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Goldman v. Weinberger: Deference or Abdication

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Goldman v. Weinberger: Deference or Abdication?

I. Introduction

Goldman v. Weinberger[1] continues a line of individual rights challenges in which the Supreme Court has carved out a special niche for the military.[2] By a five-to-four decision, the Court held that the military may, without violating the first amendment, strictly enforce a dress code provision "in the interest of the military's perceived need for uniformity,"[3] even though the provision might restrict a serviceman in the free exercise of his religion.

Earlier cases employed a version of interest-balancing, typically applied to individual rights challenges in the civilian context, to produce increasingly deferential statements in the military context.[4] With *Goldman*, however, the majority tacitly abandoned substantive interest-balancing. Instead, the Court has evolved an implicit standard of absolute deference to professional military judgments which, despite majority protestations to the contrary, leaves little room for protection of servicemen's rights.[5]

Background on the traditional Supreme Court role in indi-

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1. 106 S. Ct. 1310 (1986).

2. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296 (1983) (servicemen may not maintain suits for damages arising from alleged constitutional violations by their superior officers); Rostker v. Goldberg, 453 U.S. 57 (1981) (male-only draft registration does not violate the Constitution); Brown v. Glines, 444 U.S. 348 (1980) (Air Force restriction of petitioning and posting of printed matter on the military base does not violate servicemen's first amendment rights); Greer v. Spock, 424 U.S. 828 (1976) (Army prohibition of leafletting and political rallies on the military base without prior approval of the base commander does not violate the first and fifth amendments); Parker v. Levy, 417 U.S. 733 (1974) (court-martial of officer for anti-war statements to enlisted men under him was not violative of the first or fifth amendments); Orloff v. Willoughby, 345 U.S. 83 (1953) (doctor who was drafted into the service and subsequently denied rank and duties appropriate to his status as a doctor was not entitled to habeas corpus relief).

3. *Goldman*, 106 S. Ct. at 1314.

4. *See supra* note 2.

5. *Goldman*, 106 S. Ct. at 1313; *see also id.* at 1317 (Brennan, J., dissenting).

vidual rights challenges is provided in Part II. Particular attention is given to the standard of review which has been applied to free exercise challenges in the civilian context. Although articulated in various ways, the central theme of the standard is essentially strict scrutiny — to be upheld, the regulation challenged as a burden on individual freedom of religion must be the least restrictive means of achieving some compelling governmental objective.[6] Part II also examines the evolution of Supreme Court decisions which have produced the concept of the separate community and a deferential standard of review[7] for individual rights challenges in the military context.

The facts, procedural history, and a summary of the majority, concurring, and dissenting opinions in *Goldman* are presented in Part III. Part IV analyzes the opinion, with particular focus given to questions raised by the Brennan and O'Connor dissents: Has the Court abdicated its constitutional role in military context cases? Is the civilian standard of review a workable alternative to absolute deference in the military

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6. J. NOWAK, R. ROTUNDA, & J.N. YOUNG, CONSTITUTIONAL LAW § 17.6, at 1068-69 (3d ed. 1986) [hereinafter NOWAK]. *See also Goldman*, 106 S. Ct. at 1324-25 (O'Connor, J., dissenting). This balancing test is different from the entanglement test applied to freedom of religion challenges under the establishment clause. In the latter case, the law will be sustained if it has a secular purpose, a primary secular effect, and it does not excessively entangle government and religion. NOWAK, *supra* §17.3, at 1033.

To determine the degree of potential entanglement, the Court examines "(1) the character and purpose of the religious institution to be benefitted, (2) the nature of the aid, and (3) the resulting relationship between the government and religious authorities." *Id.* § 17.3 at 1033. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981):

> [A] policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.' "

Id. at 271 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)); Walz v. Tax Commission, 397 U.S. 664, 669 (1970) ("Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish . . . religious beliefs and practices or have the effect of doing so."); *Id.* at 674 ("We must also be sure that the end result — the effect — is not excessive government entanglement with religion.").

7. The separate community doctrine essentially states that the military is a "distinct subculture" defined and justified by its unique mission. As the Court is reluctant to interfere in this "mission," it accords a high degree of deference to professional military actions. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. REV. 177, 201-03 (1984).

context?

This Note concludes, in Part V, that the *Goldman* majority has abdicated its role by implicitly abandoning substantive interest-balancing in favor of absolute deference to military judgment. Part V suggests, however, that reasoned interest-balancing which applies a modified version of the civilian analysis can accommodate both the individual rights of servicemen and the special needs of the military, should the Court choose, in the future, to reclaim its constitutional role.

II. Background

A. *Judicial Review — The Court's Constitutional Role*

The Constitution extends to the judiciary power over all cases arising under the Constitution.[8] Beginning with *Marbury v. Madison*,[9] doctrine developed which states that the Constitution is the supreme law in the United States and that "it is emphatically the province and duty of the judicial department to say what the law is."[10] Thus a cornerstone of the American legal system is the doctrine of judicial review — the concept that it is the role of the Supreme Court to "determine the constitutionality and, therefore, the validity of the acts of the other branches of government . . . ."[11]

As part of the separation of powers among the three branches of government, the Constitution makes the President Commander in Chief of the military.[12] Responsibility for raising, maintaining, and governing the military is allocated to Congress.[13] The Supreme Court is not expressly granted a role in military matters; however, the military comes within the jurisdiction of the Court as a subordinate component of another governmental branch whose actions are subject to constitutional scrutiny by the Court.[14] Consequently, the military may be sub-

8. U.S. CONST. art. III, § 2.
9. 5 U.S. (1 Cranch) 137 (1803).
10. *Id.* at 177.
11. NOWAK, *supra* note 6, § 1.1, at 1.
12. U.S. CONST. art. II, § 2.
13. U.S. CONST. art. I, § 8, cl. 12-14.
14. Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 422 (1984) [hereinafter *Judicial Review*].

jected to constitutional scrutiny when an individual claims that military conduct or regulation violates his constitutional rights.

The first amendment to the Constitution[15] protects those fundamental freedoms thought to be essential to the functioning of a democratic society.[16] Consequently, there has been a traditional perception of first amendment freedoms as holding a special position within the hierarchy of individual rights.[17] Recognizing this, the Court has been particularly cognizant of its role as "principal expositor of the Constitution"[18] when considering alleged government infringement of such individual rights.[19]

B. *Free Exercise of Religion: Policies and Standards of Review*

Escape from European religious intolerance was among the primary motivations for the colonization of America.[20] In spite of that fact, there were a number of colonial and early state attempts to legislate religious doctrine, to tax for support of reli-

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15. U.S. CONST. amend. I: "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."

16. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (on freedom of religion):

> By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State . . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say — that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.

Id. at 429-30; Schneider v. State, 308 U.S. 147 (1939) (on free speech and press): "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. [The phrase] reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." *Id.* at 161 (footnote omitted).

17. *See, e.g.*, Braunfield v. Brown, 366 U.S. 599, 606 (1961) ("[W]hen entering the area of religious freedom, we must be fully cognizant of the particular protection that the constitution has accorded it."); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of the press, freedom of speech, freedom of religion are in a preferred position.").

18. Goldman v. Weinberger, 106 S. Ct. 1310, 1316 (1986) (Brennan, J., dissenting).

19. *See supra* note 17. *See also* Reynolds v. United States, 98 U.S. 145, 166 (1879) (stating that freedom of religious belief is absolute).

20. Kurland, *The Religious Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 2 (1984) (this article provides background on freedom of religion).

gion, and to punish failure to worship.[21] The dual religion clauses of the first amendment, the free exercise clause and the establishment clause, represented a response to such attempts.[22]

The first major decision under the free exercise clause was *Reynolds v. United States*,[23] which upheld the conviction of a Mormon on charges of bigamy. In doing so, the Court differentiated between religious belief and action taken pursuant to that belief.[24] Holding that Congress may not legislate over "mere opinion," the Court nonetheless found that Congress had power to "reach actions which were in violation of social duties or subversive of good order."[25] The Court reasoned that without this restriction on religious action, government would be undermined because religious doctrine would be superior to the law of the land.[26]

Since government regulation could permissibly reach certain actions taken pursuant to religious belief, the Court needed tests and standards to ensure that appropriate constitutional protection for individual rights would be maintained.[27] To this end, substantive interest-balancing has been applied in freedom of religion cases. Examining the specific circumstances, the Court balances the strength of the governmental interest at stake against the religious exercise involved.[28]

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21. *Reynolds*, 98 U.S. at 162 (providing historical background in decision upholding the bigamy conviction of a Mormon).

22. *Id. See* Kurland, *supra* note 20, at 1-2.

The establishment clause states that "Congress shall make no law respecting an establishment of religion . . . ," and the free exercise clause adds that "Congress shall make no law . . . prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. Together, the two clauses protect individual freedom of religion. Government may not pursue religious objectives, and it must be religiously neutral in its pursuit of secular goals, in order to safeguard the guaranteed individual freedom. NOWAK, *supra* note 6, § 17.1, at 1031.

23. 98 U.S. 145 (1879).

24. *Id.* at 164.

25. *Id.*

26. *Id.* at 167.

27. *See supra* note 22 and accompanying text.

28. *See* United States v. Lee, 455 U.S. 252 (1982) (governmental interest in maintaining a viable social security system for the common good outweighs the individual's religious belief that bars contribution to public welfare); Thomas v. Review Bd., 450 U.S. 707 (1981) (state interest in avoiding widespread unemployment was insufficient to outweigh individual's religion-based refusal to work in weapons manufacture); Wisconsin v. Yoder, 406 U.S. 205 (1972) (state interest in universal education was insufficient to outweigh Amish parents' preference for training their teenage children within the commu-

This process of substantive interest-balancing has articulated the standard of review in a number of different ways.[29] On closer examination, however, the various formulations are all shadings of a central policy — since the express purpose of the Bill of Rights is to protect the individual against government tyranny, government must demonstrate an especially important objective that would be substantially harmed by individual exemptions, before it may be allowed to infringe upon a specific Bill of Rights guarantee.[30]

Consequently, the Court strictly scrutinizes any such government action. Government must establish that the interest involved is especially important[31] (or "compelling,"[32] or "of the highest order,"[33] or "overriding"[34]). Government must also establish that the challenged means are narrowly tailored (or "least restrictive,"[35] or "not otherwise served,"[36] or "essential"[37]) to achieving the especially important interest.

One early approach in the evolution of this treatment appeared in *Cantwell v. Connecticut*,[38] which reversed the convictions of Jehovah's Witnesses for soliciting money without a license while distributing religious information.[39] As a standard, the Court stated that a general regulation without room for discretion or undue burden on religious practice would be valid.[40] The regulation in *Cantwell*, however, allowed official discretion

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nity); Sherbert v. Verner, 374 U.S. 398 (1963) (state interest in avoiding widespread unemployment was insufficient to justify denial of unemployment benefits to individual who refused to work on her Saturday sabbath); Braunfield v. Brown, 366 U.S. 599 (1961) (state interest in providing a day without commercial activity outweighed orthodox Jewish merchants interest in doing business on Sundays); Cantwell v. Connecticut, 310 U.S. 296 (1940) (statute allowing discretion to license solicitation based on religious content of the message could not survive challenge on free exercise grounds).

29. *See supra* note 28. Different words are used to articulate the standard in each case. *See infra* notes 31-37 and accompanying text.

30. *Goldman*, 106 S. Ct. at 1325 (O'Connor, J., dissenting).

31. *Id.*

32. *Thomas*, 450 U.S. at 718; *Sherbert*, 374 U.S. at 406.

33. *Yoder*, 406 U.S. at 215.

34. *Lee*, 455 U.S. at 257-58.

35. *Thomas*, 450 U.S. at 718.

36. *Yoder*, 406 U.S. at 215.

37. *Lee*, 455 U.S. at 257-58.

38. 310 U.S. 296 (1940).

39. *Id.* at 311.

40. *Id.* at 305.

to license based on the religious nature of the solicitation and was, therefore, invalid.[41]

Subsequently, a three-part standard was articulated in *Braunfield v. Brown*,[42] where the Court considered whether Sunday closing laws interfered with orthodox Jewish appellants' free exercise rights. The Court stated that the statute is valid if: 1) it regulates conduct, but not religious belief; 2) it advances a secular goal of the state; and 3) the state's purpose cannot be achieved without a burden on the religious practice.[43] In *Braunfield*, the statute did not in any way restrict appellants' belief in their sabbath or require them to forego its observance.[44] Rather, the closing law merely rendered that observance more expensive by prohibiting the operation of their businesses on Sunday.[45] The statute advanced the secular state goal of a day without commercial activity, and that goal would be undermined if an exception were allowed to orthodox Jewish merchants.[46] Thus, the standard was met; the statute was held to be constitutional both on its face and as applied.[47]

Two years later, in *Sherbert v. Verner*,[48] the Court sustained a free exercise challenge, holding that denial of unemployment benefits to a Seventh Day Adventist because she refused, for religious reasons, to work on Saturday violated the first amendment.[49] Using basically the same standard, the Court further articulated the type of state interest needed to counterbalance the right to free exercise of religion.[50]

The Court identified the essential question as "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."[51] Furthermore, the Court elaborated, "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would

41. *Id.*
42. 366 U.S. at 603, 607.
43. *Id.* at 607.
44. *Id.* at 603.
45. *Id.* at 605.
46. *Id.* at 608.
47. *Id.* at 609.
48. 374 U.S. 398 (1963).
49. *Id.* at 410.
50. *Id.* at 406.
51. *Id.*

suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[52]

There was no such paramount state interest involved in *Sherbert*,[53] and the statute effectively forced plaintiff to choose between her religion and her livelihood.[54] In addition, the statute was discriminatory because Sunday worshippers were exempt from such a choice.[55] Thus, the statute was unconstitutional.

Yet another shading of the standard appeared in *Wisconsin v. Yoder*,[56] where the Court considered a challenge by Amish parents to the state's compulsory high school attendance requirement.[57] The Court stated that the law would be valid only if it did not effectively prohibit the free exercise of a religious belief or if the state interest addressed was important enough to outweigh the first amendment right.[58] Drawing on evolving doctrine, the Court stated, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[59]

Although state interest in universal education is high, the Court found that allowing the traditional Amish practice of training their teenage children within the Amish community would not undercut the state interest.[60] Compulsory public high

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52. *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

53. 374 U.S. at 407.

54. *Id.* at 404.

55. *Id.* at 406.

56. 406 U.S. 205 (1972).

57. *Id.* at 207.

58. *Id.* at 214.

59. *Id.* at 215. The *Yoder* Court cites, as examples, Sherbert v. Verner, 374 U.S. 398 (1963); McGowan v. Maryland, 366 U.S. 420, 459 (1961) (separate opinion of Justice Frankfurter); Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

Note that the cases cited by the *Yoder* Court, as well as those discussed in the text accompanying notes 23-55 provided various articulations of the appropriate standard of review. From these, the *Yoder* Court distilled this formulation of the scale on which to balance the opposing interests.

60. *Yoder*, 406 U.S. at 222-29. The Amish practice of training their children in the community represents a part of and a way of perpetuating their traditional lifestyle. Stemming from the Amish Order's literal interpretation of the biblical command " 'be not conformed to this world . . . ,' " the lifestyle is a matter of strong religious belief. *Id.* at 216. Consequently, as the Court noted:

school attendance would produce assimilation into the mainstream of American society and thus effectively destroy the traditional way of life which was a matter of deep religious conviction to the Amish.[61] Therefore, state interest in *Yoder* was found to be weak, the individual interest was compelling, and the state consequently was unable to meet the requisite standard. The statute was held unconstitutional as it applied to the Amish.[62]

Finally, in *Thomas v. Review Board*,[63] the Court considered the challenge of a Jehovah's Witness who had quit his job because it required his participation in the manufacture of weapons — a practice contrary to his religious beliefs.[64] As in *Sherbert*, Thomas was denied unemployment benefits, and the denial was held to be violative of his first amendment rights.[65] As in *Yoder*, only the highest order of state interests was considered sufficient to outweigh individual freedoms.[66] To justify a statute which burdens free exercise of religion, the Court stated, the state must show "it is the least restrictive means of achieving some compelling state interest."[67] Thus *Thomas* reformulated the previously articulated standards into a concise expression mirroring the traditional strict scrutiny standard for infringement of fundamental rights.

C. *Individual Rights in the Military Context*

Individual rights are treated differently in the military context. This treatment derives from judicial recognition that the

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Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

Id. at 217.

61. *Id.* at 215-18.
62. *Id.* at 234.
63. 450 U.S. 707 (1981).
64. *Id.* at 709.
65. *Id.* at 719-20.
66. *Id.* at 718.
67. *Id.*

military objective is the uniquely important governmental goal of national security.[68] To achieve that objective, there must be combat-readiness; to be combat-ready, the military requires extraordinary levels of discipline, obedience, and training. Thus, the argument goes, the military must be accorded a special status as a separate society.[69] This has led the Court to state repeatedly that while servicemen do not waive their rights upon entry into the military, constitutional protection may be applied differently in the military context.[70]

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68. *See* Brown v. Glines, 444 U.S. 348, 354 (1980) ("Military personnel must be ready to perform their duty whenever the occasion arises."); Greer v. Spock, 424 U.S. 828, 837 (1976) ("One of the very purposes for which the Constitution was ordained and established was to 'provide for the common defense,' and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life . . . ."); Parker v. Levy, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is by necessity, a specialized society separate from civilian society. . . . The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' "). *See also* Hirschhorn, *supra* note 7:

> [T]he separate community doctrine consists of four propositions. First, as a matter of observation and history, the armed forces are a distinct subculture in which the individual is subordinated to the organization in a manner unlike any other government activity. Second, the existence of this peculiar relationship is evidence that it rationally serves both the armed forces' internal purposes and the larger society's interests. Third, when individual rights appear to conflict with the smooth working of the armed forces, the Court distrusts its own ability to reconcile them without harming military effectiveness. Fourth, its exceptional reluctance to intervene on behalf of judicially developed individual rights is justified because the purpose of the armed forces, "to fight wars," is fundamentally different from any other government activity.

Id. at 201-02.

69. *See supra* note 68.

70. Chappell v. Wallace, 462 U.S. 296 (1983). The Court stated that:

> This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. . . . But the special relationships that define military life have "supported the military establishment's broad power to deal with its own personnel . . . ."

Id. at 304-05; Rostker v. Goldberg, 453 U.S. 57, 67 (1981) ("None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. . . . [B]ut the tests and limitations to be applied may differ because of the military context."); *Parker*, 417 U.S. at 758 ("While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.").

It should be noted, however, that the Court has been far from unanimous in its consideration of this proposition. In *Parker*, for example, Justice Douglas argued that

1. *The Supreme Court Approach*

A passage from *Orloff v. Willoughby*[71] is characteristic of the Court's perspective in military matters: "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[72]

Utilizing this approach in *Parker v. Levy*,[73] the Court considered a first amendment challenge by an Army doctor who was court-martialled, under Articles 133 and 134 of the Uniform Code of Military Justice, for refusing to train Special Forces aides and for making anti-Vietnam War statements to his patients.[74] Upholding the constitutionality of Articles 133 and 134, the majority accepted the Army's separate community and military necessity rationales, stating:

> While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental ne-

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the first amendment has "no preferred classes for whose benefit the First Amendment extends, no exempt classes." *Parker*, 417 U.S. at 768 (Douglas, J., dissenting). Similarly, Justice Brennan has stated that "if the recent lessons of history mean anything, it is that the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security." Greer v. Spock, 424 U.S. 828, 852 (1976) (Brennan, J., dissenting). And Justice Marshall elaborated, "[w]e have never held — and, if we remain faithful to our duty, never will hold — that the Constitution does not apply to the military." *Id.* at 873 (Marshall, J., dissenting).

71. 345 U.S. 83 (1953).

72. *Id.* at 94. *See also* Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence.").

73. 417 U.S. 733 (1974).

74. *Id.* at 738 n.3 (" 'Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.' " (quoting Article 133 of the Uniform Code of Military Justice, 10 U.S.C. § 933)). *See also Parker*, 417 U.S. at 738 n.4:

> "[A]ll disorders and neglects to prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature or degree of the offense, and shall be punished at the discretion of that court."

Id. (quoting Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934).

> cessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[75]

Thus Articles 133[76] and 134[77] of the Uniform Code of Military Justice, under which Captain Levy was sentenced to three years hard labor, were found to encompass a wide range of conduct without being overbroad under the first amendment.[78] Rather, the Court found that the potential harm to military interest as a result of an officer encouraging disobedience of combat orders clearly justifed curtailment of speech.[79]

In *Brown v. Glines*,[80] the Court reviewed Air Force regulations which prohibit anyone on an Air Force base or in uniform from soliciting signatures on petitions or posting printed matter without prior approval of the base commander.[81] Captain Glines had tried to petition members of Congress for assistance in relaxing the Air Force dress code. He was removed from active duty as a result.[82]

Once again, the Court leaned heavily on the separate community rationale: "Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline."[83] On the servicemen's side of the balance, the Court noted that military commanders may not, under the regulations, restrict speech that only criticizes government policy or prohibit information distribution through other outlets.[84] Thus, the Court engaged in a balancing analysis, but the military point of view was accorded heavy weight in the context of the instant circumstances. Captain Glines' first amend-

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75. *Parker*, 417 U.S. at 758.

76. 10 U.S.C. § 933.

77. 10 U.S.C. § 934.

78. *Parker*, 417 U.S. at 760-61. Such speech "was unprotected under the most expansive notions of the First Amendment." *Id.*

79. *Id.*

80. 444 U.S. 348 (1980).

81. *Id.* at 349. *See also* Greer v. Spock, 424 U.S. 828 (1976) (holding that the regulation requiring base commanders' prior approval for civilian leafletting and political rallies on the base did not violate the first amendment).

82. *Brown*, 444 U.S. at 351.

83. *Id.* at 357.

84. Such outlets include newsstands and the United States mail. *Id.* at 355.

ment right to petition for change in Air Force grooming standards at Travis Air Force Base in California was outweighed by the asserted military necessity of absolute obedience for combat-readiness.[85]

Not all the Justices have been comfortable with the increasing deference to military claims of necessity.[86] In *Brown*, Justice Brennan provided a strong dissent which reflected his concern over the trend of the Court's decisions. Noting that previous decisions had allowed prior restraint of speech only where severe, war-time injury to the nation was a real prospect, he found the justifications in *Brown* to be far less compelling.[87] Where deference to military necessity was involved, Justice Brennan recommended restraint:

> [T]he concept of military necessity is seductively broad, and has a dangerous plasticity. Because they invariably have the visage of overriding importance, there is always a temptation to invoke security "necessities" to justify an encroachment upon civil liberties. For that reason, the military security argument must be approached with a healthy skepticism; its very gravity counsels that courts be cautious when military necessity is invoked by the government to justify a trespass on First Amendment rights.[88]

Justice Brennan had no reservations concerning the Court's

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85. *Id.* at 354-58.

86. *See infra* notes 87, 90 and accompanying text. *See also Brown*, 444 U.S. at 378 (Stewart, J., dissenting) ("And surely it cannot conceivably be argued that . . . a regulation requiring the preclearance of the content of all petitions to be circulated by servicemen in time of peace is 'necessary to the security of the United States.' "); *Greer*, 424 U.S. at 852 (Brennan, J., dissenting) ("[I]f the recent lessons of history mean anything, it is that the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security."); *Id.* at 873 (Marshall, J., dissenting) ("The Court, by its unblinking deference to the military's claim that the regulations are appropriate, has sharply limited one of the guarantees that makes this Nation so worthy of being defended. I dissent."). *See also supra* note 70 and accompanying text.

87. *Brown*, 444 U.S. at 364-65 (Brennan, J., dissenting):

> Thus far, only the interest in averting a virtually certain prospect of imminent, severe injury to the Nation in time of war has been generally considered a sufficiently weighty ground for prior restraint of constitutionally protected speech. The instant regulations, however, explicitly require commanding officers to suppress petitioning for reasons far less urgent than imminent, serious, peril to the United States or its citizens.

Id. (citations omitted).

88. *Id.* at 369.

ability to interest-balance in military context cases. Rather, he stated, "[t]o be sure, generals and admirals, not federal judges are expert about military needs. But it is equally true that judges, not military officers, possess the competence and authority to interpret and apply the First Amendment."[89]

Thus the Court has been divided on the handling of individual rights challenges in the military context.[90] The majority has continually emphasized that servicemen retain their rights in the military.[91] However, endeavors to balance those individual interests with asserted military necessity has invariably produced deferential results.

2. *Lower Federal Courts*

The federal courts have often questioned the reviewability of military rules and actions. Two approaches to dealing with individual rights challenges in the military context have emerged.[92] The first has been to apply the traditional justiciability doctrine.[93] Upon a finding that the issues involved are political in nature and best resolved by internal military judgment, the doctrine requires that courts avoid offending the separation of powers doctrine by denying reviewability.[94] However, in the absence of such a finding, the courts proceed to review on the merits, balancing military interests against servicemen's rights.[95] Only a minority of the lower courts have employed this

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89. *Id.* at 370.

90. Note that military context cases have often produced split results. *Brown*, 444 U.S. 348; *Parker*, 417 U.S. 733; and *Orloff*, 345 U.S. 83, were all five-to-three decisions.

91. *See supra* note 70.

92. *See Judicial Review, supra* note 14, at 387.

93. *Id.*

94. Gertzog, *Federal Judicial Review of Military Administrative Decisions*, 51 GEO. WASH. L. REV. 612, 616-17, 618-19 (1983); *Judicial Review, supra* note 14, at 402-03; NOWAK, *supra* note 6, § 2.15, at 109-10.

95. Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981):

> The rights enjoyed by those in the military community do not correspond identically to those enjoyed by civilians. . . . Each constitutional claim must be evaluated in relation to the specific military justification alleged. . . . If the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find the claim to be nonjusticiable and therefore not cognizable by a court.

Id. at 323-24. *See also* Sherwood v. Brown, 619 F.2d 47 (9th Cir. 1980) (denial, on the merits, of first amendment challenge to court martial of a Sikh for refusal to comply with

treatment.[96]

A majority of the lower courts have applied a test for reviewability developed in *Mindes v. Seaman*.[97] This case involved a fifth amendment challenge to an Air Force captain's removal from active duty on the basis of an erroneous effectiveness report. Captain Mindes exhausted all available military appeals in an effort to void the erroneous report. Subsequently, he sought declaratory and injunctive relief in the federal courts.[98]

The Fifth Circuit began by summarizing precedent in military context cases, noting that review has been granted where the military is alleged to have violated its own regulations, where the constitutionality of military regulations and actions is challenged and where constitutional errors in court-martial convictions are alleged.[99] However, review has been denied to servicemen challenging individual orders.[100] Consequently, the Fifth Circuit articulated the following threshold requirements for reviewability:

> [W]e have distilled the primary conclusion that a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures. The second conclusion . . . is that not all such allegations are reviewable.[101]

The court went on to hold that if the two threshold requirements were met, the reviewability analysis must include four additional factors, as follows:

> 1. The nature and strength of the plaintiff's challenge to the military determination. . . .

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dress code); Matlovich v. Secretary of the Air Force, 591 F.2d 852, 859-60 (D.C. Cir. 1978) (constitutional challenge to regulation barring homosexuals from the Air Force found reviewable and remanded to the Air Force for explanation of the reasons behind the regulation); Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975) (review, on the merits, of a first amendment challenge to regulations prohibiting servicemen in Vietnam from petitioning members of Congress — regulation upheld as applied).

96. *See Judicial Review, supra* note 14, at 387, 402. *See also supra* note 95.

97. 453 F.2d 197 (5th Cir. 1971).

98. *Id.* at 198.

99. *Id.* at 200-01.

100. *Id.*

101. *Id.* at 201.

> 2. The potential injury to the plaintiff if review is refused. . . .
> 3. The type and degree of anticipated interference with the military function. . . .
> 4. The extent to which the exercise of military expertise or discretion is involved.[102]

Thus the Fifth Circuit attempted to standardize the approach to military context cases by injecting specific balancing considerations into the preliminary reviewability decision.

As a test for reviewability, the *Mindes* factors have met with mixed reaction from courts and commentators alike.[103] The Supreme Court has not adopted the factors, and two circuits have failed to follow them.[104] In *Dillard v. Brown*, for example, the Third Circuit refused to adopt the *Mindes* factors because it anticipated that confusion would develop from the intertwining of justiciability concepts and the merits of the case.[105]

Still, the majority of circuits have discerned sufficient value in the factors to warrant their use.[106] In *Penagaricano v. Llenza*,[107] for example, the First Circuit applied the *Mindes* factors to consider the reviewability of a challenge to allegedly arbi-

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102. *Id.* The Fifth Circuit remanded Mindes' case for balancing in light of the newly declared factors. *Id.* at 202.

103. *Compare* Dillard v. Brown, 652 F.2d 316, 323 (3d Cir. 1981) (explicitly rejecting the *Mindes* test) *and* cases cited *supra* note 95 (D.C. Circuit applying traditional justiciability standards instead of the *Mindes* test) *with* Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985) (applying *Mindes* test to find challenge to National Guard separation decision non-justiciable for failure to exhaust military remedies); Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984) (applying *Mindes* test to find non-justiciable a challenge to allegedly arbitrary demotion and separation decisions by Air National Guard); Gonzales v. Army, 718 F.2d 926 (9th Cir. 1983) (applying *Mindes* factors to reject review of race discrimination challenge to delayed promotion); Nieszner v. Mark, 684 F.2d 562 (8th Cir. 1982) (applying *Mindes* factors to dismiss age discrimination challenge to Air Force refusal to commission airmen over 35 years of age) *and* Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981) (applying *Mindes* factors to deny reviewability of claim that National Guard discharge decisions discriminated on the basis of marital status).

See, e.g., Gertzog, *supra* note 94, at 612, 617-22 (both pro and con); Haggerty, *Judicial Review of Military Administrative Decisions*, 3 HASTINGS CONST. L. Q. 171, 176-96 (1976) (both pro and con); *Judicial Review*, *supra* note 14, at 400 (critical evaluation; results of *Mindes* factors are not uniform and are difficult to apply); Peck, *The Justices and The Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 61-81 (1975) (favorable evaluations).

104. The Third and D.C. Circuits. *See Dillard*, 652 F.2d 316; *see also supra* note 67.

105. *Dillard*, 652 F.2d at 323.

106. *See* cases cited *supra* note 103.

107. 747 F.2d 55 (1st Cir. 1984).

trary demotion and separation decisions by the Puerto Rico Air National Guard. The court found that plaintiff Penagaricano had satisfied the first part of the threshold test by claiming violation of his first amendment right of association.[108] The court also noted that it was unnecessary to decide the exhaustion of remedies question, since balancing of the *Mindes* factors would require a holding of non-reviewability anyway.[109]

On the first *Mindes* factor, the court found that a claim of politically motivated, arbitrary and discriminatory action was sufficiently strong on its face to favor review.[110] On the second factor, the potential injury to plaintiff weighed weakly in his favor.[111] Penagaricano had not exhausted military remedies since those available might not have been capable of providing the relief he sought; however, the court recognized that delay of a dual appeal could compound the already suffered hardship of his separation from the Guard.[112]

Conversely, the third *Mindes* factor was found to weigh strongly against review; judicial review of routine separation decisions went beyond administrative inconvenience, leaving the military in "limbo"[113] and thereby " 'seriously imped[ing] the military in the performance of vital duties.' "[114] Finally, the court found the fourth *Mindes* factor to weigh heavily in favor of the military, since demotion and separation are highly discretionary matters in which the courts have traditionally accorded deference to military expertise.[115] Choosing to emphasize the last two factors, in keeping with the judiciary's hesitancy to intervene in discretionary military matters, the First Circuit held the claim to be non-reviewable.[116]

A recent example of the application of *Mindes* may be

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108. *Id.* at 61. Violation of plaintiff's first amendment right of association was alleged to have occurred via compulsory separation from National Guard civilian employment and military service.

109. *Id.*

110. *Id.* at 62.

111. *Id.*

112. *Id.* at 62.

113. *Id.* at 63.

114. *Id.* (quoting *Mindes*, 453 F.2d at 201).

115. *Id.* at 63.

116. *Id.* at 64.

found in *Khalsa v. Weinberger*.[117] Khalsa, a Sikh, was denied enlistment by the Army because his religious beliefs would bar him from complying with the military dress code.[118] Subsequently, Khalsa challenged the action as violative of his rights under the first amendment.[119]

Weighing the nature and strength of Khalsa's claim, the Ninth Circuit noted that constitutional claims involving a dress code are weaker than those involving personal liberty.[120] The potential injury factor also weighed against Khalsa, the court reasoned, since there is no constitutional right to enlist in the military.[121] Considering the third and fourth *Mindes* factors together, the court found that these weighed against Khalsa as well. Since enlistment decisions are highly discretionary matters, review by the courts would represent a significant level of interference in military matters.[122] Thus, balancing of the *Khalsa* facts on the *Mindes* "scale" produced the conclusion that Khalsa's claim was outweighed by military interests and resulted in a holding that Khalsa's claim was non-reviewable.[123]

III. The Case: *Goldman v. Weinberger*

A. *The Facts*

Simcha Goldman is a clinical psychologist and an ordained rabbi in the orthodox Jewish religion. He was stationed at March Air Force Base in California, where he served in the mental health clinic.[124]

For three years, Goldman wore his yarmulke[125] on the base.

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117. 759 F.2d 1411 (9th Cir. 1985).

118. Sikhs are required, as part of their religion, to wear turbans, beards, long hair, and bracelets. Army Reg. 670-1 requires soldiers to shave, cut their hair, and wear only limited types of jewelry and headgear. *Khalsa*, 759 F.2d at 1412.

119. *Id.*

120. *Id.* at 1415.

121. *Id.*

122. *Id.* at 1416.

123. *Id.*

124. Goldman v. Weinberger, 106 S. Ct. 1310, 1312 (1986).

125. The wearing of a yarmulke, or skullcap, is a means of accommodating the Jewish custom of covering the head before God.

> [M]ost authorities and rabbis who have issued opinions on this subject agree that [covering the head] was not originally obligatory by law, but is a custom which has been observed with such fidelity over the centuries that it now has the force of

During that period, Goldman received no complaints about his attire and was given outstanding performance evaluations by his superiors.[126]

In 1981, however, Goldman testified for the defense at a court-martial while wearing his yarmulke, and the opposing counsel complained to the hospital commander.[127] The commander then notified Goldman that he was in violation of the Air Force dress code,[128] and ordered him to refrain from wearing the yarmulke. Goldman refused to comply. A formal reprimand followed, threatening Goldman with court-martial. Favorable recommendation for extension of Goldman's active service was withdrawn.[129]

As a result of these actions, Goldman sued the Secretary of Defense, claiming that the prohibition, as applied, violated his right to free exercise of religion under the first amendment.[130]

B. *Lower Court Opinions*

At trial before the United States District Court for the District of Columbia, the Air Force testified that strict enforcement of the dress code was essential for maintenance of morale and obedience.[131] Goldman, on the other hand, presented testimony that morale would be enhanced by a more flexible military attitude and that the Air Force had in fact made medical exceptions to the dress code in the past.[132]

In the absence of empirical studies to prove the effect of

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law. . . .

> As a result, it has become law, at least in our times, that to say any prayer or blessing, the head must be covered; and since observant Jews say blessings throughout the day, the head is kept covered at all times. This has acquired, in addition, the connotation of respect for God in general and the covered head and observance of the Torah have become synonymous.

M. ASHERI, LIVING JEWISH: THE LORE AND LAW OF THE PRACTICING JEW, 120 (1978).

126. Goldman v. Secretary of Defense, 734 F.2d 1531, 1533 (D.C. Cir. 1984), *aff'd sub nom.* Goldman v. Weinberger, 106 S. Ct. 1310 (1986).

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

128. *Id.* Air Force Reg. 35-10 requires servicemen to wear uniforms while on duty and prohibits the wearing of headgear indoors.

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

130. *Id.*

131. *Goldman*, 734 F.2d at 1533-35.

132. *Id.* at 1535. Medical exceptions from shaving requirements had been allowed to those suffering from pseudofolliculitis barbae (ingrown facial hair).

religious exemptions on morale and obedience, the district court was unconvinced by Air Force arguments.[133] Finding the yarmulke neither obtrusive nor an interference with Goldman's work, the court issued a permanent injunction to prevent the Air Force from prohibiting or punishing Goldman's religious observance.[134]

The Court of Appeals for the District of Columbia Circuit reversed and vacated the injunction.[135] The court found neither the strict scrutiny standard advocated by Goldman, nor the rational basis standard advocated by the Air Force to be appropriate.[136] Rejecting the need for any interest-balancing, the court found it was restricted to a two-fold inquiry: 1) whether there are "legitimate military ends" addressed by the challenged regulation, and 2) whether the regulations are "designed to accommodate the individual right to an appropriate degree."[137]

The court found that because of the unique military interest in uniformity and obedience, strict enforcement is a legitimate military end in itself, and the cutoff point for accommodation of individual rights is necessarily arbitrary.[138] The wearing of a yarmulke was a religious observance beyond the arbitrary cutoff point of visibility.[139] Thus, the court found, the Air Force could refuse to grant a religious exemption from the dress code without violating the individual's constitutional rights.[140]

Subsequently, petition for rehearing en banc was denied by

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133. *Id.*

134. *Id.*

135. *Id.* at 1541.

136. *Id.* at 1536.

137. *Id.*

138. *Id.* at 1540.

> [The military's interest] lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement. . . . It is impossible to argue, for example, that a decorative hat of one shape or one color is demonstrably superior to another, although it is possible to argue that enforcement of rules that certain hats may be worn only by certain people or at certain times serves the military purposes of identification and indoctrination into instinctive obedience.

Id.

139. *Id.* The wearing of a non-uniform item which could be seen by an observer fell on the unacceptable side of the arbitrary cutoff point, while that which could not be seen (e.g., a cross worn under the uniform) was acceptable.

140. *Id.* at 1540-41.

the full Court of Appeals, with three dissents.[141] Goldman petitioned the United States Supreme Court for a writ of certiorari.[142]

C. *The Supreme Court*

1. *The Majority*

In a five-to-four decision, the Supreme Court affirmed the judgment of the court of appeals, holding that "those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity," and that "[t]he First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of headgear required by religious beliefs."[143] Writing for the majority, Justice Rehnquist acknowledged Goldman's argument for application of civilian free exercise standards of review, but then turned without further comment to the "separate society" analysis.[144] Thus the only factor cited by the majority as distinguishing the instant case from other free exercise precedent was the military context in which it occurred.[145]

Citing such cases as *Brown v. Glines*,[146] *Parker v. Levy*,[147] and *Orloff v. Willoughby*,[148] the majority summarized the doctrine that the military is a special society characterized by extraordinary requirements for discipline and "esprit de corps"; that this status exists by virtue of the military's unique purpose; and that this special status justifies differential treatment of individuals in the military and civilian communities.[149] As a result, the majority stated, "[o]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for

141. *Goldman*, 106 S. Ct. at 1312.
142. *Id.* at 1311.
143. *Id.* at 1314.
144. *Id.* at 1312-13.
145. *Id.* at 1312-14.
146. 444 U.S. 348 (1980).
147. 417 U.S. 733 (1974).
148. 345 U.S. 83 (1953). *See also* cases cited *supra* notes 68-76.
149. *Goldman*, 106 S. Ct. at 1313.

civilian society."[150]

Pursuing this framework for analysis, the majority noted that first amendment guarantees are not rendered valueless to servicemen.[151] Nonetheless, the majority emphasized a lack of judicial competence to evaluate specific challenges to matters of military necessity.[152] Furthermore, Congress and the President have delegated power over military matters to military authorities.[153] Thus, the majority concluded, "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[154]

Having thus articulated the deferential standard, the majority summarized the military argument as follows. According to military professionals, uniformity helps subordinate individual identity to the needs of the military, thereby promoting discipline and establishing obedience — traits which are required of servicemen by the necessity of combat-readiness.[155] To this end, the dress code stresses uniformity, allowing only limited individual choice in jewelry, hair style, and nonvisible religious items.[156] The majority noted Goldman's arguments that the Air Force had failed to prove any real threat to discipline from the requested exception and that the granting of religious exceptions would in fact improve morale.[157] However, Goldman's arguments were dismissed by the majority as "besides the point."[158]

Instead, the majority concluded, such determinations are left to military professional judgment.[159] There is no constitutional obligation to make exceptions, even when the outcome is a burden on the free exercise of religion.[160] Thus the regulations

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1314.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

did not violate Goldman's first amendment rights.[161]

2. *The Concurrence*

Justice Stevens' concurrence began with acknowledgment that Goldman's case was particularly appealing.[162] However, Justice Stevens' analysis proceeded from the concept that the regulation must be evaluated in the broader context of all servicemen who claim exception on grounds of religious beliefs.[163]

Viewed in that light, the uniformity interest was seen to have two dimensions. First, there was the legitimate Air Force interest in uniformity recognized by the Court majority.[164] However, Stevens also recognized a constitutional "interest in uniform treatment for the members of all religious faiths."[165]

Justice Stevens believed that an exception for Goldman would lead to disparate treatment of more unusual religious practices;[166] balancing of a desired exception against impairment of military function would inevitably implicate majority group reaction to practices of minority faiths. The Air Force dress code, however, is based on the neutral criterion of visibility of the desired item; thus, Justice Stevens concluded, it must be upheld in order to preserve true uniformity of treatment.[167]

3. *The Dissents*

a. *Justice Brennan*

In a particularly strong dissent, Justice Brennan stated, "[t]he Court's response to Goldman's request is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity."[168] Emphasizing the free

161. *Id.*

162. *Id.* at 1314 (Stevens, J., concurring) (noting the genuineness of Goldman's beliefs and the possible "retaliatory motive" in the enforcement measures here).

163. *Id.* at 1315.

164. *Id.* at 1315-16.

165. *Id.* at 1316.

166. *Id.* (such as turbans for Sikhs or dreadlocks for Rastafarians).

167. *Id.*

168. *Id.* at 1316 (Brennan, J., dissenting). Justice Marshall joined in both Brennan's and O'Connor's dissents.

exercise basis for Goldman's claim, Brennan observed that the Air Force regulation required Goldman to violate his religious beliefs every day.[169] Yet despite the presence of a substantial constitutional issue and protestations that servicemen are not stripped of their constitutional rights, the majority failed to provide any reasoned analysis in its decision.[170] Rather, Brennan charged, the Court has adopted "a subrational-basis standard," according absolute deference to the military point of view.[171]

Instead of such abdication, Brennan advocated a process of reasoned judicial review in which the court would assess 1) the strength of the military interest; 2) the likelihood that the requested exception would interfere with military interests; and 3) the credibility of assertions that the regulation will protect those interests.[172] Factors such as professionalism, "functional utility, [and] health and safety . . . " might be considered.[173] In this manner, Brennan concluded, the Court could give deference to legitimate military judgments and still ensure that the burden on individual rights for purposes of military necessity has a rational foundation.[174]

b. *Justice Blackmun*

Justice Blackmun's dissent focused on the government's failure to establish impairment of its interests by either an exception for Goldman or by cumulative effect if such exceptions are allowed.[175] First, Blackmun stated that the proper standard against which to evaluate a restriction on religious freedom is that the burden is justifiable only if it is " 'the least restrictive means of achieving some compelling state interest.' "[176] Next, Blackmun affirmed the concept that servicemen "do not forfeit

169. *Id.* at 1317.

170. *Id.*

171. *Id.* Brennan stated, "[i]f a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be." *Id.*

172. *Id.* at 1318-21.

173. *Id.* at 1319.

174. *Id.* at 1321.

175. *Id.* at 1322 (Blackmun, J., dissenting).

176. *Id.* (quoting Thomas v. Review Bd., 450 U.S. 707 (1981)). This is a strict scrutiny standard of review.

their constitutional rights as a price of enlistment."[177] But despite acknowledgment that the separate community status of the military might warrant differential application of the first amendment, Blackmun found it unnecessary to define a different test here.[178]

Although Blackmun agreed that the Court should defer to reasoned military judgment, Blackmun found no empirical support here for the military position. There was no evidence that, in the event Goldman's exception was granted, a flood of similar requests would follow — or that it would be impossible to deny some of those requests based on reasoned analysis and neutral distinctions.[179] Thus, Blackmun concluded that Goldman was entitled to prevail because the Air Force failed to meet the threshold of a "minimally credible explanation."[180]

c. *Justice O'Connor*

Justice O'Connor dissented on the basis of the majority's failure to establish a standard of review for free exercise challenges in the military context.[181] Like Justice Brennan, Justice O'Connor criticized the absolute deference to assertions of military necessity.[182]

Reviewing the standards for civilian context cases, Justice O'Connor noted that even in that simpler setting, the Court had lacked clarity in articulating a single standard.[183] Nonetheless, O'Connor identified two principles which must be incorporated into any standard the Court may develop in this area. First, where there is an explicit Bill of Rights interest at stake, government must establish that its countervailing interest is of particular importance to justify the infringement.[184] Second, because the Bill of Rights was intended to protect individual rights against governmental action, government must also establish that its interest would be substantially impaired if the individ-

177. *Goldman*, 106 S. Ct. at 1322 (Blackmun, J., dissenting).
178. *Id.* at 1322-23.
179. *Id.* at 1323.
180. *Id.* at 1323-24.
181. *Id.* at 1324 (O'Connor, J., dissenting).
182. *Id.* at 1324, 1326.
183. *Id.* at 1324. *See also supra* notes 28-67 and accompanying text.
184. *Goldman*, 106 S. Ct. at 1325 (O'Connor, J., dissenting).

ual prevails.[185]

According to Justice O'Connor, the standards[186] articulated in the civilian context, free exercise cases are flexible enough to accommodate these principles and the special needs of the military.[187] O'Connor said that initially, the Court should assess the relative importance of the asserted governmental interest, taking into account at this stage the unique purpose of the military.[188] However, she added, the strength of the individual interest at stake requires a second step. Thus the Court must also ask whether granting the requested exception would substantially harm the overriding governmental interest.[189]

Justice O'Connor concluded that in Goldman's case, the government failed on this second part of the test for several reasons. By granting exceptions to the regulation, the Air Force contradicted the compelling nature of the need for uniformity.[190] The Air Force also failed to show that the conduct at issue would in any way endanger health or safety or provoke objections from Goldman's fellow servicemen.[191] Consequently, Justice O'Connor concluded, allowing Goldman to wear his yarmulke on duty posed no threat of substantial harm to compelling military interests, and, in the balance, the government's interest should have yielded.[192] In summary, Justice O'Connor reflected,

> Napoleon may have been correct to assert that, in the military sphere, morale is to all other factors as three is to one, but contradicted assertions of necessity by the military do not on the scales of justice bear a similarly disproportionate weight to sincere religious beliefs of the individual.[193]

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185. *Id.*

186. *See supra* notes 31-36 and accompanying text.

187. *Goldman*, 106 S. Ct. at 1325 (O'Connor, J., dissenting).

188. *Id.*

189 *Id.* at 1325-26.

190. *Id.* at 1326.

191. *Id.*

192. *Id.*

193. *Id.*

IV. Analysis

With *Goldman*, the Court implicitly abdicates its role as arbiter of the Constitution for future cases arising in the military context.[194] *Goldman* is the latest increment in a line of precedent according an ever-increasing deference to military assertions of necessity.

Individual rights challenges in the military context have never been treated with the same degree of interest-balancing analysis as those in the civilian context.[195] Earlier cases did exhibit a form of interest-balancing which offered some analysis of the relationship between the individual's interest and the asserted military interests. In *Orloff v. Willoughby*,[196] for example, the Court discussed the question of what rights Orloff was entitled to as a doctor drafted into the service and the impact of his refusal to take a loyalty oath. In *Brown v. Glines*,[197] the Court examined the degree to which Glines' speech was impaired by the challenged regulation. And in *Chappell v. Wallace*,[198] the Court discussed alternative grievance procedures available to enlisted men before denying them a cause of action against superior officers for constitutional violations.

In *Goldman*, however, the majority decision is void of any evaluation of the nature, relative importance, or degree of impairment of Goldman's constitutional rights. The majority merely restated, without question, the military position on discipline, uniformity, and military necessity. The most deferential statements from the precedential cases were excerpted and cited; the only explanation offered to distinguish this case from other free exercise cases was the military context in which it occurred. Although the majority continued to assert that military personnel are protected by the first amendment,[199] it failed to provide a glimmer of how this might be accomplished.

The majority decision in *Goldman* creates a single inescapable conclusion: the standard to be applied to individual

194. Goldman v. Weinberger, 106 S. Ct. 1310, 1316 (1986) (Brennan, J., dissenting).
195. *See supra* notes 28-89 and accompanying text.
196. 345 U.S. 83, 90-92 (1953). *See supra* notes 2, 71-72 and accompanying text.
197. 444 U.S. 348, 355 (1980). *See supra* notes 80-85 and accompanying text.
198. 462 U.S. 296, 302 (1982). *See supra* notes 2 & 70.
199. *Goldman*, 106 S. Ct. at 1310-14.

rights challenges in the military context will henceforth be one of absolute deference. While the Court only goes so far as to express a standard of "great deference,"[200] the unwillingness to analyze the individual's interest or to provide some framework in which the individual interest might have any chance to prevail makes clear the Court's implicit message. As Justice Brennan stated, "[t]he Court and the military have refused these servicemen their constitutional rights; we must hope that Congress will correct this wrong."[201]

There are some recommendations that can be made for a future in which the Court could decide to reclaim its constitutional role. As Justice O'Connor suggested, the standard articulated in civilian free exercise cases is flexible enough to accommodate the special needs of the military context.[202] The Court would then ask whether there is a compelling military interest, addressed in the least restrictive means possible, to justify the military burden on individual rights.[203] It would be necessary to fully weigh the relative interests at stake, to assess the degree of impairment of military interest by the individual right asserted, and to evaluate the accommodation of individual rights under the challenged regulation.[204]

Clearly, this is an area that offers no easy answers. The Court, lacking the self-confidence to evaluate military necessity, has simply become more deferential. The dissents have decried the failure to balance all the vital interests involved.[205] And the lower courts have often denied reviewability to avoid the difficult evaluations on the merits.[206]

Thus, a more refined approach to the civilian test may be required as well; to accommodate the various concerns, a detailed line of analysis is in order. The needed refinement may exist in the factors articulated by the *Mindes* court.[207] Although

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200. *Id.* at 1313.

201. *Id.* at 1322 (Brennan, J., dissenting).

202. *Id.* at 1325 (O'Connor, J., dissenting).

203. *Id. See also supra* notes 28-67 and accompanying text.

204. *Goldman*, 106 S. Ct. at 1325-26 (O'Connor, J., dissenting).

205. *See supra* notes 86-89, 168-93 and accompanying text.

206. *See supra* note 103.

207. Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971). *See supra* notes 97-102 and accompanying text.

developed as a test for reviewability, the factors could provide a framework for reasoned interest-balancing on the merits.

Applying the *Mindes* factors to Goldman's case, for example, it is clear that a different balance would result. As to the first factor, "the nature and strength of the plaintiff's challenge"[208] weighs heavily in Goldman's favor. Clearly, assertions of governmental interference with freedom of religion — one of this country's most fundamental freedoms — is of the very highest nature. As Justice Brennan stated, "[t]hrough our Bill of Rights, we pledged ourselves to attain a level of human freedom and dignity that had no parallel in history. Our constitutional commitment to religious freedom and acceptance of religious pluralism is one of our greatest achievements in that noble endeavor."[209] Since the Air Force dress code left no room for Captain Goldman's religious observance — a practice that in no way endangered or intruded upon his fellow servicemen — Goldman's challenge was strong indeed.

Similarly, "the potential injury to the plaintiff"[210] weighs in favor of Goldman. The Air Force dress code precludes Rabbi Goldman from wearing his yarmulke while on duty or in uniform — effectively a total prohibition of this observance of deep religious conviction.[211] The only alternatives are for Goldman to resign his career in the military or face court-martial. As in *Sherbert v. Verner*[212] and *Thomas v. Review Board*,[213] the individual is forced to choose between his religion and his livelihood — a burden forbidden by the Court in the civilian context.[214]

Furthermore, it is a choice not forced upon all other reli-

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208. *Mindes*, 453 F.2d at 201.

209. *Goldman*, 106 S. Ct. at 1321 (Brennan, J., dissenting).

210. *Mindes*, 453 F.2d at 201.

211. *See supra* note 125.

212. 374 U.S. 398 (1963). *See supra* notes 49-55 and accompanying text.

213. 450 U.S. 707 (1981). *See supra* notes 63-67 and accompanying text.

214. Thomas v. Review Bd., 450 U.S. 707 (1980):

> Here, as in *Sherbert*, the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*, where the Court held: "[N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable."

Id. at 717. (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)). *See also supra* notes 49-55, 63-67 and accompanying text.

gious groups in the military context. A cross or a ring with religious significance could be worn, for example, without incurring military disciplinary action.[215] Thus the constitutional requirement of government neutrality toward religion[216] is ignored here.

The potential injury to Goldman from strict enforcement of the regulation is severe. He is discriminated against because of his religious denomination, and he must choose between patriotism and religious conviction, between chosen livelihood and religious observance.

The third *Mindes* factor favors Goldman as well. The type of interference with the military function is merely a minor variation from the dress code. Such exceptions are already granted for a specific medical condition[217] and for unobtrusive items of jewelry.[218] As Justice O'Connor observed, the very existence of such exceptions contradicts the military's asserted requirements for total uniformity.[219]

Similarly, the degree of interference with military function appears to be *de minimus*. Goldman functioned in his role as Air Force psychologist for three years wearing his yarmulke. There were no complaints of disruptions at the military hospital. Consistently positive effectiveness reports were filed on Goldman during that time. It is difficult to see how any interference with military discipline, obedience, or morale resulted from Goldman's behavior.

Finally, on the fourth *Mindes* factor — "the extent to which the exercise of military expertise or discretion is involved"[220] — the balance is less clear. While the matters of military discipline, obedience, and morale are normally within the sphere of military expertise, Goldman's conduct appears to have had no impact on discipline. Moreover, Goldman's assertion of an individual right is far removed from any potential sphere of combat that might justify broadening the realm of military discretion. Since the military has not seen fit to provide studies supporting its assertions, it is difficult to evaluate the extent to

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215. *Goldman*, 106 S. Ct. at 1320 (Brennan, J., dissenting).
216. *See supra* note 22.
217. *See supra* note 132.
218. *See Goldman*, 106 S. Ct. at 1319 (Brennan, J., dissenting).
219. *Id.* at 1326 (O'Connor, J., dissenting).
220. *Mindes*, 453 F.2d at 201.

which military expertise is contradicted here. Unsupported claims of military necessity should not alone be sufficient.

In sum, the *Mindes* factors can provide a sensitive scale on which to balance the military and individual interests at stake. Applying them to the *Goldman* facts, they indicate that the military interest, while compelling, cannot outweigh the individual interest here, because the regulation has not been applied in the least restrictive means possible. Exceptions to uniformity have been granted in the past for medical reasons and for certain jewelry choices. Surely, then, exceptions should be granted in *Goldman*-type circumstances, where there is insufficient evidence of military necessity to justify governmental infringement of a fundamental individual right.

V. Conclusion

Where fundamental individual rights are at stake, absolute deference to declarations of military necessity is inappropriate. Yet the Court has applied an implicit standard of absolute deference by failing to fully evaluate unsupported military assertions and by failing to balance, in any reasoned analysis, the individual's point of view. Thus in military context cases, the Court has wrongly abandoned its traditional role as ultimate arbiter of the Constitution.

To resume its proper role, the Court must once again engage in substantive interest-balancing which fully considers the concerns of both parties. The *Mindes* factors, applied to the merits on a case-by-case basis, can refine the balancing process to more thoroughly accommodate individual rights and the special needs of the military mission.

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