NOTES

LEARNING LESSONS FROM *MULTANI*: CONSIDERING CANADA'S RESPONSE TO RELIGIOUS GARB ISSUES IN PUBLIC SCHOOLS

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I. INTRODUCTION: FRENCH OVERTONES AND WESTERN RESPONSES

In 2004, the French legislature passed a law prohibiting the wearing of most religious affiliated symbols, clothing, and garb in public schools.[1] Often called the "Headscarf Ban," the law, formulated through a special commission of politicians and scholars, is thought to be a direct attack on the growing French Muslim population.[2] Prohibited dress includes: headscarves (hijabs), turbans, skullcaps (yarmulkes), and large crosses; thus, Muslims, Sikhs, Jews, and Christians are affected.[3] French President Jacques Chirac characterized the law as necessary to maintain the religiously neutral nature of French schools and the tenet of secularism (laïcité), or strict separation of church and state.[4]

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[1] Law No. 2004-228 of March 15, 2004, Journal Officiel de la République Française [J.O.][Official Gazette of France], March 17, 2004, p. 5190; Derek H. Davis, *Reacting to France's Ban: Headscarves and Other Religious Attire in American Public Schools*, 46 J. CHURCH & STATE 221, 221 (2004); JUSTIN VAÏSSE, THE BROOKINGS INST., VEILED MEANING: THE FRENCH LAW BANNING RELIGIOUS SYMBOLS IN PUBLIC SCHOOLS 1 (2004), http://www.brookings.edu/fp/cusf/analysis/vaisse20040229.pdf. The law states that " '[in] public schools, the wearing of symbols or clothing by which students conspicuously [ostensiblement] manifest a religious appearance is forbidden.' " Elisa T. Beller, *The Headscarf Affair: The Conseil D'État on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 581 (2004). Davis's 2004 editorial highlighting the potential irony in America's reaction to the French headscarf ban through a consideration of U.S. free exercise jurisprudence has been instrumental in developing this Note.

[2] Timur Yuskaev & Matt Weiner, *Ban the Croissant!: Secular and Religious Rights*, INT'L HERALD TRIB., Dec. 19, 2003, *available at* http://www.iht.com/articles/2003/12/19/edtimur_ed3_.php; *see also* Davis, *supra* note 1, at 221 (stating "the unstated but clear aim of the law, if the French media is any guide, is to prohibit female Muslim students from wearing the hijab . . .").

[3] U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT OF THE UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM 53 (2004), *available at* http://www.uscirf.gov/countries/publications/currentreport/2004annualRpt.pdf; Stefanie Walterick, Comment, *The Prohibition of Muslim Headscarves from French Public Schools and Controversies Surrounding the Hijab in the Western World*, 20 TEMP. INT'L & COMP. L.J. 251, 251 (2006); Davis, *supra* note 1, at 221. *See also* Beller, *supra* note 1, at 582 (describing the composition of the commission charged with examining the issue of secularism).

[4] Press Release, U.S. Comm'n on Int'l Religious Freedom, France: Proposed Bill May Violate Freedom of Religion (Feb. 3, 2004), *available at* http://www.uscirf.gov/mediaroom/press/2004/february/02032004_france.html; Walterick, *supra* note 3, at 252; R. MURRAY THOMAS, RELIGION IN SCHOOLS: CONTROVERSIES AROUND THE WORLD 30–31 (2006) (stating that purpose of laïcité is to ensure citizen loyalty to the state and the principles of freedom and neutrality). *But see* VAÏSSE, *supra* note 1, at 2 (noting the principle of laïcité promotes religious neutrality rather than secularism). *See also* Madeleine Sinclair, Note, *Freedom of Religion in Canada and France: Implications for Citizenship and Judgment*, 15 DALHOUSIE J. LEGAL STUD. 39, 43 (2006) (Can.).

A majority of the French population favors the law but the reaction around the world is mixed.[5] The French headscarf controversy, or *l'affaire du foulard*, seemed to highlight headscarf bans in other countries including Singapore and Turkey.[6] On the other hand, the United States has been particularly critical of the law. In 2003, the *New York Times* reported on the Bush Administration's disapproval of the proposal in light of the principles of religious freedom.[7] The U.S. Commission on International Religious Freedom recommended the French government reassess the regulations in light of international human rights, chiefly, the specifications of the European Convention on Human Rights.[8]

While the United States' reaction has primarily taken the form of citizen protests and criticism from the government, Canada's judicial response "stands out as a strong statement in favour of minority religious freedom."[9] In light of *l'affaire du foulard*, the Supreme Court of Canada (S.C.C.) "sent a strong message that Canada's public education institutions must embrace diversity and develop an educational culture respectful of the right to freedom of

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[5] VAÏSSE, *supra* note 1, at 4–5 (noting 69% of the French population supported the law, particularly teachers and school officials'); Walterick, *supra* note 3, at 251 (discussing worldwide reaction to the law). *See* LAURA BARNETT, PARLIAMENTARY INFO. RESEARCH SERV., FREEDOM OF RELIGION AND RELIGIOUS SYMBOLS IN THE PUBLIC SPHERE 26 (2006) (Can.), *available at* http://www.parl.gc.ca/information/library/PRBpubs/prb0441-e.pdf.

[6] *Headscarves in the Headlines*, BBC NEWS, Feb. 10, 2004, http://news.bbc.co.uk/1/hi/world/europe/3476163.stm. *See also* BARNETT, *supra* note 5, at 25. Barnett reports that the *l'affaire du foulard* began in 1989, spurred on by three Muslim students who were suspended for wearing hijabs in violation of their French school's rule prohibiting overt expressions of religious beliefs. *Id.* at 28–33. Debates about the hijab have taken place in Austria, Spain, and Malaysia. Davis, *supra* note 1, at 222.

[7] Christopher Marquis, *U.S. Chides France on Effort to Bar Religious Garb in Schools*, N.Y. TIMES, Dec. 19, 2003, at A8; *see also* Claire Guimbert & Mary Ann Zehr, *Chirac Proposal on Religious Garb Stirs Debate*, EDUC. WK., Jan. 7, 2004, at 9 (observing a top Bush administrator's comments suggesting " '[a] fundamental principle of religious freedom that we work for in many countries of the world, including on this very issue of head scarves, is that all persons would be able to practice their religion and their beliefs peacefully, without government interference, as long as they are doing so without provocation and intimidation of others in society' "). *See also* Avi Schick, *French Dressing: Lessons for America from the Proposed French Ban on Religious Garb*, SLATE, Dec. 30, 2003, http://www.slate.com/id/2093315/ (showing discomfort with the U.S. government's critique of the French given the prevalence of religious-based employment discrimination in the United States).

[8] Press Release, U.S. Comm'n on Int'l Religious Freedom, *supra* note 4; ANNUAL REPORT, *supra* note 3, at 53–54.

[9] Gerald L. Gall, *Multiculturalism and the Charter*, CANADIAN JEWISH NEWS (Can.), Mar. 30, 2006, at 10; Delfin Vigil, *Worldwide Protests Over Ban on Religious Symbols French Proposal would apply to all its Public Schools*, S.F. CHRON., Jan. 18, 2004, at A22.

religion."[10] In *Multani v. Commission scolaire Marguerite-Bourgeoys*, the S.C.C. held that an orthodox Sikh student could wear a kirpan, a ceremonial dagger, to school given his strong religious beliefs.[11] The S.C.C. used *Multani* to restate the importance of freedom of religion even though a lower court addressed a similar issue in *Ontario Human Rights Commission v. Peel Board of Education*.[12]

The U.S. Supreme Court has not had such opportunity to address student religious garb issues directly.[13] *Cheema v. Thompson* is the only U.S. case directly involving *student* kirpan wearing.[14] *Cheema* was decided under the Religious Freedom Restoration Act of 1993 (RFRA), a law later partially struck down by the U.S. Supreme Court on federalism grounds in *City of Boerne v. Flores*.[15]

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[10] Terrance S. Carter & Anne-Marie Langan, *Supreme Court Gives Strong Endorsement to Freedom of Religion*, CHURCH LAW BULLETIN No. 17 (Carters Prof'l Corp., Orangeville, Ontario, Can.), Mar. 16, 2006, at 1, *available at* http://www.carters.ca/pub/bulletin/church/2006/chchlb17.pdf.

[11] Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 (Can.). Canada had its own headscarf controversy in 1994 when a Muslim student was sent home from her Montreal school for wearing a hijab in violation of the school's dress code prohibiting clothing or accessories that would marginalize a student. While no legal action was filed and the student enrolled in another school, the incident did create a great deal of discussion in Québec. One argument advanced in favor of banning the hijab arguably stemmed from the French headscarf controversy and the prohibition on the use of the public school as a forum for displaying religious beliefs. *See* Shauna Van Praagh, *The Education of Religious Children: Families, Communities and Constitutions*, 47 BUFF. L. REV. 1343, 1379 (1999); Paul Clarke, *Religion, Public Education and the Charter: Where Do We Go Now?*, 40 MCGILL J. EDUC. 351, 371 (2005) (Can.).

[12] Ontario Human Rights Comm. v. Peel Bd. of Educ., [1991] 80 D.L.R. (4th) 475, 476 (Can.).

[13] Davis, *supra* note 1, at 228 (noting that "there are no U.S. Supreme Court cases that deal with the headscarf issue").

[14] Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995).

[15] City of Boerne v. Flores, 521 U.S. 507 (1997). *See* Amarjeet S. Bhachu, Note, *A Shield for Swords*, 34 AM. CRIM. L. REV. 197, 209–10 (1996); Dipanwita Deb, Note, *Of Kirpans, Schools, and the Free Exercise Clause:* Cheema v. Thompson *Cuts Through RFRA's Inadequacies*, 23 HASTINGS CONST. L.Q. 877, 879 (1996); Douglas Laycock, *Religious Freedom and International Human Rights in the United States Today*, 12 EMORY INT'L L. REV. 951, 968 (1998); Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2213 (2005) (observing after *Flores*, "parents like Ms. Cheema could no longer bring a free exercise challenge coupled with a RFRA challenge against a school board"); *see also* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 117 (2005).

This Note will evaluate religious garb cases in light of *l'affaire du foulard*, focusing primarily on *Multani* and the Canadian treatment of religious garb issues. Consideration of *Multani* is needed given the minimal consideration of religious garb issues in the U.S. Supreme Court and federal courts. This silence may have led to many American commentators and scholars' attack on the United States for its own treatment of garb-related religious freedom issues in public schools.[16]

Part II of this Note will discuss the treatment of school kirpan wearing in Canada, focusing on the recent *Multani* decision. Part III of this Note will discuss the treatment of kirpan and religious garb in U.S. public schools through a consideration of *Cheema*. Part IV of this Note makes a case for why the United States should learn from *Multani*, considering the state of religious freedom issues in the school context. Part V provides an analysis of lessons to be learned from *Multani* by highlighting key aspects of the case and Canadian responses. Finally, Part VI addresses how the United States can use *Multani* to reiterate its commitment to religious accommodation.

II. TREATMENT OF KIRPANS IN CANADIAN SCHOOLS

The Canadian courts have addressed the issue of kirpan wearing in a number of lower court cases.[17] In 1985, the Alberta Court of Queen's Bench considered kirpans in school settings in *Tuli v. St. Albert Protestant Separate School District No. 6*.[18] There, the plaintiff sought an injunction against the school board's policy that would have suspended or expelled him for wearing his kirpan to school.[19] In a short decision, the court authorized the kirpan if blunted and held tightly within its sheath while on school property.[20] The court found that allowing the kirpan would "provide those who are unfamiliar with the tenet of his faith an opportunity to be introduced to and to develop an understanding of another's culture and heritage."[21]

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[16] Davis, *supra* note 1, at 222 (suggesting that "Americans, in thinking and talking about the new French law, usually are quick to point out the superiority of American law, assuming that the wearing of headscarves by Muslims in the nations' public schools is protected activity").

[17] *Hothi v. R.*, [1985] 3 W.W.R. 256 (Can.), represents a prominent case outside of the school context. In that case, the Manitoba Court of Queen's Bench upheld a provincial judge's decision to bar a Sikh defendant from wearing a kirpan in the courtroom during his trial. *See id.* ¶ 1.

[18] Tuli v. St. Albert Protestant Separate Sch. Dist. No. 6, [1985] 8 C.H.R.R. D/3906 (Can.).

[19] *Tuli*, [1985] 8 C.H.R.R. D/3906, ¶ 1; BARNETT, *supra* note 5, at 12.

[20] *Tuli*, [1985] 8 C.H.R.R. D/3906, ¶¶ 7–8; BARNETT, *supra* note 5, at 12.

[21] *Tuli*, [1985] 8 C.H.R.R. D/3906, ¶ 4.

The court in *Peel Board of Education* found a total ban on the wearing of kirpans problematic due to a lack of evidence suggesting kirpan wear in schools posed a danger.[22] The Peel Board of Education had adopted a no-weapons policy and considered the kirpan a dangerous weapon rather than a religious symbol.[23] The Board was unable to reach an acceptable compromise with affected members of the Sikh community such as wearing a replica or stitching the kirpan into its sheath to prevent its removal.[24] In its decision, the court considered that there were no reported incidents of school violence associated with kirpans.[25] Upon consideration of the Ontario Human Rights Code, 1981, the court rejected a prohibition on the wearing of kirpans in schools by students and teachers.[26] Students and teachers were permitted to wear kirpans only if they were "of reasonable size, worn under the wearer's clothing and not visible, and . . . sufficiently secured so that removal would be rendered difficult."[27] The Ontario Court of Appeal declined review.[28] The issue of kirpan in schools did not arise again in the courts until *Multani* reached the S.C.C. almost fifteen years later.[29]

In *Multani*, the S.C.C. unanimously agreed to set aside a court of appeal decision upholding a school board Council of Commissioners' prohibition on a student's kirpan wear.[30] The issue began in late 2001 when Gurbaj Singh

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[22] Ontario Human Rights Comm. v. Peel Bd. of Educ., [1991] 80 D.L.R. (4th) 475, at 479. *See also* Bhachu, *supra* note 15, at 221–22.

[23] *Peel Bd. of Educ.*, [1991] 80 D.L.R. (4th) 475, at 476.

[24] *Id.* at 476–77.

[25] At the time there had been incidents of violence associated with kirpans outside of the school setting including two stabbings. *Id.* at 477. *See also* HAMILTON, *supra* note 15, at 115 (citing a number of kirpan-related violent acts in Canada). One school related incident involved a Sikh youth putting his hand on the handle of his kirpan before running away without drawing it upon being assaulted on his walk home from school. *Peel Bd. of Educ.*, [1991] 80 D.L.R. (4th) 475, at 477. The court considered that Sikh students were permitted to wear kirpans in British Columbia and in other school districts. *Id.*

[26] *Peel Bd. of Educ.*, [1991] 80 D.L.R. (4th) 475, at 480.

[27] Further, the Board ordered that principals maintain the right to ensure compliance with conditions, modify the requirements, and impose reasonable temporary restrictions as needed. *Id.* at 478–79.

[28] William J. Smith, *Private Beliefs and Public Safety: The Supreme Court Strikes Down a Total Ban on the Kirpan in Schools as Unreasonable*, 16 EDUC. & L.J. 83, 83 (2006) (Can.).

[29] *Id.*

[30] Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 (Can.); *Canada Allows Sikh Students to Carry Daggers*, CHURCH & STATE, Apr. 1, 2006, at 21, *available at* http://www.av.org/site/News2?page=NewsArticle&id8087&abbr=cs.

Multani's kirpan fell from his clothing when playing on a playground at École Sainte-Catherine-Labouré, a French language school in Montreal.[31]

Gurbaj and his father, Balvir Singh Multani, who brought the lawsuit, are orthodox Khalsa Sikhs.[32] Sikhism, defined as " 'the fatherhood of God and the brotherhood of man,' " is a monotheistic religion founded in India 500 years ago with nearly 23 million followers worldwide.[33] Baptized Sikhs, like the Multanis, believe in five symbols of faith (the Five K's) including a comb (kangha), a pair of britches (kachha), a bracelet (karha), a head turban to cover uncut hair (keski), and a sword (kirpan).[34] Sikhs view the kirpan as a religious symbol to be worn at all times rather than a weapon.[35]

After the school's principal forbade Gurbaj from wearing the kirpan, the Commission scolaire Marguerite-Bourgeoys's (school board) legal counsel sent the Multanis a December 2001 letter authorizing Gurbaj to wear his kirpan provided it was sealed in a sheath inside of his clothing.[36] The Multani family agreed to the conditions set forth in the counsel's letter.[37] In February 2002, the school's governing board overruled the December resolution, finding that wearing a kirpan on school property would violate the school code of conduct's prohibition on weapons.[38] After the February decision, which instructed students to wear symbolic pendants or plastic kirpans instead, Gurbaj's father sought a judgment declaring Gurbaj's right to wear his kirpan in school if properly sealed in his clothing.[39] Québec's Attorney General

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[31] Stuart Laidlaw, *Accommodating Religions Challenges Secular Society; Supreme Court Shows Leadership with Recent Ruling Urges Schools to Teach About Their Students' Religions*, TORONTO STAR (Can.), Mar. 11, 2006, at L09; William J. Smith, *Balancing Security and Human Rights: Quebec Schools Between Past and Future*, 14 EDUC. & L.J. 99, 111 (2004) (Can.); *Timeline: The Québec Kirpan Case*, CBC NEWS, Mar. 2, 2006 (Can.), *available at* http://www.cbc.ca/news/background/kirpan/; BARRY W. BUSSEY, CHRISTIAN LEGAL FELLOWSHIP, ANALYSIS OF SCC KIRPAN DECISION: MULTANI V. COMMISSION SCOLAIRE MARGUERITE-BOURGEOYS 2006 SCC 6, at 1 (2006), http://www.christianlegal fellowship.org/Articles/SCC%20Case.pdf.

[32] Smith, *supra* note 31, at 111; *Multani*, [2006] 1 S.C.R. 256, ¶ 2.

[33] W.H. MCLEOD, WHO IS A SIKH?: THE PROBLEM OF SIKH IDENTITY 1 (2d ed. 2002); Brief of Appellants at 1, Cheema v. Thompson, 36 F.3d 1102 (9th Cir. 1994) (No. 94-16097), 1994 WL 16123892; GURINDER SINGH MANN, SIKHISM 14 (2004). The 2001 Census data reflects that 0.9% of the Canadian population is Sikh. Clarke, *supra* note 11, at 362. About 1 million Sikhs reside in Canada and nearly 500,000 in the United States. Brief of Appellants, *supra*, at 6.

[34] MANN, *supra* note 33, at 61–62; MCLEOD, *supra* note 33, at 32.

[35] *Timeline: The Quebec Kirpan Case*, *supra* note 31.

[36] *Multani*, [2006] 1 S.C.R. 256, ¶ 3; BUSSEY, *supra* note 31, at 1.

[37] BUSSEY, *supra* note 31, at 1.

[38] *Multani*, [2006] 1 S.C.R. 256, ¶ 4; Smith, *supra* note 31, at 111–12.

[39] BUSSEY, *supra* note 31, at 1–2; *Timeline: The Quebec Kirpan Case*, *supra* note 31.

intervened, issuing a statement emphasizing a zero-tolerance policy for "knives" in school, including kirpans.[40]

The superior court authorized the student to wear his kirpan to school if he complied with a number of conditions.[41] The Québec Court of Appeal dismissed the motion for a declaratory judgment in March 2004.[42] Multani appealed that court's decision to the Supreme Court of Canada.[43]

The Supreme Court of Canada addressed two key issues relevant to this Note: first, whether the school board's decision to prohibit Gurbaj from wearing his kirpan at school constituted an infringement of the student's rights under the Québec Charter or the Canadian Charter of Rights and Freedoms; and second, whether such an infringement was justifiable under an exception in the Québec Charter.[44] The court held that the school board's decision

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[40] Smith, *supra* note 28, at 93. Smith's analysis suggests the Attorney General's comments might have stemmed from broader public safety concerns such as 9/11 and terrorism. Smith, *supra* note 31, at 126–27.

[41] The conditions would require a student to wear his kirpan under his clothing at all times and to carry it in a wooden, rather than metal sheath. The sheathed kirpan was to be wrapped in a cloth envelope and sewn into the student's undergarments. School officials would be authorized to reasonably ensure that conditions were followed and the disappearance of the kirpan was to be immediately reported to school officials. If the specifications were not followed, the student would lose the right to wear the kirpan in school. *See Multani*, [2006] 1 S.C.R. ¶ 8; Carter & Langan, *supra* note 10, at 2. The factum (brief) submitted by the Canadian Human Commission as an intervener listed a few other restrictions as accommodations, provided they complied with the Sikh religion, including using an alarm or similar device to detect if the kirpan was removed from its scabbard and organizing information sessions to promote student awareness about the kirpan and student safety measures. Factum of Intervener Canadian Human Rights Commission at 16, *Multani*, [2006] 1 S.C.R. 256 (No. 30322), *available at* http://www.chrc-ccdp.ca/pdf/FactumMultani_en.pdf.

[42] *Multani*, [2006] 1 S.C.R. 256, ¶ 12; Multani v. Commission Scolaire Marguerite-Bourgeoys, [2004] 241 D.L.R. (4th) 336 ¶¶ 72 & 100 (Can.) (recognizing that even fundamental freedoms are not absolutely protected and recognizing a safety threat imposed by the presence of kirpans in schools).

[43] *Multani*, [2006] 1 S.C.R. 256, ¶ 7.

[44] *Id.* ¶ 13; Smith, *supra* note 31, at 115. An additional issue involved determining the proper standard of review for reviewing the school board's decision in an administrative context. *See* Smith, *supra* note 28, at 93–94. The majority of the court agreed to apply the stringent standard of review used in constitutional law cases, but two minority opinions argued for an administrative law standard. *See* Smith, *supra* note 28, at 95–96. The Charter of Rights and Freedoms forms Part I of the Constitution Act, 1982. *See* BARNETT, *supra* note 5, at 5 & n.13. Canada's Constitution is comprised of a number of sources, including portions of Great Britain's common law. *See* Pauline Côté & T. Jeremy Gunn, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Canada*, 19 EMORY INT'L L. REV. 685, 691 (2005). Canada did not have a document expressly guaranteeing fundamental rights until 1982. *Id.* at 694–95.

constituted an infringement on the student's freedom of religion under § 2(a) of the Charter.[45] While the court acknowledged internal limits in § 2(a) which could thwart a person's freedom to practice religious beliefs on the basis of public safety, the court declined to find such limitations applicable in Gurbaj's case.[46]

Additionally, the S.C.C., like the Court of Appeal, considered the validity of the school's interest in banning kirpans in the interest of school safety under the test established in *R. v. Oakes*.[47] However, the S.C.C. came to a different conclusion, focusing more on accommodation and finding a lack of evidence to support a total ban on kirpan wearing.[48]

In reaching its conclusion, the court noted "a total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others."[49] The court noted that while valid safety concerns were raised, banning all potential weapons in schools was not feasible because pencils and baseball bats might serve as weapons as well.[50] While the Court of Appeal made little mention of *Peel Board of Education*, the S.C.C. found the decision persuasive and distinguished the school context from that of courtrooms and airplanes where kirpans have been banned.[51] The court considered that schools are places for engagement in the "enterprise of

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[45] *Multani*, [2006] 1 S.C.R. 256, ¶ 33; BUSSEY, *supra* note 31, at 2. A more in-depth treatment of § 2(a) follows.

[46] Smith, *supra* note 28, at 96–97; *Multani*, [2006] 1 S.C.R. 256, ¶ 26.

[47] Smith, *supra* note 28, at 100–01. In *R. v. Oakes*, the S.C.C. set out the criteria used to evaluate restrictions on rights under the Charter. [1986] 1 S.C.R. 103 (Can.). To qualify as a constitutional infringement of a Charter right, the government imposition must stem from an important objective, be rationally connected to an important objective, minimize impairment on an individual's rights, and embody proportionality between the objective sought and the imposition on the individual. *Id.*; Luan-Vu N. Tran, *The Canadian Charter of Rights and Freedoms: Justification, Methods, and Limits of a Multicultural Interpretation*, 28 COLUM. HUM. RTS. L. REV. 33, 58–59 (1996).

[48] Smith, *supra* note 28, at 104. The minority opinion expresses concern with applying accommodation doctrines to public concerns. *See id.* at 102. Because the court found a total ban unreasonable, it did not have to consider the proportionality prong of the *Oakes* test. *Id.* at 105.

[49] *Multani*, [2006] 1 S.C.R. 256, ¶ 79.

[50] *Id.* ¶ 58; Bryce Chandler, *Freedom of Religion: The Supreme Court and the Kirpan*, EDUC. CAN., Summer 2006, at 33.

[51] Smith, *supra* note 28, at 104. Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. TORONTO FAC. L. REV. 1, 34–35 (1996) (Can.). Interestingly, individuals involved in the *Multani* case were allowed to wear their kirpans before the Supreme Court during hearings. BARNETT, *supra* note 5, at 13.

education in which both teachers and students are partners."[52] Finally, the court also noted that it was not wholly relevant to the analysis that other Sikhs might agree to wear a plastic or wooden kirpan if Gurbaj maintained a sincere personal belief regarding his own need to wear a kirpan.[53] In sum, the decision highlights the importance of promoting the values of multiculturalism, diversity, and respect for others.[54]

Like the United States, Canada widely recognizes the importance of freedom of religion, thus, the 1982 Canadian Charter of Rights and Freedoms remains a core document protecting individual liberties and expression.[55] The Charter serves to ensure human dignity without imposing a standardized national ideology.[56] Thus, under § 1, freedoms and rights articulated in the Charter are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[57] A number of provisions are relevant when considering religious freedoms generally. Firstly, § 2 of the Charter characterizes freedom of conscience and religion as a fundamental freedom held by "[e]veryone."[58] Secondly, § 15

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[52] Smith, *supra* note 28, at 104.

[53] BUSSEY, *supra* note 31, at 3. *See also* Avigail Eisenberg, *Reasoning about Identity: Canada's Distinctive Culture Test*, *in* DIVERSITY AND EQUALITY: THE CHANGING FRAMEWORK OF FREEDOM IN CANADA 34, 45 (Avigail Eisenberg ed., 2006) (noting that courts often hear evidence about how religious practices can be modified); *Multani*, (2006) 1 S.C.R. 256, ¶ 39 (recognizing lower court's acknowledgment that people with the same religion can vary in their adherence to religious practices).

[54] *Multani*, [2006] 1 S.C.R. 256, ¶ 78.

[55] *See* Bhachu, *supra* note 15, at 218; *see also* Mark Noll, *Continental Divides: North American Civil War and Religion as at Least Three Stories*, *in* RELIGION AND PUBLIC LIFE IN CANADA: HISTORICAL AND COMPARATIVE PERSPECTIVES 153, 153 (Marguerite Van Die ed., 2001) (noticing the Charter begins with an invocation of the supremacy of God in direct contrast to the U.S. Constitution of 1789 which makes little mention of religion); Horwitz, *supra* note 51, at 3 (acknowledging that the preamble to the Canadian Charter serves as a reminder that "a citizen may have two sources of obligation"); *see also* Tran, *supra* note 47, at 35 (calling the Charter a "promising document capable of mediating opposing values and interests"). *See also* Christopher L. Eisgruber & Mariah Zeisberg, *Religious Freedom in Canada and the United States*, 4 INT'L J. CONST. L. 244, 266 (2006).

[56] Tran, *supra* note 47, at 50, 54.

[57] Canadian Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), § 1. Thus, § 1 is commonly called the "Limitation Clause" because a right granted by the Charter cannot be absolute since personal rights are often in conflict with one another. *See* Tran, *supra* note 47, at 57. By contrast, the U.S. Free Exercise Clause is expressed in absolute terms. *See* Eisgruber & Zeisberg, *supra* note 55, at 260.

[58] Canadian Charter of Rights and Freedoms § 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). Tran notes a distinction between conceptions

requires that every individual be treated equally by and under the law "without discrimination based on race, national or ethnic origin, colour, [or] religion . . . ."[59] Finally, § 27 calls for an interpretation of the Charter in a manner that preserves and enhances the "multicultural heritage of Canadians."[60]

According to one scholar, religious freedom in Canada is comprised of the interrelated concepts of liberalism, secularism, and religious conscience.[61] The courts are left to protect individual rights and civic values by striking the balance between these concepts.[62] Canadian courts' treatment of religious freedom cases often begins with *R. v. Big M Drug Mart*.[63] *Big M Drug Mart* acknowledges that "in certain contexts minority communities suffer

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of "fundamental rights" in the U.S. Constitution and the Charter. For instance, § 2 of the Charter refers only to the expressly granted freedoms of religion, expression, press, and association, whereas the United States conception of fundamental freedoms is based on a larger collection of rights having either an express or implied basis in the U.S. Constitution. Tran, *supra* note 47, at 42–43. On the other hand, in France, freedom of religion is not fundamental, but rather, rejection of religious belief is seen as fundamental. Scholars theorize that France's recent acceptance of the weight of religious obligations may explain the country's difficulty in accepting religious difference. *See* Alain Garay, Blandine Chelini-Pont, Emmanuel Tawil & Zarah Anseur, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France*, 19 EMORY INT'L L. REV. 785, 819 (2005).

[59] Canadian Charter of Rights and Freedoms § 15(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

[60] *Id.* § 27; *see* Tran, *supra* note 47, at 56 & n.56 (listing brief sources interpreting § 27).

[61] Benjamin Berger, *The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State*, 17 CAN. J.L. & SOC'Y 39, 40 (2002) (Can). Berger refers to liberalism as a conceptualization of reason and individualism. *Id.* at 42. Religious conscience concerns an individual's "disposition towards life animated by religious conviction." *Id.* at 46. Secularism involves the use of a societal tool "to confine the influence of religion on state power." *Id.* at 49. Berger notes the concept of secularism must be viewed in light of Canada's increasingly pluralist state as evidenced by multiculturalism polices. *Id.* at 50.

[62] *Id.* at 53.

[63] R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (Can.); David M. Brown, *Where Can I Pray? Sacred Space in a Secular Land*, 17 NAT'L J. CONST. L. 121, 124 (2005) (Can.). *Big M Drug Mart* involved a challenge to the constitutionality of the Lord's Day Act which prohibited work and commercial activity on Sunday. *Big M Drug Mart*, [1985] 1 S.C.R. 295, ¶¶ 1–5. *Big M Drug Mart* defined freedom of religion as "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that." *Id.* ¶ 94; *see* Brown, *supra*, at 124. Other principal S.C.C. religious freedom cases under the Charter include *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551 (Can.), *R. v. Jones*, [1986] 2 S.C.R. 284 (Can.), and *R. v. Videoflicks Ltd.* [1986] 2 S.C.R. 713 (Can.). For a brief overview of *Syndicat* and *Jones* see Sinclair, *supra* note 4, at 60–62.

considerable disadvantages, even threats to their existence, if they are treated as identical to the majority group."[64]

Some Canadians have applied the *Big M Drug Mart* message to their consideration of the kirpan issue: "We must guard against becoming a society that cringes at kippas, turbans, and kirpans. Community leaders . . . must speak forcefully for core values of democracy, freedom of speech, civic responsibility, respect for others. Our schools must reinforce that message."[65] However, not all Canadians agree with *Multani* or its implications.[66] A 2006 comment in the *Globe and Mail* argued that the decision to allow students to bring kirpans to school seemed illogical "in a country where little old ladies cannot board an airplane with a small pair of manicure scissors."[67] A commentary on *Multani* reported that 87% of 3,734 respondents to a *La Presse* newspaper survey were opposed to the case.[68] The Québec government, which saw the original action, provided a guarded response reaffirming the school board's power to take reasonable security measures while respecting students' religious freedom.[69] However, in summary, scholars suggest *Multani* shows the S.C.C.'s willingness to view religion outside of typical societal concepts and to accommodate religious groups.[70]

Canadian school districts have faced other accommodation issues post-*Multani* and have made further exceptions for religious students. For example,

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[64] Tran, *supra* note 47, at 62.

[65] *Canada's Mosaic Serves Nation Well*, TORONTO STAR (Can.), June 10, 2006, at F06.

[66] *See* Carter & Langan, *supra* note 10, at 10 (documenting that despite the court's recognition of minority religious rights, the public reaction ranged from support to strong opposition); BARNETT, *supra* note 5, at 11 (noting that despite some resistance from Québeckers, the Multani decision reflects "the reality of compromise with respect to kirpans that already exists in school boards across Canada"); Letter to the Editor, *Theft in Schools Makes Sikh Kirpans a Danger*, TORONTO STAR (Can.), Mar. 5, 2006, at A16 (voicing Toronto resident's hope that schools will take special precautions to protect against kirpan theft).

[67] Lysiane Gagnon, Editorial, *The Kirpan Decision Isn't Welcome in Quebec*, GLOBE & MAIL, Mar. 13, 2006, at A15. *But see* Letter from Robert W. Ward, Secretary General, Canadian Human Rights Commission to the Editor of the Globe & Mail (Mar. 24, 2006), *available at* http://www.chrc-ccdp.ca/media_room/letter_editor_lettre/kirpan-en.asp (critiquing the column, noting the importance of accommodation, and recognizing the unique nature of the school context).

[68] Smith, *supra* note 28, at 84. Smith includes a number of citizen comments to "illustrate the high level of feeling that this ruling has generated in Québec" and the wide range of reasons behind the opposition. *Id.* at 84–85.

[69] *Id.* at 84.

[70] BUSSEY, *supra* note 31, at 5 (noting the court wisely declined to limit the conception of religious freedom to anything less than what was articulated in *Big M Drug Mart*, thereby preserving the recognition of religious freedoms pursuant to the Charter).

in May 2006, the Commission Scolaire Marie-Victorin closed a high school pool for a private swimming class for three Muslim students.[71] Such measures line up with general tenets of Canadian law allowing students to opt-out of patriotic ceremonies that violate their religious beliefs.[72]

Unlike education systems in the United States, Canadian schools are often closely tied to religion, particularly to Roman Catholicism and Protestant denominations.[73] Without an explicit "anti-establishment principle," religious education in Canada is often publicly funded.[74] In this respect, U.S. policy on strictly separating the institutions of church and state appear at first glance to have more in common with the French concept of laïcité.[75] However, both Canada and the United States are considered immigrant countries and thus, claim to be neutral and accommodating of religious freedom and expression rather than adopting a more secular approach.[76]

III. TREATMENT OF KIRPANS IN AMERICAN SCHOOLS

The U.S. Court of Appeals for the Ninth Circuit addressed kirpans in schools in *Cheema v. Thompson*.[77] The case is viewed as a victory for Sikh

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[71] The students asked to be excused from regular swimming class because their religion prohibited them from sharing a pool with men. *See* Sean Gordon, *Muslim Girls Allowed Private Swim Test; Religion Makes Ripples in Pool, Montreal-Area School Focus For Debate*, TORONTO STAR (Can.), May 11, 2006, at A06.

[72] Ingvill Thorson Plesner, *Legal Limitations to Freedom of Religion or Belief in School Education*, 19 EMORY INT'L L. REV. 557, 578 (2005).

[73] Smith, *supra* note 28, at 86. For an interesting argument for the termination of all public funding for religious schools see Ailsa Watkinson, *To Whom Do We Entrust Public Education?*, 14 EDUC. & L.J. 191 (2004) (Can.).

[74] Praagh, *supra* note 11, at 1362–63. For example, Roman Catholic schools in Ontario receive public funds as a means of supporting the minority religious group within the province. *Id.* at 1363–64. *See also* Richard Moon, *Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms*, 41 BRANDEIS L.J. 563, 563 (2003) (arguing § 2(a) protects individuals from state coercion but does not preclude state endorsement of religion).

[75] Eisgruber & Zeisberg, *supra* note 55, at 244. *See also* BARNETT, *supra* note 5, at 1 (noting France, unlike Canada and the United States, relies on the policy of laïcité to relegate "overt forms of religious expression to the private sphere").

[76] Praagh, *supra* note 11, at 1351–52; BARNETT, *supra* note 5, at 1.

[77] Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995). Other U.S. cases considering kirpan wear in non-school settings include *New York v. Singh*, 516 N.Y.S.2d 412 (N.Y. Civ. Ct. 1987) and *Ohio v. Singh*, 690 N.E.2d 917 (Ohio Ct. App. 1996). In the latter case, the defendant, a veterinarian, was charged with carrying a concealed weapon in an Ohio courtroom. The Ohio Court of Appeals reversed the trial court's conviction and discharged Singh after finding no

families, a demonstration of the power of religious symbols, and an illustration of the potential for compromises between families and school districts.[78] In *Cheema*, the Livingston Union School District appealed a district court order requiring it to accommodate three Khalsa Sikhs who sought to wear their kirpans to a California school.[79] The action was brought under the Religious Freedom Restoration Act of 1993 (RFRA), which states that a federal, state, or local government was prohibited from interfering "with the 'free exercise' of religion" absent proof of a " 'compelling governmental interest' " of the " 'least restrictive' " nature.[80] The students were found to be in violation of the school district's "no weapons" policy and a California penal law prohibiting the carrying knives in public places.[81] Even after the American Civil Liberties Union (ACLU) became involved, the school board and superintendent refused to reconsider their position suggesting that the Cheema children wear a necklace replica as an alternative.[82] An action seeking an injunction against enforcement of the ban was subsequently filed in the district court in early 1994.[83] The district court initially denied the injunction, but that decision was overturned on appeal.[84] On remand the district court found that the ban violated RFRA and granted the injunction.[85] The Court of Appeals for the Ninth Circuit upheld the district court's finding that the children presented sufficient evidence of hardship.[86] Further, the court found no abuse of

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evidence suggesting the kirpan was possessed as a weapon. Ohio v. Singh, 690 N.E.2d at 920–21. For a brief overview of the treatment of kirpans in other countries including India, Canada, and the United Kingdom see Bhachu, *supra* note 15, at 212–22 (observing that the United States can learn from other countries that a complete prohibition on kirpan wearing is not necessary to promote public safety and order).

[78] Alison Dundes Renteln, *Visual Religious Symbols and the Law*, 47 AM. BEHAVIORAL SCIENTIST 1573, 1576 (2004).

[79] *Cheema*, 67 F.3d at 884–85; Renteln, *supra* note 78, at 1576–77. The Cheema children were baptized during the December school recess, returned to school wearing the Five K's, and were suspended shortly thereafter. Brief of Appellants, *supra* note 33, at 2. Prior to their baptism, the Cheema children took a training course which included advisement on the proper treatment of the kirpan. *Id.* at 6–7.

[80] Brief of Appellants, *supra* note 33, at 2.

[81] Renteln, *supra* note 78, at 1577.

[82] Brief of Appellants, *supra* note 33, at 7–8.

[83] *Id.* at 9. The plaintiffs' evidence incorporated commentary on kirpans in Canadian schools, including two court decisions from the Ontario and Alberta provinces and a 1990 report submitted to the Calgary Board of Education finding no record of violence stemming from kirpan wearing in schools. *Id.* at 10–11.

[84] *See* Cheema v. Thompson, 36 F.3d 1102 (9th Cir. 1994).

[85] *Cheema*, 64 F.3d at 885.

[86] *Id.* at 885–86 (noting that under the RFRA, students had to show wearing a kirpan was

discretion in the district court's creation of the terms of the injunction after the parties failed to agree on a compromise themselves.[87] The injunction's conditions specified ideal limitations on the kirpan's length and required that it be "sewn tightly to its sheath."[88] Further, the district court required that the school district "take all reasonable steps to prevent any harassment, intimidation or provocation of the Cheema children by any employee or student in the District."[89] Judge Cynthia Holcomb was clear to note the majority was not rubber-stamping the injunction, but rather affirming the district court's discretion to orchestrate the injunction's terms.[90]

A stirring dissent by Circuit Judge Charles Wiggins highlights the other side of the story, citing the importance of the school's compelling interest in preserving a safe school environment.[91] Wiggins argued that the restrictions imposed to address the school's legitimate safety concerns were insufficient, particularly in view of testimony suggesting the Sikh students might use the kirpans as weapons.[92]

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a "sincere religious belief and that the school district's refusal to accommodate that belief put a substantial burden on their exercise of religion").

[87] *Id.* at 886. The Cheemas and the school district disagreed on the acceptable kirpan length and the mechanism for fastening the kirpans to the students' sheaths. For example, the district requested that kirpans be riveted to their sheaths, but the Cheemas only agreed to sewing the kirpans to the sheaths. *Id.* at 888 (Wiggins, J., dissenting).

[88] Conditions required the kirpan's blade be dulled, no more than 3.5 inches in length, and the kirpan be no more than 7.5 inches including the sheath. The kirpan was to be worn on a cloth strap under the student's clothing. Designated officials would be permitted to make reasonable inspections to ensure compliance. Violations of conditions could lead to a loss of privileges. *See id.* at 886.

[89] *Id.* at 886.

[90] *Id.*

[91] *Id.* at 886–87 (Wiggins, J., dissenting). Wiggins' dissent also notes that Sikhs are not permitted to wear their kirpans in other environments including courtrooms and schools. *See also* HAMILTON, *supra* note 15, at 116 (calling Wiggins' dissent "a far more rational analysis" that considers the rights of non-Sikhs). Hamilton suggests ways Sikh families can maintain their religious beliefs without posing a threat to school safety, such as sending children to religious or home schools. *Id.* at 118. For a response to Hamilton's consideration of kirpans see Marc O. DeGirolami, *Recoiling from Religion*, 43 SAN DIEGO L. REV. 619, 640 (2006).

[92] *Cheema*, 67 F.3d at 889 (Wiggins, J., dissenting); Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531, 559 (1999). Berg reasons that few U.S. districts would go further than the *Cheema* court in accommodating kirpan wear in public schools.

IV. LEARNING FROM *MULTANI*

In light of the increasing diversity of religions, continued growth of minority religions, and expanding school programs such as uniform policies, *Multani* continues to be an important decision.[93] At issue are the competing interests of school districts in training students and of parents in directing the upbringing of their children.[94] If schools' interests prevail, religious students will have to violate their religious principles or forgo a free public school education.[95]

While some U.S. school districts such as the Davis School District in Farmington, Utah, have addressed religious garb issues in their dress codes, it seems unlikely that specific treatment will be given to kirpans.[96] By contrast, at least one Canadian school district has specific dress code policies to address Sikh students wearing kirpans.[97] For example, the Delta School District of British Columbia outlined and approved a policy for the wearing of kirpans as early as 1987, noting that the kirpan was not to be considered an offensive weapon if concealed and worn as a means of religious expression.[98] However,

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[93] *See* Lechliter, *supra* note 15, at 2210 (noting that cases like *Cheema* may become more common because of changing school programs even though the volatility of Free Exercise case law makes developing judicial standards difficult).

[94] Berg, *supra* note 92, at 534.

[95] *Id.*; *see also* Multani v. Commission Scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, ¶ 40 (Can.) (finding that Gurbaj had been deprived of the right to attend a public school because he chose to follow his religious convictions).

[96] The Davis School District Policy required schools to appropriate dress code exemptions and reasonable accommodations for clothing, hairstyles, headwear, and other apparel serving as sincere expressions of personal religious beliefs. Further, the policy outlined examples of religious garb or attire warranting accommodations including but not limited to: hairstyles, yarmulkes, head scarves or turbans, crucifixes, Stars of David, or *items of ceremonial dress*. FARMINGTON, UTAH, DAVIS SCHOOL DISTRICT BOARD POL'Y: 11IR-107 RELIGION AND EDUCATION 4.1–4.3 (2000), *available at* http://www.davis.k12.ut.us/policy/manual/webdoc11.htm (emphasis added). More generally, the Salt Lake City (Utah) School District School Board policies recognize that accommodations must be made for "students whose religious beliefs are substantially affected by a dress code requirement" but do not specifically outline how accommodations should be made. SALT LAKE CITY, UTAH, SALT LAKE CITY SCHOOL DISTRICT SCHOOL BOARD POLICIES & PROCEDURES, JFCA-R, DRESS CODE R. 4.02.06.05 (2002), *available at* http://www.slc.k12.ut.us/board/policies/students/JFCA-R.pdf.

[97] BRITISH COLUMBIA, CANADA, DELTA SCHOOL DISTRICT PROCEDURE #1131.2 CONDUCT: WEARING OF KIRPAN BY MEMBERS OF SIKH RELIGION (Can.) (1992), *available at* http://web.deltasd.bc.ca/i/pdf/PP1100/Procedure11312.pdf.

[98] *Id.* In addressing safety concerns, the procedure warns against students wearing kirpans or karpas (steel bracelets) as part of Physical Education classes or other activities involving large numbers of students. Further, parents of students wearing such items are to be advised that the

not all Canadian school districts are rushing to comply with *Multani* by amending dress codes. The no-weapons policy of another British Columbia school district still appears to bar kirpans.[99]

The treatment of a potential school kirpan case in the United States will involve consideration of a number of key Supreme Court cases, including *Employment Division v. Smith*, which represented the Court's move to a narrower conception of the Free Exercise Clause.[100] It is also important to consider two school law cases, *Tinker v. Des Moines* and *Wisconsin v. Yoder*.[101] In *Smith*, the U.S. Supreme Court concluded that the Free Exercise Clause did not inhibit Oregon's ability to deny unemployment benefits to religious peyote-users dismissed from jobs.[102] In response to *Smith*, Congress passed RFRA.[103] However, the Supreme Court determined that RFRA was an unconstitutional "intrusion at every level of government" in *City of Boerne v. Flores*.[104] Thus, *Smith* still stands as a bar to an individual's ability to gain exemptions from generally applicable state laws.[105]

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students may be excused from the Physical Education programs if a potential safety hazard endangers the student wearer or others.

[99] Mikelle Saskamoose, *School District 17 (Kamloops) Bans Kirpans*, CLEARWATER TIMES (Can.), Mar. 13, 2006, *available at* http://www.bcsikhyouth.com/2006/school-district-17-kamloops-bans-kirpans/. The chairman of the school district said the board would consider accommodations if requested. *Id.*

[100] Davis, *supra* note 1, at 224; Employment Div. v. Smith, 494 U.S. 872 (1990).

[101] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[102] *Smith*, 494 U.S. at 874, 890. In *Smith*, the Court rejected an application of the test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), which involved determining whether the state action was a substantial burden on a religious exercise and then determining whether such an imposition was justified by a compelling governmental interest. *See* City of Boerne v. Flores, 521 U.S. 507, 513 (1997). Thus, in *Smith*, the Court held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." 494 U.S. at 879; *Flores*, 521 U.S. at 514.

[103] *Flores*, 521 U.S. at 512.

[104] *Id.* at 532. *Flores* involved the denial of a church's building permit under the federal RFRA. In response to *Flores*, a number of states have enacted RFRAs. *See* Berg, *supra* note 92, at 532; Charles Haynes, *Dress Codes vs. Religious Practice: What Kind of Nation Are We?*, FIRST AMENDMENT CENTER, Oct. 19, 2003, http://www.firstamendmentcenter.org//commentary.aspx?id=12080&SearchString=dress_code_vs._religious_practice.

[105] Rachael Toker, *Tying the Hands of Congress:* City of Boerne v. Flores, 33 HARV. C.R.-C.L. L. REV. 273, 273 (1998). For dialogue on RFRA as an unlawful extension of Congress's § 5 power under the Fourteenth Amendment see Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903 (2001).

Both *Tinker* and *Yoder* offer potential arguments for students and families seeking the right to wear religious garb in schools. In *Tinker*, the petitioner students and parents sought injunctive relief after the students were suspended from public schools for wearing black armbands in protest of the Vietnam War.[106] In protecting the students' speech, the Court considered whether wearing the armbands would constitute a substantial and material interference with the operation of the school or an impingement on the rights of other students.[107] The court noted that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[108] In *Yoder*, the Supreme Court recognized the right of Amish parents to remove their children from compulsory schooling, giving strong consideration to the unique nature of Amish life.[109] However, it is unclear how far *Yoder* should apply outside of the context of the Amish community.[110]

Chalifoux v. New Caney Independent School District offers a more recent treatment of free exercise and religious expression issues.[111] There, the plaintiffs alleged that the school district violated their First Amendment rights to religious expression and freedom of speech through a district-wide ban on " 'gang related apparel.' "[112] Shortly after the plaintiffs began wearing plastic rosaries to school as a form of religious expression, the school identified rosaries as gang apparel.[113] The court dismissed the school district's argument that wearing the rosary was not protected by the First Amendment since it was not a requirement of Catholic religious practice.[114] The court considered the

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[106] *Tinker*, 393 U.S. at 504.

[107] *Id.* at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[108] *Id.* at 506. Like *Yoder*, the issue of kirpan wearing would probably involve a "hybrid right of speech and religion under *Smith*." Berg, *supra* note 92, at 557. In *Smith*, the Court recognized that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections. . . ." *Smith*, 494 U.S. at 881.

[109] Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 30 (2005); Wisconsin v. Yoder, 406 U.S. 205, 216–17 (1972).

[110] Gey, *supra* note 109, at 43–44.

[111] Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997).

[112] *Id.* at 663.

[113] *Id.* at 663–64.

[114] *Id.* at 670.

claim as a hybrid under *Smith* and applied a heightened level of scrutiny to conclude prohibiting rosaries violated the plaintiffs' First Amendment rights.[115]

A number of other religious garb issues have arisen in recent years but have not been fully litigated due to compromise. For example, a family practicing Rastafarianism reached an agreement with a Louisiana school district which allowed the students to enroll in the public schools after being turned away because of the district's dress code which banned headgear and "extreme hairstyles."[116] The students' long dreadlocked hair and head coverings were deemed a violation of the policy.[117] In 2000, American Civil Liberties Union (ACLU) attorneys asked a federal court to review the school district's policies.[118] A number of other incidents involving the wearing of a cross, Star of David, and pentacle, have arisen in U.S. school districts.[119]

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[115] The court applied *Yoder* to conclude the school district's restriction on rosaries "does not 'bear more than a reasonable relation' to regulating gang activity in the District." *Id.* at 671.

[116] Aarika Mack, *Louisiana School District Relents, Allows Rastafarian Students' Dreadlocks, Caps*, FREEDOM FORUM ONLINE, Sept. 25, 2000, http://www.freedomforum.org/templates/document.asp?documentID=3630.

[117] *Id.*

[118] *Id.*

[119] In 1999, the American Center for Law and Justice sued an Alabama school district after a student faced suspension for violating the dress code by failing to wear her cross necklace underneath her shirt. Jeremy Leaming, *Alabama Student Allowed to Wear Cross in View for Now*, FIRST AMENDMENT CENTER, Feb. 2, 2000, http://www.freedomforum.org/templates/document.asp?documentID=8847. A settlement was reached but the district's attorney maintains that no precedent exists to govern conflicts between dress codes and student religious freedoms. Jeremy Leaming, *Alabama School District Settles Dispute Over Cross Necklace*, FIRST AMENDMENT CENTER, Mar. 1, 2000, http://www.freedomforum.org/templates/document.asp?documentID=11770. A Mississippi school board retracted a policy prohibiting students from wearing gang-related symbols after the ACLU filed suit when a student was told to tuck his Star of David necklace into his shirt. Press Release, American Civil Liberties Union, Jewish Student Allowed to Wear Star of David Pendant as Mississippi School Board Reverses Policy (Aug. 24, 1999), *available at* http://www.aclu.org/studentsrights/religion/12793prs19990824.html. In 2002, a Texas high school student was suspended for wearing a pentagram in violation of a prohibition on jewelry, but was later allowed to return wearing the necklace. *Texas School Superintendent Allows Wiccan Student to Wear Pentacle*, FREEDOM FORUM ONLINE, Sept. 12, 2002, http://www.freedomforum.org/templates/document.asp?documentID=16948. For an interesting case involving a challenge to a school uniform policy brought by a Christian grandparent see *Hicks v. Halifax County Board of Education*, 93 F. Supp. 2d 649 (E.D.N.C. 1999); Jeremy Leaming, *Public School Dress Code Challenged on Religious-Liberty Grounds*, FIRST AMENDMENT CENTER, Feb. 1, 1999, http://www.freedomforum.org/templates/document.asp?documentID=8553; Press Release, American Civil Liberties Union, Student Prevails in NC School Uniform Dispute (Jan. 1, 2000), *available at* http://www.aclu.org/studentsrights/dresscodes/12860prs20000111.html.

Additionally, at least two school kirpan incidents have arisen in the United States in recent years. In 2005, a fifteen year-old Amritdhari Sikh was suspended from Greenburgh Central School in New York for wearing a kirpan.[120] The student, Amandeep Singh, and his family met with school officials, and the parties agreed to allow Singh to return to school with his kirpan if it was secured in a cloth pouch under his clothing.[121] In another case, a Texas Sikh student "rejected her school's decision to allow her to wear her kirpan only if it [was] welded shut to the sheath," but declined to press the decision as she was selected to attend a prestigious academic program at another institution.[122] These two cases suggest that the facts leading to *Cheema* and *Multani* are not isolated events.

V. LESSONS: THE IMPACT OF *MULTANI*

The September 11, 2001 terrorist attacks have "left individuals in the United States acutely sensitive to anything that resembles a weapon."[123] Thus, the kirpan, a religious symbol to Sikhs, looks like a threatening weapon "[t]o the ordinary American unfamiliar with the Sikh religion."[124] That certain

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[120] Press Release, United Sikhs, United Sikhs Helps New York Sikh Student Regain Right to Wear his Kirpan to School (Mar. 16, 2005), *available at* http://www.unitedsikhs.org/PressReleases/PRSRLS-16-03-2005-00.htm. Amritdharis have undergone a special ceremony and follow Sikh practices in their entirety. MANN, *supra* note 33, at 118.

[121] Letter from Josephine N. Moffett, Superintendent of Schools, Greenburgh Central School District to Mr. and Mrs. Nirmal Singh (Mar. 4, 2005), *available at* http://www.unitedsikhs.org/rtt/Letter_from_school.pdf. The Singhs also agreed to reasonable inspections. The school district further agreed to expunge the student's record. *Id.*

[122] *Sikh Schoolgirl Rejects School's Decision to Weld Her Kirpan to the Sheath*, UNITED SIKHS: COMMUNITY VOICE (July 2, 2005), *available at* http://www.unitedsikhs.org/PressReleases/COMVCE-02-07-2005-00.htm. The school's proposal might be problematic given that Sikhs remove the kirpans from the sheaths during certain ceremonial events at Sikh temples. *See* Deb, *supra* note 15, at 882.

[123] Renteln, *supra* note 78, at 1579 (commenting that "[t]he impact of seeing a dagger in a public school should not be underestimated, [in] an era of devastating school violence and heightened awareness of terrorist attacks . . ."); Todd A. DeMitchell & Casey D. Cobb, *Policy Responses to Violence in Our Schools: An Exploration of Security as a Fundamental Value*, 2003 BYU EDUC. & L.J. 459, 459–61 (2003). After September 11, Sikhs have increasingly become victims of hate crimes and racial profiling because of their resemblance to Arabs and Muslims. *See* Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 TEMP. POL. & CIV. RTS. L. REV. 495, 496 (2005); Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 243 (2005).

[124] Renteln, *supra* note 78, at 1579. *See also* Smith, *supra* note 31, at 126 (discussing

religious objects, practices, and beliefs are often misunderstood by mainstream religious practitioners has not gone unnoticed in Canadian courts.[125] One of many important lessons of *Multani* is an acknowledgment of human rights issues in light of potential safety concerns.[126]

Multani can provide valuable lessons for other countries struggling with the issue of religious garb in public schools. Because schools serve as microcosms of the real world community for school-aged children, school cases and controversies provide insight on the state of a constitution.[127] As one scholar noted, "[S]chools will be one of the institutions that tell us what multiculturalism means as students, parents, communities and administrators come together in an educational context."[128]

Canada can rely on *Multani* as evidence of a commitment to protection of religious freedoms, but no such precedent exists in the United States. While historical and political differences in U.S. and Canadian conceptions of the church-state division exist, both countries aim to maintain a secular society while recognizing religious plurality.[129] Further, scholars acknowledge strong similarities between U.S. and Canadian court decisions on religious freedoms despite differences in the relevant legal texts, historical foundations, and social constructs of two countries.[130] Both U.S. and Canadian case law on religious

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broader concerns with public safety highlighted in the wake of September 11); Smith, *supra* note 28, at 109.

[125] Horwitz, *supra* note 51, at 7 (referencing S.C.C.'s *Videoflicks* decision and arguing that what might be a binding religious tenet to one might appear to be the basis of a fraudulent claim to another). A similar issue stemming from lack of familiarity with kirpans might involve classifying the kirpan as a weapon rather than a religious symbol. *See* Brief of Appellants, *supra* note 33, at 22 (raising this "linguistic" point in attacking the defendants' position). Whether the kirpan could be classified as a weapon was also an issue in *Peel Board of Education*. *See* Sarah V. Wayland, *Religious Expression in Public Schools: Kirpans in Canada, Hijab in France*, 20 ETHNIC & RACIAL STUD. 545, 548 (1997). Still, others will likely continue to classify the kirpan as a weapon. *See* HAMILTON, *supra* note 15, at 116 (arguing "[k]nives are knives, and children are not safe in their presence, no matter who they are" in reference to *Cheema*).

[126] Smith, *supra* note 28, at 111.

[127] Praagh, *supra* note 11, at 1345–46.

[128] *Id.* at 1394.

[129] *Id.* at 1388. For example, Praagh notes "[b]oth Courts seem to suggest, the children of a society truly dedicated to diversity and tolerance can belong, subject to certain limitations, both to particular religious communities and to the state-based society in which they live and learn." *Id.* at 1390.

[130] Eisgruber & Zeisberg, *supra* note 55, at 254–55. One of the most significant differences in religious freedom jurisprudence is constitutional decisions on public funding for religious education. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the U.S. Supreme Court ruled that the government could not provide funding to private religious schools. *Id.* at 255.

freedom can be categorized as involving either limitations on the government's ability to limit the practices of religious minorities, or limitations on the endorsement or promotion of religious activities.[131] Further, the countries' free exercise case law focuses on equality and striking a balance between accommodating state interests and religious freedoms.[132] As such, the Canadian treatment of kirpan cases, particularly *Multani*, is worthy of consideration in the United States.[133]

Multani provides three important lessons for U.S. jurisprudence, which can be summarized as: (1) the importance of compromise, (2) the functioning of the school as a teaching and learning environment, and (3) the need for guidance among schools and districts. Canadian scholars applaud the S.C.C. for taking a stand on the kirpan issue that acknowledges both safety concerns stemming from a kirpan's presence in a school and the rights of religious minorities.[134] Thus, the Court's imposition of restrictions, such as requiring the kirpan be sheathed and sewn into clothing, can be viewed as a strength, in that it highlights the importance of compromise and accommodation.[135] Compromise and accommodation require schools to relax zero tolerance policies and students to make concessions in the interest of safety while on school property.[136] These concepts are extremely beneficial since accommodation in the public schools "promote[s] toleration and respect for diversity."[137]

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[131] *Id.* at 259–60.

[132] *Id.* at 260 (recognizing similarities in courts' results despite the fact that the U.S. Free Exercise Clause is couched in absolute terms while the Charter rights can be limited).

[133] *See* Bhachu, *supra* note 15, at 218–22 (pointing out similarities in free exercise analysis and freedom of religion claims in U.S. and Canadian courts and arguing for a consideration of Canadian cases regarding kirpans in the United States); *see also* Horwitz, *supra* note 51, at 15–16 (noting Canadian and American courts have come to similar conclusions on freedom of religion issues despite more U.S. cases and history on the subject). Though scholars commonly point to the similarities between the countries' respective approaches to freedom of religion issues, as previously noted, the separation of church and state issue stands as a major point of divergence. Also, the Charter imposes a greater duty on the government to take steps to meet the needs of minority religion practitioners, rather than merely setting forth a neutral governmental approach. BARNETT, *supra* note 5, at 7. Barnett's article contains an insightful summary of the permissibility of public expression of religious symbols in other countries. *Id.* at 13–35.

[134] Laidlaw, *supra* note 31; BUSSEY, *supra* note 31, at 5.

[135] Laidlaw, *supra* note 31; Clarke *supra* note 11, at 373.

[136] Clarke, *supra* note 11, at 374.

[137] *Id.* at 373; *see also* Chandler, *supra* note 50, at 33 (suggesting "Canadian citizens and educators should take pride in the fact that our highest court recognized our inherent respect and tolerance for others' customs and beliefs").

One reason schools are prime forums for promoting tolerance, as noted by the *Multani* court, is the significant role educators play in developing tolerance for diversity.[138] Scholars agree with one Canadian education professor who suggested that the school board should have used the latest kirpan incident to teach students about Sikhism, kirpans, and tolerance.[139] Educators will have to brainstorm creative ways to teach students about the tensions between religious freedom and larger societal concerns.[140] However, Canadian schools have a number of tools to teach students the lessons of diversity and human rights. For example, Québec's human rights commission offers workshops to schools on global citizenship and interculturalism.[141] Additionally, textbooks and other course materials can transform the learning environment. One Canadian textbook company has recently updated a civics textbook to include a reference to S.C.C.'s *Multani* decision.[142] An online excerpt shows the text asks students to think critically about the case, consider the values the S.C.C. is upholding, and to consider whether Canada should adopt a law similar to the French headscarf ban.[143]

VI. IMPORTING CANADIAN LESSONS ON RELIGIOUS GARB ISSUES

The Oklahoma headscarf issue of 2003–2004 may be an indication of the U.S. government's stance on the permissibility of religious symbols in public school settings.[144] Nashala Hearn, a Muslim sixth grader from Muskogee, Oklahoma, was suspended on September 11, 2003, for eight days when her

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[138] Carter & Langan, *supra* note 10, at 8 (describing the court's discussion of educators' role as dictum).

[139] Laidlaw, *supra* note 31.

[140] Clarke, *supra* note 11, at 375 (arguing that schools are important for teaching skills, civic virtue, and citizenship).

[141] Smith, *supra* note 28, at 110–11.

[142] Emond Montgomery Publications, Book Catalogue: Canada in the Contemporary World, http://www.emp.ca/index.php?option=com_hotproperty&task=view&id=350&Itemid=59 (last visited Sept. 20, 2007); JOHN RUYPERS ET AL., CANADA IN THE CONTEMPORARY WORLD 51–69 (2006), *available at* http://www.emp.ca/downloads/224-4_ccw_03_eval.pdf (last visited Aug. 19, 2007).

[143] RUYPERS ET AL., *supra* note 142, at 57. Carter and Langan suggest an additional lesson in noting that *Multani* provides needed guidance to administrative tribunals trying to determine their role in protecting rights and freedoms under the Charter. Carter & Langan, *supra* note 10, at 8.

[144] Press Release, Dep't of Justice, Justice Department Reaches Settlement Agreement with Oklahoma School District in Muslim Student Headscarf Case (May 19, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/May/04_crt_343.htm; Davis, *supra* note 1, at 228.

principal asked her to remove her headcovering and she refused.[145] The superintendent of the school district maintained that the dress code, prohibiting any type of headgear, was an issue of safety.[146] The U.S. Department of Justice filed a complaint on behalf of the student arguing that the headscarf ban was unconstitutional.[147] The student's attorney remarked "school districts that pay lip service to pluralism and diversity but send a message of exclusion to religious adherents whose faith imposes certain dress requirements repudiate those same values in practice."[148] The incident was resolved upon the parties' settlement which required the school district to amend its policies to permit wearing religiously required headcoverings, publicize the new policy among parents, and implement a training program for educators on the policy.[149]

Even though the U.S. government and public opinion have expressed heavy criticism of the French headscarf ban, Derek H. Davis has commented that "American law on the headscarf issue might not be as far removed from the new French approach as most Americans think," particularly considering the state of the free exercise jurisprudence.[150] It is still largely uncertain how a U.S. court might consider a headscarf or kirpan issue, considering the impact of *Smith* and *Flores*.[151] As Davis notes, "*Smith* is still on the books, and public schools that wish to enforce their dress codes, provided they are not written

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[145] Marianne D. Hurst, *Oklahoma District, Muslim Student Dispute Headscarf*, EDUC. WK., Oct. 22, 2003, at 3. Hearn wore headcoverings to school from August 18, 2003 to September 10, 2003 without incident despite the principal's knowledge. *See* United States' Memorandum of Law in Support of its Cross-Motion for Summary Judgment and In Opposition to Defendants' Motion for Summary Judgment at 5, Hearn v. Muskogee Pub. Sch. Dist. 020, No. CIV 03-598-S (E.D. Okla. 2004).

[146] Hurst, *supra* note 145, at 3. The United States' Memorandum of Law lists a number of instances where the school district made exceptions to the dress code policy banning headcoverings including cases where a student suffers from medical problems such as hair loss and special events like allowing hats in honor of Dr. Seuss's birthday. United States' Memorandum of Law, *supra* note 145, at 3. Other reasons offered for policy include preserving discipline and maintaining the school's status as a "religion free zone." *Id.* at 2–3.

[147] *US Opposes Oklahoma Headscarf Ban*, BBC NEWS, Mar. 31, 2004, http://news.bbc.co.uk/2/hi/americas/3585377.stm; BARNETT, *supra* note 5, at 15.

[148] Davis, *supra* note 1, at 229.

[149] Press Release, Dep't of Justice, *supra* note 144.

[150] Davis, *supra* note 1, at 222 (observing Americans have called the French ban "a fresh outbreak of religious intolerance").

[151] Further, many of the religious symbol cases have ended in compromises between the school districts and the impacted students and their parents. *Id.* at 229. While the compromises are positive, the lack of specific precedent leaves the status of the law unclear. *Id.* at 230.

with the aim of infringing religious practices, can at least arguably rely on the *Smith* standard."[152]

Despite the unlikelihood of immediate treatment of kirpans and other religious garb issues by U.S. courts, steps should be taken to put forward a nationwide stance that recognizes the need to accommodate religious minorities' beliefs in school settings. First, more states should adopt their own versions of RFRA that extend full protections for wearing kirpans and other religious garb. Second, school districts should aggressively amend their policies to grant exceptions for religious dress needs. Third, school districts should look for opportunities to educate students and their parents about religious garb issues. Finally, the U.S. Department of Education should issue an updated advisory opinion and guidelines addressing religious garb in schools. While Davis's editorial mentions the fact that a number of states have passed RFRAs after *Flores* and notes the importance of the 1998 U.S. Department of Education guidelines for protecting student free exercise, the United States must do more than rely on dated guidelines and hope for a "move beyond an abstract adherence" to the First Amendment.[153]

State RFRAs provide a means of ensuring that state and local governments do not burden religious exercise without using the least restrictive means to achieve a compelling interest.[154] State RFRAs have been passed in direct response to *Flores* as a means of achieving broader protection of free religious exercise.[155] States adopting such measures include Arizona and Oklahoma,

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[152] *Id.* at 232 (discussing student dress codes and potential denial of students' right to wear religious symbols and clothing). While it is unlikely that the U.S. government would be within constitutional bounds if the legislature were to pass a law like the French headscarf ban, there may be opportunities for more subtle forms of discrimination. *See id.* at 232–33. *See also* Yuskaev & Weiner, *supra* note 2 (retorting "[s]o far, thanks to God, karma and Constitution, nobody has proposed an outright ban on religious head gear on this side of the Atlantic," and positing that "interfaith education and cooperation" is needed to balance religious freedoms and the secular state). Also relevant is the different treatment of teachers with regard to religious garb. State laws limiting teachers' ability to wear religious garb while performing teaching duties have often been upheld. Gey, *supra* note 109, at 18–19.

[153] *See* Davis, *supra* note 1, at 235.

[154] Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 203 (2001). For a treatment of issues surrounding state RFRAs including their enforcement, see articles in Symposium, *Restoring Religious Freedom in the States*, 32 U.C. DAVIS L. REV. 513 (1999).

[155] Berg, *supra* note 154, at 203. Alternatively, other states interpret their state constitutions in a manner that rejects *Smith*. *See* Douglas Laycock, *Church and State in The United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 537 (2006). For a list of states with RFRAs or similar policies see James A. Hanson, *Missouri's*

and have patterned their legislative acts on the federal RFRA.[156] As a starting point, more states should consider enacting RFRAs to fill the gap created by the U.S. Supreme Court's rejection of the federal version as applied to the states.[157] Doing so is particularly important given that the validity of *Cheema* is in question after *Flores*.[158]

However, a state RFRA alone may not protect students desiring to wear their kirpans to school. For example, Missouri's RFRA created an exemption allowing the state to regulate weapons including ceremonial kirpans for safety reasons.[159] The exception stemmed directly from *Cheema* and concerns with post-September 11 school shootings.[160] Thus, state RFRA provisions should "mak[e] it clear that religious freedom provisions should be available for the full range of religiously motivated conduct, whether or not it is compulsory or central to a larger system of religious belief."[161] Otherwise, a student's right to wear a kirpan or other religious garb could still be in jeopardy even with the existence of a state RFRA.

Further, U.S. school districts should consider taking proactive steps to address free exercise issues such as revising their dress code policies to create religious garb exceptions.[162] Problematic dress code provisions will likely go

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Religious Freedom Restoration Act: A New Approach to the Cause of Conscience, 69 MO. L. REV. 853, 862 & n.53 (2004).

[156] Hanson, *supra* note 155, at 862 & n.53. According to a 2003 count, twelve states had formally passed RFRAs and seven more states had court precedent reflecting a higher "compelling interest" standard. *See* Home School Legal Defense Association, Frequently Asked Questions: State Religious Freedom Acts, http://www.hslda.org/docs/nche/000000/00000083.asp (last visited Sept. 20, 2007).

[157] Home School Legal Defense Association, *supra* note 156.

[158] *See* United States v. Antoine, 318 F.3d 919, 923 (9th Cir. 2003) (suggesting *Cheema* was at least partially overruled by *Flores*). *But see* Frank Sutherland, Current Issues Regarding Religious Expression in the Schools 11, Nov. 17, 2005, http://www.lathropclark.com/contentpublications/schoollaw/FifthAnnual/FCS_2005.pdf (suggesting that *Cheema* is still good law).

[159] Hanson, *supra* note 155, at 890–91.

[160] *Id.* at 891. Considering Missouri's reaction to *Cheema*, extensive federal government endorsement of *Multani* might have the perverse effect of limiting Sikh students' abilities to wear kirpans to schools if states create RFRAs only to later carve out weapons exceptions.

[161] W. Cole Durham, *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 722 (1999).

[162] United States' Memorandum of Law, *supra* note 145, at 19 (citing Tulsa Public School Dress Code which creates an exception for religious headcoverings). The appellant's brief submitted in *Cheema* suggests that because kirpans often go unnoticed and have not created school security problems, school districts have seen little need to address the kirpan issue. Brief of Appellants, *supra* note 33, at 2.

unchallenged until a student faces expulsion for a violation.[163] As one scholar notes, "a growing number of administrators now ask students to choose between following their God and attending a public school."[164] While the optimal approach would involve proaction on the part of school districts, at the very least, dress code policies should be changed to protect students' freedom of religious expression by making accommodations for students who wear religious garb.[165]

School districts' policies would only be strengthened by programs geared toward educating students and parents about religious garb issues and the districts' stances. Programs should be in place before an incident arises in order to avoid singling out a particular student or controversy.[166] While U.S. school districts can learn from reviewing Canadian practices and policies, there are model examples at work already in the United States. The Kent School District in Washington issued a list of multicultural activities that had taken place during the school year including two information sessions about Sikhism and the Five K's for students and families.[167] These efforts will reinforce changes in dress codes by providing community education.

Further, the U.S. Department of Education should consider updating its statement on religion and religious garb. As it stands, school districts, parents, and students will have a difficult time unearthing the U.S. government's stance on religious garb issues. The Department of Education's latest official pronouncement on religion and schools was the 2003 Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary

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[163] *See* Haynes *supra* note 104; Letter from Josephine N. Moffett, *supra* note 121.

[164] Haynes, *supra* note 104 (questioning why school districts are rejecting requests for religion-based dress code exemptions).

[165] *See* Michael J. Julka, Shana R. Lewis, & Richard F. Verstegen, *Student Dress Codes*, 4 PRINCIPAL LEADERSHIP 57, 61 (2004).

[166] Laidlaw, *supra* note 31, at L09 (quoting Canadian professor, Michael Hoechsmann, on the need to show sensitivity to the student and situation by not making him "the subject of its next school assembly").

[167] Letter from Kent School District to Principals (May 16, 2006), http://www.kent.k12.wa.us/district/diversity/Multicultural_Activities_2006.pdf. Unfortunately, Kent School District's board policies do not appear to take Sikh students' special needs into account. The board policies on student dress allow for clothing associated with religious observance but the extensive no weapons policy prohibits any type of knives, objects used to intimidate, and school-related objects used to injure. A Sikh student might be able to don a turban but not a kirpan unless the district identified a kirpan as a non-weapon. KENT, WASHINGTON, KENT SCHOOL DISTRICT BOARD POLICIES, STUDENT DRESS AND APPEARANCE #3224, POSSESSION OF WEAPONS AND FIREARMS #3245, *available at* http://www.boarddocs.com/wa/ksdwa/Board.nsf/Public?OpenFrameSet (last visited Sept. 3, 2007).

Schools.[168] The public can reach archived information from previous administrations through the Department of Education's website, including a 1998 press release declaring that "schools have the discretion to decide whether students can wear religious garb such as yarmulkes and headscarves to class."[169] The 1998 Department of Education Guidelines on Religious Expression in Public Schools report that students "generally have no federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices. . . ."[170] The 1998 Guidelines revisited the 1995 memorandum on religious expression in public schools.[171] The earlier memo, noting that "nothing in the First Amendment converts our public schools into religion-free zones,"[172] remained in question after *Flores*.[173] Thus, after the invalidation of RFRA, "schools *may* accommodate students' religious requirements — but they may not have to do so. . . ."[174]

The 1998 materials, while an accurate portrayal of the law on religious garb in schools, are severely outdated and do not address socio-political events that might make a stronger case for granting school districts broad discretion in prohibiting religious garb for safety reasons. The issuance of updated guidelines would not change the limitations imposed by *Smith* and *Flores*, but instead would provide more direction for the school districts struggling to handle an increasing number of religious garb issues and the constitutionality of dress code provisions.[175] Additionally, updated guidance can provide a forum for discussing *Multani* and similar litigation in the United States while

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[168] U.S. Department of Education, Religion and Public Schools, http://www.ed.gov/policy/gen/guid/religionandschools/index.html (last visited Sept. 7, 2007).

[169] *Id.*; Press Release, White House, The President Announces Release of Revised Religious Guidelines for America's Public Schools (May 30, 1998), *available at* http://www.ed.gov/Press Releases/05-1998/wh-0530.html.

[170] Further, schools have a great deal of discretion in fashioning policies and regulations related to student dress and uniform codes. U.S. DEPARTMENT OF EDUCATION, STUDENT RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS: UNITED STATES DEPARTMENT OF EDUCATION GUIDELINES 129 (1998), *available at* http://www.freedomforum.org/publications/first/findingcommonground/B10.USDeptGuidelines.pdf.

[171] Press Release, White House, *supra* note 169.

[172] Davis, *supra* note 1, at 231.

[173] *Id.* at 232; *see also* Haynes, *supra* note 104 (observing that City of Boerne v. Flores, 521 U.S. 507 (1997), required the revision of the Department's guidelines).

[174] Haynes, *supra* note 104 (emphasis added).

[175] Further, there is evidence that school districts might be misapplying the guidelines. *See* United States' Memorandum of Law, *supra* note 145, at 18 (criticizing the school district's interpretation of the 1998 guidelines).

encouraging school districts to be respectful of student religious beliefs and practices.[176] Such encouragement, like former Secretary of Education Richard Riley's call for schools to be "vigilant in protecting the right of all students to express their religious faith in their own way," should not be buried in the Department's archives.[177]

In addition to pursuing the above stated measures, U.S. citizens might benefit from the subtle lesson of *Multani*—the importance of respect and tolerance. In Tennessee, a county school board member expressed her resentment of a board decision to allow a Muslim high school student to wear her hijab: "I think it opens up a Pandora's box for us. You may have Jewish students asking to wear yarmulkes and students from other religions making requests."[178] While Canadian provinces are not without racial, ethnic, and cultural battles, *Multani* will likely continue to move the country toward greater diversity and acceptance of differences.[179] As one scholar notes, *Multani* shows the S.C.C.'s "willingness to go beyond the societal biased opinions of the kirpan . . . to seek a compromise."[180] While it might take many years to change individual views, *Multani* exemplifies a government taking steps to facilitate that process.

VII. CONCLUSION: LESSON LEARNED?

The United States, like Canada, prides itself on being a diverse and liberal democracy.[181] However, for many Americans, the choice between serving one's god and attending public schools is real.[182] *Cheema* and other kirpan-related school incidents only highlight the impact this choice can have on children and families. It is Canada's history as a multicultural and tolerant

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[176] The guidelines were created to provide common ground on the issue of religious freedom among educators, parents, and students. *See id.* at 18.

[177] Letter from Richard Riley, Secretary, Department of Education, to Principals (Dec. 17, 1999), *available at* http://www.ed.gov/inits/religionandschools/secletter.html.

[178] *Rhonda Thurman Says Allowing Islamic Head Scarf Was Wrong Decision*, THE CHATTANOOGAN.COM, Jan. 18, 2005, http://www.chattanoogan.com/articles/article_61195.asp.

[179] *Operation Colour-Blind*, GLOBE & MAIL (Can.), June 10, 2006, at F4. According to a recent poll, 37% of Canadians think wearing a veil is problematic, and 25% find wearing religious items to be a problem. Kathleen Harris, *Ditch Custom and Conform*, LONDON FREE PRESS (Can.), Jan. 18, 2007, at A3.

[180] BUSSEY, *supra* note 31, at 5.

[181] Praagh, *supra* note 11, at 1351.

[182] *See* Haynes, *supra* note 104; *see also* Horwitz, *supra* note 51, at 2 (arguing that "the religious believer in the modern liberal state is the servant of two masters").

nation which prevented the Canadian kirpan controversies from creating the sort of decade-long upheaval France experienced over the Muslim hijab.[183] The S.C.C. used the latest Canadian kirpan issue to voice the need for tolerance, respect, and accommodation. *Multani* highlights the importance of striking a reasoned balance between the competing interests of individual freedom and state interests in the context of public schools, "crucibles of a vast social experiment."[184] Without a strong pronouncement from the U.S. Supreme Court, the resolution of religious garb issues in public schools remains unpredictable. Out of this uncertainty comes an opportunity for other branches of U.S. government, states, local school districts, and individuals to take a stand. As a multicultural nation valuing diversity, the United States would be well served to heed the lessons offered by *Multani*.

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[183] Wayland, *supra* note 125, at 556. Wayland concludes that "Canada's commitment to cultural and religious pluralism will prevent issues such as the wearing of religious attire in the public schools from ever becoming as nationally divisive as they have in France." *Id.* at 560.

[184] *Operation Colour-Blind*, *supra* note 179.