is incorrectly framed when states conflate "secularism" with the constitutional guarantee of "separatism." The French and Turkish constitutions are explicitly grounded in secular principles, which may explain why these countries have experienced a rise in social hostilities as a result of bans on Muslims' religious garb (see Chapter II – Global Context).

The U.S. Constitution is distinct because of its two-principles-for-one-right approach to religious liberty: it treats the *free exercise* and *no establishment* of religion principles as intersecting rights, best understood together as "freedom *of* religion," as compared to a purely secularist approach, "freedom *from* religion."[238] As the U.S. Supreme Court has affirmed, "There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[239]

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[238] For a more detailed analysis, see Nathan C. Walker, "Introduction to Theolegal Theory," in Nathan C. Walker and Edwin J. Greenlee, eds., *Whose God Rules? Is the United States a Secular Nation or a Theolegal Democracy?* (New York, NY: Palgrave Macmillan, 2011), pp. 1–18.

[239] *Walz v. Tax Com. of New York*, 397 U.S. 664 (1970). This 7–2 decision was reaffirmed in *Locke v. Davey,* 540 U.S. 712 (2004), when Chief Justice Rehnquist wrote for the majority, "This case involves the 'play in the joints' between the *Establishment* and *Free Exercise Clauses*."

This is distinct from an absolute secularist ban-religion-from-public-life approach. James Madison, the primary author of the First Amendment, warned his contemporaries of this effect: "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion."[240] Religious coercion, therefore, has two sides: The state can force religion upon a person or force religion out of a person. Both are unconstitutional under the First Amendment's two interlocking principles of *free exercise* and *no establishment*.

The "play in the joints" reveals that the *free exercise* and *separation* principles were historically driven by religious actors and often for religious reasons. It is well known that the Framers of the Constitution were Christians, but it was the diversity of Christian manifestations represented in society and the violent history of religious establishments in the colonies that led the constitutional framers to disallow religious tests for office and choose not to create a national church. Four years later, the states ratified the First Amendment, which made explicit that the federal government could never establish a national religion.

By 1819, after Alabama achieved statehood, 96 percent of states had disestablished their state religions.[241] Massachusetts was the last holdout in 1833,

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[240] James Madison, *Memorial and Remonstrance Against Religious Assessment* [June 20, 1785]. (Boston: Lincoln & Edmands, 1819).

[241] States with no established religion at the time of their statehood: 1787 Del.; 1787 N.J.; 1787 Pa.; R.I., founded in 1790; Md., founded in 1788 and disestablished pre-statehood in 1785; Va., founded in 1788 and disestablished in 1776; N.C., founded in 1789 and disestablished in 1776; N.Y., founded in 1788 and disestablished in 1777; 1792 Ky.; 1803 Ohio; 1812 La.; 1816 Ind.; 1817 Miss.; 1818 Ill.; 1819 Ala. States that disestablished their state religions after the state's founding/statehood but before 1819: Conn., founded in 1788 and disestablished in 1818; Ga., founded in 1788 and disestablished in 1798; N.H., founded in 1788 and disestablished in 1819; S.C., founded in 1788 and disestablished in 1790.

solidifying the separation doctrine in all state and federal constitutions.[242] This state-driven trend was not a result of *secularism* or federal overreach. These were often a result of religious justifications for *separatism* articulated by a diversity of Christian leaders at the state level. Professor John Witte Jr. documented these trends.

Witte's research[243] shows that a diversity of religious people often used religious reasons for justifying the separation of religion and state, with the primary intent to protect religion from government overreach. Specifically, he illustrated that over one hundred verses in the Bible justify separating religion and government (e.g., "render to Caesar the things that are Caesar's").[244] Alexis de Tocqueville wrote about these effects in *Democracy and America*:

> My own religious affiliation brought me particularly into contact with Catholic priests with several of whom I soon established a certain closeness. To each of them I expressed my astonishment and revealed my doubts: my view was that all these men agreed with each other except over details; but they all attributed the peaceful influence exercised by religion over their country principally to the separation of Church and state. I

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[242] Mass., founded in 1788 and disestablished in 1833.

[243] John Witte Jr. and Joel A. Nichols, "Appendix Two: State Constitutional Provisions on Religion (as of 1947)" in *Religion and the American Constitutional Experiment, Third Edition.* (Westview Press, Boulder, Colorado, 2011), pp. 300–303.

[244] "In the Hebrew Bible, the chosen people of ancient Israel were repeatedly enjoined to remain separate from the Gentile world around them and to separate the Levites and other temple officials from the rest of the people. The Hebrew Bible also made much of building and rebuilding "fortified walls" to protect the city of Jerusalem from the outside world and to separate the temple and its priests from the commons and its people. … The New Testament commanded believers to "render to Caesar the things that are Caesar's and to God the things that are God's" and reminded them that "two swords" were enough to govern the world. Christians were warned that they should "be not conformed to this world" but remain "separate" from the world and its temptations, maintaining themselves in purity and piety. Echoing the Hebrew Bible, St. Paul spoke literally of a "wall of separation" (paries maceriae) between Christians and non-Christians interposed by the Law.

> assert confidently that, during my stay in America, I did not meet a single man, priest or layman, who did not agree about that.[245]

There is consensus among scholars of American religion that the No Religious Test for Office, Free Exercise, and No Establishment clauses of the U.S. Constitution were born of compromises between members of rival Christian sects. In this vein, it is fair to characterize the first age of disestablishment[246] (1776–1833) as an age in which the state was, in theory, prevented from privileging one particular Christian sect.

In fact, this study illustrates that anti-religious-garb laws were intended to target Catholic nuns, thus privileging the Protestant Christians (as diverse as they were themselves) who dominated public schools at the time. Said another way, the argument that these statutes were designed to create a "secular" culture at the time of their enactments was code for maintaining Protestant schools.

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[245] Alexis De Tocqueville, "Main Causes for the Powerful Position of Religion in America [1835]" in Gerald E. Bevan, trans. *Democracy in America and Two Essays on America.* Vol. 1 (New York: Penguin, 2003) p. 345.

[246] By the time Alabama joined the union in 1819, 96 percent of the then 22 states had disestablished religion from their state constitutions, meaning that within 28 years of the national disestablishment clause going into effect, 96 percent of the states had no state religion. The widespread support of the disestablishment principle laid the legal foundation for states to have a distinct role from that of the federal government in the separation of church and state. The disestablishment doctrine was reinforced with another founding cornerstone of church/state law: the principle of *no preference.*

Leading scholars in the field of religious liberty[247] and the U.S. Supreme Court[248] have interpreted the use of "sectarianism" or "sects" as legal terms in the late nineteenth and early twentieth centuries as evidence of anti-Catholic bias. This historic context reveals that the Protestant-dominated legislatures may have assumed that the very presence of religious garb-wearing Catholics in Protestant-dominated public schools transformed the public school into a "sectarian" school (e.g., Catholic parochial school). In New York, for instance, in 1886, Protestant leaders of the public schools made particularly reference toward disallowing religious garb in the same of "sectarianism" and yet continued to advanced Protestant-based religious instruction in their public schools:

> In the public schools… [an] effort should be made to secure teachers having faith in God; that the [Protestant] Bible should be used in the schools; that *everything sectarian, such as particular religious garb, should be avoided* [emphasis added]; that a committee, to confer with

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[247] The Third Circuit Court of Appeals admitted in 1990 that the Pennsylvania General Assembly of 1895 enacted its anti-religious-garb law with a "putatively anti-Catholic motivation." *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990). For a general discussion of anti-Catholic developments in the United States in the nineteenth and twentieth centuries, see Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002) and E. Digby Baltzell, *The Protestant Establishment: Aristocracy & Caste in America.* (New Haven, CT: Yale University Press, 1964). Regarding state-based "no sectarian laws" that banned public funding for private religious schooling, Professor Douglas Laycock argued that "'sectarian' initially meant something like denominational; the term arose in the early-nineteenth-century legal battles between liberal and conservative Protestants. But Protestants closed ranks in response to Catholic immigration, and for the most of the nineteenth century, 'sectarian' was a code word for Catholic." Laycock stated, "Much of the American tradition of refusing to fund private schools is derived from nineteenth-century anti-Catholicism." Douglas Laycock, *Religious Liberty: Overviews and History,* Vol. 1 (Grand Rapids, MI: Eerdmans Publishing, 2010), p. 161.

[248] Justice Thomas, writing for the six to three majority in *Mitchell v. Helms*, 530 U.S. 793 at 66 (2000), stated, "Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment [of 1875], which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" See generally Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992)."

> committees of other [Protestant] religious bodies, should be appointed to prepare a Book of Morals for the use of schools; and finally that [Protestant] ministers be exhorted to bring this whole subject before their people by means of sermons or lectures.[249] [Emphasis added.]

In this era of anti-sectarianism, the Pennsylvania General Assembly used the preamble of the nation's first religious-garb statute to state that "all appearances of sectarianism should be avoided."[250] The 1910 Pennsylvania Supreme Court decision in *Herr* predates the contemporary legal frameworks that limit the extent to which a school can use the "secular culture" justification to regulate religion. The fear expressed by many leaders within the Protestant majority was that "the distinctive garbs, so exclusively peculiar to the Roman Catholic Church, create[d] a religious atmosphere in the schoolroom."[251]

Escaping "sectarianism" became a modern justification, although the meaning changed from being less an anti-Catholic approach to more of a freedom-from-religion strategy. For instance, in *Widmar v. Vincent* (1981),[252] the U.S. Supreme Court used a Free Speech framework to explicitly address the limits of a state's ability to avoid the "appearances of sectarianism" (a Free Speech argument that is outside the scope of my study but worth mentioning). In this case, the Court held that the University of Virginia was engaging in viewpoint discrimination by preventing a student from receiving $5,800 in subsidies to fund a religious publication—subsidies offered to other student

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[249] "Meeting of the Synod of New York." *New York Evangelist,* October 28, 1886.
[250] See Appendix B.
[251] Judge Hogg's dissent in *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956) at 26.
[252] *Widmar v. Vincent*, 454 U.S. 263 (1981).

publications.[253] Similar legislative and judicial developments set limits as to what constituted a justifiable avoidance of the appearance of sectarianism. In the Equal Access Act of 2010,[254] Congress made explicit that public schools are "limited open forums" that must provide student groups with equal access to school facilities, regardless of "religious, political, philosophical, or other content of the speech at [the group's] meetings."[255] This parallel set of legal developments suggest that that the U.S. Supreme Court has drawn a line to determine when a state is avoiding *sectarianism* as compared to engaging in *viewpoint discrimination*.

These historic and contemporary developments reveal at least two legal guideposts: First, government avoidance of sectarianism can result in viewpoint discrimination, which is prohibited under the Free Speech Clause; second, government inhibiting of religion can result in substantial burdens to religion,[256] which is prohibited under the Free Exercise Clause and the No Establishment Clause.[257] As a result, it is not compelling to conclude that anti-religious-garb statutes are effective at creating a "secular school culture" and avoid the "perception of favoring religion." Rather, the statutes target religion for government regulation, creating the perception that the states disfavor particular forms of religious expression. This may be permissible under secularist

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[253] *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).
[254] The Equal Access Act, 20 U.S.C. §§ 4071–4073 (1984); affirmed in *Westside Community v. Mergens*, 496 U.S. 226 (1990).
[255] See the U.S. Department of Education, *Legal Guidelines Regarding the Equal Access Act and the Recognition of Student-Led Noncurricular Groups* and the legal developments in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), in which the U.S. Supreme Court held that state-sponsored student groups must uphold nondiscrimination laws.
[256] See Chapter IV – Substantial Burden Test.
[257] "The principal or primary effect of the statute must not advance nor inhibit religion," as required under the Lemon test. *Lemon v. Kurtzman*, 403 U.S. 602. Caveat: A complete analysis of anti-religious-garb laws must take place in a future study.

constitutions, such as those of France and Turkey, that value the principle of "freedom *from* religion," but they cannot be permissible under the U.S. Constitution, which uses a two-principles-for-one-right approach to guarantee "freedom *of* religion."

Having laid the foundation of understanding about the interlock between the Free Exercise and Establishment Clauses, I will now respond to three interrelated arguments in section Chapter IV – Compelling Interest Test. Proponents of banning public schoolteachers' religious garb claim that the statutes in question prevent public schoolteachers from engaging in religious *indoctrination* and religious *instruction* because students are highly *impressionable*.

Religious garb cannot be used to indoctrinate. It is undisputed that public schools and their employees may not subject students to religious indoctrination.[258] The U.S. Supreme Court has played an important role in ensuring that public primary and secondary schools do not violate the Establishment Clause.[259] The debate before us rests not on the question of whether this can occur, because it cannot; the question is whether

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[258] *Meek v. Pittenger*, 421 U.S. 349 (1975), quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[259] See annotated description of the following cases in the bibliography: *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Aguilar v. Felton*, 473 U.S. 402 (1985), overturned in *Agostini v. Felton*, 521 U.S. 203 (1997); *Engel v. Vitale*, 370 U.S. 421 (1962); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Grand Rapids v. Ball*, 473 U.S. 373 (1985) overturned in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1. (1993); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994); *Lamb's Chapel v. Center Moriches Union*, 508 U.S. 384 (1993); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Minersville v. Gobitis* [sic, Gobitas], 310 U.S. 586 (1940), overturned in *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Mueller v. Allen*, 463 U.S. 388 (1983); *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Westside Community v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Wolman v. Walter*, 433 U.S. 229 (1977); *Zorach v. Clauson*, 343 U.S. 306 (1952).

religious garb, in itself, indoctrinates its observers. Before discussing the merits of this concern through the lens of Free Exercise protections, it is important to remember that this study rests on a series of factual parameters (see Step 4. Set Factual Parameters in Chapter III – Methodology), two of which are relevant to the indoctrination claim.

First, legally speaking, religious garb is defined as a marker used by teachers to identify themselves as "members or adherents of any religious order, sect or denomination"[260] (see Appendix A and Appendix C). This is recognizably different from legal bans on indoctrination. For instance, Pennsylvania Education Code §1505-E details specific forms of "prohibited instruction"—there can be no public-school activity that "instructs, proselytizes or indoctrinates students in a specific religious or political belief." The fact that the state wrote two different laws suggests two distinct problems and two distinct solutions. Consequently, this study assumes that public schoolteachers' religious indoctrination of students is impermissible *and* that the legal ban on religious garb is distinct from that of statutory and judicial prohibitions against indoctrination.

Second, this study rests on another factual parameter—the long history of trial courts that found *no evidence* of indoctrination or proselytization by public schoolteachers who wore religious garb while teaching (Table 3). Consequently, the religious-garb cases outlined in this study are distinct from cases where there was evidence of indoctrination. The U.S. Supreme Court vigilantly and rightfully protects public school students from state-endorsed indoctrination.[261] The question of religious

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[260] Pennsylvania Statute 24, § 11–1112 (2018). First enacted in 1895. It was reaffirmed in 1949 and 1982 and remains active today.

[261] See Chapter IV – Discussion §8 for examples of legal definitions of indoctrination, such as in *Abington School District v. Schempp*, 374 U.S. 203 (1963) in which the U.S. Supreme Court ruled, in an 8–1 decision, that state-mandated prayers and Bible readings in public schools were unconstitutional.

indoctrination is resolved. The U.S. Supreme Court, however, has yet to address the question of public schoolteachers' religious garb, which is why there is a need to conduct this narrow study based on a distinct and unresolved legal question.

Together, this study assumes these two factual parameters—legal bans of religious garb are distinct from legal bans on indoctrination, *and* trial courts in religious-garb cases have found *no evidence* of religious indoctrination (Table 3). In constructing this methodology, this study creates a narrow line of inquiry into the nature of teachers' religious garb to avoid confusing the settled case law on religious indoctrination and the unresolved question of the constitutionality of teachers' religious garb. Consequently, the findings in this study demonstrate that religious garb and religious indoctrination are not synonyms and cannot be treated as such. Religious indoctrination in public schools is unequivocally out of the question. Any evidence of a public schoolteacher indoctrinating children, whether wearing religious garb or not, should not be tolerated.

Still, proponents of anti-religious-garb statutes reject the facts presented by the trial courts that found no evidence of indoctrination (Table 3), claiming that religious garb by itself indoctrinates its observers. To conflate "the wearing of religious garb" with "an act of indoctrination" is contradictory for two reasons: first, as previously noted, it conflicts with the legal definition of religious garb in the statutes that are distinct from separate legal bans on religious indoctrination; second, it runs counter to the common definition of the word "indoctrination." The *New Oxford Dictionary* defines indoctrination as "teach[ing] a person or group to accept a set of beliefs uncritically."[262]

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[262] "Indoctrinate," *New Oxford American Dictionary* (Mac OS X 10.13.3, version 2.2.2., 2018).

To suggest that religious garb, by its very nature, indoctrinates the observer would suggest that the "dress, mark, emblem or insignia" used to indicate a teacher's religious identity forces students to "accept a set of beliefs uncritically." This is a cognitive error. Mere exposure to a teacher's religious identity—through his or her garb—does not in itself convert school children to, coerce them into, or inculcate them with their teacher's religion. The religious garb merely indicates that the teacher identifies with a particular religion. The wearing of religious garb is simply an identity statement made by the wearer; it is not a religious commandment directed at another or causing injury to another person. As Thomas Jefferson said, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god [or to wear religious garb or not]. It neither picks my pocket nor breaks my leg."[263] A teacher's religious garb neither indoctrinates a child nor causes them injury.

A historical illustration of this concern is worth noting. The Supreme Court of Pennsylvania rejected the argument that if students were to be taught by religious-garb-wearing teachers, then the school would "produce continuous and continuing, and will continue to cause and produce, irreparable and irremediable injury and damage to [the children]."[264] The "damage" referred to was not only the harm caused by children possibly turning away from the Protestant faith of their families but the perceived eternal

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[263] Thomas Jefferson. *Notes on the State of Virginia*. William Peden, ed. Chapel Hill: University of North Carolina Press, 1955, 159.
[264] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894) at 34.

damage to children's souls for claiming Catholicism.[265] The Pennsylvania Supreme Court rejected the notion that religious garb had any such power to cause harm to its observers.

In contemporary terms, the widely accepted legal definition of "indoctrination" is found in *Schempp* (1963).[266] In this landmark decision, the U.S. Supreme Court found unconstitutional state statutes in Pennsylvania and Maryland. The state legislatures wrongly mandated students enrolled in public school to begin each day by reading aloud verses of the *King James Bible* (the Protestant version) and reciting the Lord's Prayer (the Protestant version). This is the legal understanding of state-sponsored indoctrination. Public schoolteachers' compulsion (via the state's directive) of children to read aloud Protestant Bible verses and to recite Protestant prayers every day cannot be equated with a private expression of religious identity by a state employee: public schoolteachers merely express their religious affiliation through the wearing—for themselves—of religious dress, marks, emblems, or insignia. It would be considered indoctrination if, at the start of each day, the public schoolteacher *required students to wear religious garb*, thus using the authority of their position to pressure children to cloak themselves in, for instance, robes or headdresses or to adorn children with religious jewelry or symbols.

The *Schempp* decision was a lesson about the dangers of state-compelled religious coercion; the religious garb statutes are about state legislatures targeting religion for government regulation and, in doing so, substantially burdening religion in seven distinct ways (see Chapter IV – Seven Effects of Anti-Religious-Garb Statutes). It is inaccurate to

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[265] To understand the potency of these views, one needs only study the Reformation in Europe, the church/state battles of the English monarchy, the anti-papists laws in Colonial America, the Bible Riots in the Early American Republic, or the longstanding Protestant/Catholic conflicts in Northern Ireland.
[266] *Abington School District v. Schempp*, 374 U.S. 203 (1963).

claim that the state has a compelling state interest to prevent religious indoctrination through banning religious garb when there is no evidence of indoctrination (Table 3) and wearing religious garb does not meet the legal or common definition of indoctrination. The *Schempp* case was about state-initiated indoctrination, whereas the religious-garb cases are about state hostility toward the religion of state employees. These regulated teachers are simply asking that the state live up to the charge made by the U.S. Supreme Court in *Schempp,* a charge initially articulated by the high court in 1870: the state's duty is to protect all, prefer none, and disparage none.[267]

To help schools embody this vision, states can turn to national consensus statements drafted by leaders in civil liberties and religious groups, who agree that public schoolteachers should not indoctrinate students in any religion. For instance, in 2000, the U.S. Department of Education disseminated *A Teachers' Guide to Religion in Public Schools*[268] to every public school in the country. It translated for educators, parents, and students the widely accepted constitutional parameters of religion in public schools. Endorsed by twenty-two national organizations,[269] the document read as follows:

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[267] "Almost a hundred years ago in *Minor v. Board of Education of Cincinnati*, Judge Alphonso Taft . . . stated the ideal of our people as to religious freedom as one of "absolute equality before the law, of all religious opinions and sects . . . The government is neutral, and, while protecting all, it prefers none, and it disparages none." *Abington School District v. Schempp*, 374 U.S. 203 at 20 (1963).

[268] Based on guidelines originally developed by James V. Panoch and published in 1974 by the Public Education Religion Studies Center at Wright State University. The guidelines quoted here are from Charles C. Haynes, *A Teachers' Guide to Religion in Public Schools* (Washington, DC: Religious Freedom Center of the Newseum Institute, 2017). For a complete list of consensus guidelines on religion in public schools, see Charles C. Haynes and Oliver Thomas, *Finding Common Ground: A First Amendment Guide to Religion and Public Schools* (Nashville, TN: First Amendment Center, 2011).

[269] Charles C. Haynes, *A Teachers' Guide to Religion in Public Schools* (1st edition, Nashville, TN: First Amendment Center, 2000; 2nd edition, Washington, DC: Religious Freedom Center of the Newseum Institute, 2017). This consensus statement was endorsed by the American Association of School

- The school's approach to religion is *academic*, not *devotional*.
- The school strives for student *awareness* of religions but does not press for student *acceptance* of any religion.
- The school sponsors *study* of religion, not the *practice* of religion.
- The school may *expose* students to a diversity of religious views but may not *impose* any particular view.
- The school *educates* about all religions; it does not *promote* or *denigrate* religion.
- The school *informs* the students about various beliefs; it does not seek to make students *conform* to any particular belief.

This consensus statement was designed to teach school leaders about the legal parameters of religion and public education. It also was distributed to formally instruct teachers on the legal parameters of engaging students in the academic study of religion[270] in history, literature, and social studies classes.[271] This consensus statement is also helpful in distinguishing between the teachers who wear religious garb and the teachers who indoctrinate children. The wearing of religious garb is a personal act by a government employee and cannot be used to *force* anyone, let alone a child, to *engage* in

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Administrators, American Federation of Teachers, American Jewish Committee, American Jewish Congress, Association for Supervision and Curriculum Development, Baptist Joint Committee on Public Affairs, Christian Educators Association International, Christian Legal Society, Council on Islamic Education, National Association of Elementary School Principals, National Association of Evangelicals, National Association of Secondary School Principals, National Council of Churches of Christ in the U.S.A., National Council for the Social Studies, National Education Association, National PTA, National School Boards Association, Union of American Hebrew Congregations, and Union of Orthodox Jewish Congregations of America.

[270] Diane L. Moore, Chair, et al. "Guidelines for Teaching About Religion in K-12 Public Schools in the United States," American Academy of Religion, Religion in the Schools Task Force, April 2010.

[271] Benjamin P. Marcus, Chair, et al. "Supplement: Religious Studies Companion Document for the C3 Framework," *College, Career and Civil Life Framework for Social Studies State Standards,* National Council for the Social Studies, 2017. Co-authors include Jessica Blitzer, West Hartford Public Schools (CT); Seth Brady, Naperville Central High School (IL); John Camardella, Prospect High School (IL); Niki Clements, Rice University (TX); Susan Douglass, Georgetown University (DC); Benjamin P. Marcus, Newseum Institute (DC); Diane L. Moore, Harvard Divinity School (MA); and Nathan C. Walker, Teachers College Columbia University (NY).

a devotional activity; *coerce* students to accept the teacher's religion for themselves; *compel* students to engage in a spiritual practice; *impose* or *expose* students to what they would not otherwise experience in the workplace or in the public square; or seek to *conform* students to any religious behaviors or beliefs, regardless of whether the teachers identify as religious or not.

The result of this analysis is twofold: public schools and their employees—whether acting on behalf of a state legislature or acting by themselves—may not inculcate religion, *and* religious garb worn by teachers in public schools does not, in itself, indoctrinate its student observers. Religious garb simply informs onlookers of the wearer's identity.

Informing is, admittedly, a type of instruction—religious garb informs another about a wearer's lived religion in public life. As previously noted, Pennsylvania Education Code §1505-E details specific forms of "prohibited instruction"—there can be no public-school activity that "instructs . . . students in a specific religious . . . belief." The question then arises: does being informed about another's religious identity meet the definition of "religious instruction"?

Religious garb cannot be used for religious instruction. One of the most often cited quotes in the contemporary literature on this topic[272] was offered by the Kentucky Appellate Court, in *Rawlings* 1956, which held that,

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[272] L. S. Tellier, "Wearing of Religious Garb by Public-School Teachers." AMERICAN LAW REPORTS, 60 A.L.R.2d 300 (1958); *Moore v. Board of Education*, 4 Ohio Misc. 257 at 26 (Ohio Ct. Com. Pl. 1965);

> While the dress and emblems worn by these Sisters proclaim them to be members of certain organizations of the Roman Catholic Church and that they have taken certain religious vows, these facts do not deprive them of their right to teach in public schools, so long as they do not inject religion or the dogma of their church. *The garb does not teach. It is the woman within who teaches* [emphasis added].[273]

The view that *garb does not teach; teachers do* is not merely an opinion. It is a verified fact as a result of decades of case law (Table 3). As I demonstrated in the "factual parameters" section of Chapter III – Methodology, in all the cases that took up the narrow question of teachers' religious garb, the trial courts found no evidence of religious instruction (Table 3).

For instance, *Zellers* (1951) was primarily an Establishment Clause question involving a taxpayer challenge of the state of New Mexico's decision to rent church buildings to operate a public school led by members of the church. This is a set of facts distinct from the narrow Free Exercise inquiry into whether the state can regulate the religious garb of a public employee. *Zellers* was similar to other cases that involved

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[273] *Rawlings v. Butler*, 290 S. W. 2d 801 at 7 (Ky. Ct. App., 1956); James Chester Antieau, Phillip Mark Carroll, and Thomas Carroll Burke. "Wearing of Religious Garb by Public School Teachers." New York: Central Book Company, 1965, 56; John David Burkholder. "Religious Rights of Teachers in Public Education." Journal of Law and Education, Vol. 18. Issue 3 (Summer 1989): 356; Edmund E. Reutter, "Teachers' Religious Dress: A Century of Litigation." WEST'S EDUCATION LAW REPORTER 701 WELR 747 (January 1992): 3; Charles C. Haynes, "Should Schools Ban Teachers in Religious Garb?" *The Janesville Gazette*, August 1, 2009; Maria Zhurnalova, "Religion in the Public Sphere: Public Schools and Religious Symbolism: A Comparative Analysis." Doctor of Juridical Science (SJD) diss., Central European University, 2007; Stacey V. Reese, "Accommodation of School Employee Religious Expression and Practice." In Lisa Soronen, ed., Religion & Public Schools: Striking a Constitutional Balance, National School Board Association Council of School Attorneys (Washington, D.C., 2008): 59; Kathleen A. Holscher, "Habits in the Classroom: A Court Case Regarding Catholic Sisters in New Mexico." Ph.D. dissertation, Princeton University, 2008, 247; Kathleen Holscher, "Contesting the Veil in America Catholic Habits and the Controversy over Religious Clothing in the United States." JOURNAL OF CHURCH AND STATE, Vol. 54, Issue 1 (Winter 2012); Ioanna Tourkochoriti, "The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the United States. WILLIAM AND MARY BILL OF RIGHTS JOURNAL, Vol. 20, Issue 791 (March 2012): 43.

public school districts acquiring private schools that continued to operate as religious schools and other cases in which religious institutions received taxpayer funds. In these cases, the teachers' wearing of religious garb was done in the context of public funds being used to administer a private religious school.[274] Put simply, these sets of cases were about the schools, not the teachers.

This delineation suggests that courts took great care to determine during the fact-finding period whether the religious garb-wearing teachers were, in fact, engaging in religious instruction. If such evidence existed, the cases would become about the proselytization of children, which is a distinct set of legal issues that fall outside the parameters of facts in this study (see Chapter III – Methodology).

The example of the "Jesus-2000—J2K" T-shirt[275] is a clear act of religious persuasion on the part of an authority figure. The intent and effect were to prey on students at a time when young people had many speculations about the "catastrophic" effects of Y2K—fears that the world would end or that a massive computer bug triggered at the turn of the millennium would cause global chaos.

Religious garb is more benign than a blatant act of proselytization or indoctrination. The religious garb simply denotes that a teacher is "a member or adherent of any religious order, sect, or denomination," which a Christian can do in a variety of

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[274] I distinguish between the religious-garb cases against teachers and the following no-aid-to-religion cases against schools: *Knowlton v. Baumhover,* 182 Iowa 691 (Iowa Sup. Ct. 1918); *State v. Taylor*, 122 Neb. 454 (Neb. Sup. Ct. 1932); *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940); *Harfst v. Hoegen*, 349 Mo. 808 (Mo. Sup. Ct. 1941); *Zellers v. Huff*, 55 N.M. 501 (N.M. Sup. Ct. 1951); *Berghorn v. Reorganized School District No. 8,* 364 Mo. 121 (Mo. Sup. Ct. 1953); *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956); *Moore v. Board of Education*, 4 Ohio Misc. 257 (Ohio Ct. Com. Pl. 1965). It is unlikely that such challenges would occur given the U.S. Supreme Court's ruling in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), which overturned the taxpayers' standing as narrowly defined in *Flast v. Cohen*, 392 U.S. 83 (1968).

[275] *Downing v. West Haven,* 162 F.Supp 2d 19 (U.S. Dist. Ct., D. Conn. 2001).

ways—to wear a cross neckless, a What-Would-Jesus-Do bracelet, ash on the forehead during Ash Wednesday, and so on. As a result, an accommodation policy that permits the wearing of religious garb law would not privilege one religion over another; it would simply need to make explicit that religious garb cannot be used for indoctrination, proselytization, or religious instruction.

The fact that all the religious-garb cases do not involve religious instruction or proselytizing (Table 3) proves that the courts have already distinguished the definition of religious garb from the meaning of religious instruction. If we know what religious instruction is not, then how can we know what it is? We turn now from the literature on law to the literature on religion.

To alleviate any further ambiguity, the definition of religious instruction, also known as religious education or faith development,[276] is this: a holistic and often immersive way to cultivate the 3Bs of religious identity formation—a person's *beliefs* and *behaviors* through acts of *belonging*.[277] Beliefs may come in the form of theological or ethical worldviews that are expressed through ideas, doctrines, scripture, or oral narratives. Behaviors may come in the form of what Richard J. Foster classified as inward disciplines (meditation, prayer, fasting, and study), outward disciplines

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[276] Sharon Daloz Parks, "Faith Development," in Michael D. Waggoner and Nathan C. Walker, eds., *The Oxford Handbook of Religion and American Education.* (New York, NY: Oxford University Press, forthcoming 2018); Robert Kegan, "There the Dance Is: Religious Dimensions of a Developmental Framework," in James W. Fowler and Antoine Vergote, eds., *Toward Moral and Religious Maturity*, (Morristown, NJ: Silver Burdett); and James W. Fowler, *Stages of Faith: The Psychology of Human Development and the Quest for Meaning* (San Francisco: Harper and Row, 1981).

[277] Benjamin P. Marcus, "Religious Literacy in American Education," in Michael D. Waggoner and Nathan C. Walker, eds., *The Oxford Handbook of Religion and American Education.* (New York, NY: Oxford University Press, forthcoming 2018).

(simplicity, solitude, submission, and service), or corporate disciplines (confession, worship, guidance, and celebration).[278] Acts of belonging may weave beliefs with behaviors to give people an understanding that they belong to something larger than themselves (a tribe, community, tradition, or transcendent reality). The history of American religious education[279] reveals a longstanding commitment to cultivate people's faith development across the lifespan. A person's decision to wear religious garb may reflect certain beliefs (e.g., modesty or discretion), as reminders to engage in everyday spiritual practices (e.g., to count the rosary), or as a reflection of a person's belonging in a community or tradition (e.g., long hair worn by Native Americans).

In the context of this study, religious garb simply denotes that a teacher is "a member or adherent of any religious order, sect, or denomination." The legislator's definition of religious garb suggests that it is simply an expression of a person's selfhood, which justices have taken great care to distinguish from an act of religious instruction. In other words, in civil society, wearing religious garb is a private act in a public place; in public schools, however, teachers wearing religious garb is a private act with public significance.[280]

Admittedly, witnessing someone's religious garb is certain to create an impression, but to what degree and in what direction?

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[278] Richard J. Foster, *Celebration of Discipline: The Path to Spiritual Growth.* (New York, NY: HarperCollins, 1998).
[279] Mark A. Hicks, "Religious Education in the Traditions," in Michael D. Waggoner and Nathan C. Walker, eds., *The Oxford Handbook of Religion and American Education.* (New York, NY: Oxford University Press, forthcoming 2018); John Roberto, *Thirteen Trends and Forces Affecting the Future of Faith Formation in a Changing Church and World: Faith Formation 2020* (Naugatuck, CT: LifeLong Faith Associates, Summer 2009).
[280] Special thanks to Professor Jay P. Heubert for this insightful distinction.

Yes, students are impressionable—in what way? The U.S. Supreme Court rightfully understands the Constitution to prohibit public schools from engaging in religious *indoctrination* and religious *instruction*—neither of which defines religious garb, as previously demonstrated. These prohibitions derive from the Court's longstanding commitment to shield highly *impressionable* children from religious coercion.

The impressionability standard arises mostly from Establishment Clause cases[281] designed to measure the degrees to which the state religiously compromises students. This measurement problem for judges mirrors the "enduring problem for all educators," Justice Stephens asserts—the "risk of treating students as adults too soon, or alternatively to risk treating them as children too long."[282]

The unique challenge of measuring the degrees of students' impressionability today is that, in an age of social media, students of all ages are inundated with images of authority figures who wear religious garb in:

- advertisements (e.g., Amazon's 2016 Super Bowl commercial depicting a friendship between a priest an imam;[283] Macy's introduction of the Verona

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[281] *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Westside Community v. Mergens*, 496 U.S. 226 (1990); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Bender v. Williamsport Area School District*, 475 U.S. 534, 556 (1986); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Stone v. Graham*, 449 U.S. 39 (1980); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 at 686 (1971); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421, 436 (1962).

[282] Justice Stevens's dissent in *Westside Community v. Mergens*, 496 U.S. 226 (1990).

[283] Elizabeth Weise, "Amazon ad may be first to feature a Muslim cleric," *USA Today,* Nov. 16, 2016; TRT World, "Amazon [Super Bowl] ad featuring priest and imam buddies goes viral," Turkish Radio and Television Corporation, Nov. 18, 2016.

Collection, an "international modest clothing brand" for Muslim women[284]);

- cartoons (e.g., religious identities of Marvel superheroes);[285]
- movies and television (e.g., reality-TV show *Breaking Amish*,[286] actors Meryl Streep and Philip Seymour Hoffman in *Doubt* about Catholic clergy,[287] or Hindu characters portrayed in *Life of Pi* or *Slumdog Millionaire*);[288]
- newscasts (e.g., anchor wearing a cross necklace);[289]
- sports (e.g., Olympian Ibtihaj Muhammad winning a gold medal in fencing);[290]
- toys (e.g., Mattel introducing a hijab-wearing Barbie doll);[291] and so on.

The assumption behind the question of impressionability is that exposure to the garb of the "religious other" will result in observers' increased affection for, admiration of, or interest in the wearer's religion. Is this even more so when a student's teacher

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[284] Christina Carton and Maya Salam, "Macy's Courts Muslims With New Hijab Brand," *New York Times*, February 8, 2018. "In 2015, Muslim women spent $44 billion on modest clothing items alone, an earlier Global Islamic Economy report said."
[285] Howard Kramer, "Seven Most Religious Superheroes of the Marvel Universe," *The Complete Pilgrim,* May 17, 2017.
[286] TLC, *Breaking Amish.* Creators Eric Evangelista and Shannon Evangelista. The Learning Channel, 2012.
[287] *Doubt.* Directed by John Patrick Shanley. Los Angeles, CA: Miramax, 2008.
[288] *Life of Pi.* Directed by Ang Lee. Century City, CA: Fox 2000 Pictures, 2012; *Slumdog Millionaire.* Directed by Danny Boyle and Loveleen. Century City, CA: Fox Searchlight Pictures, 2008.
[289] Fox News Channel contributor stated, "For the record, I'm wearing crosses again. If you don't want to hear my news analysis because of it, I'm OK with that. I've learned to bless my detractors," Lauren Ashburn, "My cross to bear—why I no longer hide my faith in the newsroom," *Fox News,* March 16, 2014.
[290] "In 2016, fencing champion Ibtihaj Muhammad became the first Muslim woman wearing a hijab to represent the United States at the Olympics. She became the first female Muslim-American athlete to win an Olympic medal when she took home the bronze in the team sabre event at the Summer Games in Rio." A&E *Biography,* "Ibtihaj Muhammad Biography," *Biography.com,* A&E Television Networks, Nov. 14, 2017. Accessed at www.biography.com/people/ibtihaj-muhammad-071416.
[291] Christina Binkley, "Barbie Gets a Hijab," *The New Yorker,* Nov. 13, 2017.

adorns religious garb in the public classroom? This question can imply a negative connotation related to the more heightened concerns of naïve students being susceptible to religious indoctrination and religious instruction at the hands of agents of the state.

In twelve decades, courts in Pennsylvania (1894 and 2013),[292] North Dakota (1936),[293] Indiana (1940),[294] Kentucky (1956),[295] and Mississippi (1990)[296] agreed that schoolchildren are impressionable, easily influenced, and worthy of protection. These courts accepted as reasonable the notion that students are impressionable but these courts did not agree any of the following three claims: that (a) children, by the nature of their age, are too sensitive to be exposed to teachers' religious garb; that (b) students' exposure to teachers' religious garb for long periods of time would "inspire respect if not sympathy for the religious denomination to which the [teachers] so manifestly belong"[297] (see discussion of the "size, frequency, and visibility" standards in IV. B.); and (c) that teachers were somehow less than an ideal role model[298] because they wore religious garb. The case of Deborah McGlothin illustrates these points.

In 1990, the Mississippi Supreme Court rejected the claim made by a school principal that it was "inappropriate" and a terminable offense for a teacher to periodically

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[292] *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894); *Nichol v. Arin*, 268 F.Supp 2d 536 (W.D. Pa. 2003).
[293] *Gerhardt v. Heid*, 66 N.D. 44 (N.D. Sup. Ct. 1936).
[294] *Johnson v. Boyd*, 217 Ind. 348 (Ind. Sup. Ct. 1940).
[295] *Rawlings v. Butler*, 290 S. W. 2d 801 (Ky. Ct. App., 1956).
[296] *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990), cert. denied, 498 U.S. 879.
[297] *Knowlton v. Baumhover,* 182 Iowa 691 (Iowa Sup. Ct. 1918).
[298] The U.S. Supreme Court has noted concern for teachers' unique influence as a role model: "a state exerts great authority over students in elementary and secondary public schools through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure…" *Edwards v. Aguillard*, 482 U.S. 578 (1987).

wear an African-style headdress, such as during a school-sponsored event celebrating Black History Month. The principal's rationale was that "[a]ll children need positive role models, but especially do elementary-aged children because of their very impressionable young minds." When firing the teacher, McGlothin, for periodically wearing an Ethiopian headdress, the principal wrote, "I am concerned that your appearance is giving [students] a distorted view of what is appropriate."[299]

The Mississippi Supreme Court disagreed and reinstated McGlothin's employment, noting that the school district and the school board had previously articulated the pedagogical interest in promoting diversity through multicultural education. This ruling suggests that exposure to multiple cultures, including religious cultures, is a compelling state interest. This is further supported by the U.S. Supreme court, when writing for a unified bench, Chief Justice Roberts expressed that the state must take "'relevant differences' into account," including racial and religious.[300] In this way, the courts have affirmed that exposure to difference is considered a positive value, creating valuable *impressions* such as diversity, religious liberty, and peaceful coexistence. (The precise question of whether a religiously diverse teacher corps meets

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[299] *Mississippi v. McGlothin*, 556 So.2d 324 (Miss. Sup. Ct. 1990), cert. denied, 498 U.S. 879.
[300] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). In reflecting upon the decision to uphold the Religious Land Use and Institutionalized Persons Act, Chief Justice Roberts connected the themes of religious diversity with racial diversity, saying, "The Court has noted that '[c]ontext matters' in applying the compelling interest test (*Grutter v. Bollinger* [539 U.S. 306 (2003) at 327]) and has emphasized that the fundamental purpose of *strict scrutiny* is to take 'relevant differences' into account." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) pp. 9-10.

the definition of a compelling pedagogical interest is untested and worthy of future consideration.)

When examining the constitutionality of anti-religious-garb statutes, courts must also take into consideration the negative impressions that may result when a student perceives the state as being hostile to religion.[301] In McGlothin's case, imagine the impressions the student body would have when discovering their teacher was fired for wearing an African headdress, particularly the black students in the school.

Nebraska's statute created an even more dramatic scenario. The law threatens criminal penalties for teachers who wear religious garb while teaching in public schools, including possibly being "committed to the county jail for a period not exceeding thirty days."[302] Although there is no evidence of this part of the statute being implemented, imagine what impressions students would form when seeing their habit-wearing teacher being handcuffed, forced into a police car outside the school, and sent to jail. I imagine that a reasonable child would have the impression that the state wants to expel Catholics. In this context, would not an impressionable child equate banning Catholic nuns from teaching in public schools as a less severe extension of the state's violent history in

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[301] The U.S. Supreme Court held, "it cannot be said that the danger that children would misperceive the endorsement of religion [by permitting religiously affiliated student clubs to meet on campus after school hours] is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

[302] Neb. Code § 79-898 (2016) statute was first enacted in 1919 (c. 248, § 1, p. 1018) and reaffirmed in 1922, 1929, 1943, 1949, and 1994; it was repealed in 2017.

expelling other religious minorities, such as with the Indian Removal Act (1830),[303] when more than 4,000 Cherokees were displaced through the Trail of Tears, or with Mormons in 1838, when the governor of Missouri issued an extermination order against all members of the Church of Jesus Christ of Latter-Day Saints?[304] These violent visuals of banishment are rooted in the policy objective of promoting uniformity over diversity—an unrealistic policy objective in a nation as diverse as the United States. Whether physical violence, job loss, or psychological despair, religious animosity in law creates a lasting impression.

Another way to approach the subject is to ask whether the state's enactment of anti-religious-garb laws says less about the students' impression of the teachers and more about their impressions of themselves. Imagine, for instance, a Muslim girl in Philadelphia who wears a hijab learning that her teacher, Mrs. Reardon, was just fired because she wore a hijab. Imagine a Sikh boy or girl in Oregon learning that their teacher, Mrs. Cooper, was just fired for wearing a turban. Would not these students ask themselves, "Will the school kick me out too? Do I belong here?" Consider that the students may have religious-garb-wearing family members who work for the school district. Might they ask, "Will they lose their jobs, too? Will our family have to move (again)?" Consider the impressions of non-Muslim or non-Sikh students in these

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[303] *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875.* Statutes at Large, 21st Congress, 1st Session, Chap. CXLVIII., May 28, 1830 (Washington, DC: Library of Congress) p. 411.

[304] "The Mormons must be treated as enemies, and must be exterminated or driven from the state if necessary for the public peace—their outrages are beyond all description," Governor Lilburn Boggs, Mo. Exec. Order No. 44, Oct. 27, 1838.

classrooms. Would they conclude that their school fears, disfavors, or even hates Muslims and Sikhs, teaching them that they should too? Might not this lead some students to think they can look down upon or mistreat fellow students who identify as Muslim or Sikh? As previously discussed, religious-based harassment in the workplace[305] and religious-based bullying of students in schools is on the rise.[306] As of 2017, forty-two percent of Muslims with children enrolled in K-12 schools report bullying of their children because of their religion, compared with twenty-three percent of Jews, twenty percent of Protestants, and six percent of Catholics.[307] In this context, would not non-Muslim teachers who may have a personal bias against Islam feel emboldened to mistreat their Muslim students because their supervisor terminated the employment of a fellow teacher who wore a hijab? After all, the perpetrators in one in four of the cited bullying incidents against Muslim students were *teachers and administrators*.[308] If students are already seeing their teachers bully Muslim students, would not those students, regardless of their identity, perceive the state to be hostile to Muslims if a hijab-wearing teacher was removed from the public schools?

Given these trends, it is imperative for states to develop school cultures in which the entire teacher corps effectively implements anti-bullying programs and models for

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[305] The Equal Employment Opportunity Commission reports that since September 11, 2001, the "the EEOC saw a 250% increase in the number of religion-based discrimination charges involving Muslims." In response, the EEOC "filed nearly 90 lawsuits alleging religious and national origin discrimination involving Muslim, Sikh, Arab, Middle Eastern and South Asian communities, many of which involved harassment." EEOC, *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities.* (Washington, DC: Equal Employment Opportunity Commission, 2018).
[306] Dalia Mogahed and Youssef Chouhoud, *American Muslim Poll 2017: Muslims at the Crossroads,* Institute for Social Policy and Understanding, (Washington, DC: ISPU, 2017).
[307] *Ibid.*, Mogahed and Chouhoud (2017).
[308] *Ibid.*, Mogahed and Chouhoud (2017). See also Beatrice Dupuy. "Muslim Students are Getting Their Hijabs Pulled Off by Teachers in Classrooms Across the Nation." *Newsweek*, November 16, 2017.

students how to promote peaceful coexistence. One way this can be achieved is to repeal the anti-religious-garb laws. This way, students who wear religious garb may see themselves represented in leadership, and all students will learn the important civic skill of interacting with diverse authority figures. In this scenario, the impression would not imply an endorsement or inoculation of religion but a promotion of the civic understanding of the mission of American education—public schools serve the entire public.

Imagine, in this context, the children who share the religious-garb-wearing teacher's religion. Would not they feel a greater sense of self-worth or belonging, believing that they, too, can one day dedicate their life to public service? The children with different religious identities, or none at all, may develop essential socialization skills, better preparing them for a diverse workforce and global society. Should not the public school prepare students to possibly work with—or work for—someone whose religious identity is different from their own? Will not these civic competencies benefit a student who in the future sits on a jury to hears the account of a religious-garb-wearing witness? Or a student who, after coming of age and registers to vote, listens to a debate between two candidates for political office, one of whom does and one of whom does not wear religious garb? Or a student, who in the future is pulled over by a police officer who wears religious garb?[309] Would the public school have adequately prepared them to

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[309] As of 2017, at least eight major police departments permit Muslims to wear a neck covering while on duty: Atlanta, Baltimore, Charlotte, Los Angeles, Memphis, New York, San Francisco, Washington, DC.

respect the authority of a witness, a political candidate, or a police officer? Teachers are not the only authority figures students will encounter in society—why not prepare them accordingly? In other words, could it be that learning from diverse authority figures is a compelling pedagogical interest?[310]

There are no court cases that address the specific question of the pedagogical benefits of exposing students to a religiously-diverse faculty. Would there be? I base this conjecture on legal cases that affirmed the pedagogical benefits of exposing students to a racially diverse student body.[311] Chief Justice Roberts cites this benefit when issuing a landmark ruling[312] about religious liberty in which he explicitly connects racial diversity and religious diversity. In writing for the unanimous court, he stated, "the Court has noted that 'context matters'[313] in applying the compelling interest test, and has emphasized that strict scrutiny's fundamental purpose is to take 'relevant differences' into account."[314]

Public schools may consider taking relevant differences into account when examining the constitutionality of anti-religious-garb statutes. Doing so may help students understand how lived religion[315] manifests in public and private life—aware that

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[310] Although not applicable to religion, it has been argued that a racially diverse student body is a compelling pedagogical interest. Patricia Gurin, "Expert Report of Patricia Gurin: Selections from *The Compelling Need for Diversity in Higher Education*, Expert Reports in Defense of the University of Michigan," *Journal of Equity & Excellence in Education*, 32:2, 36–62 (1999).
[311] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[312] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).
[313] Citing *Grutter v. Bollinger*, 539 U.S. 306 (2003), 327.
[314] *Ibid.*, citing, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), 228.
[315] R. Ruard Ganzevoort and Srdjan Sremac, eds., *Lived Religion and the Politics of (In)Tolerance* (New York: Palgrave Macmillan, 2017); Meredith B. McGuire, *Lived Religion: Faith and Practice in Everyday Life* (New York: Oxford University Press, 2008).

understanding does not imply agreement. Scholars refer to this educational process as cultivating the civic competency of *religious literacy.*[316] This educational objective is championed by professional associations of scholars of religion[317] and social studies educators.[318] When the state upholds *religious literacy* as a positive pedagogical objective, the state views students' academic exposure to religious diversity as not an act of coercion, but a product of civic education.

Empirical research on this topic is worth noting. Emile Lester and Patrick S. Roberts conducted a study of the civic competencies developed in students when a school district in Modesto, California, introduced a mandatory religious literacy program about the world's religions.[319] Their study showed that "the pre-test found students alarmingly intolerant on questions dealing with respect for First Amendment rights. After the course, students were more willing to extend the rights to run for public office, teach in public schools, hold public rallies and make a public speech to their 'least-liked group.'" They found that exposure to the academic study of religion did not change the students' religious identity but decreased their intolerance of others.

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[316] Diane L. Moore, *Overcoming Religious Illiteracy: A Cultural Studies Approach to the Study of Religion* (New York: Palgrave Macmillan, 2007); Stephen Prothero, *Religious Literacy: What Every American Needs to Know—and Doesn't* (New York: HarperOne, 2007); Benjamin P. Marcus, "Religious Literacy in American Education," in Michael D. Waggoner and Nathan C. Walker, *The Oxford Handbook of Religion and American Education* (New York: Oxford University Press, forthcoming 2018).
[317] Diane L. Moore, Chair, et. al., "Guidelines for Teaching About Religion in K-12 Public Schools in the United States," American Academy of Religion, Religion in the Schools Task Force, Apr. 2010.
[318] Benjamin P. Marcus, Chair, et. al., "Supplement: Religious Studies Companion Document for the C3 Framework," *College, Career & Civil Life Framework for Social Studies State Standards,* National Council for the Social Studies, 2017. The authors included: Jessica Blitzer, West Hartford Public Schools (CT); Seth Brady, Naperville Central High School (IL); John Camardella, Prospect High School (IL); Niki Clements, Rice University (TX); Susan Douglass, Georgetown University (DC); Benjamin P. Marcus, Newseum Institute (DC); Diane L. Moore, Harvard Divinity School (MA); and Nathan C. Walker, Teachers College Columbia University (NY).
[319] Emile Lester and Patrick S. Roberts, *Learning About World Religions in Public Schools: The Impact on Student Attitudes and Community Acceptance in Modesto, Calif.,* Nashville, TN: First Amendment Center, 2006.

In light of this research, scholars agree that both *religious literacy* and *religious liberty* are compelling pedagogical objectives for public schools to promote. Whether those precise objectives are achieved by exposing students to teachers' religious garb has yet to be determined. This study, on the other hand, demonstrates that terminating the employment of religious-garb-wearing teachers may give students a wide range of impressions, including that the school is not adequately preparing them to participate in a religiously diverse society.

In light of this research, *religious literacy* and *religious liberty* are compelling pedagogical objectives for the state to consider. In doing so, they will develop alternative means of promoting diversity over uniformity rather than justify banning private acts of devotion from public places.

Prepare students for a nation of religious minorities. Today, public schools in the United States have a unique challenge of educating the next generation in an age of insurgent nationalism, as expressed in the fears that "The Mexicans are coming!"[320] and "The Africans and Haitians are coming!"[321] and "The Muslims are coming!"[322] These

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[320] "They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people," Donald J. Trump, *Announcement for Candidacy for President of the United States.* (New York, NY: Trump Tower), June 16, 2015. Trump, Donald J. (2015, June 16). Video and transcript available on C-SPAN, accessed at www.c-span.org/video/?326473-1/donald-trump-presidential-campaign-announcement. See also Katie Reilly, "Here Are All the Times Donald Trump Insulted Mexico," *Time,* August 31, 2016.
[321] "President Trump … balked at an immigration deal that would include protections for people from Haiti and some nations in Africa, demanding to know at a White House meeting why he should accept immigrants from 'shithole countries' rather than from places like Norway…." Julie Hirschfeld Davis, Sheryl Gay Stolberg, Thomas Kaplan, "Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa," *New York Times,* January 11, 2018.
[322] Arguably the most conservative circuit court in the country, the Fourth Circuit Court of Appeals, held: There is "undisputed evidence that the President of the United States has openly and often expressed his desire to ban [Muslims] from entering the United States." The court held that the President's directive

sentiments of ethnic and religious animosity harken back to the original age of anti-religious-garb legislation, which benefited from people believing the warnings of a "Heathen Invasion"[323] or fearing that the Irish Catholics would seize the public schools, as this study shows.[324]

These historic fears of a non-white, non-Protestant "takeover" of America[325] were embedded in immigration laws. From 1790, the year before the Bill of Rights was ratified, to 1954, there was one requirement for citizenship: applicants had to be white.[326] The legal definition of "white" had a profound impact on the nation's racial and religious demographics, which is important to note when examining the origins and effects of anti-religious garb legislation; it is also an important factor to consider when examining the purposes of public education today.

"strikes at the basic notion that the government may not act based on *religious animosity* [emphasis added]." *International Refugee Assistant Project v. Trump,* 857 F. 3d 554 (4th Cir. 2017).

[323] Mabel Potter Daggett, "The Heathen Invasion," *Hampton Columbian Magazine*, Vol. XXVII, No. 4, October 1911.

[324] See also Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002); E. Digby Baltzell, *The Protestant Establishment: Aristocracy & Caste in America* (New Haven, CT: Yale University Press, 1964); Maura Jane Farrelly, *Anti-Catholicism in America, 1620–1860* (Cambridge University Press, 2017).

[325] A troubling claim, considering white Protestants' colonization, removal, and extermination of indigenous Americans. Roxanne Dunbar-Ortiz, *An Indigenous People's History of the United States.* (Beacon Press, 2014).

[326] United States Naturalization Law of March 26, 1790 (1 Stat. 103); The Immigration and Nationality Act of 1952 (Pub.L. 82–414, 66 Stat. 163, enacted June 27, 1952). Roger Daniels, *Coming to America: A History of Immigration and Ethnicity in American Life*, 2nd edition. (New York, NY: HarperCollins, 2002). *Race: The Power of an Illusion.* Larry Adelman, Executive Producer. California News Real, PBS, 2003, explains, "The 1790 Naturalization Act reserves naturalized citizenship for whites only. African Americans are not guaranteed citizenship until 1868, when the Fourteenth Amendment to the Constitution is ratified in the wake of Reconstruction. Groups of Native Americans become citizens through individual treaties or intermarriage and finally, through the 1924 Indian Citizenship Act. Asian immigrants are ineligible to citizenship until the 1954 McCarran-Walter Act removes all racial barriers to naturalization."

For instance, in 1922, Japanese immigrant Takao Ozawa was denied citizenship on the grounds that Japanese were not considered white[327]—a U.S. Supreme Court ruling used to further justify the internment of Japanese Americans during World War II.[328] In 1923, Bhagat Singh Thind, an Indian Sikh who wore a turban, was unable to persuade the U.S. Supreme Court that Indians, as a branch of Aryans, were Caucasian. Even though he had previously served in the U.S. Army during World War I, the high court upheld the decision to deny him citizenship.[329] These cases reveal how the white Protestant majority's fears of a "takeover" were pervasive in various laws, not only anti-religious garb legislation. Just as race was legally constructed,[330] so were the religious demographics of the country.[331]

A review of this history shows that the fears of a "takeover" of the white Protestant establishment have been and continue to be actualized:

- John Fitzgerald Kennedy, the first Irish Catholic to serve as the President of the United States, was elected in 1960[332] and Barack Hussain Obama,[333] the first African American to serve as President of the United States, was elected in 2008;

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[327] *Ozawa v. United States*, 260 U.S. 178 (1922).
[328] *Korematsu v. United States*, 323 U.S. 214 (1944).
[329] *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).
[330] Ian Haney Lopez, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996); Vijay Prashad, *The Karma of Brown Folk* (Minneapolis: University of Minnesota Press, 2001); Ronald T. Takaki, ed., *From Different Shores: Perspectives on Race and Ethnicity in America* (New York: Oxford University Press, 1987).
[331] Vincent N. Parillo, *Diversity in America*, 3rd ed. (Newbury Park, CA: Sage, 2009); Mark A. Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* (New York: Oxford University Press, 2005); Edwin Gaustad and Leigh Schmidt, *A Religious History of America* (San Francisco: Harper & Row, 2004).
[332] John F. Kennedy's presidency, elected November 8, 1960 and served from January 20, 1961 to his assassination on November 22, 1963.
[333] Barack H. Obama, elected November 4, 2008 and served from January 20, 2009 to January 20, 2017.

- Thirteen U.S. Supreme Court justices have identified as Catholic, five of whom currently serve on the court;[334] eight U.S. Supreme Court justices have identified as Jewish, three of whom currently serve on the court.[335]

- In 2006, Keith Ellison became the first Muslim to be elected to Congress;[336] in 2012, Tulsi Gabbard[337] became the first Hindu to be elected to Congress and in 2012 Mazie Hirono became the first Buddhist to be elected to Congress, and the first U.S. Senator born in Japan;

- In 2012, Protestants, for the first time in U.S. history, became a minority, representing forty-eight percent of the population;[338]

- In 2016, the religiously unaffiliated, previously referred to as "heathens," now make up the largest group in twenty states;[339] and most notably,

- In 2016, White Christians made up less than half of the public (forty-three percent), of which white Protestants made up less than a third of the American population (thirty percent). [340]

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[334] Roger Brooke Taney; Edward Douglass White; Joseph McKenna; Pierce Butler; Frank Murphy; Sherman Minton; William Brennan; Antonin Scalia; Antony Kennedy; Clarence Thomas; John Roberts; Samuel Alito; Sonia Sotomayor. Neil Gorshuch was raised Catholic but later joined an Episcopal church, and thus is not included in this list.

[335] Louis Brandeis, Benjamin N. Cardozo, Felix Frankfurter, Arthur Goldberg, Abe Fortas, Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan.

[336] Former Republican candidate for Senate for Alabama protested Ellison's election: "Enough evidence exists for Congress to question Ellison's qualifications to be a member of Congress as well as his commitment to the Constitution in view of his apparent determination to embrace the Quran and an Islamic philosophy directly contrary to the principles of the Constitution. But common sense alone dictates that in the midst of a war with Islamic terrorists we should not place someone in a position of great power who shares their doctrine. In 1943, we would never have allowed a member of Congress to take their oath on *Mein Kampf*, or someone in the 1950s to swear allegiance to the *Communist Manifesto*. Congress has the authority and should act to prohibit Ellison from taking the congressional oath today!"

[337] David "Kawika" Crowley, who unsuccessfully ran against her, claimed that Hinduism "doesn't align with the constitutional foundation of the U.S. government.

[338] "Pew: Protestants no longer majority." Associated Press, October 9, 2012 citing Luis Lugo, director, *"Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation.* (Washington, DC: Pew Research Center), October 9, 2012.

[339] "There are 20 states in which no religious group comprises a greater share of residents than the religiously unaffiliated. These states tend to be more concentrated in the Western U.S., although they include a couple of New England states, as well. More than four in ten (41%) residents of Vermont and approximately one-third of Americans in Oregon (36%), Washington (35%), Hawaii (34%), Colorado (33%), and New Hampshire (33%) are religiously unaffiliated." Daniel Cox and Robert P. Jones, *America's Changing Religious Identity.* (Washington, DC: Public Religion Research Institute, 2017). This report is based on "the single largest survey of American religious and denominational identity ever conducted."

[340] "Today, only 43% of Americans identify as white and Christian, and only 30% as white and Protestant. In 1976, eight in ten (81%) Americans identified as white and identified with a Christian denomination, and a majority (55%) were white Protestants." Daniel Cox and Robert P. Jones, *America's Changing Religious Identity.* (Washington, DC: Public Religion Research Institute, 2017).

This data suggests that, in 2012, the United States became the first, as far as I know, nation of religious minorities—where no one religious tradition represents more than half of the population.

These tectonic shifts in American demographics may help explain some of the return of xenophobic political rhetoric, which teachers are forced to address in the public classroom. This is significant in many ways. Public schools are educating students in a time unlike any other in American history. These changes must be taken into consideration when articulating the *compelling state interests* used to regulate the dynamic and diverse public education system in America. These interests inevitably will need to acknowledge the religious identities of the diverse student body and teacher corps. After all, the United States has become a nation of religious minorities.

Today, public schools are forced to ask the question: What does a nation of religious minorities require of its residents? How will the public schools prepare students to navigate the inevitable complexities of living in and self-governing a minority–majority country? Many leaders in the fields of law, education, and religion agree that public schools must cultivate two civic competencies in the next generation of citizens: *religious literacy* and *religious liberty*.

Religious literacy is not merely the development of content knowledge about religion, as Professor Steven Prothero stresses the "key stories, doctrines, practices, symbols, scriptures, people, places, phrases, groups, and holidays of the world's major

religions."[341] A religiously literate person understands, as Professor Diane Moore explains, that religions are internally diverse, change over time, and are embedded in all aspects of culture."[342] A religiously literate person can also understand how people and groups form their religious identities, as Benjamin Marcus explains in his scholarship on the 3Bs of religious identity formation—the degrees of influence that *beliefs*, *behaviors*, and acts of *belonging* have on a person's or group's identity.[343]

A legally literate person can understand that religious liberty is not a political wedge issue but a constitutional and human right that protects people of all religions and none.[344] In the United States, the guarantee to freely exercise religion along with the promise that governments will not establish a religion or privilege one religion over another are two principles of the one right described as religious freedom. Or, as John Courtney Murray stated, the religious liberty clauses of the First Amendment are "articles of peace," not "articles of faith."[345] These articles of peace build upon the U.S.

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[341] Stephen Prothero, *Religious Literacy: What Every American Needs to Know—and Doesn't* (New York: HarperOne, 2007).
[342] Diane L. Moore, Chair, et al., "Guidelines for Teaching About Religion in K-12 Public Schools in the United States." American Academy of Religion, Religion in the Schools Task Force, Apr. 2010. Diane L. Moore, *Overcoming Religious Illiteracy: A Cultural Studies Approach to the Study of Religion* (New York: Palgrave Macmillan, 2007.
[343] Benjamin P. Marcus, "Religious Literacy in American Education," in Michael D. Waggoner and Nathan C. Walker, *The Oxford Handbook of Religion and American Education.* (New York, NY: Oxford University Press, forthcoming 2018).
[344] Charles C. Haynes and Oliver S. Thomas, *Finding Common Ground: A Guide to Religious Liberty in Public Schools* (Nashville, TN: First Amendment Center, 2002).
[345] John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (London: Sheed and Ward, 1960), 195.

Constitution's commitment to *chartered pluralism*. Os Guinness, the primary architect of the *Williamsburg Charter*[346] explains:

> Chartered pluralism is a vision of religious liberty in public life that, across the deep differences of a pluralistic society, forges a substantive agreement, or freely chosen compact, on three things that are the "3Rs" of religious liberty in a pluralistic society: *rights, responsibilities, and respect* [emphasis added].
>
> The compact affirms that, first, that religious liberty, or freedom of conscience, is a fundamental and inalienable *right* [emphasis added] for peoples of all faiths and none; second, that religious liberty is a universal right joined to a universal duty [*responsibility*] to respect that right for others [especially for those with whom we disagree]; and third, that the first principles of religious liberty, combined with the lessons of two hundred years of constitutional experience, require and shape certain practical guidelines by which a robust yet civil discourse [*respect*] may be sustained in a free society that would remain free[347] [emphasis added].

Free schools have a special duty to promote liberty for all members of society, especially the most vulnerable. Public schools serve as the training ground on which students will become the first generation with the burden and opportunity to self-govern a nation of religious minorities.

It is my hope that public school today will teach students, first by showing them, that religious liberty is not simply a political slogan but a way of life for people of all religions and none.

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[346] Signed by 100 national leaders on June 22, 1988, *The Williamsburg Charter* was drafted in commemoration of the 200th anniversary of Virginia's call for a Bill of Rights. See *Appendix: The Williamsburg Charter* in James David Hunter and Os Guinness, eds., *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy* (Washington, DC: The Brookings Institution, 1990), 123–146.

[347] Os Guinness, "Introduction," in James David Hunter and Os Guinness, eds., *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy* (Washington, DC: The Brookings Institution, 1990).

V – CONCLUSION

Pennsylvania's and Nebraska's statutory bans on teachers wearing religious garb in public schools, as demonstrated in this study, (1) failed the *general applicability test* and (2) *substantially burdened* religions, as defined under the provisions in *Sherbert* and the Religious Freedom Protection Act (RFPA). The statutes (3) partially met the *rational basis* test, but when faced with *strict scrutiny*, the statutes (4) failed to meet the *compelling interest* and (5) *narrowly tailored* tests. I close this chapter with a discussion of how when it came to state bans on public schoolteachers' religious garb, the *strict scrutiny* test is "strict in theory and fatal in fact."[1]

Legal Conclusions

The Statutes Are Neither Neutral nor Generally Applicable

The Pennsylvania and Nebraska statutes failed the *general applicability* test (Chapter IV – General Applicability) because they targeted religious practice for government regulation and therefore were not "facially neutral." The religious activity that it sought to regulate was the wearing of "any dress, mark, emblem or insignia indicating the fact that such [public school] teacher is a member or adherent of any

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[1] Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

religious order, sect or denomination."[2] By the end of World War II, twenty-two states, either through state statutes or administrative regulations, prohibited public schoolteachers from wearing religious garb in the classroom. These laws were enacted in an undisputed era of anti-Catholic bias, which is why habit-wearing Catholic nuns were the targets of government regulation. The fact that in the nineteenth and twentieth century only religious minorities brought suit demonstrated that these laws were discriminatory in, not only, design but also effect. The contemporary cases targeted religious-garb wearing Muslim and Sikh teachers, which served as further evidence that the statutes were not neutral. A generally applicable law would have been one that the Pennsylvania Supreme Court authorized the state legislature to create, but it did not.[3] To date, it remains undisputed that the statutes are neither neutral nor generally applicable laws, as required under the *Smith* standard.

Having failed to meet this threshold, the *Sherbert* standard was triggered, beginning with an inquiry into whether the statutes burdened religion, which they did substantially.

The Statutes Substantially Burdened Religion

There were seven ways in which the study demonstrated that the statutes substantially burdened religion (Chapter IV – Substantial Burden Test, §1–§7*)*, as defined under *Sherbert* and the Pennsylvania's Religious Freedom Protection Act (RFPA). This

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[2] Pennsylvania Statute 24, § 11-1112 (2017). This anti-religious-garb statute was the first in the United States, enacted in 1895. It was reaffirmed in 1949 and 1982 and remains active today.

[3] The Pennsylvania Supreme Court ordered as follows: "The legislature may, by statute, enact that all teachers shall wear in the schoolroom a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals." *Hysong v. Gallitzin*, 164 Pa. 629 (Pa. Sup. Ct. 1894).

meant that a burden could have been direct or indirect or fundamental or incidental to religion. Pennsylvania had additional requirements: The law…

> substantially burdens a person's religion when the state's action: Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; Significantly curtails a person's ability to express adherence to the person's religious faith; Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion; Compels conduct or expression which violates a specific tenet of a person's religious faith.[4]

The anti-religious-garb laws in Pennsylvania and Nebraska directly burdened licensed public schoolteachers through legal penalties. Catholic, Mennonite, Muslim, and Sikh teachers were terminated for wearing religious garb while teaching in public schools. The criminal and professional burdens they faced were severe, creating a substantial burden on them as individuals and on their families. The statutes also directly burdened school directors for failing to comply, extending the circle of criminality to accomplices. The statutes indirectly burdened women; every case in this 123-year saga involved female teachers. The statutes indirectly burdened religious minorities because of how their religious practices manifested. The statutes also targeted some religions over other religions because of garb visibility, size, and frequency of wear, as well as burdened religion over non-religion. The local communities were also indirectly burdened because the implementation of the statutes contributed to school districts becoming even more religiously segregated. For these reasons, teachers in Nebraska successfully passed the substantial burden test under *Sherbert.* Teachers in Pennsylvania

[4] 71 Pa. Stat. Ann. §2404.

also passed the substantial burden test under *Sherbert*, as well as met all four of the tests under RFPA, though they were only required to meet one.

The plaintiffs successfully passed the burden standard, which triggered *strict scrutiny*—a series of tests the defendants (the government) was required to pass. The Pennsylvania and Nebraska had to provide at least one compelling reason that the statutes created such a burden, and if that reason was deemed compelling under the highest standard of judicial review, the states had to demonstrate that the statute was *narrowly tailored* to achieve the *least restrictive means* possible. This study shows that they failed all parts of *strict scrutiny*.

The Statutes Partially Met the Rational Basis Test

The case law reveals that any negative treatment of teachers was a result of the state persuading the courts that their reasons for regulations, at times, met the rational basis test (Chapter IV – Discussion, §2 and 4§). The problem is that the some of the more historic trend-setting cases pre-date the U.S. Supreme Court's development of the *rational basis* and *strict scrutiny* standards. After surveying the eight reasons states used to justify the regulation (Chapter IV – Compelling Interest Test, §1–§7), the study shows through an examination of eleven findings (Chapter IV – Discussion, §1–§11) that the justifications failed at least one of the three-pronged *strict scrutiny* test.

The Statutes Failed the Compelling Interest Test

The states failed to demonstrate compelling reasons for prohibiting teachers from wearing religious garb. It may have been reasonable to want to create a "secular school culture," but the precise language in the laws targeted "sectarianism," (Chapter IV –

Discussion, §7). which legal scholars and the U.S. Supreme Court consider code for anti-Catholicism (Chapter IV – General Applicability). Regardless of the origins, the present study shows that the effects of a secular agenda were rooted in a misunderstanding of the U.S. Constitution. The First Amendment uses the two principles of *no establishment* and *free exercise* of religion to promote one right: freedom *of* religion—unlike the freedom *from* religion approaches used in France and Turkey's constitutions (Chapter IV – Discussion, §7). As a result, some objectives met the *rational basis* test (Chapter IV – Discussion, §2 and §4) but none passed the definition of "compelling" under the highest standard of judicial review.

The study also revealed that it is neither rational nor compelling for the state to justify banning public schoolteachers' religious garb on the grounds that it indirectly resulted in taxpayers subsidizing religion (Chapter IV – Discussion, §6). No court in the 123-year-old history found this objective to be credible when it came to the narrow cases filed by teachers. As a result, the question of publicly-subsidized schoolteachers using their salaries to make donations to religious organizations from which they belong has no bearing on this study.

It may have been reasonable to avoid being perceived as a school that approved or favored religion (Chapter IV – Compelling Interest Test, §3*)*; however, this study found that the statutes disproportionately inhibited minority religions and privileged non-religion over religion (Chapter IV – Substantial Burden Test), justifications did not meet the heights of the *compelling interest* test.

The study examined the safety justifications for banning certain types of religious garb (Chapter IV – Compelling Interest Test, §8). The study concluded that the proposed

safety regulations were not rational because they were not responding to a verified problem, nor meet the narrowly tailored standard under *strict scrutiny* (Chapter IV – Discussion, §2 and §3).

The study considered the states concerns of a "religious takeover," religious *indoctrination,* and religious *instruction* in order to protect highly *impressionable* students (Chapter IV – Compelling Interest Test, §5–§7). The study concluded that the irrational fear of the religious "other" is not compelling (Chapter IV – Discussion, §2 and §11), nor is it accurate to say that religious garb, in itself, indoctrinates or instructs—positions that contract the legal definitions in the statutes and the case law that found no evidence of religious instruction (see Table 3 and Chapter IV – Discussion, §8–§9). The study problematized the view that exposure to the religious garb of a public schoolteacher can have only a unidirectional negative impression on children (Chapter IV – Discussion, §10). The study scrutinized the assumptions about what constitutes impressionability and warned against states creating a chilling effect in the classroom, giving religious-garb-wearing children the impression that they, too, should be fearful of their own status in the school. Such behavior by the state could impress upon children whose identity differs from that of their teachers that the state is hostile to religion, whether those children identify as religious or not. The defendants' claim that religious garb only negatively influences children (e.g., convert them to the religion of their teacher) failed to acknowledge the positive pedagogical impressions students may develop when exposed to religious diverse authorities—a necessary civic skill to develop in order to participate in self-governing a nation of religious minorities.

Having failed to provide compelling justifications for banning teachers' religious garb, the study did not technically need to proceed with an examination under the *narrowly tailored* test; however, for the sake of answering the research questions the study included a brief discussion of the application of this third prong of the *strict scrutiny* standard (Chapter IV – Narrowly Tailored Test).

The Statutes Failed the Narrowly Tailored Test

A dominant rationale was used to justify that the anti-religious-garb statutes were narrowly tailored. States claimed that the restriction applied only to the religious garb worn by teachers while they were teaching in public schools—because it was not an absolute ban on the wearing of religious garb in public by all people it was, therefore, by its nature narrowly tailored. On its face, this seemed reasonable; however, other less restrictive means were then and now available. The teacher could have been invited to work for the administration or the school board, rather than be fired or sent to jail. As benevolent as this suggestion may be, the study shows that this created more problems than it solved: Will a religious-garb-wearing professional be prevented from serving as a school principal or be barred from running for a seat on the school board—two positions that have much more influence and authority over students and the school's culture? Even this administrative accommodation would have resulted in religious discrimination, which the study determined was unlawful. Regardless, the states in this study failed not only to provide compelling interests for justifying the burden on religion but also failed to demonstrate regulatory alternatives (e.g., anti-mask laws) that achieved their interests (e.g., public safety).

As a result, the statutes failed all parts of the *strict scrutiny* standard.

Strict Scrutiny Is "Strict in Theory and Fatal in Fact"

These conclusions reinforced the findings in Adam Winkler's legal research on the effects of the *strict scrutiny* standard.[5]

In what would be become "one of the most quoted lines in legal literature,"[6] Gerald Gunter explained that, when examining Free Speech and Equal Protection cases, the U.S. Supreme Court's *strict scrutiny* standard is "strict in theory and fatal in fact,"[7] suggesting that the method itself will determine its outcome.

In testing this hypothesis, Winkler conducted an empirical analysis of how federal courts applied *strict scrutiny*, concluding that Free Speech and Equal Protection cases were not, in fact, destined for failure. In *religious liberty* cases, however, he found that they "had the highest survival rate of any area of law in which strict scrutiny applie[d]: 59 percent, more than double the mean of the other doctrinal categories."[8] (Professor Ira C. Lupu characterized the high rate, but not absolutely guarantee, of survival of Free Exercise claims as "strict in theory, but ever-so-gentle in fact."[9])

Winkler went on to examine the courts' application of this standard with statutory origins (e.g., the federal RFRA or RLUPA) and those based on the Free Exercise Clause (a similar bifurcation found in the design of this study). One of his key findings is that the primary types of religious liberty claims—*exemption* and *discrimination*—may factor into whether a government action will survive *strict scrutiny*. Winkler concluded that

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[5] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 VAND. L. REV. 800, 793–871 (2006).
[6] Kathleen M. Sullivan, *Gerald Gunther: The Man and the Scholar,* 55 STAN. L. REV. 643, 645 (2002).
[7] Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).
[8] *Ibid.*, Winkler, p. 857.
[9] Ira C. Lupu, "The Trouble with Accommodation," 60 GEO. WASH. L. REV., 743, 756 (1992).

statutes challenged under an exemption argument survived seventy-four percent of the time, leading the courts not to grant religious accommodations three-quarters of the time. In contrast, if the statute in question was filed as a religious discrimination case, then the government regulation on religion survived *zero percent* of the time—meaning that it truly is fatal in fact. Winkler explains:[10]

> In the discrimination cases… the courts confront laws or other government actions that explicitly single out religious organizations or practices for disadvantageous treatment—for example, a police department's ban on facial hair that permits medical but not religious exceptions.[11] That scrutiny in such cases is particularly deadly ought to be expected. As the Supreme Court wrote in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, "a law targeting religious beliefs as such is never permissible." Yet, to warrant strict scrutiny under the Free Exercise Clause in the first place, the law has to subject religions to exactly such discriminatory treatment. In other words, strict scrutiny only applies to laws that are by their very nature already unconstitutional.

This study supports Winkler's conclusion. The very fact that Pennsylvania and Nebraska targeted religious garb for government regulation triggered a discrimination claim. Under *strict scrutiny,* Winkler's study demonstrated and my study supports, it is possible to meet the required *compelling interests* and *least restrictive* means doctrine to justify *substantially burdening* someone in an invidiously discriminatory fashion. Therefore, when it comes to religious discrimination cases, such as the question of state bans on public schoolteachers' religious garb, *strict scrutiny* is "strict in theory and fatal in fact."

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[10] Winkler, *Ibid.*, p. 862.
[11] Winkler cites "*Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 f.3d 359, 360 (3d Cir. 1999) (invalidating requirement that police officers shave their beards)."

Contributions

Interdisciplinary Contributions

By design, this research project is interdisciplinary. The findings make meaningful contributions to the fields of education, religion, and most importantly, law.

Education research. The study told an important story about what religious-garb-wearing public schoolteachers have faced over the last twelve decades. The findings contributed to the question of public officials' religious liberty rights and the constitutional limits of the states' power to regulate religion. The findings also contributed to educational questions about students and their exposure to religious differences and revealed new insights about the purpose of public education in a multi-religious society.

Future education researchers may find helpful the legal research methods developed in this study. The five-step process methodology included: (1) synthesizing judicial tests, in order to narrow the analysis to distinct legal causes of action; (2) collecting primary and secondary documents to determine the historical fact patterns in the anti-religious-garb cases; (3) articulating narrow legal research questions; (4) set factual parameters; and (5) conducting a legal analysis using legal methods such as deductive analysis, rule-based reasoning techniques, analogical reasoning strategies, and identifying logic fallacies. Non-lawyers looking to conduct research on education law may find helpful these legal research methods and legal analysis techniques.

Religious studies. The study contributed to the academic study of religion by illustrating how state legislatures have defined and how courts have interpreted the legal definitions of "religious garb." These definitions revealed inconsistences and biases about

the nature of religion and people's free exercise thereof. As later discussed in the limitations section of this chapter, the second phase of this study will map the judicial systems' evolving legal definition of religion, which may contribute to academic study of how both the courts and scholars of religion define religion. Also, the study shed light on core assumptions that lawmakers and courts have about students' impressionability—how they perceive religion to manifest in public places and how people form their religious or non-religious identities, including their own. In this context, this study could serve as a case study for psychological research on religious identity formation, the cultural-studies research on lived religion, and the education research that justifies that the civic competency of religious literacy is a compelling pedagogical objective.

Reporting on religion. In addition, this 123-year-old history contributed to the field of journalism, in that the study illustrated how news media reported on law and religion in the wake of these controversies. Some of the reports were descriptive in nature—historically documenting the results of legislative initiatives—whereas others were investigative. These reports, spanned thirteen decades, further affirming this subject's importance by archiving various political and legal conflicts. The consistency with which the media reported on these developments suggested that this is a perennial and unsettled issue that captures the public's attention, generation after generation. The study contributed to the field of journalism education by providing a case study in how reporting on religion may have contributed to the public's understanding of both law and religion.

Legal Contributions

This research on statutory bans on public schoolteachers' religious garb made the following contributions to the study of law and religion.

Filled the gap and corrected the record. First, this study filled a series of gaps in the literature. It verified the accuracy of previous studies and corrected the record on how many states regulated public schoolteachers' religious garb and classified them into state statutory bans and administrative regulatory actions. It illustrated how these laws were enacted by members of state legislatures, introduced as administrative bans by superintendents and school boards, and, in one case, enacted through a statewide public referendum. These findings demonstrated how pervasive the attempts were to prohibit public schoolteachers from wearing religious garb, specifically "suspect" religious minorities of the day.

Enumerated the causes of action. The study documented the complex lineage of case law regarding the regulation of teachers' religious garb. It demonstrated that there is no uniformity in legal reasoning among state or federal courts under the thirty-two different causes of action used by plaintiffs to challenge anti-religious-garb laws and regulations. The only consistent pattern is the fact that public schoolteachers won their cases in states that did not have an anti-religious-garb statute at the time, whereas this study affirmed that they consistently failed when challenging states whose legislatures had enacted statutory bans.

It also distinguished two types of cases that were otherwise conflated in the literature: cases that challenged schools and cases brought by teachers. Those in the first set were often field by taxpayers who questioned the church/state relationship after a

public school district acquired a private school or authorized the use of public funds for private religious schools. In these cases, the evidence of teachers wearing religious garb was presented with a plethora of other facts used to test an Establishment Clause claim. The study explained why these were distinct from the narrow set of cases involving true public schools who happened to employ religious-garb-wearing teachers.

Connected historical and contemporary conflicts. The study demonstrated that scholars considered the legal question of anti-religious-garb laws worth studying not only because of its historical significance but also because of the continuation of these conflicts today. In making these connections, the revealed systematic patterns of religious discrimination in the judicial system over a 123-year period.

The study also proved that it is possible to resolve the longstanding legal questions as to the constitutionality of Pennsylvania's current garb statutes under the Free Exercise Clause of the First Amendment to the U.S. Constitution and the Pennsylvania Religious Freedom Protection Act. The study concluded that both Nebraska and Pennsylvania violated the federal *neutral and generally applicable* and *strict scrutiny* standards. It also concluded that Pennsylvania's law, the only remaining anti-religious-garb law in the country, violated Pennsylvania's unique, four-part substantial burden test. The study concluded that these statutory bans on teachers' religious garb are unlawful.

Documented anti-Catholicism in the law. It also provided additional historical evidence of local and state governments using the rule of law to target Catholics. This meaningfully contributed to the body of literature on the conflicts between Protestants and Catholics in the United States, a conflict in the new world that mirrored that of the old world.

Introduced new data about the Smith effect. The study also brought a new understanding to the effect that the *Smith* decision has had on the judicial system. It revealed that several of the contemporary cases involving African Hebrew Israelite, Muslim, and Sikh teachers were absorbed in the widespread confusion about how to apply *Smith*. The research showed the influence that federal and state religious freedom restoration acts had Free Exercise cases, further explaining why, to date, no court has used *strict scrutiny* to test the constitutionality of a state ban on public schoolteachers' religious garb.

Connected domestic and international conflicts. Finally, the study connected the domestic legal conflicts over regulating religious garb to comparable conflicts around the world. It situated the historical and contemporary conflicts about legal bans on religious garb in public schools in the United States, within current discussions in the United Nations, the European Union, and Canada. The study reviewed how the question of government regulation of religious garb worn by both teachers and students in public schools has recently erupted in six countries and in the European Court of Human Rights. The analysis drew upon research that showed that at least thirty-two countries throughout the world currently prohibit some forms of private acts of devotion in public places. The study drew from research that illustrates that countries with high restrictions on religion are more likely to experience greater increases in social hostility and violence. This study connected these global trends to historic conflict over public schoolteacher's religious garb in the United States. Taken together, the study demonstrated the real-world significance of the research topic.

Implications

The results of this study reveal important legal and educational implications as well as significant considerations for public education in a religiously diverse democracy.

For Legislators, Policymakers, and Administrators

First, lawmakers, school boards, state superintends of education, and principals of public schools throughout the United States may find helpful the documentation of the systematic discriminatory effects of regulatory and statutory bans on public schoolteachers' religious garb. They may heed the warnings revealed in this study as well as implement use education law to build common ground where the entire public is served by public education. Pennsylvania legislators, in particular, may benefit from using the data presented to take responsibility for the negative results of previous generations' actions and, as recommended in this study, repeal the nations' last religious garb law. Doing so would definitively end to this 123-year-old saga.

For Judges, Attorneys, and Scholars of the Law

Second, judges and attorneys may resonate with the ways in which the study integrated both the *Smith* and *Sherbert* standards to test the legitimacy of these statutes. They may find useful the classification of various arguments used for and against regulations on public schoolteachers to better prepare them to defend or adjudicate teachers' religious liberty claims. Legal professionals and scholars of the law may also find intriguing the finding that, when applied to religious discrimination cases, *strict scrutiny* is "strict in theory and fatal in fact."

For Public Schoolteachers and Teachers' Unions

Third, educators may resonate with the findings of this study. Teachers and the unions that represent them may draw upon the reverberating arguments in this study to better advocate for religious liberty in public schools. As made explicit in this study, this does not mean that public schoolteachers can or should engage in religious indoctrination, proselytizing, or in any way religiously coerce students. Such behavior is unconstitutional and betrays centuries of religious justifications made by religious people for separating religion and government (Chapter IV – Discussion, §7). This study does show, however, that public officials, in their limited function, retain their fundamental constitutional rights. This study demonstrates how it is possible to accommodate a teachers' religious garb without infringing on the rights of others.

For Public Education in a Pluralist Democracy

Finally, this study reveals additional implications for the public's understanding of public education in a pluralist democracy. As previously cited, in 2012, Protestants became, for the first time in U.S. history, a minority. As a result, public schools now face an unprecedented challenge: to prepare generations of students to self-govern a nation of religious minorities. This tectonic shift in demographics requires educators and lawmakers to ask: What does a nation of religious minorities require of its residents? This study concludes that public schools are the primary locus for the next generations to cultivate two necessary civic competencies in an age of unprecedented diversity: *religious literacy* and *religious liberty*. These competencies are developed when public schools serve as laboratories for constitutional democracy, starting with ensuring that the fundamental rights of all of the stakeholders—including teachers—are fully honored.

Limitations

The legal analysis in this study of state bans on public schoolteachers' religious garb is limited in the following ways.

Nebraska's Repeal

The most obvious deficit is the fact that, midway through this research project, Nebraska repealed its anti-religious-garb law. The repeal was introduced on January 5, 2017 and signed into law on March 27, 2017. To maintain the integrity of the two-state design, I bracketed my study period from 1894 to 2016.

Establishment Clause

The study is admittedly deficient because it does not include a comprehensive legal analysis of the statutes under the Establishment Clause of the First Amendment—a set of arguments that serve as the primary rebuttals to Free Exercise claims.

As the study established, there are two principles for the constitutional right to religious freedom in the United States: the right to free exercise of religion and the restriction on government from establishing a national or state religion. These are inseparable, reinforcing rights that when analyzed together result in legally sophisticated and politically balanced views. When they are read in isolation of one another, a court can miss the wisdom that each principle has to offer and fall victim to the politicization of religious freedom.

In this context, this study is limited to the time and place in which it took place. This study was conducted in one of the most hyper-partisan times in modern American

history.[12] On the right, religious freedom has become a battle cry to rally conservatives against initiatives to legalize same-sex marriage and to provide contraception coverage, for example, and to reject arguments in favor of the separation of religion and state. On the left, "religious freedom" is cartooned with air quotes because of the view that claims of conscience are mere guises for discrimination and religious justifications for law are mere attempts at establishing a state religion. These stereotypes propagate division, as if political conservatives are only for *their* religion and progressives are against *all* religion. One way to transcend this zero-sum thinking is to give equal treatment to both the principle of *free exercise* of religion and the guarantee to *no establishment* of religion. In doing so, we can see how both principles contribute to America's bold new experiment of governing a nation of religious minorities.

This study, however, focused only on Free Exercise jurisprudence to meet the requirements of a narrow academic research project. Hopefully readers will understand that this draft is the first part of a larger research project that I intend to conduct once outside the academy. That next study will include a comprehensive examination of Establishment Clause jurisprudence and apply those judicial standards to these same anti-religious-garb laws.

Free Speech

The next stage of the study will include an analysis of free speech law, aware that religious garb is an expressive act also protected by the constitutional guarantee of free

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[12] Carroll Doherty, Jocelyn Kiley, Bridget Johnson, "Democrats and Republicans more ideologically divided than in the past," in *The Partisan Divide on Political Values Grows Even Wider*, Washington, DC: Pew Research Center, October, 2017.

speech. The intersectionality of these rights is also best analyzed together, which it is proposed to add this analysis to the second stage of the research.

Workplace Discrimination

Similarly, the second study will include an analysis of statutory provisions that prevent religious discrimination in the workplace. Some plaintiffs in this case who experienced religious-based discrimination in public schools sought remedies under Title VII of the Civil Rights Act of 1964. The second stage of the study will include an examination of whether the statute has either or both a *disparate treatment* (intentional) or *disparate impact* (unintentional) on teachers' religion. It will also apply the Title VII standards to test whether a public school district experiences "undue hardship" when accommodating a religious-garb-wearing teacher.

Together, this continued examination under the Title VII of the Civil Rights Act and the Establishment Clause and Free Speech clauses of the First Amendment will further illustrate the intersectionality of these constitutional and civil rights protections against religious discrimination.

Legal Definition of Religion

Although there are many more shortcomings in this first stage of research, there is a final limitation worthy of mentioning before transitioning into listing the recommendations for future research.

This study on the 123-year-history of anti-religious-garb laws implied but did not make explicit that the judicial system operated from different legal definitions of religion at distinct points in time. As a result, the research is limited in that it did not map those

distinct definitions onto the legal justifications for regulating teachers' religious garb. Meaning, this study I did not make explicit how a court in 1894 was operating from a proudly different legal definition of religion than a court may in 2018.

For instance, at the U.S. Supreme Court level, nineteenth-century legal definitions of religion[13] were limited to monotheism.[14] Later, the Court broadened the constitutional meaning of the term to include non-theistic traditions while rejecting the idea that religion is "merely a personal moral code."[15] Then the Court found a that "legitimate religion" would need to have had a "longstanding" and "sincere"[16] belief system and could only receive constitutional protections if it did not contravene criminal laws. These legal definitions of religion continued to change under *Smith*, the federal and state Religious Freedom Restoration Acts, and the *Hobby Lobby* decision that extended the religiously liberty definition of person to corporations, which I discuss in Chapter II – Literature Review.

Throughout this history not only did the definitions of religions change and the definitions of religious persons, but also the methods for defining religion changed, too. Methods used to legally define religion ranged from scholarly interpretations, to narrow or broad analogies to beliefs and practices observed in established religions, to detailed multi-pronged[17] judicial tests. These various legal definitions of religion were intimately

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[13] Eduardo Peñalver, "The Concept of Religion" *Yale Law Journal*, Vol. 791 (1997); Kent Greenawalt, "Religion as a Concept in Constitutional Law" 72 Cal. L. Rev 753 and (1985–1986) and Kent Greenawalt, "The Concept of Religion in State Constitutions" 8 Campbell L. Rev. 437.
[14] *Davis v. Beason*, 133 U.S. 333 (1890); *United States v. McIntosh*, 283 U.S. 605 (1931).
[15] *Torcaso v. Watkins*, 367 U.S. 488 (1961); *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 393 U.S. 333, 339 (1970).
[16] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[17] *United States v. Meyers,* 95 F.3d 1475 (10th Cir. 1996).

related to competing religion clauses in state constitutions which give their own unique definitions of religions. The methods that courts used to legally define religion resulted in the lack of a uniform definition of religion, which meant that legal questions about regulating religion were particularly vulnerable to government bias.

The second stage of the study will include a comprehensive rubric of the competing legal definitions of religion, and the methods used by the U.S. Supreme Court to define religion, with special attention to the legal definitions of "exercise" of religion. The study will distinguish between government regulations that seek to compel beliefs or to force theological confessions and a person's religious "acts" that may cause another harm, thus justifying government regulation of religious behavior. The untested hypothesis is that that the problem of legally defining religion is rooted in the influence that Protestant Christianity had on the legal system. As this study shows, this influence disproportionally disenfranchised religious and racial minorities who wore religious garb while teaching in public schools. This hypothesis is worth further examination in the second phase of this study.

Recommendations

In addition to addressing the study's limitations, it is recommended that additional research be conducted on the following subjects.

No Aid to Religion Laws

The study of bans on teachers' religious garb in public schools resulted in the discovery of a complex network of *no aid to religion laws* in state constitutions—laws that prevented public funding to support religion. Much of the literature on this subject

dismisses these provisions because many state constitutions include the term "sectarian," which legal scholars and courts have dismissed as code for anti-Catholic bias. In many instances, there is evidence for this deduction, as this study affirms.

Upon a closer look, there are additional nuances worthy of future consideration:[18] (a) the *no sectarian* sections in state constitutions is only one example of *no aid to religion* laws, many of which predate the ratification of the First Amendment; (b) in some regions Catholics were the targets of these laws and in other regions the targets were other minorities (e.g., Anglicans, Baptists, Jews, Mormons, Quakers, and so on); and (c) in some instances, they were even proposed and advanced by Catholics and therefore cannot simply be dismissed as anti-Catholic rhetoric. The reason for this last point is that many religious people had their own religious justifications for separating religion and government, which counters the unidirectional position that *no aid to religion* laws were a part of a secularist agenda.

I recommend that future research be conducted on the four types of *no aid to religion* laws that further analyzed in the unpublished dataset that arose from this study: state laws from 1775 to present that banned funding of (1) *teachers of religion* (e.g., clergy); (2) *sectarian instruction*; and (3) *seminaries* (e.g., theological schools to train clergy). This data set reveals that these first two types of laws were commonly discussed in the literature and that the *no seminary* laws are intermittently discussed, whereas a fourth type of *no aid to religion* is routinely overlooked: (4) constitutional provisions that prevent funding dedicated to public education from being *diverted for other purposes*.

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[18] Nathan C. Walker, "Local, State and Religious Origins of No Aid to Religion Laws," under review with *J.L. Religion,* Cambridge University Press.

The *no diversion* laws, found in the financial sections of state constitutions—not in the religion or education clauses—do not explicitly mention religion, which may explain why they have been regularly overlooked. Yet, the case law on teachers' religious garb reveals that these laws were used to restrict public funding to public schooling long before Congress' failed attempt at passing the Blaine Amendment in 1876. This proposed constitutional amendment in 1876 nearly banned all federal and state governments from financing private religious schools, but the fact is that, despite its failure, 87 percent of states had already enacted some type of *no aid to religious education* law, many of which predated the ratification of the First Amendment.

The field of law and religion would benefit from a comprehensive analysis of these state laws, especially in the aftermath of *Smith,* when courts have become more reliant on state constitutions to expand religious freedom protections. The unpublished dataset developed from but not integrated in this study on teachers' religious garb could advance a future study on *no aid to religion laws*.

No Religious Test for Teachers Laws

This study also revealed another under-researched area: state constitutions with *no religious test for teachers* laws. As previous cited, examples include clauses in the following constitutions: Nebraska (1875), Colorado (1876), Montana (1889), Idaho (1889), Utah (1889), Wyoming (1890), New Mexico (1911), and Arizona (1912).

These laws are geographically bound, potentially revealing an important legal trend that was occurring during the western-expansion era. A future study on this subject may reveal the role that the federal laws played as these regions went from being governed as federal territories to states with their own constitutions. This study may also

reveal particular insight into the role that the Church of Latter-day Saints had on the development of these laws, either with Mormon-majorities advocating for these laws or federal authorities introducing them in suspicion of Mormons. In Arizona and New Mexico, similar legal patterns may exist but this time in regions with a strong Catholic influence. At this point, these reasons are based on a preliminary review, worthy of a more comprehensive study.

Comparative Law

It is also recommend conducting a multi-national study on legal restrictions on religious garb in public schools. The study could take both a historic and contemporary look at policy trends and their impacts. The field of comparative studies in law and religion may provide helpful lenses through which to examine the global findings.[19]

For instance, there are four common understandings of religious liberty in constitutions throughout the world: freedom *of*, *for*, *from*, and *within* religion.[20] These conceptual frameworks could bring additional insight into the examination of legal restrictions on religion in public schools.

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[19] An excellent template from which to build this study can be found in Maria Zhurnalova's 2007 doctoral dissertation in comparative law from Central European University provides a comprehensive survey of religion and public schools in seven countries, which provides specific treatment of students' and teachers' religious dress worn in public schools. Maria Zhurnalova, "Religion in the Public Sphere: Public Schools and Religious Symbolism: A Comparative Analysis." Doctor of Juridical Science (SJD) diss., Central European University, 2007.

[20] I was first exposed to this framing when attending the biannual meeting of the International Consortium for Law and Religion Studies, of which I am a member. *Freedom of for from within Religion: Differing Dimensions of a Common Right?* St. Hugh's College, Oxford England, Sept. 8, 2016 – Sept. 11, 2016. The conference leaders defined these terms as follows: "*Freedom of religion or belief*, as a right recognized for every human being, is the first dimension, but not the only one. *Freedom from religion*, that is the right to live one's life without being compelled to perform religious acts, is another and *freedom for religion*, which concerns the institutional side of this right (what was once called "libertas ecclesiae") is a third dimension that demands consideration. Finally, *freedom in religion* concerns the rights that the faithful (and sometimes not so faithful) are entitled to enjoy within their religious communities."

Impressionability Studies

The final and most important recommendation for future research concerns the "impressionably" of children.

As documented, legal experts from a wide range of ideological perspectives support the conclusion that it is unconstitutional to single out teachers' religious garb for government regulation. There are, however, disagreements on how best to balance the rights and interests of children and religious-garb-wearing teachers. These disagreements often hinge on the assumptions the observer brings to the question of the "impressionability" of students in compulsory education settings.

The literature on teachers' religious garb reveals a dominant assumption that students' impressions are unidirectional: that students will have *negative* impressions if exposed to religious garb worn by public schoolteachers (e.g., the fear children will be religiously coerced and converted to the religion of their teacher). This is an verified claim that requires a series of replicated and independent studies in order to fully substantiate. In this context, I close this study with a reflection on five concerns that I have with resting the fate of students' and teachers' constitutional rights on this assumption. My hope is that these questions will help inform future studies about the impressionability of elementary, middle, and high school students.

First, the degree of "impressionability" of teachers' religious garb question is untested. No studies have examined students' impressions of teachers' religious garb or

religious identity.[21] As a result, it is inconclusive that students' impressions are or will be negative. It is recommended that future research include a longitudinal study of elementary, middle school, and high school students and their attitudinal and educational impressions of teachers' religious garb. Studies should also examine the effects of students' exposure to religious garb worn by a wide variety of authority figures, such as friend's parents, medical professionals, police officers, military personnel, elected officials, celebrities, athletes, and so on.

Second, the negative assumption about children's impressionability may also underestimate the intellect and agency of the very children it seeks to represent. Future studies should also include how students themselves form their religious or non-religious identities and how they view others do the same. The literature and research on faith formation could inform research designs, such as the work of James Fowler, Sharon Daloz Parks, and others. As previously cited, Ben Marcus' research serves as a helpful conceptual lens through which to examine students' impressions by using the 3 B's of religious identity formation: *belief, behavior,* and *belonging*. The use of these frameworks could help test the assumption that adults bring to students' identity development. The goal is to test students' ability to self-differentiate at different ages, especially at a time when news media, entertainment, sports, and changing social demographics expose children to far more religious diversity than any other previous generation has known.

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[21] There are studies that measure the effects authority figures attractiveness; clothing worn by authority figures (e.g., with or without glasses; with or without wearing a uniform); or the casual, moderate, or conservative dress worn by public schoolteachers. For a complete discussion see Pamela A. Phillips and Lyle R. Smith, "The Effects of Teacher Dress on Student Perceptions." *Reports: Research/Technical* (June 1992): 1–29.

Third, the historic and contemporary conclusions made about students' impressions contradict the religious literacy scholarship. As previously cited, Emile Lester's *Modesto Study* reveals positive results when students complete a required world's religion curriculum. Diane Moore's research on how teachers prepare students to be religiously literate provides an important conceptual framework for testing students' impressions about whether they understand that "religions are *internally diverse* as opposed to uniform; religions *evolve and change over time* as opposed to being ahistorical and static; religious influences are *embedded in all dimensions of culture* as opposed to the assumption that religions function in discrete, isolated, 'private' contexts."[22]

Fourth, the assumption that students will have negative experiences when exposed to teachers' religious garb ignores the question of the professionalism of teachers. It is recommended that future studies also examine whether teacher training programs an education leadership programs include *religious literacy* or *religious liberty* training in their curriculum, and if so, what the effects of this training are, and if not, what the possible consequences are of teachers and administrators being unprepared to face this potential legal conflict. Embedded in this recommendation is my belief that legislatures and courts will benefit from hearing directly from the teachers. Educators are very good at measuring the impact of their actions in their classrooms. What do they think is really going on and why? In other words, what are *their impressions* of children's learning process—how and when and why do children have a change in their impressions? What

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[22] Diane L. Moore, *Differentiations: Differentiating between devotional expression and the academic study of religion,* (Cambridge, MA: Harvard Religious Literacy Project, 2018).

are the qualities of those impressions from the teacher's perspective? This line of questioning gets at the heart of how people learn about religion and the short- and long-term effects of that learning.

Finally, the unidirectional conclusion of students' impressions of teachers' religious garb also assumes parents' motivations for enrolling their children in public schools—an assumption that is also untested. Embedded in this position is the view that parents are and should be fearful of their children being exposed to teachers' religious differences. Does this position accurately represent parents today? If so, what are their concerns and why? Do they expect public schools to be purely secular environments? Do they expect school leaders to advance the agenda of freedom *from* religion, or do they expect that public schools should serve the entire public, which by its nature will expose their children to ideas, people, and customs that are different from their own? Such a study may find, as I suspect, that parents have many fears and many desired outcomes. One of those outcomes may be, as I affirm in this study, for public schools to serve as laboratories for democracy where fundamental constitutional rights, such as religious freedom, are advanced for people of all religions and none.

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Cleveland v. United States, 329 U.S. 14. (1946). (The U.S. Supreme Court upheld the Mann Act that prohibited the transport of girls and women across state lines to enter polygamous marriages.)

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Commonwealth v. Herr, 229 Pa. 132 (Pa. Sup. Ct. 1910). (In a one-paragraph affirmation of the Pennsylvania Superior Court's decision, thus overturning *Hysong.* Note: the Pennsylvania Supreme Court comprised *none* of the same members who had heard *Hysong.*)

Commonwealth v. Herr, 39 Pa. Super. 454 (Pa. Super. 1909). (The Superior Court of Pennsylvania, lower than the Pennsylvania Supreme Court, held that the 1895 anti-religious-garb law did not violate a Mennonite woman's rights to wear "unusual plain dress" under the state constitution's "right to worship," "right of conscience," "no interference," "no preference," and "no religious tests for office" clauses. The court also held that the state's anti-religious-garb law did not violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. Note: this occurred before the U.S. Supreme Court applied the federal Bill of Rights to state laws.)

Commonwealth v. Herr, Court of Quarter Sessions of Lancaster County, No. 26 (Lancaster Mun. Ct. 1908). (The County Court held that "… the legislature did not see fit to make any universal rule. It adopted no general style of dress; but it did attempt to exclude certain persons, who, on account of their religious sentiments, saw fit to adopt a plain garb, from holding employment under the commonwealth.")

Cooper v. Eugene Sch. Dist. No. 41, 301 Ore. 358 (Or. Sup. Ct. 1986), app. dismissed, 480 U.S. 942 (1987). (The Oregon Supreme Court found that a female Sikh teacher's right to free exercise of religion under the Oregon Constitution was "reasonably denied" when her employment was terminated and teaching license revoked for wearing a turban while teaching. The Third Circuit claims in *Reardon* that the U.S. Sup. Ct. denied Cooper's appeal for "lack of a substantial federal question.")

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Coushatta v. Big Sandy, 817 F.Supp. 1319 (E.D., Tex. 1993). (Federal district court ruled in favor of Native American students' wearing of traditional hair length while in school regardless of the school dress code that restricted male students' hair length to reaching the top of a shirt collar. After finding that sincerity of religious belief does not depend on the belief's being part of a traditional religion, universally practiced within the religion, or even explicitly mandated by the religion, the court held that the school board did not meet the requisite "compelling government interest" standard.)

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Good News Club v. Milford Central School, 533 U.S. 98 (2001). (In a 6–3 decision, the U.S. Supreme Court held that denying an extracurricular student club from having access to the public school violated the Establishment Clause. The court held, "It cannot be said that the danger that children would misperceive the endorsement of religion [by permitting religiously affiliated student clubs to meet on campus after school hours] is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.")

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*Leyla Sahin v. Turkey*i 44774/98 (ECHR 2008). ("European Court of Human Rights held by sixteen votes to one, that there had been no violation of Article 9 [freedom of thought, conscience and religion] of the European Convention on Human Rights" when a Muslim medical student was prevented from wearing a headscarf because the ban was "necessary in a democratic society.")

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Lowe v. City of Eugene, 463 P. 2d 360 (1969). ("Public land cannot be set apart for the permanent display of an essentially religious symbol when the display connotes government sponsorship.")

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McGowan v. Maryland, 366 U.S. 420 (1961). (In an 8–1 decision, the U.S. Supreme Court held that Maryland's blue laws did not violate the religion clauses of the First Amendment because the contemporary practice of the law was secular and designed to promote the "health, safety, recreation, and general well-being" of its residents.)

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Meek v. Pittenger, 421 U.S. 349 (1975). (In a 6–3 decision, the U.S. Supreme Court held that Pennsylvania "auxiliary services" for nonpublic schools (75% of which were religious schools) violated the Establishment Clause, except for the state loaning textbooks. The unconstitutional services included "counseling, testing, psychological services, speech and hearing therapy, and related services for exceptional, remedial, or educationally disadvantaged students.")

Meixsell, Suzanne H. and Perry A. Zirkel. "Religious Garb." *Journal of Cases in Educational Leadership*, The University Council for Educational Administration Vol. 10, No. 1 (March 2007): 32–39.

Menora v. Illinois, 683 F.2d 1030 (7th Cir. 1982). (Seventh Circuit Court rhetorically affirmed Jewish student-athletes' request to wear their yarmulkes (skullcaps) during basketball games but not if they were to use bobby pins to secure the yarmulkes to their heads because the pins could jeopardize students' safety. The court recommended finding other ways to secure the yarmulkes, such as using chinstraps or having the kippot (plural of kippah, a brimless cap) sown to headbands or having the students wear full-headed caps. The court both affirmed the dress code while rhetorically affirming the students' free exercise rights, which the court held were not violated in this context.)

Meyer v. Nebraska, 262 U.S. 390 (1923). (The U.S. Supreme Court found unconstitutional a statute that restricted foreign-language education under the Due Process Clause of the Fourteenth Amendment. This particular case involved fourth graders reading the bible in German at the Zion Parochial School, a one-room schoolhouse.)

Minersville v. Gobitis [sic, Gobitas], 310 U.S. 586 (1940). (In an 8–1 decision, the U.S. Supreme Court upheld the decision of public schools in Minersville, Pennsylvania to expel students for refusing to salute the U.S. flag—doing so would violate their religion as Jehovah's Witnesses. The court affirmed the school's interest in promoting "national cohesion" in the name of "national security." Three years later, in light of the developments in Nazi Germany with similar compulsory practices, the U.S. Supreme Court overturned itself in the 1943 case *West Virginia v. Barnette,* 319 U.S. 624.)

Mirzazadeh, Tina. "Discrimination in the Name of Secularism: A Ban on Religious Symbols in Quebec." *Pacific McGeorge Global Business & Development Law Journal* Vol. 28, Issue 2 (2015): 411–434.

Mississippi v. McGlothin, 556 So.2d 324 (Miss. Sup. Ct. 1990), cert. denied, 498 U.S. 879. (The Mississippi Supreme Court held that a public schoolteacher's periodic wearing of a head wrap as a religious cultural expression of her identity as an African Hebrew Israelite from Ethiopia was constitutionally protected under both the Free Exercise clause of the U.S. Constitution's First Amendment, as incorporated by the Fourteenth Amendment, as well as under the "no religious tests," "no preference," and "free enjoyment of all religious sentiments" clauses of Mississippi's Constitution. The Mississippi Supreme Court applied the U.S. Supreme Court's *strict scrutiny* test and did not find applicable the U.S. Supreme Court's decision in *Goldman v. Weinberger*, in part because Congress had overturned it two years earlier. Three months after the *McGlothin* case was decided, the U.S. Supreme Court issued *Smith* (1990), thus overturning McGlothin's federal Free Exercise claim.)

Mitchell v. Helms, 530 U.S. 793 (2000). (In a 6–3 ruling, the court found that the use of public funds for educational equipment and materials did not violate the Establishment Clause because some of the schools were private religious schools. Justice Thomas wrote that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." Specific to the current study, the court argued that "anti-sectarian" laws were evidence of anti-Catholicism. Justice Thomas wrote, "Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment [of 1875], which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'")

Monsen, Lauren. "Acceptance of Religious Garb in U.S. Shows Diversity, Tolerance: U.S. official discusses her adherence to Muslim dress codes." *U.S. State Department Documents,* USINFO, Nov. 30, 2006.

Monshipouri, Mahmood. "A Review of Dominic McGoldrick's Human Rights and Religion: The Islamic Headscarf Debate in Europe." *Muslim World Journal of Human Rights* Vol. 4, Issue 2 (2007): 1–4.

Moore v. Board of Education, 4 Ohio Misc. 257 (Ohio Ct. Com. Pl. 1965). (Case involving the consolidation of private Catholic schools with a public school district.)

Morse, Jane. "U.S. Laws Protect Right to Wear Religious Garb at Work: Somali woman wins her case to wear a hijab on the job." *U.S. State Department Documents*. Federal Information & News Dispatch, Inc., August 6, 2007.

Mueller v. Allen, 463 U.S. 388 (1983). (In a 5–4 decision, the U.S. Supreme Court applied the *Lemon* test to conclude that Minnesota did not violate the Establishment Clause when allowing taxpayers to deduct private religious school expenses from their state income tax.)

Multani v Commission scolaire Marguerite-Bourgeoys, 1 S.C.R. 256 (Supp. Ct. Canada 2006). (The Supreme Court of Canada held that a public school failed to meet the legal principle of *proportionality*—the judicial requirement that there must be a legitimate reason for a regulation. The problem was based on the characterization of the kirpan as a weapon when "over the 100 years since Sikhs have been attending schools in Canada, not a single violent incident related to the presence of kirpans in schools [had] been reported." The court also held that the school board's interest in promoting the "highest degree of safety" was not proportionate, considering that the school allowed students to use scissors, pencils, and baseball bats.)

Murphy, Timothy J. "Comparative Secularism: Leaving Room for the Holy Spirit and Headscarves in Turkish and American Public Schools." *California Western International Law Journal* Vol. 45, Issue 2 (Spring 2015): 297–329.

Mushaben, Joyce Marie. "Women between a Rock and a Hard Place: State Neutrality vs. EU Anti-Discrimination Mandates in the German Headscarf Debate." *German Law Journal* Vol. 14, Issue 9 (September 2013): 1757–1786.

NAACP v. Button, 371 U.S. 415 (1963). (The first case in which the U.S. Supreme Court applied the strict scrutiny standard to the First Amendment protection of freedom of association.)

Near v. Minnesota, 283 U.S. 697 (1931). (The U.S. Supreme Court applied to state and local laws the federal protection of freedom of the press under the First Amendment to the U.S. Constitution.)

New Haven v. Torrington, 132 Conn. 194 (Conn. Sup. Ct. 1945). (A case involving public funds to support a Roman Catholic orphan asylum, which was considered unconstitutional.)

New Mexico State Board of Education, Resolution, March 6, 1951. ("It Is Hereby Resolved and Adopted as the policy of this board that all nuns, brothers, or priests of the Catholic Church, or members of any other sectarian religious group, wearing clothing of religious significance, should be removed from the public schools throughout the state as expeditiously as circumstances (of) each locality allows; and, it is further adopted as the policy of this board that insofar as possible no property owned by religious groups shall be leased or rented by the state from such religious or sectarian organization unless exceptional circumstances require such action."

Newbill, Lucas. "A Nurse's Face: The Burqa in the Hospital." *North Carolina Central Law Review* Vol. 39, Issue 1 (2016): 33–62.

Newborn, Brooke E. "Public School Dress Codes and the Free Exercise Clause of the First Amendment—Jacob's Ladder." *Pennsylvania Bar Association Quarterly* Vol. 80 (October 2009): 172.

Nichol v. Arin, 268 F.Supp 2d 536 (W.D. Pa. 2003). (A federal district court judge ruled that a teacher's assistant was not a "teacher" under the definition of Pennsylvania's School Code; therefore, Brenda Nichol was not bound by Pennsylvania's anti-religious-garb statute and could freely wear a Christian cross necklace while assisting in the public classroom. The judge issued an extensive nonbinding opinion about the unconstitutionality of the statute, using judicial tests under the Free Exercise, Free Speech, Establishment, and Title VII provisions.)

Noack, Rick. "Austria's New Anti-Burqa Law Isn't Quite Working as Intended." *Washington Post,* October 9, 2017. ("Officers are stopping people on bikes who are wearing scarves. On Friday, police fined a man about $175 for wearing a shark costume for promotional purposes in Vienna's city center.")

Noonan, John T. and Edward McGlynn Gaffney, eds. "Wearing Religious Garb" and "Religious Orders and Religious Garb in the Public Schools." In *Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government*. New York, NY: Foundation Press, 2001, 456–464 and 767–769.

North Dakota Legislative Council. Minutes of the Education Services Committee, October 23, 1988. ("Chairman Holmberg said Section 15-47-29 which provides that a public schoolteacher may not wear in school or while engaged in teaching any dress or garb indicating the fact that such teacher is a member of or an adherent of any religious order, sect, or denomination, was removed because the committee determined that the section contained the potential for significant First Amendment challenges. Chairman Holmberg said Section 15-47-30, which requires the suspension and revocation of a teaching certificate for wearing religious garb, was omitted because the committee determined that the section contained the potential for significant First Amendment challenges.)

Nussbaum, Martha C. *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age*. Cambridge, Massachusetts: Belknap Press, 2012.

O'Connor v. Hendrick, 184 N.Y. 421 (N.Y. Ct. App. 1906). (Members of the Order of the Sisterhood of St. Joseph of the Roman Catholic Church were discharged for refusing to comply with the state superintendent's regulation that prohibited teachers from wearing distinctive religious garb in the public classroom. In a 7–0 opinion with one concurrence, the highest court in the state affirmed the appellate court decision, upholding the superintendent's regulation under New York Constitution's "no aid to religion" clause.)

O'Connor, Edward L., Attorney General of Iowa. Memo, "Schools: Catholic Nuns Teaching in Public Schools." Office of the Attorney General, State of Iowa, October 10, 1936 (1936 WL 68743 Iowa A.G.). ("True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword, it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. Christianity is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. True Christianity never shields itself behind majorities. When Christianity asks the aid of government beyond mere impartial protection, it denies itself… Where a Catholic nun would teach school in the public school and receive a salary therefore, she would be required under the vows that she took when she became a member of her order to turn this money over to the ecclesiastical order to which she belonged. Therefore, public money would be used for the purpose of supporting ecclesiastical sectarian institutions, which, under the laws of this state, is prohibited. If a Catholic nun applied for a position in the public schools and agreed that she would not accept any salary for her services, she would still be prohibited from teaching in the public schools, in accordance with the views of the courts as set forth above, because of the wearing of her particular religious garb. It is further the opinion of this department that a Catholic nun dressed in the garb of her order, or a representative of any other creed wearing a particular distinctive religious garb, cannot teach in the public schools of the State of Iowa while wearing such distinctive ecclesiastical garb, and that no public moneys can be paid to any teacher where the money is transferred by such teacher under her own particular vows to any sectarian institution, school, association or order.)

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Oregon House Bill 3686, February 22, 2010. "(Clarifies circumstances in which employer imposes occupational requirement that restricts ability of employee to wear religious clothing. Includes difficulty or expense to maintain religiously neutral work environment among factors to be considered when determining if requested accommodation creates undue hardship for employer that is school district, education service district or public charter school. Provides that reasonable accommodation imposes undue hardship on employer that is school district, education service district or public charter school when accommodation constrains legal obligation to maintain religious neutrality in school environment and to refrain from endorsing religion. Repeals provisions prohibiting teacher in public school from wearing religious dress while engaged in duties as teacher and sanctioning teacher for doing so. Takes effect July 1, 2011.")

Osborne Allan G., Alley Ostrowski, and Luke M. Cornelius. "Should Teachers be Allowed to Wear Distinctive Religious Garb in Public Schools?" In Charles J. Russo, *Debating Issues in American Education: A SAGE Reference Set* (Book 4), SAGE Publications, 2012, 284–299.

Osman, Fatima. "Legislative Prohibitions on Wearing a Headscarf: Are They Justified?" *Potchefstroom Electronic Law Journal* Vol. 17, Issue 4 (2014): 1317–1349.

Ove, Torsten. "Judge Hears about Cross-Wearing Suit; Teacher's Aide Seeks End to Suspension." *Pittsburg Post-Gazette,* May 13, 2003.

Ove, Torsten. "Suspended Teacher's Aide Sues Over Cross Necklace." *Pittsburgh Post-Gazette*, May 7, 2003.

Ove, Torsten. "Woman Who Wore Cross Gets Job Back: School Aid Reinstated Until Aug. 28 Hearing." *Pittsburg Post-Gazette,* June 26, 2003.

Ozawa v. United States, 260 U.S. 178 (1922). (In a unanimous decision, the U.S. Supreme Court ruled that Japanese immigrant Takao Ozawa was not eligible for citizenship on the grounds that Japanese were not considered "free white persons"—a ruling later referenced by the U.S. Supreme Court in justifying in *Korematsu* (1944), the 6–3 ruling that upheld President Franklin D. Roosevelt's internment of Japanese Americans during World War II.)

Paddock v. Pulsifer, 23 P. 1049, 1051 (Kan. Sup. Ct. 1890). (One of the state court decisions that originated the *strict scrutiny* standard.)

Patrick, Jeremy. "The Religion Provisions of the Nebraska Constitution: An Analysis and Litigation History." *Journal of Law and Religion* Vol. 19, Issue 2 (2003–2004): 331–396.

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Peabody, Michael D. "The Right Thing." *Liberty Magazine,* March/April 2011. (Article affirming the repeal of Oregon's anti-religious-garb statute in *Liberty Magazine,* a publication of the Seventh-day Adventist Church.)

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Pfeffer, Leo. "Garbed Nuns as Public School Teachers." In Leo Pfeffer, *Church, State, and Freedom*. Boston, Massachusetts: Beacon Press, 1953, 496–502.

Phillips, Pamela A. and Lyle R. Smith. "The Effect of Teacher Dress on Student Perceptions." *Reports: Research/Technical* (June 1992): 1–29.

Pierce v. Society of Sisters, 268 U.S. 510 (1925). (In a unanimous decision, the U.S. Supreme Court found unconstitutional Oregon's law that required parents to send their children to public schools. The court held that parents' right to choose their child's education, whether in a public or a private religious school, was protected under the Due Process clause of the Fourteenth Amendment. The state could not force parents "to accept instruction from public teachers only." In *Cooper* (1986), the Oregon Supreme Court admitted that the state's anti-religious-garb laws originated from a "period of anti-Catholic intolerance that also gave us the initiative measure against private schools struck down in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).")

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Plesner, Ingvill Thorson. "Legal Limitations to Freedom of Religion or Belief in School Education." *Emory International Law Review* Vol. 19, Issue 2 (Summer 2005): 557–586.

Prince v. Massachusetts, 321 U.S. 158 (1944). (In a 5–4 decision, the U.S. Supreme Court affirmed the Massachusetts child welfare law that restricted children, in this case, Jehovah's Witness children, in selling religious literature. The court stated, "The family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither the rights of religion nor the rights of parenthood are beyond limitation.")

Prince, Joyce Howard. "Pa. Teacher's Aide Suspended for Cross." *The Washington Times,* May 9, 2003.

Proctor, John R., President of the Civil Service Commission of the United States, June 6, 1895. (Federal order appointing "superintendents, teachers, and matrons" from

previously federally contracted schools to transfer to government appointments, including Catholic nuns and priests who wore religious garb.)

R. Singh v. France, 27561/08 (ECHR 2009). (One of six cases decided in 2009 by the European Court of Human Rights that unanimously affirmed a school's decision to expel Muslim and Sikh students for wearing religious garb.)

Ramachandran, Gowri. "Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing." *Maryland Law Review* Vol. 66, Issue 1 (2006): 11–93.

Rawlings v. Butler, 290 S.W.2d 801 (Ky. Ct. App., 1956). (The state Court of Appeals held that the Kentucky Constitution's "no aid to religion" clause was not violated when employing habit-wearing Catholic nuns.)

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Reisman-Brill, Joan "The Ethical Dilemma: Can Teachers Wear A Cross to School?" *TheHumanist.com,* April 17, 2013. (Daniel Mach, Director of the ACLU Program on Freedom of Religion and Belief, "explained that although public school teachers don't shed their constitutional rights at the schoolhouse gate, when they are in class they act as representatives of the government and must take care not to promote, endorse, or denigrate any religious viewpoint, or religion in general. 'The lines are not always precise, but courts have typically given public schools considerable leeway to guard against Establishment Clause violations by teachers,' he said.")

Report of the Attorney General of Indiana, 1920. ("… it is my opinion that a rule of a school board or trustee forbidding teachers during the hours when schools are in session from wearing a distinctive garb indicating religious or denominational membership would be a reasonable rule and would be upheld by the courts… It is my opinion that the wearing a distinctive religious uniform or garb by a teacher in the school room is a continuous teaching of religion and constant reminder that the wearer is attached to a particular form of worship…. They have ceased to be civilians and have become ecclesiastical persons, are known by their religious names and wholly devoted to religious work.")

Report of the Attorney General of Indiana, 1923. ("… in the absence of any rule or regulation prescribed by statute or by some appropriate school officer thereunto authorized by statute, I am of the opinion that an action for recovery of money paid [to religious-garb-wearing teachers] by the trustee under the circumstances herein stated could not be successfully maintained.)

Report of the Attorney General of Louisiana, No. 82-733, September 2, 1982. ("The wearing of religious garb by university faculty members does not constitute an establishment of religion.")

Report of the Attorney General of Massachusetts, 1967. ("… a school committee need not hire specially garbed members of religious orders if it feels that 'the effect of [their attire] worn… at all times in the presence of their pupils would be to inspire… sympathy for the religious denomination to which they … belong." Citing *O'Connor* (1906); *Zellers* (1951); *Berghorn* (1953); and concurring opinion of Justice Brennan in *Shempp* (1963).

Report of the Attorney General of New Mexico, 1967 (With references to *Zellers* 1951.)

Report of the Attorney General of North Dakota. "Schools—Teachers—Wearing Religious Garb." Office of the Attorney General, State of North Dakota, August 25, 1945.

Report of the Attorney General of South Dakota. Letter to L. R. Navin, State's Attorney, Davison County. "Schools & School Districts: Payment of Tuition from Public School District Funds to Attend Elementary School Operated as a Parochial or Private Institution." Office of the Attorney General, State of South Dakota, April 7, 1967. ("You are also advised that the fact that a member of a Catholic religious order is hired as a school teacher, and teaches in the garb or habit of her order while employed as a public school teacher neither disqualifies her as such teacher, if she holds a teaching certificate, nor does such transfer a public school into a parochial school, if she teaches the standard courses of instruction prescribed for the particular grade being taught, and such teacher does not teach religious or sectarian courses.")

Report of the Attorney General of South Dakota. Letter to Mr. J. F. Hines, Superintendent of Public Instruction. "Catholic Sisters may teach in public schools." Office of the Attorney General, State of South Dakota, August 13, 1936. Citing *Gerhardt v. Heid*, 66 N.D. 44, (N.D. Sup. Ct. April 2, 1936).

Report of the Attorney General of Vermont, No. 369, January 29, 1970. ("Members of religious order may teach in public school; no constitutional prohibition against wearing religious garb subject to reasonable regulation.")

Report of the Secretary of the Interior. *Education Report* (1892): 1158. ("Sisters of Charity are religious persons, and as such have no place in the public school to propagate religious doctrine; but if they be women of education and teaching ability, it lies wholly within the authority of the board of education to employ them to do the legitimate work of the school. If, however, to any class of patrons their presence is obnoxious or unacceptable by reason of the significance of their religious garb, the board must either retire them or require them to wear the usual garb of teachers in the classroom.")

Report on the Application of the European Union Charter of Fundamental Rights, Brussels, 30.3.2011 SEC (2011) 396 final: 1–55. (European Commission Staff Working Document accompanying document to the report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.)

Reutter, Edmund E. "Teachers' Religious Dress: A Century of Litigation." *West's Education Law Reporter* 701 WELR 747 (January 1992): 1–15.

Reuven, Ziegler. "The French Headscarves Ban: Intolerance or Necessity?" *John Marshall Law Review* Vol. 40, Issue 1 (Fall 2006): 235–266.

Reynolds v. United States, 98 U.S. 145 (1878). (In its first case involving the Free Exercise clause of the First Amendment, the U.S. Supreme Court unanimously affirmed President Lincoln's ban on bigamy, plural marriages. The court emphasized the right to belief and the free exercise of one's beliefs. Justice Waite wrote, "Congress was deprived of all legislative power over mere opinion but was left free to reach actions which were in violation of social duties or subversive of good order." The court emphasized that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." Justice Waite proposed the following analogy: "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?" Justice Waite asserted that to exempt religious acts from civil law "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.")

Rich, Burdett A. and M. Blair Wailes, eds., *American Law Reports Annotated*, Vol. V., Rochester, NY: The Lawyers Co-operative Publishing Company, 1920, 841–866, 877–879.

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Scopes v. State, 289 S.W. 363 (Tenn. Sup. Ct. 1927). (Tennessee decision affirming the Butler Act, which banned the teaching of evolution in public schools. This was overturned by the unanimous U.S. Supreme Court decision in *Epperson v. Arkansas* 1968.)

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Skinner v. Oklahoma, 316 U.S. 535 (1942). (U.S. Supreme Court found unconstitutional a "three strikes" law that justified the sterilization of African Americans; the first U.S. Supreme Court case to use the exact phrase *strict scrutiny*.)

Sorensen, C. A., Attorney General of Nebraska and George W. Ayres, Assistant Attorney General of Nebraska. Letter to Mr. P. F. O'Gara, Attorney at Law, Harington, Nebraska. "Schools—Sectarian Schools Not Entitled to Share in State School Funds." Office of the Attorney General, State of Nebraska, March 15, 1930. ("I am… of the opinion that the law forbidding the wearing of a sectarian garb in the school room by a teacher in the public schools of this state is a valid enactment… The fact that the State Superintendent did not revoke [teachers'] certificates [who]… knowingly violated a state law and committed an act which was a crime against the state… and that neither they nor the members of the district school board were prosecuted by the local authorities as they might have been, for a gross violation of a state law, does not in my opinion absolutely bar the State Superintendent from asserting that the school over which they presided was not entitled to a share of the state school funds.")

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Tilton v. Richardson, 403 U.S. 672 (1971). (In a 5–4 decision, the U.S. Supreme Court found unconstitutional the "20-year clause" in the Higher Education Facilities Act of 1963 that sought to permit the use of federal funds to subsidize the construction of buildings owned by private religious schools. The court held that Congress did not entangle religion and the state when seeking to provide these funds because "college students are less impressionable and less susceptible to religious indoctrination" and could establish a nonreligious building on campus that is indistinguishable between those on public campus and the buildings used for religious purposes on private campuses.)

Tinker v. Des Moines, 393 U.S. 503 (1969). (In a 7–2 decision, the U.S. Supreme Court found that a school prohibition on students wearing armbands in protest of the Vietnam War violated the students' free speech rights guaranteed under the First Amendment to the U.S. Constitution. In writing for the majority, Justice Fortas briefly mentioned teachers' rights, stating, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.")

Torcaso v. Watkins, 367 U.S. 488 (1961). (In a unanimous decision, the U.S. Supreme Court held that Maryland's constitutional provision of a religious test for office violated the Establishment, No Religious Test, and Equal Protection clauses of the U.S. Constitution. The court held that no state or federal government could require someone to express a religious belief or disbelief, which made moot the legitimacy of seven similar state constitutions. State legislatures cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can they aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." By footnoting the non-theistic religions such as Buddhism, Taoism, Ethical Culture, and Secular Humanism, the court broadened the legal definition of religion from that of monotheism.)

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United States v. Bhagat Singh Thind, 261 U.S. 204 (1923). (In a unanimous decision, the U.S. Supreme Court upheld the federal government's decision to revoke the citizenship of Bhagat Singh Thind, an Indian Sikh, who previously became naturalized to serve in the U.S. Army during World War I. After completing this service, the court rejected Thind's argument that because he considered himself a "high caste Aryan" of the Caucuses of India, where the term Caucasian originated, he met the federal immigration definition of a "free white person.")

United States v. Carolene Products Co., 304 U.S. 144 (1938). (In this case, the U.S. Supreme Court required that lawmakers have a "rational basis" for introducing economic legislation—the rational basis test being the lowest level of judicial review. Writing for the majority, Justice Stone then used "Footnote Four" to explain that the court may need a "more exacting judicial scrutiny" when laws burden protected classes of minorities, whether religious, ethnic, or racial.)

United States v. Lee, 455 U.S. 252 (1982). (In a unanimous decision, the U.S. Supreme Court held that an Amish employee, because of his religious beliefs, was not exempt from paying Social Security taxes because the tax was applicable to everyone.)

United States v. McIntosh, 283 U.S. 605 (1931). (The U.S. Supreme Court upheld the federal government's decision to deny citizenship to a man who refused, on religious grounds, to "bear arms in defense of the United States." In this case, the court made the theological claim that "We are a Christian people . . . with reverence the duty of obedience to the will of God.")

United States v. Meyers, 95 F.3d 1475 (1996). (In this case, the Tenth Circuit applied the analogy method to legally define religion. Judge Clarence Brimmer, asking whether "the Church of Marijuana" was a legitimate religion, acknowledged that the "threshold for establishing the religious nature of beliefs is low." He used the following criteria for determining that the Church of Marijuana was not a religion. A religion consists of an expression of ultimate ideas, metaphysical beliefs, and a moral or ethical system that result in a comprehensiveness of beliefs, as well as accoutrements of religion, such as a founder/prophet/teacher, important writings, gathering places, keepers of knowledge, ceremonies and rituals, structure or organization, holidays, diet or fasting, appearance and clothing, and propagation.)

United States v. Seeger, 380 U.S. 163 (1965). (In a unanimous decision, the U.S. Supreme Court rejected Congress's prerequisite that a person needed to believe in a "Supreme Being" to be eligible as a religious conscientious objector. The court defined religion as "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." The court reached this conclusion by acknowledging "a vast panoply of beliefs" in a country with a "rich and varied spiritual life"—ranging from monotheism to Buddhism to Hinduism and various Christianities, including Paul Tillich's *God above the God of Theism* and the Catholic Church's statement in Vatican II that "the whole concept of a God 'out there' . . . is itself becoming more of a hindrance than a help.")

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Unknown Author. "Hit the Innocent Bystander." *The Hartford Courant*, Hartford, Connecticut, June 1, 1895.

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Woywod, Stanislaus. *A Practical Commentary on the Code Canon Law*, Vol. 2. New York: Wagner, (1926): 248–249.

WWF. "Pittsburgh Letter by WWF." *The Interior,* May 17, 1894. ("Pittsburg seems to be for a time the center of agitation concerning Roman Catholic control of public schools. Not long since the Riverdale school was consolidated with the parochial school, and 'the sisters' were appointed teachers. An injunction was applied for, under A.P.A. auspices, with the result that the consolidation was promptly overturned and the nuns withdrawn, the injunction suit falling to the ground for want of notice. Almost at once the like experiment was tried in Gallitzin, a village some eighty miles east of this city, and here the effort has been persisted in, and the trial on request for an injunction is at this writing near a conclusion. It is claimed that 250 of the 300 families in the school district are Roman Catholic, and that the nuns do not teach religion during school hours. There is, however, some conflict of testimony on these points; and it is claimed that the religious garb of the teachers, required by the rules of the order, is of itself an offence and a menace.")

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). ("The term 'narrowly tailored,' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used.")

Zabel, Orville H. *God and Caesar in Nebraska: A Study of the Legal Relationship of Church and State.* Lincoln, Nebraska: The University of Lincoln, 1955.

Zellers v. Huff, 55 N.M. 501 (N.M. Sup. Ct. 1951). (In primary reliance on the "free from sectarian control" clause of the New Mexico Constitution, the state's supreme court upheld the school board's ban on public schoolteachers' religious garb. The court also rejected the claim that the anti-religious-garb law violated New Mexico's "no religious test for teachers" clause. The court held that "all nuns . . . wearing clothing of religious significance, should be removed from the public school.")

Zelman v. Simmons-Harris, 536 U.S. 639 (2002). (In a 5–4 decision, the U.S. Supreme Court rules that Ohio's school voucher program does not violate the Establishment Clause.)

Zhurnalova, Maria. "Religion in the Public Sphere: Public Schools and Religious Symbolism: A Comparative Analysis." Ph.D. dissertation, *Central European University*, 2007.

Zirkel, Perry A. "Employees Wearing Religious Attire." *Principal,* The National Association of Elementary School Principals (November/December 2004): 10–11.

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993). (In a 5–4 decision, the U.S. Supreme Court ruled that a school district cannot deny a deaf student to keep a sign-language interpreter previously employed at a Roman Catholic high school were the student was previously enrolled.)

Zollmann, Carl. "American Civil Church Law." *American Law: Religion*. New York, NY: Columbia University, 1917. Reprint: Clark, New Jersey: The Lawbook Exchange, 2008, 35–36.

Zorach v. Clauson, 343 U.S. 306 (1952). (In a 6–3 decision, the U.S. Supreme Court held that New York City's release time program did not violate the Establishment Clause.)

APPENDICES

Appendix A – Legal Terms and Judicial Standards

Religious Garb is defined as "Any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."[23]
The Free Exercise Clause of the First Amendment to the United States Constitution declares that "Congress shall make no law . . . prohibiting the free exercise" [of religion].[24] The U.S. Supreme Court applied the constitutional guarantee to one's free exercise of religion to all state laws in 1940[25] through the Fourteenth Amendment, which proclaims that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[26] There are two predominant judicial tests used by federal courts to rule on Free Exercise cases, which this study will refer to as the *Sherbert* and *Smith* standards.
The *Sherbert* Standard is a three-part judicial test that courts use to apply the *strict scrutiny* standard to Free Exercise cases. Judges first turn to the plaintiffs to determine whether (1) their constitutional right to free exercise of religion was *substantially burdened,* regardless of whether that burden is incidental or fundamental, indirect or direct. If so, the court turns to the state to examine whether lawmakers had a (2) *compelling government interest* to justify the burden and then examines whether the legislature (3) *narrowly tailored* the law to achieve that interest through the *least restrictive* means possible.[27] This study refers to this three-part test as the *Sherbert* standard because of the U.S. Supreme Court's application of these steps in the landmark case *Sherbert v. Verner* (1963).[28] See "Evolution of Free Exercise Standards" in Chapter II – Literature Review for a complete analysis of the origins and evolution of this judicial test.

[23] Pennsylvania Statute 24, Religious Garb § 11-1112 (1895–2018). This anti-religious-garb statute was the first in the United States, enacted in 1895. It was reaffirmed in 1949 and 1982 and remains active today.
[24] U.S. CONST. amend. I., Free Exercise Clause.
[25] *Cantwell v. Connecticut,* 310 U.S. 296 (1940).
[26] U.S. CONST. amend. XIV.
[27] See Chapter II – Origins and Evolutions of Free Exercise Standards for a discussion of why courts and scholars use the terms "narrowly tailored" and "least restrictive means" interchangeably.
[28] *Sherbert v. Verner*, 374 U.S. 398 (1963).

Appendix A. Continued.
The *Yoder* Exemption originated from the landmark case *Yoder v. Wisconsin* (1972),[29] in which the U.S. Supreme court applied the first two steps of the *Sherbert* test. The court held that (1) Wisconsin's compulsory-education law "unduly burdened" the free exercise of religion of Amish and Mennonite families and threatened their way of life; and (2) the state's interest in school attendance until the age of 16 was not compelling, given the vocational and peaceful nature of the religions and the families' willingness to enroll their children in all but two of the required years—implying the court's recognition of a *least restrictive* alternative. Having failed the second question of the *Sherbert* test, the court did not explicitly determine whether the state *narrowly tailored* the law. The *Yoder* decision reaffirmed the application of the *Sherbert* test, which is why "the period from 1963 to 1990 is often labeled the Sherbert/Yoder era of Free Exercise Clause law."[30] This ended with the controversial *Smith* decision.
The *Smith* Standard, also known as the *general applicability* test, requires that government regulations must be "neutral and generally applicable" and cannot "target religious conduct for distinctive treatment."[31] This study refers to this as the *Smith* standard because of its prominent use in the highly disputed case, *Employment Division v. Smith* (1990), in which the Court held that Native Americans who used peyote for sacramental purposes could not receive an exemption from general laws banning the use of narcotics. The *Smith* court limited the previously uncontroversial *Sherbert* standard to laws that are not neutral and generally applicable.[32] See Chapter IV – Presentation and Analysis of Findings for an analysis of why Pennsylvania and Nebraska's anti-religious-garb laws are not neutral and generally applicable because the statutes seek to regulate particular kinds of religious conduct.

[29] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[30] Eugene Volokh, *Some Background on Religious Exemption Law*, THE VOLOKH CONSPIRACY. June 12, 2010, www.washingtonpost.com/news/volokh-conspiracy.
[31] See my later discussion of *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), in which Justice Kennedy wrote for the unanimous court: "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive *strict scrutiny* only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny."
[32] In *Employment Division v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court upheld the decision to deny unemployment benefits to drug counselors who used peyote as part of a Native American ritual.

Appendix A. Continued.
The Federal Religious Freedom Protection Act of 1993: In response to the controversial *Smith* decision, Congress sought to restore the *Sherbert* (strict scrutiny) standard by passing the Religious Freedom Restoration Act of 1993 (RFRA, pronounced *riff-ra*). In *City of Boerne v. Flores*, 521 U.S. 507 (1997) the U.S. Supreme Court found that Congress overstepped its constitutional enforcement powers when seeking to apply the federal RFRA to the states, thus limiting the *Sherbert* test to federal laws. In response to this development, twenty states[33] have since passed their own "mini-RFRAs," which restored the *Sherbert* standard to state laws, such as the Pennsylvania Religious Freedom Protection Act of 2002.
Pennsylvania's Religious Freedom Protection Act of 2002 (RFPA, pronounced *riff-pa*) follows the federal *general neutrality* and *strict scrutiny* standards, thus incorporating the *Smith* and *Sherbert* tests to Pennsylvania law. RFPA statute makes explicit that "an agency shall not (1) *substantially burden* a person's free exercise of religion, including any burden which results from a rule of general applicability."[34] The statute continues: "An agency may substantially burden a person's free exercise of religion if the agency proves, by a preponderance of the evidence,[35] that the burden is all of the following: (2) In furtherance of a *compelling interest* of the agency and (3) The *least restrictive means* of furthering the compelling interest."[36]
The Four-Part "Substantial Burden" Test in Pennsylvania's RFPA explains that a state agency substantially burdens a person's religion when the state's action: "(1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; (2) Significantly curtails a person's ability to express adherence to the person's religious faith; (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion; (4) Compels conduct or expression which violates a specific tenet of a person's religious faith."

[33] Conn. (1993), R.I. (1993), Ala. (1998), Fla. (1998), Ill. (1998), Ariz. (1999), S.C. (1999), Tex. (1999), Idaho (2000), N.M. (2000), Okla. (2000), Pa. (2002), Mo. (2003), Va. (2007), Tenn. (2009), La. (2010), Kan. (2013), Ky. (2013), and Miss. (2014).

[34] Pennsylvania Religious Freedom Protection Act of 2002, 71 Pa. Stat. Ann. §2404, section 4a.

[35] Two evidentiary judicial standards used in civil cases include *preponderance of the evidence* and *clear and convincing evidence*. BLACK'S LAW DICTIONARY defines the *preponderance* standard as "An evidence presented that provides more convincement than the pre-existing evidence presented in court." The Legal Information Institute defines this as "a requirement that more than 50% of the evidence points to something," thereby meeting the necessary burden of proof. *Clear and convincing evidence* is the a more rigorous standard requiring "positive, precise and explicit" evidence "as opposed to ambiguous, equivocal, or contradictory proof," BLACK'S LAW DICTIONARY, 2nd ed. Both of these standards are less restrictive than the "beyond a reasonable doubt" test used in criminal cases.

[36] 71 Pa. Stat. Ann. §2404, section 4b.

Appendix B – Statutes in Question

Original Text of Pennsylvania's Religious Garb Law of 1895[37]

AN ACT to prevent the wearing in the public schools of this Commonwealth, by any of the teachers thereof, any dress, insignia, marks or emblems indicating the fact that such teacher is an adherent or member of any religious order, sect or denomination, and imposing a fine upon the board of directors of any public school permitting the same.

Whereas, It is important that all appearances of sectarianism should be avoided in the administration of the public schools of this Commonwealth.

Section 1. Be it enacted, That no teacher in any public school of this Commonwealth shall wear in said school or whilst engaged in the performance of his or her duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination.

Section 2. That in case of violation of the provisions of the first section of this act by any teacher employed in any of the public schools of this Commonwealth notice of which having been previously given to the school board employing such teacher that it shall be the duty of such school board to permanently suspended such teacher for employment in such school for the term of one year, and in case of a second offense by the same teacher it shall be the duty of said school board to permanently disqualify such teacher from teaching in said school, and any public school director failing to comply with the provisions of this act shall be guilty of a misdemeanor and shall be punishable, upon conviction of the first offense, by a fine not exceeding one hundred dollars, and in case of a second conviction or the violation of the provisions of this act the offending school director shall be punished by a fine not exceeding one hundred dollars and shall be deprived of his or her office as a public school director. A person thus twice convicted shall not be eligible to appointment or election as a director of any public school in this State within a period of five years from the date of his or her second conviction.

Approved—The 27th day of June, A. D. 1895

[37] The Pennsylvania General Assembly first enacted the Pa. 24, Religious Garb § 11-1112 in 1895, in response to the Pennsylvania Supreme Court's affirmation of Catholic nuns from wearing habits while teaching in state public schools in *Hysong v. Gallitzin School District*, 164 Pa. 629, 30 A. 482 (1894). The Pennsylvania General Assembly reenacted the statute in 1949 and 1982. Two proposed repeals of the laws failed to get out of committee in 2011 and 2012. Pennsylvania's statute is the only anti-religious-garb law in the country that remains today.

Revised Text of Pennsylvania's Religious Garb Law 1949[38]

Section 1112. Religious Garb, Insignia, etc., Prohibited; Penalty.—

(a) That no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination.

(b) Any teacher employed in any of the public schools of this Commonwealth, who violates the provisions of this section, shall be suspended from employment in such school for the term of one year, and in case of a second offense by the same teacher he shall be permanently disqualified from teaching in said school.

Any public school director who after notice of any such violation fails to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction of the first offense, shall be sentenced to pay a fine not exceeding one hundred dollars ($100), and on conviction of a second offense, the offending school director shall be sentenced to pay a fine not exceeding one hundred dollars ($100) and shall be deprived of his office as a public school director. A person thus twice convicted shall not be eligible to appointment or election as a director of any public school in this Commonwealth within a period of five (5) years from the date of his second conviction.

[38] The Pennsylvania General Assembly reenacted the statute in 1949 and 1982. The 1949 version removes the previously contradictory statement that the suspension was both "permanent" and yet only last "one year." Two proposed repeals of the laws failed to have enough votes to get out of committee in 2011 and 2012. Pennsylvania's statute is the only anti-religious-garb law in the country that remains today.

Text of Nebraska's Religious Garb Statute of 1919[39]

Chapter 248 | House Roll No. 115
Introduced by Mr. H. E. Anderson and Mr. Randall
School—Teachers—Denomination Dress

AN ACT declaring the wearing in the public schools of this state by any of the teachers therefor of any dress, or garb, indicating the fact that such teacher is an adherent or member of any religious order, sect or denomination, to be a misdemeanor, providing a punishment for the violation thereof and imposing a fine upon the Board of Directors or other school officers of any public school permitting the same.

Be in Enacted by the People of the State of Nebraska

Section 1. Unlawful to wear dress indicating membership in religious order—penalty.—Any teacher in any public school in this state who shall wear in said school or while engaged in the performance of his or her duty any dress, or garb, indicating the fact that such a teacher is a member or an adherent of any religious order, sect or denomination, shall upon conviction therefore, be deemed guilty of a misdemeanor and fined in any sum not exceeding one hundred ($100) dollars and the costs of prosecution or shall be committed to the county jail for a period not exceeding thirty days or both.

Sec. 2. Duty of educational board—violation—penalty.—In the case of violation of section 1 of this act by any teacher employed in any public school, notice of which having been previously given to the school board, board of education or board of directors employing such teacher, it shall be the duty of such school board, board of education or board of directors to suspend such teacher from employment in such school for the term of one year. In case of the second offense by such teacher, it is the duty of the Board of education, board of directors or school board to disqualify permanently such teacher from teaching in such school and any public school director, member of a board of education or school board who fails to comply with the provision of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a find not exceeding one hundred ($100) dollars and costs of prosecution.

Sec. 3. Emergency.—Whereas an emergency exists, this act shall be in force from and after its passage and approval.

Approved, April 15, 1919.

[39] Nebraska Religious Garb Statute of 1919, Code § 79-898 (1919–2017) was first enacted in 1919 (c. 248, § 1, p. 1018) and reaffirmed in 1922, 1929, 1943, 1949, and 1994 and then repealed in 2017. Source of original text: Darius M. Amsberry, Secretary of State, *Laws, Resolutions and Memorials Passed by the Legislature of the State of Nebraska at the Thirty-Seventh Session,* Jan. 1919 to Apr. 18, 1919, p. 1018.

Appendix C – Examples of Religious Garb

1. African Hebrew Israelite (headdress[40])
2. Buddhist (saffron robe,[41] dharma wheel insignia, malas/prayer beads)
3. Catholic (habit,[42] rosaries/beads,[43] devotional scapular/two rectangular pieces of cloth,[44] or an Ash Wednesday marking)
4. Church of the Brethren (hair covering and long dress[45])
5. Daoist (yin-yang insignia)
6. Hindu (bindi/red dot on forehead, Om insignia, saffron robe[46])

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[40] *Mississippi Employment Security v. McGlothin,* 556 So.2d 324 (1990). School dress codes can disproportionally impact African Americans, which illustrate that the question of regulations of "religious" garb can also affect cultural and ethnic expressions. For a recent example see, Kay Lazar, "Black Malden charter students punished for braided hair extensions," *Boston Globe,* May 12, 2017; Kay Lazar, "Mystic Valley charter school drops ban on hair extensions," *Boston Globe,* August 12, 2017.
[41] Justice Stevens's example in his concurrence in *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[42] *Hysong v. Gallitzin School District*, 164 Pa. 629, 30 A. 482 (1894), overturned in *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910); *O'Connor v. Hendrick*, 184 N.Y. 421 (N.Y. Ct. App. 1906); *Johnson v. Boyd,* 217 Ind. 348 (Ind. Sup. Ct. 1940); *Zellers v. Huff*, 55 N.M. 501; 236 P.2d 949 (1951); *Rawlings v. Buttler,* 290 S.W.2d 801 (1956). See also Grant Shulte (2017) "Nebraska targets ban on religious garb worn by teachers," *Associated Press*, January 17, 2017; Michael Shively (2017) "Legislative Bill Would Eliminate 100-Year-Old Religious Garb Law," *KWBE Nebraska News Chanel,* January 18, 2017.
[43] *Chalifoux v. New Caney*, 976 F.Supp. 659 (S.D. Tex. 1997).
[44] Justice Brennan's example in his dissent in *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[45] *Kennedy v. St. Joseph's Ministries,* 657 F.3d 189 (4th Cir. 2011).
[46] An example highlighted by Justice Stevens concurrence in *Goldman v. Weinberger,* 475 U.S. 503 (1986).

7. Jewish (yarmulke/skullcap,[47] beard,[48] tzitzit/knotted tassel,[49] mezuzah[50] pendant,[51] tichel/headscarf)
8. Mennonite (bonnet[52])
9. Muslim (beard,[53] burqa/full-body covering, hijab/headscarf,[54] niqab/mouth-nose covering)
10. Native American (hair length[55])
11. Nazirite (hair length[56])
12. Protestant Christian (cross necklace[57])
13. Rastafarian (dreadlocks[58])
14. Shriner (fezz/hat)
15. Sikh (kirpan,[59] turban[60])
16. Wiccan (pentacle)

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[47] Student case: *Menora v. Illinois,* 683 F.2d 1030 (7th Cir. 1982). Military case: *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[48] Rocco Parascandola, "Hasidic NYPD Recruit Fired Over Beard," *New York Daily News*, June 2, 2012; Rocco Parascandola, "Hasid cop recruit bashes NYPD's terror claim in firing over refusal to trim beard." Lawyer for defendant claims the "city has come up with an 'after-the-fact rationalization' by saying facial hair would prevent him wearing a gas mask with a proper fit." *New York Daily News*, June 27, 2013.
[49] Justice Brennan's example in his dissent in *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[50] Justice Brennan's example in his dissent in *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[51] Justice Ackerman's example in his concurrence in *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990).
[52] *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910).
[53] *Holt v. Hobbs*, 574 U.S. ___ (2015).
[54] *United States* [Reardon] *v. Board of Education,* 911 F.2d 882 (3rd Cir. 1990); *EEOC v. READS*, Inc. 759 F.Supp. 1150 (U.S. Dist. Ct. of Pa. 1991); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 Sup. Ct. 2028 (2015).
[55] Student cases: *Coushatta v. Big Sandy*, 817 F.Supp. 1319 (E.D., Tex. 1993); *Betenbaugh v. Needville Independent School District,* 611 F.3d 248 (5th Cir. 2010).
[56] EEOC (2012) "Taco Bell Operator Pays $27,000 to Resolve EEOC Religious Discrimination Lawsuit: Fayetteville Restaurant Fired Worker Over Religion-Mandated Long Hair, Federal Agency Charged." U.S. Equal Employment Opportunity Commission, Press Release, 27 April 2012.
[57] *Nichol v. Arin*, 268 F.Supp 2d 536 (W.D. Pa. 2003).
[58] *Flowers v. Columbia College Chicago,* 397 F.3d 532, 535 (7th Cir. 2005).
[59] Student case: *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).
[60] *Cooper v. Eugene Sch. Dist.* No. 41, 301 Ore. 358 (1986), app. Dismissed, 480 U.S. 942 (1987).