COMMENTS

A NEW CATEGORY OF FREE EXERCISE CLAIMS: PROTECTION FOR INDIVIDUALS OBJECTING TO GOVERNMENTAL ACTIONS THAT IMPEDE THEIR RELIGIONS

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The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

—Bowen v. Roy, 106 S. Ct. 2147, 2152 (1986).

[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

—Sherbert v. Verner, 374 U.S. 398, 412 (1963)
(Douglas, J., concurring).

The United States Constitution provides each individual with the right to exercise freely her religion.¹ There are three ways in which a law could conflict with an individual's religious liberty. First, a law could limit the ability of an individual to believe in her religion. Second, a law could limit the ability of an individual to act in accordance with her religion (or require her to act contrary to her religion). Third, a law could result in governmental action that conflicts with an individual's religion.

The Supreme Court has established a different degree of protection for each of these types of situations. In the first situation, the Su-

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¹ U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

preme Court has consistently held that the free exercise clause acts as an absolute bar to laws that limit an individual's ability to believe in her religion.² In the second situation, the Court has ruled that the free exercise clause is not an absolute bar;³ rather, the Court has permitted laws that limit an individual's actions, but only when the state interest outweighs the individual's interest.⁴

The third situation is the focus of this Comment. In *Bowen v. Roy*,⁵ eight members of the Supreme Court ruled that the free exercise

² See *Bowen v. Roy*, 106 S. Ct. 2147, 2152 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983); *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (The first amendment "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

³ See, e.g., *Roy*, 106 S. Ct. at 2152.

⁴ The specifics of the balancing test are, however, beyond the scope of this Comment. This Comment deals with the preliminary question of when there should be free exercise protection (i.e., when the balancing test should be applied); it does not deal with the degree of protection that should be provided by the Court's balancing test. For examples of applications of the balancing test, see *United States v. Lee*, 455 U.S. 252, 257-58 (1982) (the regulation must be "essential to accomplish an overriding governmental interest"); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Sherbert*, 374 U.S. at 406 ("[N]o showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'") (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). But see *Roy*, 106 S. Ct. at 2156 ("Absent proof of an intent to discriminate against particular religious beliefs or against religions in general, the Government meets its burdens when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.") This holding in *Roy* would represent a major reduction in the burden required of the government to justify this type of interference with religious liberty. This portion of the Chief Justice's opinion, however, did not command a majority of the Court. Rather, five members of the Court agreed that *Sherbert* and *Thomas* controlled the outcome of the issue. See *id.* at 2168 (O'Connor, J., concurring in part and dissenting in part).

Subsequent cases have also rejected Chief Justice Burger's *Roy* standard. See *Hobbs v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046, 1049 (1987) (rejecting Chief Justice Burger's standard in *Roy*); *United States v. Merkt*, 794 F.2d 950, 955 (5th Cir. 1986) (relying on *Yoder* and *Lee* despite "fragmentation of opinions" in *Roy*). But see *Leahy v. District of Columbia*, 646 F. Supp. 1372, 1376-78 (D.D.C. 1986) (relying on *Roy* in refusing to apply *Yoder*, *Sherbert*, and *Thomas* to a case where an individual objected to a social security number requirement for drivers' licenses).

The degree of protection that should be given to an individual objecting to a law that limits an individual's actions is beyond the scope of this Comment. For a general examination of the balancing test as applied by the courts, see Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967).

⁵ 106 S. Ct. 2147 (1986).

clause does not give an individual the right to dictate governmental actions.⁶ The effect of this ruling is to distinguish between a law that requires an individual to act contrary to her religion (providing free exercise protection), and one that results in an action by the government that impedes an individual's religion but does not require or prevent any action by the individual (providing no free exercise protection).

Part I of this Comment will examine the distinction between individual and governmental actions, evaluate the justifications underlying this distinction, and conclude that the distinction is neither satisfactory nor consistent with the general policies underlying the religion clauses. Part II will apply the *Roy* distinction to past free exercise cases in four different contexts and find that the distinction is inconsistent with the holdings in these cases. The result is that *Roy* represents an unjustified curtailment of free exercise protection, without providing adequate guidance for courts to apply the decision. This in turn will permit courts to avoid the harsh results of *Roy* merely by distinguishing a case from it. Part III will propose that a third category of free exercise claims should be recognized. Specifically, the courts should provide protection to individuals objecting to governmental actions that impede the ability of the individual to choose or follow a specific religion, even when no individual action is required or prevented.

I. THE DISTINCTION BETWEEN INDIVIDUAL AND GOVERNMENTAL ACTION

A. *Bowen v. Roy: No Free Exercise Right To Prevent Governmental Action*

In *Bowen v. Roy*,⁷ an Abenaki Indian challenged the requirement that all participants in the Aid to Families with Dependent Children and Food Stamp programs furnish their social security numbers and allow the agency to use the numbers in the administration of each program.⁸ Specifically, Roy refused to obtain, furnish, or allow the use of a social security number for his two-year-old daughter, Little Bird of the Snow, because he believed that a unique numerical identifier would rob

⁶ *Id.* at 2152 (Burger, C.J., Powell and Rehnquist, JJ.), 2159 (Blackmun, J., concurring in part), 2161 (Stevens, J., concurring in part and concurring in the result), 2165 (O'Connor, Brennan, and Marshall, JJ., concurring in part and dissenting in part).

⁷ 106 S. Ct. 2147 (1986).

⁸ 42 U.S.C. 602(a)(25) (1982 & Supp. III 1985); 42 U.S.C. 1320(b-7)(a)(1) (Supp. III 1985); 7 U.S.C. 2025(e) (1982).

her spirit.⁹ As a result of Roy's refusal to comply with program requirements, the Pennsylvania Department of Public Welfare terminated benefits for Little Bird of the Snow. Roy then filed an action against the Secretary of the Pennsylvania Department of Public Welfare, the Secretary of Health and Human Services, and the Secretary of Agriculture, arguing that the free exercise clause entitled Little Bird of the Snow to an exemption from the social security number requirement.¹⁰

The scope of the inquiry changed markedly when a federal officer testified that Little Bird of the Snow had already been assigned a social security number.¹¹ The government argued that the case was moot because, based on Roy's beliefs, Little Bird of the Snow's spirit had already been "robbed."¹² The case, however, was revived when Roy then testified that it was not the establishment but the widespread use of the social security number in the government's computer system that would rob his daughter's spirit.¹³ The court's focus was thereby shifted from an examination of the contention that the government was requiring an individual to act contrary to her beliefs (obtaining and furnishing a social security number), to scrutiny of the assertion that the government was threatening to act in a manner that was contrary to an individual's religion (using the number in the computer systems).¹⁴ The district court, nevertheless, enjoined the government from using or disseminating the social security number issued in the name of Little Bird of the Snow Roy.¹⁵ The court also required the government to provide benefits for Little Bird of the Snow without requiring her to "furnish" a

⁹ Roy, 106 S. Ct. at 2150. Roy testified to his belief that "control over one's life is essential to spiritual purity and indispensable to 'becoming a holy person,' . . . [and] that technology is 'robbing the spirit of man.'" *Id.* He further testified that in order to prepare his daughter for greater spiritual power, he must "keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to 'rob the spirit' of his daughter and prevent her from attaining greater spiritual power." *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 2150-51.

¹² *Id.* at 2151.

¹³ *Id.*

¹⁴ All other religious challenges to social security number requirements have related specifically to the government requiring the individual to act contrary to her religion by obtaining a number. *See, e.g.,* Callahan v. Woods, 736 F.2d 1269, 1271 (9th Cir. 1984) (religious belief that social security numbers are "the mark of the beast" by which the Antichrist endeavors to control mankind); Stevens v. Berger, 428 F. Supp. 896, 897 (E.D.N.Y. 1977) (religious belief that the use of social security numbers is a device of the Antichrist).

¹⁵ Roy v. Cohen, 590 F. Supp. 600, 614 (M.D. Pa. 1984), *rev'd sub nom.* Bowen v. Roy, 106 S. Ct. 2147 (1986).

social security number.¹⁶

On direct appeal, the Supreme Court reversed the district court by underscoring the distinction between individual and governmental conduct.¹⁷ Specifically, the Court ruled that although free exercise protection is provided when a law requires an individual to act contrary to her religion (or refrain from acting in accordance with it), no free exercise protection is provided when a law results in an action by the government that, although it may impede an individual's religious beliefs, does not require or prevent any action by the individual. In the Court's view, Roy's objection could not be sustained because the "use" of an existing social security number already in the government's possession involved only governmental action (no action by Roy was required or prevented).

The Court thus fashioned a bright-line test to determine when free exercise protection would be accorded. Eight members of the Court concurred in this position,¹⁸ thus displaying unusually strong support for the decision. Such enthusiastic support is disquieting not only because the Court's rationale is severely flawed,¹⁹ but the resulting standard is at worst a curtailment of free exercise protection²⁰ and at best unworkable.²¹

¹⁶ *Id.* This injunction, however, was only extended until Little Bird of the Snow's 16th birthday. *Id.* For a general discussion of the standard applied in evaluating the claim regarding "furnishing" of the number, see Note, Roy v. Cohen: *Social Security Numbers and the Free Exercise Clause*, 36 AM. U.L. REV. 217 (1986).

¹⁷ Roy, 106 S. Ct. at 2152 n.6 (noting that "it is clear . . . that the Free Exercise Clause, and the Constitution generally, recognize such a distinction" between individual and governmental conduct).

¹⁸ See *supra* note 6 and accompanying text. Justice White dissented from the entire opinion but did not expressly address the question of whether the free exercise clause extends to an individual's objecting to governmental actions. Roy, 106 S. Ct. at 2169 (White, J. dissenting).

Regarding the issue of "furnishing" a number, the Court was divided. Chief Justice Burger, joined by Justices Powell and Rehnquist, ruled that requiring applicants to furnish their social security numbers as a condition for eligibility for governmental benefits does not violate the free exercise clause. *Id.* at 2153-58. In order to reverse the second injunction, Chief Justice Burger would have invoked a new standard for determining the validity of government regulations under the free exercise clause. *Id.* at 2156. Under this new standard, the government would "meet[] its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Id.* This portion of the opinion, however, was joined only by Justices Powell and Rehnquist. *Id.* at 2149. See *supra* note 4.

¹⁹ See *infra* notes 22-46 and accompanying text.

²⁰ See *infra* notes 47-103 and accompanying text.

²¹ See *infra* notes 104-37 and accompanying text.

B. *Analysis of Bowen v. Roy: A Flawed Rationale*

1. The Failure to Adequately Justify the Distinction Between Individual and Governmental Action

The *Roy* Court proffered three justifications for failing to provide free exercise protection to individuals objecting to governmental actions that, although not requiring or preventing any individual action, nevertheless encumber the individual's religion. Unfortunately, these justifications are unpersuasive. First, the Court insisted that historically no free exercise protection had ever been provided in this context: "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."²² Although this may be true, the converse is also true: the first amendment had never been interpreted to bar free exercise claims by individuals objecting to purely governmental actions. The Court had never explicitly dealt with the issue. Moreover, in other free exercise contexts, protection had been given *sub silentio* to individuals objecting to governmental actions that did not require or prevent any action by the individual. For instance, without noting the distinction between individual and governmental conduct, courts have protected individuals by requiring the government to show a sufficiently important state interest before allowing it to photograph members of the Pentecostal church for drivers' licenses,²³ to give blood transfusions and other medical treatment to Christian Scientists and Jehovah's Witnesses,²⁴ to have female guards frisk male Muslim prisoners,²⁵ and to develop public lands that are sacred to Hopi and Navajo Indians.²⁶ Courts thus have implicitly provided free exercise protection to individuals objecting to purely governmental actions; and the Supreme Court has given either open or tacit approval to these decisions.²⁷

The Court's second justification was that an individual cannot require the government to join in her religious practices. Specifically, the Court stated:

The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs

²² *Roy*, 106 S. Ct. at 2152.

²³ See *infra* notes 50-68 and accompanying text. In one of these cases, the Supreme Court affirmed the decision. See *infra* note 66.

²⁴ See *infra* notes 69-85 and accompanying text.

²⁵ See *infra* notes 86-103 and accompanying text.

²⁶ See *infra* notes 112-37 and accompanying text.

²⁷ See *infra* notes 66, 82-84, 86, and accompanying text.

in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter.²⁸

This argument, however, fails to recognize the distinction between requiring the government to follow an individual's religion and requiring the government to refrain from acting in ways that would obstruct an individual's religious belief. Consider the situation where a member of religion *X* institutes a challenge to the government practice of having offices open on Saturday because it is her sabbath. This is precisely the type of challenge about which the Court was concerned: the individual is attempting to force the government to join in her religion. Taken to its extreme, if there were seven religions, each with a different day of the week as its sabbath, government offices could never open. Obviously, the Court has voiced a valid objection: to permit such challenges would be to completely frustrate government functioning.

Compare, however, the situation where members of religion *Y* believe that a specific two-hundred-year-old majestic oak is a living deity. The members of the religion pray to the tree and believe that if it is cut down their religion would be destroyed. The members learn that the government intends to cut down the tree in order to accommodate plans to build a road. By shifting the proposed road one hundred feet east the government could save the tree; and the alteration would not cause problems or entail any additional expense. The government, nevertheless, refuses to alter its plans even though members of religion *Y* object. In this situation, these individuals do not want the government to join their religion; rather, they want the government to refrain from acting in a manner that would make it impossible for them to continue to follow their religion.

In both of these situations, the governmental action conflicts with the religion and the only action involved is action by the government (no individual action is required or prevented). However, in the first situation, an individual is attempting to force the government to follow her religion, while in the second she is trying to prevent the government from acting in a manner that would impede her ability to comply with her religion. The situation in *Roy* is analogous to the second situation. *Roy* does not want the government to refrain from using social security numbers thereby obligating the government to join his religion; he sim-

²⁸ *Roy*, 106 S. Ct. at 2152.

ply requests that the government refrain from using a number for his daughter because he believes that if a number is used Little Bird of the Snow will be unable to comply with her religion.²⁹

The Court's final argument in favor of the distinction was by analogy: "Roy may no more prevail on his religious objection to the government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."³⁰ There are, however, several important problems with this analogy. First, the fact that the government's filing cabinets are grey or a particular size involves a present condition; it does not involve a government action. Roy does not object to the government possessing computers (a present condition), he only objects to the government using his daughter's social security number in the computers (a governmental action). The only way to implicate a governmental action would be for an individual to object to the government using the cabinets in a particular manner. Second, the size or color of the government's filing cabinets would not ordinarily be known to the public, whereas the government's use of Little Bird of the Snow's social security number is mandated by federal statute.³¹ The individual would, therefore, lack the knowledge of wrongdoing necessary to challenge the condition and, in some religions, necessary to give rise to a violation of the religion's tenets.³² Finally, the size or color of filing cabinets is not directed at a specific individual. The social security number requirement, however, is specifically aimed at Little Bird of the Snow. Accordingly, to the extent that it is an action at all, having filing cabinets is a "general" governmental action; and conversely, the application of the social security number to Little Bird of the Snow is a "specific" governmental action. It is an essential argument of this Comment that challenges to general governmental actions should only be

²⁹ *Id.* at 2150.

³⁰ *Id.* at 2152.

³¹ *Id.* at 2151. *See supra* note 8.

³² In Judaism, there are three ways to violate a religious tenet: intentionally, unknowingly, and accidentally. If a violation is intentional, it is necessarily considered a sin. If a violation is accidental or forced, it is not considered a sin. In the middle situation, where a violation is considered unknowing, the violation, although it is still considered a sin, is deemed to be one of a lower level. Telephone Interview with Rabbi Moshe Schwartz, Hallandale, Florida (Aug. 16, 1987); *see* MAIMONIDES, BOOK OF MISHNA TORAH, ch. 2 (Laws of Sacrifices). An example of this third category is when a follower of the religion is trapped in a desert, loses track of the days, and, thinking that it is Thursday, works on a Saturday in violation of her Sabbath. In such a case, even though the violation was committed unknowingly, the individual still committed a lower-level sin because she should have known that it was the Sabbath. Thus, at the time when offerings are allowed to be brought, she would be required to bring one. *See* MAIMONIDES, *supra*; THE TALMUD, tractate shabbot, 67b.

recognized when the individual first demonstrates that the action would impede her ability to choose or follow her religion,³³ giving rise to a threshold question that would further limit the cause of action.³⁴

The filing cabinet analogy has great intuitive appeal because it is nearly impossible to imagine a sincere religious objection to the size or color of a filing cabinet. Nevertheless, sincere objections can be raised. Suppose the members of religion *Z* believe that red is the color of the devil and if they or their likenesses are confined to a small, red place they will be eternally damned. The government informs *A*, a member of religion *Z*, that if she applies for welfare her photograph will be placed in a small, red filing cabinet. She objects, seeking an exemption. In this situation, the individual is objecting to a governmental action that is being specifically applied against her. As in *Roy*, the individual is forced to choose between her physical sustenance and the tenets of her religion. Because this type of action impairs the individual's ability to believe in her religion, courts should provide free exercise protection.

2. Individual Versus Governmental Action: An Arbitrary Distinction

The distinction between individual and governmental action is indicative of neither the severity of the consequences of the action, nor the difficulty of the choice forced upon the individual. As a result, because alternative rationales offered by the Court have proven to be infirm, the distinction is purely arbitrary.

Take for example a situation where the government plans to build a shopping mall on a particular tract of land; and both *A* and *B*, members of religions *X* and *Y*, respectively, believe that this land is sacred. In their eyes, development of the land would be an affront to their deities and destroy their respective religions. The critical difference is that members of religion *X* hold ceremonies and collect herbs on the land, while members of religion *Y* never trespass on the land. *A*, therefore, objects to the shopping center because it prevents her from performing the herb collecting ritual that is the very essence of her faith. *B*, on the other hand, objects to the shopping center because it would destroy the land that is the focal object of her religious worship. Although *A* and *B* both face the destruction of their faith should the shopping center be erected, the *Roy* distinction would recognize *A*'s claim because she would be precluded from traversing the land, but it would not recognize *A*'s claim because although she is estopped from believ-

³³ See *infra* notes 148-54.

³⁴ See *infra* note 153 and accompanying text.

ing, she is not precluded from executing any physical act.

In *Roy*, a regulation conditioned the receipt of welfare benefits on each applicant providing a social security number and the government using that number in its computer system. Assume that there are two individuals, *C* and *D*, applying for benefits. *C*'s religion prevents her from applying for and providing a unique numerical identifier, while *D*'s religion permits her to provide the numbers so long as they are not dispersed throughout the computer system. The crucial difference between these two situations is that *C* cannot provide a social security number, while *D* may provide a number but would later be harmed by its misuse by the government. Under the *Roy* distinction, *C* would be given free exercise protection while *D* would not, even though both *C* and *D* are faced with the same difficult choice between their religious beliefs and a government benefit.

The Court's underlying assumption can only have been that *A* and *C* have stronger claims because an individual, rather than governmental, action is involved. But on the contrary, this hypothetical demonstrates that the weight of a free exercise claim is unrelated to whether an individual action is subverted.

3. The Underlying Purpose of the Free Exercise Clause

The *Roy* standard, by failing to protect an individual objecting to a governmental action that impedes her religion but does not require or prevent any action on her part, violates the underlying purposes of the two religion clauses of the first amendment.³⁵ The free exercise clause and the establishment clause together³⁶ stand for the proposition that an individual should be able to choose and follow a religion free from governmental interference. In *Abington School District v. Schempp*³⁷ the Supreme Court stated:

[T]he Free Exercise Clause . . . recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. . . . Its

³⁵ See, e.g., Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1465 (1985).

³⁶ See *Larson v. Valente*, 456 U.S. 228, 245 (1982) ("This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."); *Abington School Dist. v. Schempp*, 374 U.S. 203, 215 (1963) (noting that the establishment and free exercise clauses place the Government in a "neutral" position).

³⁷ 374 U.S. 203 (1963).

purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority.³⁸

James Madison believed that freedom for all religions is best guaranteed by free competition between religions.³⁹ Thus, governmental interference, in either a positive or a negative sense, must be prohibited.⁴⁰ The government must remain neutral in relation to all religions,⁴¹ orthodox as well as unusual,⁴² and also between religious believers and nonbelievers.⁴³ The government may not act in ways that would aid or handicap any religion.⁴⁴ Hence, proposed actions by the government that would impede the ability of an individual to choose or follow a religion should be justified by a sufficiently important governmental interest, even if no action by the members of the religion are required (or prevented). The ability of an individual to choose or follow a religion is necessarily impeded when the government acts in a manner that would

³⁸ *Id.* at 222-23; see also *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (stating that the purpose of the establishment and free exercise clauses is to prevent, as far as possible, the intrusion of either the church or the state into the precincts of the other).

³⁹ See, e.g., *The Federalist* No. 51, at 324 (1901 ed.) ("[S]ecurity for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects."); see also *Larson*, 456 U.S. at 245 ("Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs.").

⁴⁰ See *Larson*, 456 U.S. at 246 (stating that the state may not adopt programs or practices that aid or oppose any religion); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Schempp*, 374 U.S. at 226 (stating that "it is not within the power of government to invade that citadel [of the individual heart and mind], whether its purpose or effect be to aid or oppose, to advance or retard").

⁴¹ See *Larson*, 456 U.S. at 246 (stating the general principle of denominational neutrality); *Epperson*, 393 U.S. at 104 (stating that "[t]he First Amendment mandates governmental neutrality between religions"); *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects.").

⁴² See *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *Sherbert v. Verner*, 374 U.S. 398, 416 (1963) (Stewart, J., concurring in the result) (stating that the "Constitution commands the positive protection by government of religious freedom—not only for a minority, however small—not only for the majority, however large—but for each of us"); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (constitutional protection for religious beliefs that are unusual or only held by a few people); cf. *Wisconsin v. Yoder*, 406 U.S. 205, 207-13 (idiosyncratic separateness of Old Order Amish exemplifies the diversity of protection by the free exercise clause).

⁴³ See, e.g., *Schempp*, 374 U.S. at 218 (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947)).

⁴⁴ See, e.g., *id.* at 215 ("The government is neutral, and, while protecting all, it prefers none, and it *disparages* none." (quoting an unpublished opinion)); see also *supra* note 40.

destroy⁴⁵ or handicap⁴⁶ a religion.

II. *Bowen v. Roy*: SHIFTING THE FOUNDATION OF FREE EXERCISE PROTECTION

A. *Rolling Back Free Exercise Protection*

In the past, courts have applied traditional free exercise protection in three situations involving action only by the government: photographing applicants for drivers' licenses,⁴⁷ administering medical treatment,⁴⁸ and frisking prisoners.⁴⁹ In each of these situations, the Court expressed approval for some level of protection. The *Roy* standard therefore represents an unjustified retrenchment of free exercise protection.

1. Requiring Photographs for Drivers' Licenses

In most states, every applicant for a driver's license must be photographed.⁵⁰ Generally, states require that this photograph be taken and processed by the state's motor vehicle division.⁵¹ This photograph re-

⁴⁵ For example, in *Wilson v. Block*, 708 F.2d 735, 740 n.2 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983), if the government acts by expanding the ski resort, then the Hopi Indian religion may become extinct. See *infra* note 127. See also *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.) cert. denied 449 U.S. 953 (1980) (challenging the flooding of an Indian religious site); Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 781 n.109 (1984) (discussing novel Indian claims).

⁴⁶ For example, if the government threatens to act in a way that would cause an individual spiritual unrest if she applies for a governmental benefit, then the individual is forced to choose between the benefit and the dictates of her faith. Accordingly, the individual, through her religion, is handicapped and should receive constitutional protection. Specifically, the government can handicap religious beliefs by insisting on using an individual's social security number if she applies for welfare benefits or requiring her to be photographed for a driver's license. See *infra* notes 142-46 and accompanying text.

⁴⁷ See *infra* notes 50-68 and accompanying text.

⁴⁸ See *infra* notes 69-85 and accompanying text.

⁴⁹ See *infra* notes 86-103 and accompanying text.

⁵⁰ See e.g., CAL. VEH. CODE § 12800.84 (West 1971 & Supp. 1987); IND. CODE ANN. § 9-1-4-37(b) (Supp. 1986). Overall, at least 47 states require photographs of the licensee to appear on drivers' licenses. See *Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984), *aff'd sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985) (affirmed by an equally divided Court, Justice Powell not participating, without opinion). However, New York, one of the nation's most populous states, does not statutorily require photographs on drivers' licenses. *Id.* at 1126 n.5. See also COLO. REV. STAT. § 42-2-106(3) (1973) (abolishing photograph requirement) (repealed 1979).

⁵¹ See e.g., COLO. REV. STAT. § 42-2-106(3) (1973) ("Such photograph shall be taken and processed with equipment leased or owned by the department.") (repealed 1979); IND. CODE ANN. § 9-1-4-37(f) (Supp. 1986) ("In carrying out the provisions of this section the commissioner shall undertake to obtain the equipment necessary to pro-

quirement conflicts with several religions, among them the Pentecostal House of Prayer⁵² and the Assembly of YHWHHOSHUA,⁵³ whose members believe in a literal interpretation of the Bible.⁵⁴ Several cases have arisen throughout the country relating to this conflict.⁵⁵ For example, in *Quaring v. Peterson*,⁵⁶ Francis Quaring sought a Nebraska driver's license but refused to allow the state to take her photograph as required by Nebraska law.⁵⁷ A Pentecostal Christian, Quaring based her refusal on her religious conviction that the Second Commandment is violated by creating a likeness of God's creation.⁵⁸

After unsuccessfully attempting to obtain an exemption from the photograph requirement, Quaring brought suit against the Nebraska Department of Motor Vehicles.⁵⁹ The Court of Appeals for the Eighth Circuit ruled that "[c]learly, a burden upon Quaring's free exercise of religion exists in this case."⁶⁰ The court balanced the State's interest in driver identification and in administrative efficiency against the burden on Quaring's religious beliefs.⁶¹ Judge Bright, writing for the court, concluded that the state's interests⁶² did not outweigh Quaring's interest in religious liberty because the state already had a process for accommodating photograph exemptions and the number of persons who would seek such an exemption for religious reasons would most likely

vide the photographs for permits and license. . . .").

⁵² See *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 269 Ind. 361, 380 N.E.2d 1225 (1978) (enjoining the Indiana Bureau of Motor Vehicles from requiring members of the Pentecostal House of God to have photographs on their drivers' licenses).

⁵³ See *Dennis v. Charnes*, 646 F. Supp. 158 (D. Colo. 1986) (enjoining the Colorado Motor Vehicles Division from requiring members of Assembly of YHWHHOSHUA to have photographs on their drivers' licenses); *Johnson v. Motor Vehicle Div.*, 197 Colo. 445, 593 P.2d 1363 (refusing to enjoin the same), *cert. denied*, 444 U.S. 885 (1979).

⁵⁴ The Assembly of YHWHHOSHUA and Pentecostal House of Prayer derive their beliefs from a literal interpretation of the second Commandment: "Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is the earth beneath, or that is in the water under the earth." *Quaring*, 728 F.2d 1121, 1123 (citing *Exodus* 20:4 and *Deuteronomy* 5:8). Followers of these religions believe that the Commandment is violated by creating a likeness of God's creation. *Id.*

⁵⁵ See, e.g., *id.*; *Dennis*, 646 F. Supp. at 158; *Johnson*, 197 Colo. at 455, 593 P.2d at 1363; *Bureau of Motor Vehicles*, 269 Ind. at 361, 380 N.E.2d at 1225.

⁵⁶ 728 F.2d 1121 (8th Cir. 1984), *aff'd sub nom.* *Jensen v. Quaring*, 472 U.S. 478 (1985).

⁵⁷ See *id.* at 1122.

⁵⁸ See *id.* at 1123. "Quaring's belief extends beyond her refusal to have her photograph taken and allowing it to appear on her driver's license. She believes that the Second Commandment forbids her from possessing any image having a likeness of anything in creation." *Id.* at 1123.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1125.

⁶¹ *Id.*

⁶² See *id.* at 1127.

be small.⁶³ On this basis, the appellate court affirmed the district court's injunction ordering Nebraska officials to issue Quaring a driver's license without requiring that she be photographed.⁶⁴

In all of the cases involving religious objections to photograph requirements, the courts have applied traditional free exercise doctrine and have balanced the state's interest against the burden on religion.⁶⁵ The Supreme Court affirmed the *Quaring* decision on this basis.⁶⁶ The standard applied by the courts in this context was the standard that the Supreme Court now insists is reserved for situations in which the government is requiring an individual to act contrary to her religious belief. But in fact, the government was not requiring the individual to act at all. The government was directing action at the individual.⁶⁷

⁶³ *Id.* at 1127. This argument raises the interesting issue of whether the amount of religious liberty to which an individual is entitled should be predicated on the number of other people sharing the belief. For example, in *Quaring* the court ruled that the interest in administrative efficiency was not sufficiently compelling because only a small number of persons would seek an exemption (i.e. share Quaring's belief). *Id.* If more people had shared the belief, then the interest in administrative efficiency would presumably be greater and the court may have denied the exemption. The protection of an individual's religious liberty should not, however, be related to the number of other people that share her beliefs. See *Sherbert v. Verner*, 374 U.S. 398, 420 n.2 (1963) (Harlan, J., dissenting); Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 332-33 (1969).

⁶⁴ See *Quaring*, 728 F.2d at 1128.

⁶⁵ See *id.* at 1126-27; *Dennis v. Charnes*, 646 F. Supp. 158, 163 (D. Colo. 1986); *Johnson v. Motor Vehicle Div.*, 197 Colo. 455, 458-59, 593 P.2d 1363, 1365 (1979); *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.* 269 Ind. 361, 368-69, 380 N.E.2d 1225, 1229 (1978). The major state interest involved has been that police must be able to identify motorists quickly and accurately in order to ensure that only licensed motorists drive. See *Quaring*, 728 F.2d at 1126; *Dennis*, 646 F. Supp. at 168; *Johnson*, 197 Colo. at 458-59, 593 P.2d at 1365; *Bureau of Motor Vehicles*, 269 Ind. at 368-69, 380 N.E.2d at 1229. The courts, although they have consistently applied a balancing test in this context, have split as to whether this interest is sufficiently compelling to justify burdening the individual's religion. Compare *Quaring*, 728 F.2d at 1126-27 (government did not demonstrate a compelling state interest because giving an exemption to those with religious objections would not cause any undue administrative burdens) and *Bureau of Motor Vehicles*, 269 Ind. at 369, 380 N.E.2d at 1229 (state's interest in the photograph requirement is not so compelling that it may be allowed to infringe on religious freedom) with *Johnson*, 197 Colo. at 459, 593 P.2d at 1366 (state's interest in photographic identification is so compelling that the individual's challenge must fail). See generally Casenote, *Free Exercise of Religion—State May Require a Photograph on a Drivers License Though the Licensee's Religious Beliefs Prohibit Photographs of Any Type*—*Johnson v. Motor Vehicle Division*, 593 P.2d 1393 (Colo. 1979), 1980 B.Y.U. L. REV. 471, 483 (concluding that exemptions from the photograph requirements for individuals with religious objections is an acceptable, less burdensome alternative).

⁶⁶ The Supreme Court affirmed *Quaring v. Peterson* without an opinion on a four to four vote. *Jensen v. Quaring*, 472 U.S. 478 (1985). Justice Powell took no part in the decision. *Id.* For a general discussion of *Quaring v. Peterson*, see Pepper, 'Quaring' May Help Supreme Court Clarify Religious Freedom Doctrine, NAT'L L. J., April 8, 1985, at 24.

⁶⁷ The individuals object specifically to the government photographing them, not

The situation is analogous to *Roy*. There, Roy objected to the Social Security Administration's use of Little Bird of the Snow's social security number in its computer system; here, the individual is objecting to the government taking a photograph. In either scenario, government action, not intentionally precipitating acts or omissions by the individual, serves to obstruct the individual's exercise of her religion. Of course, there is a difference in that the individual must be present to be photographed but is not present when the government uses the social security number in its computers. In both situations, however, the active party is the government, not the individual.⁶⁸ Had the *Roy* distinction between governmental and individual action been drawn in the driver's license photograph cases, it is conceivable that the courts would not even have considered the state interest involved, concluding instead that the individuals had not stated a protectable free exercise claim.

2. Administering Medical Treatment to Individuals over Their Religious Objections

Jehovah's Witnesses and Christian Scientists believe that certain medical treatments and blood transfusions violate their religious beliefs.⁶⁹ Situations have arisen where hospitals are faced with conflicts

to providing a photograph. See, e.g., *Johnson*, 197 Colo. at 457, 593 P.2d at 1364 (The individuals argue that "any requirement that they be photographed before they may be issued a driver's license violates their right to the free exercise of their religion.").

⁶⁸ In both cases an argument could be made that the individual is acting by allowing the government to use the social security number in the computers or by allowing the government to take the photograph. This argument is purely semantic (by definition, being photographed is passive while photographing is active) and was not considered by the Supreme Court in *Roy*.

⁶⁹ See e.g. *Winters v. Miller*, 446 F.2d 65, 68 (2d Cir.) (involving a Christian Scientist who objected to medication based on her religious beliefs), *cert. denied*, 404 U.S. 985 (1971); *In re Boyd*, 403 A.2d 744, 746 n.1 (D.C. 1979) (same); *Mercy Hospital Inc. v. Jackson*, 62 Md. App. 409, 411, 489 A.2d 1130, 1131 (Md. Ct. Spec. App. 1985) (noting that a Jehovah's Witness "may not, under any circumstances, receive blood transfusions"), *vacated* 306 Md. 556, 510 A.2d 562 (1986) (vacating as moot); see also Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92, 122-25 (1974) (noting First Amendment issue in the area of compulsory amniocentesis); Gobert, *Psychosurgery, Conditioning, and the Prisoner's Right to Refuse 'Rehabilitation'*, 61 VA. L. REV. 155, 165 (1975) (noting First Amendment issue in the area of correctional therapy); Winick, *Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331, 350 (1981) (same). Jehovah's Witnesses believe and accept as authority the admonition of Jehovah found in the Holy Bible commanding Christians to "abstain from blood." *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488, 502 (W.D. Wash. 1967). The belief of Jehovah's Witnesses respecting blood transfusions is based on two passages from the Bible. See *id.* at 502 n.8. (citing *Acts of the Apostles*, 15:20 ("Hence my decision is not to trouble those from the nations who are turning to God, but to write to them to abstain from things polluted by idols and from fornication and from what is strangled and from blood.")), and *id.* (citing *Leviticus*, 17:10 ("As for any man of the house of Israel or some alien resident . . .

between an individual's religious objection to treatment and the doctor's desire to preserve the patient's life. For example, in *Mercy Hospital, Inc. v. Jackson*,⁷⁰ Mrs. Jackson was admitted into Mercy Hospital while in premature labor. The hospital staff recommended that she undergo a Caesarean delivery.⁷¹ As a Jehovah's Witness, one of the basic tenets of Mrs. Jackson's faith was that she not, under any circumstances, receive a blood transfusion.⁷² The hospital staff informed her that there was a forty to fifty percent chance that she would need a transfusion during a Caesarian delivery, and that if the need arose and no transfusion were made she would die.⁷³ The delivery without blood transfusions, however, would pose virtually no threat to the health of the fetus.⁷⁴ Despite the significant risk to her life, Mrs. Jackson and her husband steadfastly refused to compromise their religious belief and requested that the delivery proceed without blood transfusions.⁷⁵

Because the hospital staff believed the medical risk was unacceptable, they petitioned for the appointment of a guardian for Mrs. Jackson with the authority to consent to blood transfusions for her.⁷⁶ The court denied the hospital's application for guardianship, the operation occurred without the use of transfusions, and both Mrs. Jackson and the child survived the surgery.⁷⁷ The hospital appealed the decision,⁷⁸ and the Maryland Court of Special Appeals, noting the importance of

who eats any sort of blood, I shall certainly set my face against the soul that is eating the blood, and I shall indeed cut him off from among his people.")).

In *Lewis v. Califano*, 616 F.2d 73 (3d Cir. 1980), a member of the Church of God challenged a decision by the Social Security Administration denying her disability benefits. Unlike the Jehovah's Witnesses and Christian Scientists, members of the Church of God can undergo surgery. Consistent with her religious beliefs, however, Ms. Lewis decided to rely on the "power of prayer." The Court of Appeals for the Third Circuit held that the first amendment protected individual conscience and rejected the government's argument that "an individual's belief which is not a tenet of the church in which she worships is not a belief protected by the First Amendment" *Id.* at 79.

⁷⁰ 62 Md. App. at 409, 489 A.2d at 1130.

⁷¹ *Id.* at 411, 489 A.2d at 1131.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 412 n.2, 489 A.2d at 1131 n.2.

⁷⁵ *Id.* at 411-12, 489 A.2d at 1131.

⁷⁶ *Id.* at 412, 489 A.2d at 1131.

⁷⁷ *Id.*

⁷⁸ The purpose of the appeal was to establish a precedent to guide the courts in future similar situations, not to adjudicate rights between the parties. Ordinarily, the case would have been moot because the surgery was concluded, the child was born, and the patient had been discharged. *Id.* at 413, 489 A.2d at 1132. However, "[b]ecause of the probability of repetition and the substantial likelihood that the matter will always be moot by the time it reaches an appellate court," the court "deem[ed] it to be in the public interest . . . to answer Mercy's question." *Id.* But see *Mercy Hosp., Inc. v. Jackson*, 306 Md. 556, 510 A.2d 562 (1986) (vacating the decision of the Court of Special Appeals as moot).

religious freedom, applied a compelling state interest test.⁷⁹ The court ruled that a competent, pregnant adult has the right to refuse a blood transfusion in order that she comply with her religious beliefs, so long as the decision is made knowingly and voluntarily and will not endanger the delivery, survival, or support of the fetus.⁸⁰ Although the decision was later vacated as moot, the court's rationale, reasoning and resolution of the merits was neither affected nor questioned.

Applying the *Roy* standard, the *Jackson* case did not involve individual action because Mrs. Jackson was not required to inject herself. Nonetheless, the Maryland Court of Special Appeals applied the very balance that *Roy* rejects in cases where courts determine that exclusively governmental action was involved—action that did not precipitate or preclude individual action. Likewise, other courts have employed a balancing test when scrutinizing the forced administration of medication against the backdrop of a free exercise challenge, even though, like *Jackson*, individual action was not present.⁸¹ Although the Supreme

⁷⁹ *Id.* at 415, 489 A.2d at 1133.

⁸⁰ *Id.* at 418, 489 A.2d at 1134. In other cases, courts have extended the right to refuse medical treatment on religious grounds to involuntarily committed mental patients. Specifically, a court held that an involuntarily committed patient who had not been found by any court to be mentally incompetent cannot be given medication which would violate her religious beliefs:

[W]here there is clear evidence that appellant's religious beliefs pre-dated by some years any allegations of mental illness and where there was no contention that the current alleged mental illness in any way altered these views, there is no justification for defendants-appellees to substitute their own judgment for that of their patient.

Winters v. Miller, 446 F.2d 65, 69 (2d Cir.) cert. denied, 404 U.S. 985 (1971). Furthermore, even when a patient has been adjudicated mentally ill and incompetent, a hospital cannot administer medication to her if, before her illness and incompetency, she had rejected any use of medication on religious grounds. See *In re Boyd*, 403 A.2d 744, 753 (D.C. 1979) (adopting the "substituted judgment" standard). But the right to refuse medical treatment on religious grounds is not absolute. If a blood transfusion is necessary to the well-being of a child, a court can authorize it despite the express objection of parents who are opposed to transfusions on religious grounds. See, e.g., *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488, 503-505 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962); see also Richards, *The Individual, the Family and the Constitution: A Jurisprudential Perspective*, 155 N.Y.U. L. REV. 1, 50,52 (1980) (discussing the tension between parents and the state when parents object to lifesaving medical procedures on religious grounds); Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213, 216 (1975) (raising the issue of euthanasia of defective newborns in light of legal precedent overruling the right of parents to block medical treatment of their children).

The state can also require compulsory vaccinations in the interest of public health. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (state can require vaccination); *Calandra v. State College Area School Dist.*, 512 A.2d 809 (1986) (state can require tetanus immunization as a condition for participation in interscholastic sports).

⁸¹ See *supra* note 69.

Court denied certiorari in these cases,⁸² its adoption of the *Roy* standard appears to demonstrate a nascent disapproval for these results.

While involving only governmental, not individual, action, this genre of case differs notably from *Roy*'s social security number requirement and *Quaring*'s photograph requirement in two ways. First, the governmental action in the medical treatment cases has a physical, as well as spiritual, effect on the individual. In the social security number and photograph requirement cases, the individual is spiritually, but not physically, affected. However, the Supreme Court has never required an individual to prove that failure to follow her religion would cause physical harm; spiritual harm has always been sufficient.⁸³ Second, the medical treatment cases involve an *unprovoked* governmental action: the individual has no say whatsoever. The social security number and photograph requirement cases involve *responsive* governmental action: the government acts only if the individual applies for a governmental benefit. The courts, however, have generally rejected the distinction between unprovoked and responsive burdens on religious liberty and protected individuals against both.⁸⁴ In the medical treatment cases, the

⁸² See, e.g., *Winters v. Miller*, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

⁸³ For example, in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), the Court provided free exercise protection to a Jehovah's Witness who claimed that his religion forbade participation in production of armaments. See *id.* at 710-12. The Court did not require Thomas to prove that he would suffer physical harm if he participated in building armaments; potential spiritual harm was sufficient. See *id.*; see also *Sherbert v. Verner*, 374 U.S. 398 (1963) (free exercise protection given to individual claiming that religion prevented her from working on Saturdays without requiring her to prove physical harm would occur if she violated her religion).

⁸⁴ See, e.g., *Osgood v. District of Columbia*, 567 F. Supp. 1026, 1035-36 (D.D.C. 1983) (noting that a plaintiff must establish that at the time she faced treatment she believed that the treatment would violate her religion even if she did not consent to the treatment). Moreover, in this context responsive governmental action may actually be more objectionable than direct governmental action. In the case of an unprovoked, direct governmental action, the individual is not acting by consenting to the action (i.e. the medical treatment) because the government acts not only without the individual's consent, but also against her will. See *Sherbert*, 374 U.S. at 404. In the case of the responsive indirect governmental action, if the governmental conditions a benefit upon a specific act by the government, the individual is implicated in the action by applying for the benefit. Thus, a responsive indirect governmental action presents as strong, if not a stronger claim for protection as an unprovoked direct governmental action.

Another distinction between the medical treatment cases and the social security number and photograph requirement cases is that the medical treatment cases also implicate the general rights to refuse treatment and to bodily integrity. These rights are considered in balancing the state's interest against the individual's interest. See, e.g., *Mercy Hosp., Inc. v. Jackson*, 62 Md. App. 409, 415-16, 489 A.2d 1130, 1133 (1985). However, because this Comment is concerned with when the balancing test should be applied, and not how it should be applied, the implications of the rights to refuse treatment and to bodily integrity on the balancing are beyond the scope of this Comment.

individual, although greatly affected by the governmental action, is neither required nor prevented from doing any act herself. However, the individual undoubtedly believes that the governmental action has a profound impact on her spiritual well-being. Similarly, in *Roy*, the plaintiff believed that the government's use of Little Bird of the Snow's social security number would have a profound impact on her spiritual well-being.⁸⁵ Nevertheless, based on the distinction drawn in *Roy*, both claims would be unprotected by the free exercise clause because they involve action by the government but not by the individual.

3. The Frisking of Male Prisoners by Female Guards

In America, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."⁸⁶ In general, the Supreme Court has held that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty."⁸⁷ However, "while inmates are not stripped of their constitutional rights at the prison gate," these rights are properly subject to a "greater degree of intrusion than would be allowed outside the prison gate."⁸⁸

The need for security in prisons requires guards to search and frisk prisoners to ensure that they do not have weapons. Title VII of the Civil Rights Act of 1964⁸⁹ requires prisons to hire women as

For a general discussion of these rights, see Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973).

⁸⁵ Roy testified that Little Bird of the Snow's spirit would be robbed and she would be prevented from attaining greater spiritual power. *Bowen v. Roy*, 106 S. Ct. 2147, 2150 (1986).

⁸⁶ *Madyun v. Franzen*, 704 F.2d 954, 958 (7th Cir.) (quoting *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)), *cert. denied*, 464 U.S. 996 (1983).

⁸⁷ *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972); *See also Madyun*, 704 F.2d at 958. The free exercise rights of prisoners have been recognized in several contexts. *See, e.g.,* *Burgin v. Henderson*, 536 F.2d 501 (2d Cir. 1976) (right to grow a beard for religious purposes); *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969) (right of access to religious literature); *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967) (right to religious services); *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975) *aff'd sub nom. Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (special diet based on religious restrictions).

⁸⁸ *Madyun*, 704 F.2d at 958. *See also Bell*, 441 U.S. at 545 ("[S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations."); *Price v. Johnston*, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitations of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

⁸⁹ 42 U.S.C. § 2000e(h) (1982).

guards in male prisons.⁹⁰ However, some male prisoners, based on religious beliefs, object to being touched by female guards.⁹¹ In *Madyun v. Franzen*,⁹² a male prisoner refused to submit to a "frisk search"⁹³ by a female guard because it violated his Islamic faith.⁹⁴ Ultimately, a male correctional officer was summoned to perform the search. The guard, however, filed a report, citing Madyun for disobedience, and he received a fifteen-day "segregation" sentence by the prison disciplinary committee.⁹⁵ The Court of Appeals for the Seventh Circuit, noting that even a limited frisk search conducted by women guards may be incompatible with the tenets of Madyun's religion, applied a balancing test to determine whether the intrusion was justified by a state interest of sufficient magnitude.⁹⁶ However, because Madyun was a prisoner, the court reduced the burden on the government to justify the intrusion on Madyun's religious liberty.⁹⁷ Specifically, the court held that "prison rules that incidentally restrain the free exercise of religion are justified only 'if the state regulation has an important objective and the restraint on religious liberty is reasonably adapted to achieving that objective.'"⁹⁸ The court further held that this burden was met because the state demonstrated a substantial interest in having its women guards perform frisk searches on male inmates.⁹⁹

⁹⁰ See, e.g., *Madyun*, 704 F.2d at 961; *Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir. 1982) ("If a state is required to hire women as guards in its male prisons, it reasonably seems to follow that it must be allowed to utilize female guards to the fullest extent possible."), *cert. denied*, 461 U.S. 907 (1983).

⁹¹ See *Madyun*, 704 F.2d at 956 (physical contact between a man and a woman other than his wife or mother is incompatible with the tenets of Islamic religion).

⁹² 704 F.2d 954 (7th Cir.), *cert. denied*, 464 U.S. 996 (1983).

⁹³ *Id.* at 956. The female officer gave the following description of her "frisk search:" "The resident is asked to raise his arms. I then run my thumbs under his collar, take my hands and rub them across the top of his arms, come back under his arms to his armpits and down his side to his waist. I run my finger around his waistband. I run my hands down the outside of his legs and back up to mid thigh. I then reach around and pat his chest area and his back." *Id.* at 956 n.1.

⁹⁴ *Id.* at 956.

⁹⁵ *Id.* at 956.

⁹⁶ *Id.* at 957-58.

⁹⁷ *Id.* at 958.

⁹⁸ *Id.* at 959-60 (quoting *La Reau v. MacDougall*, 473 F.2d 974, 979 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973)). This standard is much lower than the compelling state interest that is generally required. See *supra* note 4 and accompanying text.

⁹⁹ *Madyun*, 704 F.2d at 960. The court reasoned that frisk searches are an "integral part of prison security and an important part of a guard's duty. If women are not allowed to perform these limited searches . . . [then] the utility of women prison guards would be significantly diminished." *Id.* Thus, in order to provide equal opportunity for women in state prisons, which is a legal obligation of the state under Title VII, prisons must allow women "to perform the important tasks required of their male guard counterparts." *Id.*

Religious claims by male prisoners arising from frisk searches by female guards are similar to *Roy* in that both situations involve action by government agents; no action by the individual is required or prevented. Of course, requiring a frisk search is somewhat different from threatening to use a social security number in a computer if an individual applies for a governmental benefit. Frisk searches, similar to medical treatment, are unprovoked governmental action, while conditioning a governmental benefit is a responsive governmental action. An individual, however, should be protected against both unprovoked and responsive restraints on her religious liberty.¹⁰⁰ Hence, although *Roy* and *Madyun* are different in many ways,¹⁰¹ they are similar to the extent that both involve governmental, not individual, action. Nevertheless, in *Madyun*, the Court of Appeals for the Seventh Circuit did provide some free exercise protection to a male prisoner objecting to being frisked by female guards.¹⁰² This result would be incompatible with the distinction drawn by the Supreme Court in *Roy*.¹⁰³

B. *The Imposition of an Unworkable Standard*

Despite the subtle distinctions between the *Roy* scenario and those found in the cases just discussed, it is unlikely that these differences translate into a realistic distinction between action that is solely undertaken by the government and individual action. Nonetheless, because the *Roy* Court failed specifically to overrule these lines of cases, the standard articulated by *Roy* will surely be blurred. Courts will be able to distinguish *Roy* so that the facts before the bench fit situations in which free exercise protection traditionally had been afforded. Lawyers, moreover, will be able to avoid *Roy* simply by pleading a secondary effect on individual action. A new line of cases involving free exercise challenges to the development of sacred Indian lands provides the template for this discussion.

¹⁰⁰ See *supra* note 84; *infra* notes 137-43 and accompanying text.

¹⁰¹ *Madyun* is different from *Roy* in that frisk searches also implicate other rights, such as the right to privacy, see *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982) (holding that by instructing female guards to exclude the genital area in conducting a frisk, the individual is afforded sufficient privacy rights), *cert. denied*, 461 U.S. 907 (1983), unreasonable search, and cruel and unusual punishment. See *Madyun*, 704 F.2d at 956, 960-61. In *Madyun*, however, these claims were also dismissed. *Id.* For a further discussion of these cases, see Note, *Constitutional Limitation on Body Searches in Prisons*, 82 COLUM. L. REV. 1033 (1982).

¹⁰² See *Madyun*, 704 F.2d at 960.

¹⁰³ See *supra* notes 17-21 and accompanying text.

1. The Ambiguities Inherent in the *Roy* Standard: Precluding Meaningful Guidance

There is language in *Roy* suggesting that the distinction between governmental and individual action can be limited to internal, as opposed to external, governmental action: "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford the individual a right to dictate the conduct of the Government's *internal* procedures."¹⁰⁴ Faced with a free exercise challenge by Northwest Indians to government plans approving timber harvesting and road construction in a national forest, the Ninth Circuit employed this very distinction to circumvent the application of *Roy*.¹⁰⁵

Although timber harvesting and road construction may be entirely external action, and using social security numbers solely in a government computer system may be entirely internal action, few other actions are entirely internal or external. Would using an individual's social security number become external if the number was printed on benefit checks? Should timber harvesting and road building be considered external even if it is conducted entirely on government-owned land? Is photographing an applicant for a driver's license internal or external?¹⁰⁶ What if the photographs were to be used solely in government files rather than being affixed to the driver's license? Would the use of a prisoner's committed name, rather than his religious name, by prison guards solely within a prison be considered internal or external governmental action?¹⁰⁷ No definition of "internal" is given either by the *Roy* Court or by the Ninth Circuit. It would appear, therefore, that courts could avoid the harsh results of the *Roy* standard and produce an outcome to which they are predisposed by labeling governmental conduct internal rather than external.

Lawyers for plaintiffs challenging governmental actions will also be able to circumvent the result of the *Roy* decision simply by pleading some secondary effect on individual action. For instance, in *Quaring v. Peterson*, the primary action at issue was that of the government taking a photograph required for a valid driver's license.¹⁰⁸ Should a similar

¹⁰⁴ *Bowen v. Roy*, 106 S. Ct. 2147, 2152 (1986) (emphasis added).

¹⁰⁵ See *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986) (finding that logging and road building are "not the kind of internal government practice[s] that the Court found beyond free exercise attack in *Roy*."). See also *infra* notes 134-35.

¹⁰⁶ See *supra* notes 50-67 and accompanying text.

¹⁰⁷ See, e.g., *Azeez v. Fairman*, 795 F.2d 1296 (7th Cir. 1986).

¹⁰⁸ See *supra* notes 55-67 and accompanying text.

factual pattern presently arise, the plaintiff's attorney would be able to assert a seemingly innocuous individual action, such as presence, to distinguish *Roy*, and then insist that such action is protected by virtue of the *Quaring* decision.¹⁰⁹

Even if *Roy* were to recur, an attorney would conceivably be able to avoid the *Roy* precedent by pleading a collateral effect on individual action. At trial, *Roy* testified that the utilization of Little Bird of the Snow's social security number would rob her spirit and "prevent her from attaining greater spiritual power."¹¹⁰ Being confronted with the *Roy* precedent, an attorney would then ask about the effect the loss of spiritual power would have on Little Bird of the Snow. Undoubtedly, *Roy* could claim that some of her religious actions would be affected; for example, he could claim she would be unable to perform or participate in certain rituals because of her spiritual impurity.¹¹¹ In short, whenever a governmental action impedes a religion, some secondary effect on individual action can always be found to avoid the *Roy* result.

2. Example of Unworkability: Indian Land Use Cases

Indian groups have claimed that governmental use and development of certain public lands violate their religious freedoms.¹¹² Adherents to traditional Indian religions claim that development of certain areas would result in the extinction of their religions because it would

¹⁰⁹ Likewise, new cases challenging coerced medical treatment or the frisking of prisoners may also be unaffected by *Roy* even though they involve primarily government action. Plaintiffs will be able to distinguish *Roy* by pleading a secondary effect on individual action and then relying on the pre-*Roy* cases for the proposition that these types of intrusions should be afforded some protection. See *supra* notes 69-102 and accompanying text.

¹¹⁰ *Roy*, 106 S. Ct. at 2150.

¹¹¹ Similarly, assume that a primary governmental action destroys a religion as in the majestic oak hypothetical. See *supra* text accompanying note 29. The members of the religion, although not formally deterred from acting, will in the future be unable to pray to their deity. Thus, they would be able to avoid the *Roy* precedent.

¹¹² See, e.g., *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688 (9th Cir. 1985) (Northwest Indians objecting to timber harvesting and road construction); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.) (Hopi and Navajo Indians objecting to proposed expansion of ski resort in San Francisco Peaks), *cert. denied*, 464 U.S. 956 (1983); *New Mexico Navajo Ranchers Ass'n v. I.C.C.*, 702 F.2d 227 (D.C. Cir. 1983) (Navajo Indian's suit to block construction of a rail line on sacred Indian sites); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir.) (Navajo Indian suit against water storage project located on a Navajo reservation), *cert. denied sub nom. Badoni v. Broadbent*, 452 U.S. 954 (1980); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.) (Cherokee Indian's challenge to the completion of the Tellico Dam and flooding of sacred Cherokee land), *cert. denied*, 449 U.S. 953 (1980); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982) (Lakota Nation and Tsistsistas Nation objecting to construction of roads and parking area near ceremonial religious grounds), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied sub nom. Fools Crow v. Gullet*, 464 U.S. 977 (1983).

"undermine the religious power of sacred rites, inhibit communications with spirits, prevent the collection of healing herbs, and even kill tribal deities."¹¹³ Application of traditional free exercise doctrine is especially difficult in this area because many Indian religions do not adhere to the Judeo-Christian concept of a supreme and immortal deity, a belief in whom may be divorced from any specific site or mode of worship. Rather, these Indian religions are site-specific: the place where an event occurred, and not the event itself, has spiritual significance.¹¹⁴ Traditional free exercise¹¹⁵ doctrine, by protecting practices rather than locations, fails to provide adequate protection for Indian religions. Thus, although the development of a particular tract of land could devastate an Indian religion, traditional free exercise doctrine might not provide any protection.

Generally, courts have applied a three-part test in Indian land development cases. First, the courts have required the Indians to prove that the governmental action creates a burden on their religion.¹¹⁶ Second, the courts have required the Indians to show that the "area at issue is indispensable and central to their religious practices and beliefs, and that the proposed governmental actions would seriously interfere with or impair those religious practices."¹¹⁷ Third, the courts have ap-

¹¹³ Note, *supra* note 35, at 1448. See, e.g., *Northwest*, 795 F.2d at 692; *Wilson*, 708 F.2d at 740; *Badoni*, 638 F.2d at 177.

¹¹⁴ See Note, *supra* note 35, at 1448-49 ("location is essential to many aspects of Indian ritual and belief"). See also Note, *Indian Worship v. Government: A New Breed of Religion Cases*, 1984 UTAH L. REV. 313, 319-20 ("The basic difference between world and Indian religions has been defined as the difference between perceiving the world in a spatial or linear manner. . . . To Indians, communal involvement in ceremonies and continual renewal of relationships with holy places are more important than the efforts to conform individual behavior to religious dogma, a characteristic of the major world religions." (footnotes omitted)).

¹¹⁵ The distinction in *Roy* between individual and governmental action exemplifies the bias against site-specific religions. By not providing protection unless an individual action is required or prevented, the *Roy* standard would fail to protect against a governmental action that could destroy a site that is indispensable to an Indian religion. For example, in the majestic oak example, *supra* text accompanying note 29, the *Roy* standard would fail to provide any protection to religion Y because destroying the tree would involve action only by the government, but not by any individuals.

¹¹⁶ See, e.g., *Northwest*, 795 F.2d at 691; *Wilson*, 708 F.2d at 740; *Badoni*, 638 F.2d at 176; *Sequoyah*, 620 F.2d at 1163.

¹¹⁷ *Northwest*, 795 F.2d at 692. See, e.g., *Wilson*, 708 F.2d at 742-44; *Badoni*, 638 F.2d at 176-77; *Sequoyah*, 620 F.2d at 1164; *Crow*, 541 F. Supp. at 792. Although the courts have required a showing of "centrality" in Indian land cases, such a showing has not been required in traditional Free Exercise cases. See Note, *Constitutional Law: Religious Freedom and Public Land Use*, 20 LAND & WATER L. REV. 109, 116-17 (1985); Note, *supra* note 114, at 323-24. This added burden on Indians claiming infringements of their religious liberty goes directly against the Congressional policy of providing special protection to Indian religious claims. See generally, The American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1982). For a general discussion of the A.I.R.F., see Note, *supra* note 35, at 1457-59.

plied a balancing test, searching for a compelling government interest.¹¹⁸ These claims have generally failed either because the Indians have not shown a sufficient burden on religion¹¹⁹ or because there was a sufficiently compelling state interest involved.¹²⁰ For example, in *Wilson v. Block*,¹²¹ the Navajo and Hopi tribes attempted to block a plan for further development of the San Francisco Peaks.¹²² The Peaks are within a National Forest and are managed by the Forest Service.¹²³ A 777-acre section of the Peaks known as the "Snow Bowl" had been used for downhill skiing since 1937.¹²⁴ In 1979, the Forest Service decided to allow further development of the Snow Bowl by private investors.¹²⁵ Both the Navajos and the Hopis believe that the expanded use of the Peaks would directly burden their religions. The *Wilson* court noted:

Believing the San Francisco Peaks to be sacred, [the Navajo and Hopi Indians] feel that development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes.

. . . .

. . . The Hopis and the Navajos believe that they owe a duty to the deities to maintain the San Francisco Peaks in their natural state. They believe that breach of that duty will lead to serious adverse consequences for their peoples.¹²⁸

¹¹⁸ See, e.g., *Northwest*, 795 F.2d at 694; *Wilson*, 708 F.2d at 742-44; *Badoni*, 638 F.2d at 176-77; *Sequoyah*, 620 F.2d at 1163-64; *Crow*, 541 F. Supp. at 790-91.

¹¹⁹ See, e.g., *Wilson*, 708 F.2d at 744-45; *Sequoyah*, 620 F.2d at 1164.

¹²⁰ See, e.g., *Badoni*, 638 F.2d at 178-79; *Crow*, 541 F. Supp. at 794.

¹²¹ 708 F.2d 735 (D.C. Cir.), *cert.denied*, 464 U.S. 956 (1983). For a general discussion of *Wilson*, see Note, *Constitutional Law: Religious Freedom and Public Land Use*, *supra* note 119.

¹²² *Wilson*, 708 F.2d at 738-39.

¹²³ *Id.* at 738. The fact that the land is owned by the government and that the Indians have no property right in the land is not dispositive. The government must manage its property in a manner that does not offend the Constitution. See, e.g., *Badoni*, 638 F.2d at 176; *Sequoyah*, 620 F.2d at 1164.

¹²⁴ *Wilson*, 708 F.2d at 738.

¹²⁵ *Id.* at 738-39.

¹²⁶ *Id.* at 740. Specifically, the Navajos believed that the Peaks are one of the four sacred mountains that form the boundaries of their homeland. *Id.* at 738. Not only do they believe the Peaks to be the home of specific deities, but they consider them "the body of a spiritual being or god, with various peaks forming the head, shoulders, and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin." *Id.* In essence, the Navajos regard the Peaks as a living deity, pray directly to them as such, and believe that their development would impair the Peaks' healing power. *Id.* The Hopis believe that for six months each year, the Kachinas, "emissaries" from the creator, reside in the peaks. The Kachinas' activities on the Peaks create the rain and snow storms that support the Hopis' villages. *Id.* "The Hopis

Thus, the development of the Peaks would seriously damage the Navajo and Hopi religions. Furthermore, testimony by the Chairman of the Hopi Tribe suggested that in the long run the expansion could even lead to the extinction of the Hopi religion and culture.¹²⁷

The *Wilson* court ruled, however, that the development would not burden the Indians' religious beliefs or practices.¹²⁸ The court held that "plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."¹²⁹ The court reasoned that because religious practices could occur in many other locations, the Hopi and Navajo Indians could practice their religions at other sites.¹³⁰ This finding precluded the court from conducting a balancing test before it ruled against the Indians.¹³¹ This ruling represents a fundamental misunderstanding of Indian religions, which emphasize the importance of the place where events occurred, rather than the events themselves.¹³² The ability to pray, collect herbs, and conduct ceremonies at other sites does not satisfy the Indians' duties to conduct these practices at a specific site.¹³³ In a sense, therefore, whether or not individual action has been prevented was a threshold question for Indians challenging the development of land even before *Roy*. That standard has been difficult, if not impossible, to meet.

Nevertheless, in *Northwest Indian Cemetery Protective Association v. Peterson*,¹³⁴ a case decided after *Roy*, the Court of Appeals for the Ninth Circuit reversed this trend. The case provides an ideal example of a court distinguishing *Roy* by focusing on the secondary effects

believe that the use of the Peaks for commercial purposes would constitute a direct affront to the Kachinas and to the Creator." *Id.*

¹²⁷ *Wilson*, 708 F.2d at 740 n.2. *See also id.*: "It is my opinion that in the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people. If our people no longer possess this long-held belief and way of life, which will inevitably occur with the continued presence of the ski resort' . . . 'a direct and negative impact upon our religious practices [will result]. The destruction of these practices will also destroy our present way of life and culture.'" (quoting Abbott Sekaquaptewa, former chairman of the Hopi tribe).

¹²⁸ *Id.* at 745.

¹²⁹ *Id.* at 744.

¹³⁰ *Id.*

¹³¹ *Id.* at 745. The court found no need to decide whether the ski area expansion was a compelling government interest because the plaintiffs had not shown that development would burden their religious beliefs or practice. *Id.*

¹³² *See Note, supra* note 114, at 320.

¹³³ *Wilson*, 708 F.2d at 744.

¹³⁴ 795 F.2d 688 (9th Cir. 1986).

on individual action rather than on the primary governmental action. The court here found that government plans to permit timber harvesting and road construction in a national forest burdened the religion of the Northwest Indians; moreover, no sufficiently compelling state interest justified this interference.¹³⁵ The court stressed the ancillary effects on individual action: "Communication with the 'great creator' is possible in the high country because of the pristine environment and opportunity for solitude found there. . . . [T]he harvesting of timber in the high country, including 'clear cutting,' would seriously damage the salient visual, aural, and environmental qualities of the high country."¹³⁶ Continuing with this rationale, the court held in favor of the plaintiffs: "[M]uch of the adverse impact would be indirect, [due to] . . . increased uses made possible by the Road [N]oise levels from the proposed Road would interfere with religious uses of the high country . . . [thus] demonstrat[ing] that the Road would interfere with the free exercise of their religion."¹³⁷

Thus, despite the fact that the court had already instituted a threshold question, to which *Roy* gave added validity, and that the government's action had only a tangential effect on individual action, the court nonetheless marshalled the plaintiffs' cause.

III. PROPOSED SOLUTION: A THIRD CATEGORY OF FREE EXERCISE PROTECTION

The standard articulated by the Supreme Court in *Bowen v. Roy* can be interpreted either as a curtailment of free exercise protection or as the imposition of a standard providing no guidance to the courts. The result is that in some cases free exercise protection will not be accorded in areas in which it has traditionally been applied, while in other cases protection will be accorded irrespective of *Roy*. Even more egregious is the fact that this confusion results from a standard that affronts the purpose underlying the free exercise clause,¹³⁸ results in an arbitrary distinction among plaintiffs,¹³⁹ and responds to the Court's driving concerns in a manner so overbroad that it undermines those

¹³⁵ *Id.* at 695.

¹³⁶ *Id.* at 692 (citing Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594-95 (N.D. Cal. 1983)).

¹³⁷ *Northwest*, 795 F.2d at 693. For additional examples of the effect of governmental action on individual action, see *Bandoni v. Higginson*, 638 F.2d 172, 176 (1980) (performing religious ceremonies); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1160 (1980) (collecting medicines); *Crow v. Gullet*, 541 F. Supp. 785, 788 (1982) (site of pilgrimages and ceremonies).

¹³⁸ See *supra* notes 35-46 and accompanying text.

¹³⁹ See *supra* notes 28-34 and accompanying text.

concerns.¹⁴⁰ In effect, a third type of free exercise protection is warranted: protection against government action that impairs an individual's ability to choose or follow her religion freely even when no individual action is required or prevented.

Currently, the Supreme Court recognizes two categories of free exercise protection:¹⁴¹ the freedom of an individual to believe, which is absolute, and the freedom of an individual to act in accordance with her beliefs, which is protected unless there is a compelling state interest justifying infringement. A standard providing protection against purely governmental actions that infringe on the ability of individuals to choose or follow a specific religion freely¹⁴² both comports with the purposes behind the free exercise clause and is narrowly tailored to address the concerns voiced by the *Roy* Court. This standard neither requires the government to join in an individual's religion nor to justify every one of its actions. Moreover, the standard permits courts to take notice of the severity of the deprivation to the plaintiff.

A. *Governmental Actions Aimed at Specific Individuals*

If the governmental action is aimed at a specific individual, that individual's ability to choose or follow a religion will always be obstructed. This is true whether the individual-specific governmental action is unprovoked, as in the case of frisk searches or forced medical treatment, or responsive, as in the case of social security number or photograph requirements for public benefits. Unprovoked individual-specific governmental action threatens to violate the individual's conscience with a direct infringement. On the other hand, responsive governmental action compels the individual to choose between the dictates of her faith and abandoning a government benefit to which she is otherwise entitled and probably *needs*. In short, the government either engages in torture or extortion, in either case interfering with the individual's ability to choose or follow her religion. Because the free exercise clause was intended to proscribe such interference, courts generally should extend protection.¹⁴³

Moreover, individuals challenging governmental action in these cases simply seek a religious exemption, not a total cessation of the practice. *Roy*, for example, sought not to eradicate the social security

¹⁴⁰ See *supra* notes 21-27 and accompanying text.

¹⁴¹ See *supra* notes 1-6 and accompanying text.

¹⁴² The ability of an individual to choose and follow a religion free from governmental interference is a major purpose of the religion clauses. See *supra* notes 35-46 and accompanying text.

¹⁴³ See *supra* notes 35-46 and accompanying text.

number requirement for welfare recipients but only to exclude his daughter from the requirement; similarly, individuals asserting religious objections to photograph or frisking requirements desire only to exempt themselves from the practices, not to end them completely. Consequently, the argument that permitting these claims would choke government operations loses validity.

Finally, individuals objecting to unprovoked governmental actions may view these actions just as seriously as an infringement of their right to pray.¹⁴⁴ Certainly, the consequences may be equally damaging. Likewise, while responsive governmental actions associated with government benefits create only an indirect burden on religion,¹⁴⁵ they can actually create a heavier burden when in fact the benefit is a matter of necessity. While the individual can take refuge in the knowledge that unprovoked government action is undertaken without her consent, in the case of responsive governmental action the individual is implicated in the religious violation because it was at her instigation (by applying for the benefit) that the governmental action was taken. In any event these violations are equally objectionable because the Supreme Court has consistently held that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."¹⁴⁶

The same burden on religion is created whether the state conditions a benefit on a governmental or an individual action. In both cases, the individual is forced to choose between the tenets of her religion and the governmental benefit. Thus, in both cases, the individual should be given free exercise protection.

¹⁴⁴ See *supra* notes 69, 98 and accompanying text.

¹⁴⁵ See *supra* notes 7-21, 50-68 and accompanying text (discussing the social security number requirement for welfare benefits and the photograph requirement for drivers' licenses, respectively).

¹⁴⁶ *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981). See also *Bowen v. Roy*, 106 S. Ct. 2147, 2169 (1986) (O'Connor, J., concurring in part and dissenting in part) ("The fact that appellees seek exemption from a precondition that the Government attaches to an award of benefits does not, therefore, generate a meaningful distinction between this case and one where appellees seek an exemption from the Government's imposition of penalties upon them."); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (holding that a state may not "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation").

B. General Governmental Actions

Religious objections to general actions by the government that are not aimed at a specific individual should only be recognized when the action would impede the ability of individuals to freely choose or follow a religion.¹⁴⁷ This impediment to choice would surely occur if the government acted in a way which destroyed or severely handicapped a religion. An individual, however, should not be able to stop the government from acting simply because, based on her religion, she could not act in that manner herself.¹⁴⁸

1. Developing the Appropriate Test

If protection were provided whenever there was a conflict between a governmental action and any religion, then the government would be forced to justify almost every one of its actions. When a governmental action is aimed at the specific individual, only that individual should be able to bring a religious objection.¹⁴⁹ On the other hand, when the government acts in a general manner, the range of potential conflicts is dramatically increased. In fact, few, if any, governmental activities occur to which some person or group might not object on religious grounds.¹⁵⁰ As the *Roy* court noted, "virtually *every* action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection."¹⁵¹

This concern over the government's ability to operate, however, should not bar recovery in all cases of general governmental actions. It is obviated by the requirement that individuals initially demonstrate that the governmental action actually impedes their ability to choose or follow a religion. Conflict between their religion and governmental action is not necessarily sufficient. Plaintiffs would meet this threshold inquiry only when a governmental action would destroy or handicap their religion.¹⁵²

¹⁴⁷ See *supra* notes 35-46 and accompanying text.

¹⁴⁸ For example, consider the situation where an individual objects to government offices being open on Saturdays. See *supra* note 29 and accompanying text.

¹⁴⁹ Cf. *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("For the Free Exercise Clause is written in terms of what the government cannot do to the individual . . .").

¹⁵⁰ See *Autenrieth v. Cullen*, 418 F.2d 586, 589 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970) (individuals seeking refunds of federal income taxes used to fight the war in Viet Nam).

¹⁵¹ *Roy*, 106 S. Ct. at 2156 n.17.

¹⁵² This Comment is primarily concerned with the preliminary question of when there should be Free Exercise protection; it is not concerned with what degree of protection should be provided (the workings of the balancing test). Nevertheless, a short

In the majestic oak example,¹⁶³ this part of the test would be met because if the tree were cut down, tribe members would be unable to pray to the tree. Thus, the religion would be destroyed. Consequently, present members would be unable to follow their faith and prospective members would be unable to choose that religion.

Destruction of the religion, however, should not be a prerequisite for free exercise protection. It is not the exclusive indicator of an action that obstructs an individual's ability to choose or follow her religion. For example, assume that a religion exists whose followers believe that certain mountains are living deities and pray to them accordingly. One mountain is in California and the other in Pennsylvania. If the government decided to build a military base on the mountain in Pennsylvania, followers of the religion would undoubtedly object because of their belief that development would destroy the spiritual powers of the mountain. The governmental action would not destroy the religion; rather, members of the religion could pray to the other mountain. However, this would require that they move to California. Forcing the members of a religion to choose between abandoning their religion or moving across the country undoubtedly impedes their ability to follow their religion. Thus, members of the religion should be protected. However, this religious interest should be balanced against the interests of the government and other citizens in building the military base on that particular mountain.

discussion of the factors to be included in the balancing test for general governmental actions is provided below.

In the case of general governmental actions, the interests of other citizens in utilizing the benefits of general governmental actions, as well as the state's interest in the action, must be considered in the balancing test. For example, in *Wilson v. Block*, 708 F.2d 735 (D.C. Cir), *cert. denied*, 464 U.S. 956 (1983), other citizens had an interest in utilizing the benefits of the proposed ski resort. If the resort was not expanded because of the religious objections of the Hopi and Navajo Indians, then the other citizens would be harmed. One way that this interest could be considered would be by reducing the degree of protection provided in the balancing test.

This interest, however, does not apply to all general governmental actions. For example, reconsider the situation where government plans to build a road would require that a majestic oak, symbolic to followers of religion *Y*, be cut down. *See supra* note 29 and preceding text. Other citizens undoubtedly have an interest in using the proposed road. However, if the government accommodated religion *Y* and moved the road to the east, other citizens would not be harmed. Thus, other citizens have an interest in using the road, but do not have an interest in having the road built in that specific location. The interests of other citizens in a governmental action should be considered only when the religious objection would prevent the entire project; their interests are not implicated when the government can accommodate the religious individuals and still proceed with the project.

¹⁶³ *See supra* note 29 and preceding text.

2. Application to the Development of Sacred Indian Lands

Under the standard proposed in this section, an individual (or a group of individuals) could only object to the development of public land by the government if that development would impede the ability of individuals to freely choose or follow a religion.¹⁵⁴ In *Wilson v. Block*,¹⁵⁵ the Navajo and Hopi Indians believed that the further development and expansion of a ski resort on the San Francisco peaks would lead to serious consequences for their religions and seriously impair the ability of the religion to successfully teach their people that the peaks are a sacred place.¹⁵⁶ In essence, the governmental action could lead to the extinction of the religions. The standard proposed in this section would protect the followers from such a result.¹⁵⁷

The second part of the test would be to balance the individuals' religious interests against the interests of the state and of other citizens. In *Wilson*, the court did not examine the state interest involved because it found no burden on religion was present.¹⁵⁸ The government has a statutory interest in administering national forests for multiple uses.¹⁵⁹ The statute instructs the United States Forest Service to consider the relative values of resources and not necessarily to emphasize the combinations of uses that would give the greatest dollar return.¹⁶⁰ The value

¹⁵⁴ This standard would apply even if no action by the individuals is involved. In actuality, most of the cases involve governmental actions that also restrict actions by the individuals. See *supra* note 137. However, this Comment is concerned especially with the situation when the only action involved is that of the government. The case that is most similar factually is *Wilson*, 708 F.2d 735. There, the Indians claimed that the development alone, independent of the restrictions on their actions, would severely impede their religions, leading them to possible extinction. *Id.* at 739-740.

¹⁵⁵ 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

¹⁵⁶ *Id.* at 740.

¹⁵⁷ A governmental action which handicaps and potentially destroys a religion undoubtedly violates the religion clauses. *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("The state may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute." (citing *Epperson v. Arkansas* 393 U.S. 97, 106 (1968))); *Abington School Dist. v. Schempp*, 374 U.S. 203, 215 (1963) ("The government is neutral, and, while protecting all, it prefers none, and it *disparages* none." (citing *Minor v. Board of Educ.*, Sup. Ct. of Cincinnati (Feb. 1870) (unpublished))).

¹⁵⁸ *Wilson*, 708 F.2d at 745.

¹⁵⁹ 16 U.S.C. § 529 (1982) ("The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom."). See generally Note, *Constitutional Law: Religious Freedom and Public Land Use*, *supra* note 117, at 118 (discussing the interests involved and concluding that the expansion does not serve a compelling state interest).

¹⁶⁰ 16 U.S.C. § 531(a) (1982) ("Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people . . . with consideration being given to the relative values of the various resources, and not neces-

of the Peaks to the Navajo and Hopi Indian religions is one of the elements that should be considered. Furthermore, the establishment and maintenance of areas of wilderness is consistent with the purposes and provisions of the statute.¹⁶¹ Prior to the expansion of the ski resort, the Peaks accommodated both citizens interested in skiing and the Indians' religion. If the ski resort were expanded, one of the multiple uses of the Peaks would be destroyed: the religious use by the Indians.¹⁶² Thus the state interest in expanding the ski resort is very small.

Other citizens also have an interest in expanding the ski resort. Specifically, these citizens have an interest in using the mountain for skiing. However, these citizens could undoubtedly ski on other mountains. The skiers would argue that the Indians could conduct their religious practices on other mountains. But, because the Indian religions are site-specific,¹⁶³ this would not be possible. Hence, the Indian's religious interest, in this case, outweighs the interest of the state and of other citizens in expanding the ski resort.

CONCLUSION

The two religion clauses of the first amendment together stand for the proposition that an individual should be free to choose or follow a religion without any invasions by the government.¹⁶⁴ State interference in religion, whether positive or negative, must be prohibited.¹⁶⁵ However, the standard developed in *Roy* only provides religious protection when individuals are prevented from acting in accordance with their religion (or coerced into acting against it). Nevertheless, situations arise when action by the government that neither requires nor prevents any action by the individual can substantially burden an individual's religion. This can occur when the government acts directly against an individual, threatens to act in a certain manner if the individual applies for a governmental benefit, or acts in a general manner that would destroy or severely handicap a religion. The prohibition of interference by the

sarily the combination of uses that will give the greatest dollar return or the greatest unit output.").

¹⁶¹ See 16 U.S.C. § 529 (1982) ("The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528 to 531 of this title.").

¹⁶² In *Wilson*, the Indians' religious use is accomplished by maintaining the Peaks in their natural state. See *Wilson*, 708 F.2d at 740. This is consistent with the statutory governmental interest which allows the maintenance of areas for wilderness. See *supra* note 161 and accompanying text.

¹⁶³ See *supra* note 114 and accompanying text.

¹⁶⁴ See *supra* notes 35-46 and accompanying text.

¹⁶⁵ See *supra* notes 40, 44 and accompanying text.

government must apply to these situations as well as when individuals are required to or prevented from acting in accordance with their religions.

To followers of orthodox religions, many of the religious practices and claims in this Comment may seem unusual and trivial; the encroachments on the first amendment may seem minor. Still, to members of these religions the burdens are very real. The government must protect both unusual and orthodox religions.¹⁶⁶ As the Court stated in *Schempp*,¹⁶⁷ "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent"¹⁶⁸ Religious liberty is one of our most sacred liberties.¹⁶⁹ If it is sacrificed, all other civil rights are at risk. "[I]t is proper to take alarm at the first experiment on our liberties,"¹⁷⁰ as James Madison once warned.

¹⁶⁶ See *supra* note 41-43 and accompanying text.

¹⁶⁷ 374 U.S. 203 (1963).

¹⁶⁸ *Id.* at 225.

¹⁶⁹ See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 413 (1963) (Stewart, J., concurring in result) ("I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting) (noting that the freedom of religion "was first in the Bill of Rights because it was first in the forefathers' minds").

¹⁷⁰ J. MADISON, *Memorial and Remonstrance Against Religions Assessments*, in 2 THE WRITINGS OF JAMES MADISON 185 (G. Hunt ed. 1901).