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PARADIGMS LOST: THE SECOND CIRCUIT FACES THE NEW ERA OF RELIGION CLAUSE JURISPRUDENCE

Donald L. Beschle*

INTRODUCTION

During the 1989-90 term, the Second Circuit decided several cases presenting issues under the religion clauses of the First Amendment.¹ While the facts of the cases are interesting, the issues presented were not unique or particularly novel; the decisions might not seem noteworthy under normal circumstances. But these are not normal times for the religion clauses. Both the Establishment Clause and the Free Exercise Clause have been the subject of renewed interest by the Supreme Court. Widespread dissatisfaction with the tests developed a generation ago to assess claims under these provisions has led to serious reconsideration of both standards. With regard to the Establishment Clause, the three-part test enunciated in *Lemon v. Kurtzman*² survives, at least in theory, but two alternative ways of approaching Establishment Clause claims, one developed by Justice O'Connor, the other by Justice Kennedy, now contend for acceptance. In short, the future direction of Establishment Clause jurisprudence is unclear, but change is in the air.

In *Employment Div., Dep't of Human Resources of Oregon v. Smith*³ the Supreme Court charted a course for the future of the Free Exercise Clause that seems anything but unclear. But the new standard diverges so sharply from the law of the last two decades, and seems to diminish so seriously the force of the constitutional guarantee, that one is reluctant to conclude that the debate over the scope of the clause is over. The inadequacies of the *Smith* test may require its refinement or reconsideration,

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

² 403 U.S. 602 (1971). See notes 78-85 and accompanying text *infra*.

³ 110 S. Ct. 1595 (1990). See notes 121-31 and accompanying text *infra*.

and that will require the existence of doctrinal alternatives which seem both theoretically and practically attractive.

When we examine this past term's Second Circuit religion clause cases against the background of recent efforts by the Supreme Court to improve the standards that control in such cases, the juxtaposition provides a number of insights. First, the cases illustrate quite well why many feel frustrated by the religion clause doctrine of recent decades. If applied literally and stringently, old rules produce results that seem not only wrong but, in the case of the Free Exercise Clause, almost anarchic. In order to avoid such results the tests must be applied in a way that makes them seem too imprecise to be useful. Debate over the religion clauses may be subsumed in a larger debate over the relative value of clarity and flexibility in law.⁴

In addition to helping explain the past and present, the cases may also provide some suggestions for the future. At least one of last term's cases, apparently applying pre-*Smith* free exercise law, may illustrate an alternative to *Smith* that avoids at least some of the problems which led to *Smith* and *Smith's* rejection of earlier standards. On the other hand, another case, in which Justice O'Connor's test is purportedly applied, with results that seem at best questionable, may suggest future developments in Establishment Clause jurisprudence that are by no means encouraging.

This Article will begin by describing last term's Second Circuit religion clause decisions: *Kaplan v. City of Burlington*,⁵ *Theriault v. A Religious Office*,⁶ *Benjamin v. Coughlin*,⁷ and *New York State National Organization for Women (NOW) v. Terry*.⁸ Part II will describe the changes and tensions that have

⁴ The most recent renewal of this perennial debate was largely sparked by an article by Justice Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989), and comments on Justice Scalia's thoughts as they appear there and elsewhere. Perhaps the most interesting of these analyses is Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

⁵ 891 F.2d 1024 (2d Cir. 1989) (before Feinberg, Meskill and Lumbard, JJ.; opinion per Feinberg, J., dissent per Meskill, J.), *cert. denied*, 110 S. Ct. 2619 (1990).

⁶ 895 F.2d 104 (2d Cir. 1990) (before Oakes, C.J., Pratt and Sand, JJ.; opinion per Oakes, C.J.).

⁷ 905 F.2d 571 (2d Cir. 1990) (before Miner, Van Graafeiland and Pierce, J.J.; opinion per Miner, J.), *cert. denied*, 111 S. Ct. 372 (1990).

⁸ 886 F.2d 1339 (2d Cir. 1989) (before Cardamone, Pratt and Lasker, J.J.; opinion per Cardamone, J.), *cert. denied*, 110 S. Ct. 2206 (1990).

emerged recently in religion clause jurisprudence, and that provide the background for understanding the significance of the cases sketched in Part I. Part III will analyze the cases and attempt to assess their possible relevance to the future of the religion clauses.

I. THE CASES

A. Kaplan v. City of Burlington

The city of Burlington, Vermont, has nineteen parks, perhaps the most prominent of which is City Hall Park.⁹ City Hall Park is a two and one-half acre downtown plot of land, bordered on three sides by streets lined with commercial buildings, and on the fourth side by City Hall, the Old Fire Station and a bank.¹⁰ The park is typical of New England town squares, with trees, benches, a circular fountain, two monuments to those killed in different wars and various other functional fixtures.¹¹

City Hall Park is a public forum, but certain uses involving large groups, exclusive use or reservation of particular times and spaces require a special permit from the city.¹² In the five years preceding this lawsuit, about three hundred permits had been issued "for commercial, religious . . . political or quasi-political activities," as well as for more innocuous uses such as picnics and softball games. No permit request was denied during this time period.¹³ Until 1986 the religious uses allowed by permit included one-day gatherings of believers for activities such as gospel music concerts, a "Jesus rally," and distribution of food and clothing to the poor.¹⁴ In December 1986 the Vermont Organization for Jewish Education—Lubavitch—was granted a permit to erect a wrought iron menorah,¹⁵ approximately twelve

⁹ Kaplan v. City of Burlington, 891 F.2d 1024, 1025 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990).

¹⁰ Kaplan v. City of Burlington, 700 F. Supp. 1315, 1317 (D. Vt. 1989).

¹¹ *Id.*

¹² *Id.* (citing BURLINGTON, VT. CITY CODE, ch. 22, app. D).

¹³ *Id.* at 1317-18.

¹⁴ 891 F.2d at 1026. Until 1986 no permit was sought for the display "of an unattended, solitary religious symbol," nor for the use of the park for a time period as long as eight days. *Id.* See also note 18 *infra*.

¹⁵ A menorah is a religious symbol of the Jewish faith, and is recognized as such by the general public. The menorah is associated with Chanukah, a religious holiday observed by Jews during an eight-day period which ordinarily

feet wide and sixteen feet high, in the park and to leave it standing there during the eight days of Chanukah. The menorah was accompanied by a sign, "visible to some distance in a westerly direction," stating "'Happy Chanukah' 'Sponsored by: Lubavitch of Vermont.'" ¹⁶ The same display was erected, also pursuant to a permit, in December 1987, and again stood for the eight days of Chanukah. ¹⁷ The display created some controversy: the city received a number of phone calls supporting and opposing the presence of the menorah. ¹⁸ Some of the opposition was "blatantly anti-semitic;" ¹⁹ other opponents objected to any religious symbols in a public park. ²⁰ In December 1987 the city felt the need to convene a press conference to explain that the menorah was not sponsored by the government. ²¹ Plaintiffs, including a Unitarian minister and the rabbi of a Reform Jewish congregation, sued to enjoin the menorah display from being permitted in City Hall Park in December 1989. ²²

falls between the latter part of November and the first part of January of each year. A menorah is a nine pronged candelabra representing the eight days of Chanukah, with one space for a candle used to light the other eight. . . . Each Chanukah the menorah is lit to celebrate the miracle of a continuously burning light . . . "[w]hen the Maccabees rededicated the Temple, they had only enough oil to last for one day. But . . . the oil miraculously lasted for eight days (the length of time it took to obtain additional oil)."

891 F.2d at 1026 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)).

¹⁶ 700 F. Supp. at 1318. "The Lubavitch movement is a Hasidic sect that seeks to reawaken interest among Jews in traditional Judaism." 891 F.2d at 1026. The Vermont group is associated with Chabad Lubavitch, a larger group that advocates the display of menorahs all over the country. *Id.*

¹⁷ 891 F.2d at 1026.

¹⁸ 700 F. Supp. at 1320. The menorah received "widespread press attention" in 1987; apparently it had not gotten such attention in 1986, nor in the two prior years, when the menorah was displayed for only one day. 891 F.2d at 1027. Some, including the Burlington City Attorney, believed that the menorah became controversial in 1987 because only a week before Burlington issued the permit, the nearby town of Hyde Park, Vermont, settled a lawsuit by agreeing to remove a cross from the top of a Christmas tree located on the front lawn of the Hyde Park courthouse. *Id.* It is reasonable to believe, then, that despite the fact that the decisions regarding the cross and the menorah were made by different government units, at least some of the hostility to the menorah was actually displaced resentment over the removal of the cross in Hyde Park, that is, anger that the menorah seemed entitled to greater protection than the cross.

¹⁹ 700 F. Supp. at 1321 n.7.

²⁰ Two of the plaintiffs offered private property to Vermont Lubavitch as an alternative site for the menorah. 891 F.2d at 1027.

²¹ 700 F. Supp. at 1320.

²² *Id.* at 1321 n.8. The fact that the named plaintiffs were "literate and educated" led the district court to characterize their complaint as essentially "that other individu-

The district court dismissed the suit, holding that the three-part *Lemon* test²³ was not violated by the display. The city's purpose in granting the permit, the court held, was the secular goal of permitting equal access to a traditional public forum.²⁴ There was no significant entanglement of government and religion in the application process.²⁵ Finally, the district court held that the display did not have the primary effect of advancing religion. Focusing on the question of whether an act of government "conveys the appearance of government endorsement,"²⁶ the court found that given the presence of the sign with the menorah, and given the status of City Hall Park as a traditional public forum, any perception of government endorsement would be not only erroneous, but also unreasonable. Thus, the city "did not objectively convey a message of endorsement of religion" and did not violate the "effect" inquiry of the *Lemon* test.²⁷

On appeal, a divided panel of the Second Circuit reversed.²⁸ Judges Feinberg and Lumbard held that the menorah was impermissible in light of the recent Supreme Court decision in *County of Allegheny v. ACLU*.²⁹ In *Allegheny* a divided Court held that a similar menorah, displayed next to a Christmas tree, was a permissible display in front of a government office building, but that a privately maintained crèche, standing alone, was not permissible in the lobby of a courthouse.³⁰ Four justices would have permitted both displays, three would not have per-

als - not them - might get the wrong impression [that Burlington was endorsing religion rather than merely allowing speech in a public forum]." *Id.*

²³ See notes 78-85 and accompanying text *infra*.

²⁴ 700 F. Supp. at 1319 (citing the obligations of a government entity to permit access to a public forum set out in *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983)).

²⁵ *Id.* at 1319-20.

²⁶ *Id.* at 1320.

²⁷ *Id.* at 1322 n.9. While the court found that even an erroneous perception of government endorsement could be sufficient to lead to an Establishment Clause violation, it insisted that such a perception be "objectively reasonable," and not limited to those who, for reasons such as age or illiteracy, might not be able to understand the sign or the press conference explaining the absence of city endorsement, or the general policy of free access to the park for First Amendment activity. *Id.* at 1321-22.

²⁸ *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989).

²⁹ 492 U.S. 573 (1989).

³⁰ *Id.* at 598-602 (invalidating the crèche) and at 613-21 (permitting the menorah). Both displays were located in Pittsburgh. The courthouse lobby was found not to be a public forum, *id.* at 600 n.50; whether the area in front of the office building qualified as a public forum was not discussed.

mitted either display. Justices O'Connor and Blackmun cast the deciding votes, and held that the crèche, but not the menorah, improperly conveyed a message of government endorsement of religion.³¹

The *Kaplan* majority took *Allegheny*, along with the earlier case of *Lynch v. Donnelly*,³² to establish a rule invalidating "unattended, solitary religious symbols on public property" and permitting them only when accompanied by secular symbols of comparable nature.³³ In dissent, Judge Meskill stressed that to bar religious symbols in this case was "a content-based restriction on religious expression in a public forum" and that, under cases such as *Widmar v. Vincent*,³⁴ it is such an exclusion rather than the issuance of the permit that deserves strict scrutiny. Considering that City Hall Park is a traditional public forum, that the display is present only during Chanukah, and that there was a prominent sign attesting to the private ownership of the menorah, no reasonable observer could take the display to be an official endorsement of religion. Rather, the menorah could be seen only as endorsement of the principle of equal access to traditional First Amendment forums.³⁵

B. *Theriault v. A Religious Office in the Structure of the Government Requiring a Religious Test as a Qualification*

Shiloh Harry Theriault, also known as Harry W. Theriault, Dr. Harry Theriault and the Bishop of Tellus, has spent most of the last two decades in several different federal prisons. He has spent a significant amount of his confinement as a party to law-

³¹ Justice Kennedy concurred, with Chief Justice Rehnquist and Justices White and Scalia, in advocating permission of both displays, *id.* at 655-79 (Kennedy, J., concurring in part and dissenting in part); Justice Brennan wrote on behalf of himself, Justice Marshall and Justice Stevens for the position that both were invalid, *id.* at 637-46 (Brennan, J., concurring in part and dissenting in part).

³² 465 U.S. 668 (1984) (rejecting the contention that the Establishment Clause was violated by the display of a crèche as part of a larger publicly financed holiday display in a prominent, but private, park in Pawtucket, Rhode Island).

³³ 891 F.2d 1030. The court repeated the phrase "unattended, solitary" religious symbol a number of times; once a third adjective, "semi-permanent," was added.

³⁴ 454 U.S. 263 (1981). In *Widmar* the Court held that a state university's practice of excluding student groups from forums open to most such groups on the basis of the religious nature of the excluded groups' purpose and message violated the free exercise rights of the religious student groups.

³⁵ 891 F.2d at 1031-34 (Meskill, J., dissenting).

suits in federal court, "either as a plaintiff complaining of prison conditions or as a defendant being prosecuted for unruly prison conduct."³⁶ While imprisoned in Atlanta in 1970, Theriault obtained a mail-order Doctor of Divinity Certificate and founded the Church of the New Song, made up entirely of inmates. At first, Theriault considered his "Eclatarian" faith to be a "game" but later "began to take his own religious claims seriously" to the point where at least some prison officials believed his activities to be "truly religious in nature."³⁷

In 1970 Theriault brought suit against officials of the Bureau of Prisons seeking, under the Free Exercise Clause, the right to conduct religious services at the prison. In addition, the suit sought, under the Establishment Clause, a ruling that the activities of the Bureau's chaplain were unconstitutional.³⁸ Although the district court dismissed the contention that the hiring of chaplains was a violation of the Establishment Clause, it did enjoin the chaplains' practice of reporting on prisoners' participation in religious activities to caseworkers who would use these reports, among others, to prepare the inmate profiles presented to the Board of Parole.³⁹ The court reasoned that by making religious activity a positive factor in parole determinations, the Bureau "may compel some to participate in religious

³⁶ *Church of New Song v. Establishment of Religion*, 620 F.2d 648, 654 n.5 (7th Cir. 1980), *cert. denied*, 450 U.S. 929 (1981). The footnote sets out the citations for all of Theriault's cases up to 1980, and takes up about three-quarters of a page of small print.

³⁷ *Theriault v. Carlson*, 339 F. Supp. 375, 377-78 (N.D. Ga. 1972), *vacated and remanded*, 495 F.2d 390 (5th Cir.), *reh'g denied*, 498 F.2d 1402, *cert. denied*, 419 U.S. 1003 (1974). Theriault's claim to religious authority certainly sounded like either "a game" or an attempt to take biblical literalism to a new plane. Serving time for robbery, Theriault pointed to *Revelation* 3:3, "If you will not awake, I will come like a thief, and you will not know at what hour I will come upon you," and claimed to be the thief referred to in the text. 339 F. Supp. at 377 n.1.

³⁸ *Id.* at 377-78.

³⁹ *Id.* at 380-82.

There can be no doubt that an inmate whose file contains a positive religious report stands a better chance of being released on parole than an inmate with a neutral or negative religious report. Indeed, it is likely that the inmates' very knowledge of the existence of these religious reports may compel some to participate in religious activities. The Government, by allowing these religious reports to be submitted, is in effect promoting religion among inmates and indirectly punishing the atheist, agnostic or [member of Theriault's church] who declines to participate in these religious programs.

Id. at 382. The Fifth Circuit, in vacating and remanding this decision, did not address the Establishment Clause issue, but rather focused on the religious sincerity of Theriault's free exercise claims. 495 F.2d at 393-95.

activity" in violation of the neutrality called for by the Establishment Clause.⁴⁰

The district court also responded favorably to Theriault's free exercise claim, holding that prison officials could not prohibit religious services simply because they were proposed by an unusual denomination, even one with "fanatical or preposterous" beliefs, unless a clear threat to prison discipline or some other compelling interest could be demonstrated.⁴¹ Theriault later filed an action alleging a failure by prison officials to comply with that portion of the court's ruling, and also filed an independent action asserting a free exercise claim against prison officials at the federal penitentiary at La Tuna, Texas, where he had been transferred. After these cases had been consolidated, Theriault's claims were dismissed by the District Court for the Western District of Texas.⁴²

The court based its holding on a finding that Theriault's Church of the New Song did not qualify as a religion, but was instead a "masquerade" to obtain protection for a "philosophy, the sole purpose of which is to cause or encourage disruption of established prison discipline for the sake of disruption."⁴³ The religious services were no more than "gripe sessions" and "were totally lacking in anything approaching religious content."⁴⁴ Closely related to the question of whether Theriault's church was a genuine religion was the court's inquiry into the sincerity of Theriault's professed beliefs. The court found Theriault's profession that he is the second Messiah to be "insincere."⁴⁵

Theriault appealed from this decision, but the Court of Appeals for the Fifth Circuit dismissed the pro se appeal, with

⁴⁰ 339 F. Supp. at 382.

⁴¹ *Id.* at 382-83. It was on this point that the appellate court found that the district court had been remiss. Theriault had not been required to substantiate sufficiently his sincerity and the religious nature of his organization. 495 F.2d at 393-95.

⁴² *Theriault v. Silber*, 453 F. Supp. 254 (W.D. Tex. 1978). In an opinion that almost reeks of impatience, not only at Theriault, but also at the appellate court for allowing the litigation to continue, Judge Wood focused on Theriault's claim to head a bona fide religion.

⁴³ *Id.* at 260.

⁴⁴ *Id.* at 260 ("Petitioner and his cohorts have formed an organization whose purpose is to improve the position of member prison inmates vis-à-vis prison administrations. . . . [T]he unmistakable stench of the skunk is found emanating from that which petitioner has declared a rose.").

⁴⁵ *Id.* at 261. The court compared Theriault's views to "the megalomania of Adolf Hitler . . . or Charles Manson" *Id.*

prejudice, after two notices of appeal were filed containing "vile and insulting references to the trial court."⁴⁶ And so, when Theriault, now having been transferred to the federal penitentiary in Marion, Illinois, instituted another suit seeking free exercise protection for his church, the district court and court of appeals dismissed the claim on *res judicata* grounds, citing Theriault's Texas suit.⁴⁷ Interestingly enough, in a suit brought by prisoners of the Iowa State Penitentiary seeking free exercise protection for the Church of the New Song, the District Court for the Southern District of Iowa held that the Iowa branch of the church did qualify as a religion, and that there was insufficient evidence to conclude that its members were insincere.⁴⁸

The district court in Iowa held that it was not bound by the judgment of the district court in Texas; the facts in the cases involving Theriault himself "were simply not the facts in this case."⁴⁹ At least with respect to the Iowa State Penitentiary congregation, the court found that the church had sufficient resemblance to recognized religions, it "afford[ed] its members a sense of self-worth and inspire[d] a sense of community,"⁵⁰ discouraged violence and hate and did not on its face urge conduct incompatible with prison life. Thus, the members of the church were guaranteed free exercise rights in prison, subject to "neutral reasonable regulation" which would be permissible in the case of any religious practice by inmates.⁵¹ Ironically enough, due largely to procedural rules of *res judicata* and collateral estoppel, the Church of the New Song was held entitled to free exercise protection only where the congregation seeking such protection was not headed by the founder of the church.

⁴⁶ *Theriault v. Silber*, 574 F.2d 197 (5th Cir. 1978). Theriault was given ten days to file proper notice, but his second notice of appeal was also found to be abusive, and this time the appeal was dismissed with prejudice. *Theriault v. Silber*, 579 F.2d 302 (5th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979).

⁴⁷ *Church of New Song v. Establishment of Religion*, 620 F.2d 648 (7th Cir. 1980).

⁴⁸ *Loney v. Scurr*, 474 F. Supp. 1186 (S.D. Iowa 1979); *Remmers v. Brewer*, 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd per curiam*, 494 F.2d 1277 (8th Cir. 1973), *cert. denied*, 419 U.S. 1012 (1974).

⁴⁹ 474 F. Supp. at 1190.

⁵⁰ *Id.* at 1193.

⁵¹ *Id.* at 1197. The Iowa court criticized other courts' treatment of the Church of the New Song for "muddl[ing] the distinct question of whether the Church is a religion with the question of what limitations may permissibly be placed on the congregation exercise of the Church of the New Song in a prison environment." *Id.* at 1195.

Nevertheless, Theriault, now incarcerated at the federal facility in Otisville, New York, was back in federal court in 1984, with a case remarkably similar to his 1970 lawsuit. Theriault now claimed to head the Holy Mizanic faith and claimed that Otisville prison officials were denying the members of that religion free exercise protection.⁵² In addition, Theriault again challenged the activity of state-employed chaplains on Establishment Clause grounds. He alleged that chaplains participate in nonreligious activity, such as discipline of prisoners, and that this was evident from the Inmate Handbook which provided that in addition to caring for inmates' spiritual needs, the chaplains "will also assist in the correctional process to the fullest extent possible."⁵³

Nearly five years after the filing of Theriault's suit, the district court granted judgment on the pleadings to defendants. But a unanimous panel of the Second Circuit reversed and remanded the case for further proceedings. With respect to Theriault's claim concerning the activity of authorized chaplains, the court found that Theriault was not merely challenging the power of the prison system to hire chaplains, but rather was challenging the scope of those chaplains' duties. The court stated that "prison chaplains' exercise of substantial government authority may constitute excessive religious entanglement in the affairs of the state, even if the employment of prison chaplains does not."⁵⁴ On remand, the district court was directed to examine "the scope of the authority exercised by prison chaplains" to determine whether the Establishment Clause or Religious Test Clause was violated.⁵⁵ With respect to Theriault's free exercise claims, the district court was directed to conduct an inquiry into whether the Holy Mizanic faith is a religion, or merely a renamed version of the Church of the New Song, and if the new faith is a religion, whether the rights of its adherents were being

⁵² *Theriault v. A Religious Office*, 895 F.2d 104, 105-06 (2d Cir. 1990), *rev'g* 709 F. Supp. 115 (S.D.N.Y. 1989).

⁵³ *Id.* at 106.

⁵⁴ *Id.* at 107. The court cited *Theriault v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972), and distinguished prior cases sustaining the government's power to hire and pay chaplains as being limited to approving employment of such chaplains to meet the religious needs of prisoners or military personnel. See *Katcoff v. Marsh*, 755 F.2d 233 (2d Cir. 1985).

⁵⁵ 895 F.2d at 107. U.S. CONST. art. VI provides in part: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

abridged.⁵⁶

C. Benjamin v. Coughlin

This case also concerned free exercise claims by inmates, but the circumstances are much less complex. Rastafarian inmates in New York State Department of Correctional Services institutions brought suit against prison authorities claiming the right to hold regular religious services, the right to "a vegetarian diet with foodstuffs that their faith permits them to eat,"⁵⁷ exemption from the general requirement that inmates have their hair cut before being photographed upon arrival at the institution, and the right to wear "loose fitting knit headgear known as 'crowns'."⁵⁸ The district court, accepting the religious nature of both the Rastafarian movement and the inmates' specific claims,⁵⁹ enjoined enforcement of the haircut regulation against plaintiffs, but rejected the other claims.⁶⁰

A unanimous panel of the Second Circuit affirmed. Drawing specifically on cases involving prison rules,⁶¹ the court found that the standard to be applied to a free exercise claim in such an environment is whether the regulation in question is "reasonably related to legitimate penological interests" in light of the impact that an exemption would have on the penal system, the presence or absence of alternative means by which the prisoners might exercise their rights, and the existence or absence of "ready alternatives . . . which accommodate the right and satisfy

⁵⁶ *Id.*

⁵⁷ Benjamin v. Coughlin, 905 F.2d 571, 580 (2d Cir.), *cert. denied*, 111 S. Ct. 372 (1990). The inmates did not seek, either as part of their diet or part of their religious services, the right to smoke marijuana. *Id.* at 573 n.2. Outside the context of prisons, Rastafarians have argued for religious exemption from drug laws for their practice of smoking marijuana during religious ceremonies. See Note, *Soul Rebels: The Rastafarians and the Free Exercise Clause*, 72 GEO. L.J. 1605, 1620-23 (1984).

⁵⁸ 905 F.2d at 573. "A fundamental tenet of the religion is that a Rastafarian's hair is not to be combed or cut, resulting in rope-like strands known as 'dreadlocks.'" *Id.*

⁵⁹ Benjamin v. Coughlin, 708 F. Supp. 570, 571 (S.D.N.Y. 1989). Prison authorities did not challenge the religious nature of the claim. New York state courts have affirmed the contention that Rastafarianism is a religion for First Amendment purposes. See *Overton v. Coughlin*, 133 A.D.2d 744, 520 N.Y.S.2d 32 (2d Dep't 1987). For a concise description of Rastafarianism and the question of whether it is a religion, see Note, *supra* note 57, at 1605-14.

⁶⁰ 708 F. Supp. at 577.

⁶¹ 905 F.2d. at 574 (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Turner v. Safley*, 482 U.S. 78 (1987); *Pell v. Procunier*, 417 U.S. 817 (1974)).

the government interest."⁶² These same factors would be applied to plaintiffs' equal protection claim, that is, that especially with respect to the prohibition of headgear, their religious claims were treated differently from analogous claims by prisoners of other faiths.⁶³

Although the court accepted the need for prison authorities to obtain photographs accurately depicting inmates "for purposes of identification in the event of escape," the court found that the alternative of photographing inmates with their hair tied back in "pony tails" would satisfy the state's interest.⁶⁴ The prison permitted any inmate to regrow his hair, and reserved the right to photograph any inmate whose appearance changed drastically, demonstrating its own understanding of the fact that how the inmate looked upon entry is less important than how he looks upon escape. A Rastafarian prisoner would surely regrow his hair as soon as possible after his initial haircut. Thus, the district court was upheld in its holding that refusal to accommodate Rastafarian prisoners with respect to the haircut regulation failed the balancing test required by the Free Exercise Clause.

On the other hand, the court upheld the denial of the Rastafarians' right to congregate for prayer. Prison regulations required that religious services may take place only if the prison religious group has a "free-world sponsor," that is, an individual or group outside the prison who regularly visits and communicates with the prisoners group. The purposes of outside sponsorship are "to ensure that the meeting is convened for religious purposes" and not for illegitimate reasons, and "to minimize conflicts among inmates as to the nature and content of the service."⁶⁵ Although Rastafarians have no traditional clergy, an "Elder," one educated in the religion, could serve the same purpose in satisfying the regulation. The fact that no Elder had come forward was described as simply not the fault of prison

⁶² *Id.* As the court noted, this was described in *Turner*, 482 U.S. at 81, as "a lesser standard" than that used outside the prison environment.

⁶³ *Id.* at 575. Other religious headgear, specifically the Jewish yarmulke and the Muslim Kufi, were permitted. *Id.* at 579. Jewish and Muslim prisoners were also accorded some "special dietary accommodation." *Id.*

⁶⁴ *Id.* at 576-77. Such accommodations would have only "a de minimis effect on valid penological interests." *Id.* at 577. Plaintiffs did not challenge the requirement that they receive a shave prior to being photographed. *Id.* at 572. That requirement was held constitutional by the Second Circuit in *Fromer v. Scully*, 874 F.2d 69 (2d Cir. 1989).

⁶⁵ 905 F.2d at 577-78.

authorities and, therefore, not fatal to the legitimacy of the regulation.⁶⁶

Similarly, the court affirmed the district court's holding that the regulation which prohibited the wearing of Rastafarian "crowns" satisfied the balancing test and was therefore permissible. Unlike the Jewish yarmulke and the Islamic Kufi, headgear permitted by the regulations, Rastafarian crowns are "large and loose fitting,"⁶⁷ and therefore pose genuine risks as potential hiding places for contraband. This fact, held the court, not only justified the prohibition under free exercise balancing, but was a sufficient distinction from other religious headgear to defeat any equal protection challenge.⁶⁸

Finally, the court upheld the district court's rejection of the challenge to prison officials' refusal to provide an Ital diet, consistent with Rastafarian requirements. The court found that the Ital diet was ill-defined: various individuals and sects within Rastafarianism imposed different restrictions. The accommodation of all variations of Ital could well be "administratively infeasible" or extremely costly. The court declined to define the Ital diet to assess the practicality of accommodating it, as prison authorities do for at least some dietary requirements of Jewish and Muslim prisoners.⁶⁹

⁶⁶ *Id.* at 578.

⁶⁷ *Id.* at 579.

⁶⁸ *Id.*

⁶⁹ *Id.* at 579-80.

In general, Rastafarians do not eat meat, and almost universally abstain from eating pork. Most Rastafarians abstain from alcohol and caffeine. Some Rastafarians do not eat fish, and some refuse dairy products. Some refrain from eating any foods that have been processed, particularly canned food, believing that the can symbolizes a coffin, or death. Some Rastafarians refuse to eat vegetables that have been cooked for more than a few minutes, believing that overcooking destroys the food's natural value. Rastafarians also object to vegetables that have been treated with non-organic pesticides or fertilizers.

Some Rastafarians will only eat food that is prepared and served in pots and bowls made of natural materials: more specifically, clay pots and calabash bowls. Some Rastafarians will eat only food that they have prepared themselves. Others refuse food that has been prepared by a woman during her menstrual period.

D. New York State National Organization for Women (NOW)
v. Terry

Although this case did not explicitly deal with a claim under the religion clauses, it did raise free speech issues with free exercise overtones, and is worth noting as part of the cluster of Second Circuit cases under discussion. Randall Terry is an anti-abortion activist whose organization, Operation Rescue, has staged many demonstrations and acts of civil disobedience in attempts to interfere with the operation of abortion clinics.⁷⁰ Many Operation Rescue activists see their opposition to abortion as, at least in part, a religious duty.⁷¹

The plaintiffs sought and obtained, in New York state court, a temporary restraining order (TRO) enjoining the defendants from "trespassing on, blocking, [or] obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester counties."⁷² The underlying lawsuit sought permanent injunctive relief of the same nature. Despite the TRO, the defendants staged a demonstration outside an abortion clinic "at which several hundred participants were arrested."⁷³ At this point, the defendants successfully petitioned to remove the original lawsuit to federal court based on the federal statutory basis of one of the plaintiffs' causes of action.⁷⁴

Judge Ward of the Southern District of New York continued, in a modified form, the state TRO, and subsequently imposed civil contempt sanctions for the defendants' repeated violations of the order.⁷⁵ Ultimately, the district court issued the permanent injunction sought by the plaintiffs.⁷⁶ The defendants' appeal presented, among other issues, the claim that the district court had improperly limited their First Amendment rights.

⁷⁰ The history of the specific activities giving rise to this lawsuit are set forth in *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1250-53 (S.D.N.Y. 1989).

⁷¹ One of Terry's two named codefendants was a clergyman, Rev. James P. Lisante. For a sympathetic profile of Operation Rescue, see Meehan, *On the Road with the Rescue Movement*, 15 HUMAN LIFE REV., Summer 1989, at 7.

⁷² *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1344 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990).

⁷³ *Id.*

⁷⁴ *Id.* (claim under 42 U.S.C. § 1985(3)).

⁷⁵ *Id.*

⁷⁶ *Id.* at 1345.

After conceding that the defendants were engaged in political speech entitled to full First Amendment protection, the appeals court found the limitations on trespass, obstructing ingress and egress and "physically obstructing or tortiously harassing" those entering and leaving the clinics were reasonable time, place and manner restrictions. The provisions of the TRO were found to be content-neutral and narrowly tailored to a significant government interest and also did not deprive defendants of alternative means of communication.⁷⁷ Thus, the First Amendment claim was rejected.

II. THE BACKGROUND: RECENT SUPREME COURT RELIGION CLAUSE JURISPRUDENCE

This term's religion cases in the Second Circuit were decided at a moment of change and uncertainty in the standards to be applied in such disputes. Tests employed by the Supreme Court to resolve Establishment Clause and Free Exercise Clause cases have been reexamined, revised and even entirely abandoned. It is unlikely that this process of change is yet complete. Certainly with respect to the Establishment Clause, and perhaps also with respect to the Free Exercise Clause, the Court is likely to continue to revisit these issues and revise its approach. The significance of last term's Second Circuit cases cannot be measured without at least a brief discussion of the background against which they were decided.

For the last two decades religion clause jurisprudence used two decisions of the early Burger Court, *Lemon v. Kurtzman*⁷⁸ and *Wisconsin v. Yoder*,⁷⁹ as analytical paradigms. In *Lemon*, an Establishment Clause challenge to a state program of salary supplements to parochial school teachers teaching in specified secular subjects, the Court created a three-step Establishment Clause test. The first two steps, drawn from earlier cases invalidating organized prayer and Bible reading in public schools, were to ascertain whether the purpose and primary effect of a challenged government practice were secular.⁸⁰ If either was not,

⁷⁷ *Id.* at 1362-64.

⁷⁸ 403 U.S. 602 (1971) (Establishment Clause).

⁷⁹ 406 U.S. 205 (1972) (Free Exercise Clause).

⁸⁰ 403 U.S. at 612.

the statute or practice failed to satisfy the Constitution.⁸¹ The third step, drawn from an unsuccessful Establishment Clause challenge to the common practice of exempting religious property from taxation,⁸² stressed the impermissibility of either church or state directly meddling in each other's internal affairs. A government practice, even one with a legitimate secular purpose and primary secular effect, violates the Establishment Clause if it leads to impermissible "entanglement" between church and state.⁸³

The *Lemon* test was widely criticized as indeterminate and therefore potentially too permissive, or, as too restrictive creating a "Catch-22" paradox between its third prong and its first two.⁸⁴ Particularly in contexts other than those involving proposed government aid to religious schools (the specific type of question that gave birth to the test), the *Lemon* standards were difficult to use when assessing the permissibility of government action. Not only were they applied with different degrees of rigor, but occasionally the test was not applied at all.⁸⁵

Wisconsin v. Yoder was the high-water mark for judicial deference to free exercise claims. Before the 1960s the Supreme Court seemed to employ a relatively simple rule, that is, that the

⁸¹ This inquiry was summarized in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963):

[W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. at 222.

⁸² *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970).

⁸³ *Lemon*, 403 U.S. at 619. In *Lemon* the Court accepted the state's secular purpose but found that the supervision necessary to assure that the salary supplements would have a primarily secular effect would violate the nonentanglement requirement.

⁸⁴ Compare, e.g., Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U.L. REV. 207, 209 (1978) (Establishment Clause jurisprudence under *Lemon* is too restrictive of religion, and "results in the denial of true religious liberty to many Americans") with Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall - A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 786 (*Lemon* test has been used to justify "a movement of gradual, secularized Christian ethnocentrism" inconsistent with First Amendment values).

⁸⁵ See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the Court upheld the use of paid chaplains by the Nebraska legislature with no reference to the *Lemon* test, but rather upon the grounds that history validated the practice.

Free Exercise Clause protected only belief and expression of belief, and did not extend to conduct.⁸⁶ Thus, with minor exceptions,⁸⁷ the Free Exercise Clause became largely redundant, merely a specific restatement of protection of activity also protected by the Free Speech Clause.⁸⁸

The 1963 decision of *Sherbert v. Verner*⁸⁹ gave independent force to the Free Exercise Clause. *Sherbert* held unconstitutional a state requirement that to be eligible for unemployment compensation a recipient must be willing to accept jobs requiring Saturday work. The requirement placed the plaintiff, a Sabbatarian, in the position of having to choose between receiving compensation and agreeing to compromise a central tenet of her religion.⁹⁰ The Court held that when a statute caused "substantial" interference with the practice of religion, the state had to demonstrate that application of the statute without exception for the conscientious believer was necessary to protect a "compelling state interest."⁹¹

It might be argued that *Sherbert* made constitutionally suspect only government practices that single out a certain type of religion disadvantageously. Only those whose day of rest and worship was Saturday were restricted; Sunday worshippers were not asked to give up their special day. But in *Yoder*, the *Sherbert* test was applied to a more clearly neutral statute: Wisconsin's requirement that all children attend school until the age of sixteen.⁹² The Old Order Amish reject formal education beyond the eighth grade, believing that such education teaches values inconsistent with the Amish faith, and removes children from

⁸⁶ See *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (Free Exercise Clause does not protect "actions which were in violation of social duties or subversive of good order.").

⁸⁷ E.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (granting religious literature a constitutionally based exemption from a state tax on published materials that was generally enforceable despite its impact on nonreligious First Amendment activity).

⁸⁸ Thus, religiously motivated expressive activity was protected in cases such as *Cantwell v. Connecticut*, 310 U.S. 296 (1940), but on grounds that made the religious nature of the individual's motives irrelevant.

⁸⁹ 374 U.S. 398 (1963).

⁹⁰ South Carolina required that to be eligible for unemployment compensation a claimant must accept "available suitable work" unless good cause could be shown for declining it. Religious scruples against Saturday work did not constitute "good cause." *Id.* at 400-02.

⁹¹ *Id.* at 406.

⁹² *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

the community during "the crucial and formative adolescent period of life."⁹³

Applying strict scrutiny, the Court initially found that the requirement of high school attendance was a substantial burden on Amish religious practice.⁹⁴ The Court then found that history demonstrated that the Amish approach to education was effective in preparing adolescents for productive adult roles in the Amish community. Since the asserted state interest in compulsory education was precisely preparation for effective adulthood, the Court held that the state had failed to establish a compelling interest in applying the requirement of one or two years of high school to Amish children.⁹⁵

While criticism of *Lemon* takes several different forms, criticism of the *Yoder* test has largely made one point—that *Yoder* has been a paper tiger. In the eighteen years following *Yoder*, the only context in which free exercise claimants have prevailed before the Supreme Court has been in unemployment compensation cases substantially similar to *Sherbert*.⁹⁶ The track record of free exercise claimants, then, stands in sharp contrast to that of litigants who have raised colorable claims in other constitutional areas subject to strict scrutiny.⁹⁷ And while some of these cases presented the Court with situations in which enforcement of the challenged statute might well have survived strict scru-

⁹³ *Id.* at 211.

[The Amish] view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness" rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Id. High school attendance, the Amish believe, would "endanger their own salvation and that of their children." *Id.* at 209.

⁹⁴ *Id.* at 218.

⁹⁵ *Id.* at 221-29.

⁹⁶ See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

⁹⁷ Since *Yoder*, the Supreme Court has not sustained a claim of free exercise exemption outside of the context of unemployment benefits. See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Bowen v. Roy*, 476 U.S. 693 (1986); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *United States v. Lee*, 455 U.S. 252 (1982).

tiny,⁹⁸ several others presented state interests that seemed far short of compelling, or situations in which an exemption would hardly threaten the state interest at all.⁹⁹ Such inconsistency has, like the *Lemon* test, drawn much criticism.¹⁰⁰

Significant dissatisfaction with the tests for both religion clauses led to recent reconsideration of both by the Supreme Court. In the case of the Establishment Clause, this reconsideration has been rather cautious and has led to two different proposals, neither of which has yet been clearly endorsed by a majority of the Justices. The first of these alternatives was presented by Justice O'Connor in concurring opinions in two cases, one striking down an Alabama "moment of silence" requirement in public schools¹⁰¹ and one permitting a city-sponsored Christmas display including a crèche among other seasonal decorations.¹⁰²

Describing her suggestion as a clarification of, rather than as an alternative to, *Lemon*, Justice O'Connor stated that the central purposes of the Establishment Clause are twofold. "One is [to prevent] excessive [government] entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines."¹⁰³ The second, not entirely unrelated to

⁹⁸ For example, in *Lee*, 455 U.S. at 252, the Court rejected claims of religion-based exemption from the social security laws, and in *Bowen*, 476 U.S. at 693, the Court rejected claimant's efforts to prevent the government from making its own internal use of his family's social security numbers on the ground that granting such claims might well impose serious burdens on compelling government interests.

⁹⁹ Perhaps the best example is *Goldman*, 475 U.S. at 503, in which the Court deferred to the value of uniform military dress code regulations in denying the claim by an Orthodox Jew of a right to wear a yarmulke while performing his duties as an army psychologist.

¹⁰⁰ See, e.g., Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENTARY 147 (1987); Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847 (1984); Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); Pepper, *Reynolds, Yoder and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309.

¹⁰¹ *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

¹⁰² *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

¹⁰³ *Id.* at 687-88. Justice O'Connor cites as an example *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), which struck down, on Establishment Clause grounds, a zoning ordinance giving churches the right to veto tavern permits near those churches.

the first, is to prevent "government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."¹⁰⁴ This nonendorsement test has received much attention, most of it being at least generally positive.¹⁰⁵ Partly, no doubt, this is because Justice O'Connor's elaboration of the test gives some substantive meaning and rationale to the concept of government neutrality which seemed largely absent in many *Lemon*-era rulings. In addition, and this is both subtle and significant, the test itself satisfies the criteria of neutrality and the appearance of neutrality.

Perhaps the only constant factor in most academic suggestions for alternatives to *Lemon* has been that they are quite obviously meant to move Establishment Clause jurisprudence clearly toward either a more strict "separationism" or a more lenient "accommodationism."¹⁰⁶ Adoption of any of these tests would rightly be seen not merely as an improvement in the process of First Amendment analysis but also an obvious shift toward one side of the substantive debate. Both legal commentators and the general public would likely see such a clear shift as itself a fundamental statement by the Court about the value of traditional religion, either "endorsement" or "disapproval."

It is not at all clear that adoption of the nonendorsement test would lead to a consistent shift in substantive outcomes of Establishment Clause cases toward either the strict separationist

¹⁰⁴ *Id.* at 688.

¹⁰⁵ See, e.g., Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 YALE L.J. 1631 (1986); Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049 (1986); Note, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147 (1987). Of course, not all reaction has been favorable. See, e.g., Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266 (1987).

¹⁰⁶ Compare, e.g., McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (contending that "there exists a class of permissible government actions toward religion, which have as their purpose and effect the facilitation of religious liberty") with Goldberg, *The Wall of Separation of Church and State*, 11 GEO. MASON U.L. REV. 1 (1989) (in which former Justice Arthur Goldberg advocates "far more strict" limitations on government aid to religion). See also Cord & Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895.

or the accommodationist position. In fact, in the opinions in which she has expanded on the nonendorsement test, Justice O'Connor has used it to invalidate a "moment of silence" statute (a separationist outcome),¹⁰⁷ to sustain the display of a crèche as part of a large municipal display celebrating the holiday season (an accommodationist outcome),¹⁰⁸ and finally, to declare holiday displays by the City of Pittsburgh permissible and impermissible, based on the content of the particular display (a clear victory for neither side).¹⁰⁹

This cannot be said of the alternative proposed by Justice Kennedy in his separate opinion in *County of Allegheny v. ACLU*.¹¹⁰ To Kennedy the crucial question is whether the government has used "government's power to coerce . . . to further [religious] interests," or whether it has "proselytize[d]" or "contributed significant amounts of tax money to serve the cause of one religious faith."¹¹¹ At least in certain cases, particularly those involving "passive symbols" maintained by private parties on government property, adoption of this test would shift the balance of Establishment Clause jurisprudence clearly toward the "accommodationist" position. Justice Kennedy obviously believes that his test would make these questions more determinate; his harshest criticism of Justice O'Connor's proposal is its inability to lead to clear answers.¹¹²

Justice Kennedy's test surely does make outcomes determinate in cases involving "passive" symbols of the Christmas season. The courthouse crèche display in *Allegheny*, a case that might be expected to make all but the most consistent accommodationist at least hesitate, passes the test with flying colors. Yet, beyond the question of Christmas displays, is the "coercion" or "proselytization" test really more determinate than the nonendorsement test? Justice Kennedy cites, with approval, landmark cases prohibiting organized prayer and bible reading in public schools, even when the school permits individual chil-

¹⁰⁷ *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

¹⁰⁸ *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

¹⁰⁹ *County of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring). See notes 29-31 and accompanying text *supra*.

¹¹⁰ 492 U.S. at 655 (Kennedy, J., concurring in part and dissenting in part).

¹¹¹ *Id.* at 664.

¹¹² *Id.* at 669-77.

dren to opt out of the exercise.¹¹³ Why should these practices be regarded as clearly more coercive than the Pittsburgh crèche display? And what about the practice of the Nebraska legislature in paying a permanent chaplain to deliver invocations before legislative sessions?¹¹⁴ Is this state proselytization or direct financial contribution to propagation of a particular religious viewpoint? Rigorous application would seem to invalidate such legislative practice, but Justice Kennedy is clearly not inclined to overturn *Marsh v. Chambers*.¹¹⁵

While this is not to suggest that Justice Kennedy's coercion test could not be made consistent with most or all Establishment Clause precedent, it does indicate that the standard of "coercion" or "proselytization" leaves enormous room for exactly the same kind of uncertainty created by the use of the nonendorsement test. The only way to provide certainty would be to define "coercion" as limited to actual legal compulsion and to limit "proselytization" to something very close to the creation of a state-sponsored church. It is unlikely that Justice Kennedy intends to move Establishment Clause jurisprudence that far toward the accommodationist pole.¹¹⁶

Still, it is likely that, in practice, Justice Kennedy's test would be somewhat more determinate than Justice O'Connor's. This cannot be determined from merely comparing the words employed by the competing tests, but rather by looking at the full opinions in which they appear. Justice Kennedy states that

¹¹³ *Id.* at 661 n.1 ("The prayer invalidated in [*Engel v. Vitale*, 370 U.S. 421 (1962)] was unquestionably coercive in an indirect manner . . ."). Justice Kennedy also concedes that "an obtrusive year-round religious display would place government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* at 661. Is this merely another way to define "endorsement"?

¹¹⁴ *Marsh v. Chambers*, 463 U.S. 783 (1983). See note 85 *supra*.

¹¹⁵ 492 U.S. at 663-66. Justice Kennedy would find legislative prayer noncoercive. Perhaps it is, and distinguishable from school prayer by the age and suggestibility of the audience. But why is such prayer, even if noncoercive, not proselytization? Proselytization, to be such, need not be effective. Does Justice Kennedy mean to bar noncoercive proselytization only in contexts in which it is likely to be effective? If so, his proposal may be strikingly similar to Professor Jesse Choper's suggested revision of *Lemon* to prohibit government actions that are both intended and likely to have the effect of influencing religious choice. See Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 410 U. Prrt. L. Rev. 673 (1980). Whether this is a better test than nonendorsement may be debatable, but in any event it is hard to see how it is a clearly more determinate test.

¹¹⁶ See note 113 and accompanying text *supra*.

prevailing Establishment Clause jurisprudence goes beyond neutrality to denigrate religion by invalidating "our strong tradition of government accommodation and acknowledgement" of such beliefs.¹¹⁷ The inference can easily be drawn that the author of that sentence would consistently decide close cases in favor of accommodation. In contrast, Justice O'Connor's opinions do not suggest a consistent tilt toward either the separationist or accommodationist position. Not only has the nonendorsement test led to outcomes that have displeased adherents of both positions, but the source of criticism of the test has largely shifted. When first put forward it drew criticism as insufficiently separationist; now it has become the target of attacks by the Court's accommodationists.¹¹⁸ Thus, although the *Lemon* test is still cited and given some deference,¹¹⁹ it seems, except to a small group of strict separationists, to be somewhat like a family patri-

¹¹⁷ *Allegheny*, 492 U.S. at 664.

¹¹⁸ In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the dissenting opinions criticize Justice O'Connor, who provided the fifth vote to uphold the Pawtucket crèche. Justice Brennan was troubled by her willingness to allow government "acknowledgements," short of endorsement, of religion, 465 U.S. at 713-17 (Brennan, J., dissenting). Justice Blackmun chided Justice O'Connor for lax application of *Lemon*, 465 U.S. at 726-27 (Blackmun, J., dissenting). An article of mine approving the nonendorsement test, Beschle, *The Conservative As Liberal: The Religion Clauses, Liberal Neutrality and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987), was cited by Professor Howard Ball, disapprovingly, as standing in the accommodationist camp. Cord & Ball, *supra* note 106, at 920-21.

In *Allegheny* Justice Kennedy strongly attacks nonendorsement as leading to "[o]bsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation." 492 U.S. at 677-78. In fact, in an opinion joined by the "accommodationist" wing of the Court, he suggests that he finds the nonendorsement test even more offensive than strict separationism, since the latter is more consistent. 492 U.S. at 678-79 (Kennedy, J., concurring in part and dissenting in part). This statement, and the level of hostility reflected toward the nonendorsement test is striking, given the fact that earlier in his opinion, Justice Kennedy seems to employ his own nonendorsement test to refute strict separationism: "A categorical approach would install federal courts as jealous guardians of an absolute 'wall of separation', sending a clear message of disapproval." *Id.* at 657 (emphasis added). Justice Kennedy's statement on the relative merits of nonendorsement and strict separationism is striking evidence of the value that he appears to place on certainty and predictability, even at the expense of accommodationist outcomes.

¹¹⁹ Justice O'Connor has described the nonendorsement test as merely a "clarification" of *Lemon*. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). In *Mueller v. Allen*, 463 U.S. 388, 394 (1983), the Court, cautioning that *Lemon* "provides 'no more than [a] helpful signpost[t],'" still purports to apply it. See also *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985) (stating that *Lemon* would be applied, and that part of *Lemon* is the question of nonendorsement).

arch on his deathbed, spoken of with respect, but not taken all that seriously, while potential heirs jockey for position with an eye toward the inevitable passing. The possibility that *Lemon* will be followed by a test more clearly aligned with strict separationism seems extremely slight; with the departures of Justices Brennan and Marshall, only Justice Stevens can be classified as a consistent, predictable separationist.¹²⁰ In starkly pragmatic terms, it would seem wise for separationists to reconsider the virtues of the nonendorsement test; that test and Justice Kennedy's more accommodationist coercion test seem to be the clear contenders for the future Establishment Clause analysis model.

If the future of Establishment Clause jurisprudence is unclear, the future of the Free Exercise Clause was charted so unambiguously, but at the same time so unexpectedly, in 1990, that observers must wonder whether the new direction of free exercise analysis can possibly be what it seems to be. Despite widespread criticism of recent free exercise decisions, few expected that the Court would use *Employment Div., Dep't of Human Resources of Oregon v. Smith*¹²¹ to completely rework free exercise jurisprudence. Both parties maintained that existing precedent provided ample support for their positions.¹²² The narrow issue presented by *Smith* was whether Native American religionists, whose practices have for many years included sacramental use of peyote, are entitled, by virtue of the Free Exercise Clause, to an exemption from generally applicable state statutes prohibiting the use of mind-altering drugs.¹²³

¹²⁰ See 492 U.S. at 646-55 (Stevens, J., dissenting). Justice Stevens' separationism is so strong that it turns up even in quite unexpected places. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 560-72 (1989) (Stevens, J., concurring in part and dissenting in part), in which he suggests that a statute is invalid if its goal is grounded in religious beliefs.

¹²¹ 110 S. Ct. 1595 (1990). See note 3 and accompanying text *supra*.

¹²² In the state court proceedings, Oregon had maintained that it had adopted a practice narrowly tailored to a compelling state interest. *Smith v. Employment Div.*, 301 Or. 209, 721 P.2d 445 (1986), *vacated*, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990). Justice O'Connor would have upheld the state's position on those grounds, 110 S. Ct. at 1606-15 (O'Connor, J., concurring). Earlier state and federal court decisions applying strict scrutiny were divided on the question of free exercise protection for the sacramental use of peyote. See *Brown, Religion: The Psychedelic Perspective: The Freedom of Religion Defense*, 11 AM. INDIAN L. REV. 125 (1983).

¹²³ Respondents had not been convicted under the Oregon criminal statute, OR. REV. STAT. § 475.992(4) (1989), but rather had been dismissed from their jobs as employees of a private drug rehabilitation organization based upon their sacramental use of peyote

Given current public attitudes on illegal drug use, it seemed a safe bet that the Court would refuse to recognize such a right, but given prior free exercise cases, it also seemed safe to assume that the Court could and would do so while still applying the strict scrutiny standard of *Yoder*. Instead, thirty years of free exercise law was dismantled.

Justice Scalia, writing for a five-member majority, seriously narrowed the commonly accepted view of the scope of the clause. Citing the Court's earliest free exercise cases, he held that the clause was principally aimed at protecting beliefs, not actions.¹²⁴ It would protect action only where the state's motive in banning or compelling it was hostility to the religious motivation behind, or message conveyed by, the act.¹²⁵ As Scalia himself points out, no such case has ever been presented to the Supreme Court; as Justice O'Connor points out in her concurring opinion, Scalia's test makes the Free Exercise Clause largely a restatement of the due process requirement that government action have a rational (that is, secularly defensible) basis.¹²⁶ Scalia does not acknowledge that the Court is seriously altering free exercise law; rather he states that "we have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."¹²⁷ All prior cases which appeared to do just that were described as "hybrid situation[s]" in which free exercise was merely a distraction from the genuinely determinative claim. This is, no doubt, a plausible description of the cases from the 1930s and 1940s involving religiously motivated free speech

and were subsequently denied unemployment compensation under a provision of state law denying benefits to those dismissed for work-related misconduct. 110 S. Ct. at 1597-98.

¹²⁴ "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." 110 S. Ct. at 1599.

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Id. at 1600 (citing *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879)).

¹²⁵ 110 S. Ct. at 1599.

¹²⁶ 110 S. Ct. at 1608 (O'Connor, J., concurring).

¹²⁷ 110 S. Ct. at 1600.

claims,¹²⁸ but it is far from the common understanding of *Yoder*.¹²⁹ To Scalia, *Yoder* is a case about "the right of parents . . . to direct the education of their children."¹³⁰ Finally, *Sherbert* and its progeny are seen as creating a special exception, not involving a government decision to regulate conduct generally, but rather only to regulate unemployment compensation programs, which "invite consideration" of individual circumstances.¹³¹ In short, the rule that unwillingness to violate religious principles may not serve as a rigid bar to eligibility for unemployment compensation survives, but it may have the same relevance to the rest of First Amendment law as the holding that professional baseball is not interstate commerce for purposes of the Sherman Act has to the rest of antitrust law.¹³²

Under a test that subjects only the law itself, rather than the failure to provide an exemption, to scrutiny, and asks only whether it is rational and does not violate other constitutional commands, some truly remarkable conclusions seem warranted. A state or local prohibition on alcoholic beverages need not exempt sacramental wine;¹³³ government may prohibit liturgically mandated alterations to the interior of a church by designating the sanctuary a landmark to be preserved under zoning restrictions;¹³⁴ and laws prohibiting gender discrimination in employ-

¹²⁸ *E.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹²⁹ See notes 93-95 and accompanying text *supra*.

¹³⁰ 110 S. Ct. at 1601. On this point, Justice Scalia also cites *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹³¹ 110 S. Ct. at 1603.

¹³² See *Flood v. Kuhn*, 407 U.S. 258 (1972). The exemption, based on grounds of *stare decisis*, has had no effect on the Court's classification of other professional sports as having an effect on interstate commerce, and therefore falling within the jurisdiction of the Sherman Act. See *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971); *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club*, 348 U.S. 236 (1955).

¹³³ The *Smith* dissenters point out that the National Prohibition Act, §3, 41 Stat. 308, contained an exemption for sacramental wine. 27 U.S.C. § 1 (1919), *repealed by* ch. 740, § 1, 49 Stat. 872. They suggest that even had such an exemption not been incorporated into the statute, it would have been constitutionally compelled. 110 S. Ct. at 1618 n.6 (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.).

¹³⁴ See generally *Rector, Wardens, and Members of St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y.), *aff'd*, 914 F.2d 348 (1990) (landmark restrictions upheld where church wanted to replace existing structure); *Orthodox Minyan of Elkins Park v. Cheltenham Township Zoning Hearing Bd.*, 123 Pa. Commw. 29, 552 A.2d 772 (1989) (court found that zoning board's denial of special exception to convert residential property to synagogue was arbitrary and invalid).

ment need not exempt churches, even in their choice of clergy.¹³⁵

Scalia's response is to direct those seeking exemptions to the legislature.¹³⁶ Here the fit between *Smith* and Justice Kennedy's more lenient approach to the Establishment Clause becomes evident. The clear implication of Scalia's suggestion of legislative redress is that exemptions from general duties created by the legislature will be valid, that is, will not themselves violate the Establishment Clause.¹³⁷ If they do, then the option of legislative exemptions becomes illusory. With *Yoder* understood as commanding government to permit, in some cases, religious-based exemptions from general duties, the Establishment Clause issue was easily resolved. In *Lemon* terms, the secular purpose and effect of this exemption was compliance with the mandate of the Free Exercise Clause.¹³⁸ With that response unavailable, is it clear that legislative exemptions present no constitutional problems?

Clearly, an exemption or pattern of exemptions that favors a particular religion, and is not extended to analogous claims based on secular moral grounds raises questions under the nonendorsement test. But, as discussed above, Scalia and Kennedy favor a test that draws the constitutional line at coercion or proselytization.¹³⁹ An exemption, it might be said, is merely an accommodation, not in any way a coercive act. But exemptions might easily be seen to generate some sort of pressure. Take, for instance, the most historically prominent of such ex-

¹³⁵ Compare *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (prohibition on gender discrimination cannot be applied to church's choice of ministers and analogous personnel) with *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (statutes prohibiting gender bias do apply to churches when choosing employees not in clergy or decision-making positions).

¹³⁶ 110 S. Ct. at 1606: "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required"

¹³⁷ *Id.* The characterization of a question of special treatment for religion as presenting primarily a question of free exercise or one of Establishment Clause concern can be crucial in determining the outcome. The classic example may be tax exemptions for religious property. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); note 83 and accompanying text *supra*.

¹³⁸ See notes 78-85 and accompanying text *supra*.

¹³⁹ See notes 110-18 and accompanying text *supra*.

emptions, that for conscientious objectors to military service.¹⁴⁰ If such an exemption were limited to certain denominations with an unambiguous history of pacifism,¹⁴¹ would that influence some with antiwar views to join those churches, and would that influence be "coercion"?¹⁴² Analogous examples might be generated, even in the specific area at issue in *Smith*, that is, drug use. Would a legislative exemption for adherents of Native American religions influence some to adopt those beliefs, and if so, is that coercion?¹⁴³ It does not seem implausible that at least some legislative exemptions might run afoul of even a reasonably accommodationist view of the Establishment Clause.

The second, and perhaps more striking, problem with the Scalia suggestion is that it quite obviously is a more feasible option for members of religions that command the allegiance of large numbers of voters, and less so for minority faiths. Justice Kennedy, in *Allegheny*, criticized the nonendorsement test as quite possibly giving greater leeway to accommodate minority faiths than those that are dominant in the community. He noted that a reasonable observer, informed of the demographics of, say, Pittsburgh, could not conclude from the display of a menorah on city property that it was a community in which non-Jews

¹⁴⁰ See generally *Gillette v. United States*, 401 U.S. 437, *reh'g denied sub nom. Negre v. Larsen*, 402 U.S. 934 (1971); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Girouard v. United States*, 328 U.S. 61 (1946), *overruling United States v. Macintosh*, 283 U.S. 605 (1931).

¹⁴¹ In *Gillette* the Court rejected the claim that the statutory limitation of conscientious objector status to those who object to "war in any form," thereby disqualifying those who object to a particular war as unjust, violated the Constitution. The Court finessed the contention that certain types of religion had been singled out for favorable treatment by saying that the inquiry focuses on the consistent pacifism of the individual and whether it springs from religious conviction, not on the consistent pacifism of the religious group to which the individual belongs. *Gillette*, 401 U.S. at 451. Thus, had *Gillette* adhered to a consistent pacifism which he derived from his Catholicism, he would not have lost his status as a conscientious objector simply because his opposition to war went beyond the "just war" tenet of his church.

¹⁴² See notes 110-18 and accompanying text *supra*.

¹⁴³ It would seem very likely that one factor behind the reluctance to exempt any form of drug use, on religious grounds, from general prohibitions is the suspicion that it will lead to an unmanageable number of insincere professions of religious belief to protect illegal behavior. See Brown, *supra* note 122, at 137-43, discussing cases in which the defense of sacramental use was invoked by defendants not members of the Native American Church, and sometimes not members of any recognized church at all, following the California Supreme Court's exemption from criminal prosecution of peyote use by members of the Native American Church in *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

were excluded from full civic participation. On the other hand, a cross displayed under the same circumstances might be reasonably perceived as Pittsburgh proclaiming itself a Christian city.¹⁴⁴ Justice Kennedy is wary of any test that will not, in practice, treat all religions equally.

Yet, by joining Justice Scalia's opinion in *Smith*, Kennedy endorsed a test that plainly has a disparate effect on different religions. The invitation to religious groups to seek legislative exemption stands on its head the insight of *Carolene Products*¹⁴⁵ and the work of structuralists such as John Hart Ely.¹⁴⁶ Justice Kennedy is upset that the nonendorsement test might disadvantage religious groups with substantial electoral power yet is unconcerned that *Smith* disadvantages those without such power. Contrary to decades of constitutional law, the religion clauses are interpreted by Justice Kennedy in a way that provides special protection for those least in need of it.

Perhaps this overstates *Smith*'s endorsement of legislative exemptions. It may be that the exemptions envisioned would have to be framed without explicit denominational favoritism. Surely, giving an exemption from a general prohibition of alcohol to only Roman Catholic churches, and not to other denominations that also use sacramental wine, would be impermissible. Yet *Smith* does not provide a principle to limit the availability of legislative exemptions, and neither does the noncoercion standard of Justice Kennedy's Establishment Clause approach.¹⁴⁷

¹⁴⁴ See *County of Allegheny v. ACLU*, 492 U.S. 573, 616 n.64 (1989), in which Justice Blackmun refers to the fact that the Jewish population of Pittsburgh is only slightly over 10% as relevant to the determination of whether a reasonable observer would derive a message of endorsement or one of pluralism from the menorah in that case.

¹⁴⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938). The case is best known for its famous footnote 4, which suggested that a level of scrutiny beyond the "rational basis" test might be appropriate in three types of cases: first, "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments"; second, when "legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; finally, when "statutes [are] directed at particular religious . . . national . . . or racial minorities . . ." *Id.* at 152 n.4.

¹⁴⁶ J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Dean Ely here constructs probably the most influential and elaborate defense of the use of judicial review to achieve "representation - reinforcing" ends, among them to insure that minorities are not systematically denied the same protections secured by majorities through the democratic process.

¹⁴⁷ See notes 110-18 and accompanying text *supra*.

These flaws in *Smith* have hardly gone unnoticed. Justice O'Connor, in her concurring opinion, and three dissenting Justices strongly criticize the abandonment of strict scrutiny.¹⁴⁸ The very presence of these strong objections may indicate that *Smith* is likely to endure; *Smith* was a deliberate step over forceful opposition, not merely a thoughtless misstep. Still, if the Court can, with a collective straight face, present *Smith* as consistent with *Yoder*,¹⁴⁹ perhaps modification of *Smith* might also be possible, if presented as entirely consistent with precedent. Thus, the Supreme Court has seriously altered Free Exercise Clause jurisprudence in the last year and seems poised to at least modify Establishment Clause analysis in the near future. Against this background, we return to the cases decided last term by the Second Circuit. How consistent are they with this new thinking regarding the religion clauses? To what extent do they illustrate the reasons for such changes? And most significantly, what do they augur for the future? Specifically, might they suggest some ways out of the dilemmas posed by current doctrine?

III. THE FUTURE: WHAT CAN WE LEARN FROM LAST TERM'S CASES?

Last term's Second Circuit religion clause decisions can be evaluated in several ways. The two traditional inquiries would

¹⁴⁸ *Smith*, 110 S. Ct. at 1606-13 (O'Connor, J., concurring); 110 S. Ct. at 1615-16 (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.).

¹⁴⁹ 110 S. Ct. at 1601, 1601 n.1 (*Yoder* involved Free Exercise claim in connection with "other constitutional protections"). In a 1988 commencement address at McGeorge School of Law, University of the Pacific, Justice Kennedy quoted the argument of *Yoder*'s counsel before the Supreme Court:

My argument . . . will pursue two points. One, the free exercise claim, and secondly, the question of danger to interests of the state

We're talking about a whole complex of religious interests: religious interests in rights, in education, and in worship; in parental nurture and individual religious choice; in vocation and communal association with respect to teaching and learning, and with respect to privacy [I]ndeed, we're talking about . . . the continued existence of the Amish faith community in the United States.

Kennedy, *The Three R's of the Law: Reason, Rhetoric and Respect*, McGEORGE MAGAZINE 1989, at 33, 35 (quoting opening argument in *Yoder*, 406 U.S. 205 (1972)). It is difficult to maintain that those most involved in the case did not see it as one primarily about free exercise. Although Justice Kennedy presented the quote as an illustration of powerful rhetoric, without explicitly endorsing its substance, this commencement address does seem to imply that, in 1988, he shared that understanding of the substance of *Yoder*.

be to explore whether they were correct in a positivist sense, that is, consistent with controlling precedent, or to ask whether they were correct in a normative sense, that is, whether they embody a view of what the clauses should command. Each of these questions is of some interest, although the value of the positivist question is reduced by the shifting standards supplied by the Supreme Court for use in these cases. But if the dynamic nature of religion clause standards makes the positivist question less interesting, it highlights a third way to examine these cases. What do they tell us about the future, about where religion clause jurisprudence is headed, why it is moving in that direction, and whether alternative courses are possible and preferable?

A. *The Establishment Clause*

Kaplan may be a significant case, but for reasons likely to displease Judges Feinberg and Lumbard. It may prove to be a pyrrhic victory for advocates of strict separation. As discussed in Part II, the Justices inclined to use *Lemon* to reach consistent separationist outcomes are now a minority and, with the departure of Justice Marshall, likely to be even less influential in the future.¹⁵⁰ The Court is likely to adopt either Justice O'Connor's nonendorsement test, or Justice Kennedy's noncoercion and nonproselytization test.¹⁵¹ Of the two, nonendorsement seems clearly closer to the separationist position. *Kaplan* itself indicates that, at least in cases involving the display of religious symbols, the nonendorsement test can be used to reach separationist ends more easily than the noncoercion test.

However, the Second Circuit's invocation of the nonendorsement test in barring the menorah in *Kaplan* may provide evidence for those who criticize the test as being unacceptably indeterminate, and, more specifically, see such indeterminacy as a weapon to be unduly employed against all forms of accommodation.¹⁵² Of course, indeterminacy is not necessarily a fatal flaw; much of constitutional law consists of general rules that leave much leeway in application to specific situations. The tension between the Free Exercise and Establishment Clauses may make a certain degree of unpredictability the only alternative to rules

¹⁵⁰ See note 120 and accompanying text *supra*.

¹⁵¹ See notes 101-18 and accompanying text *supra*.

¹⁵² See text accompanying note 112 *supra*.

that, while clear, seriously undervalue one or another of these First Amendment concerns. But if flexibility leads to outcomes that seem to strain too much to enforce separationism, Justice Kennedy's critique of the nonendorsement test is likely to gain adherents.

Both *Allegheny* and *Lynch* stress the importance of the context in which a religious display on public property is viewed. But surely the question of whether the display, in context, conveys government endorsement cannot be reduced to asking whether the scene includes, in the same visual frame, a secular symbol to balance the religious message. Context includes several other things, among them the nature of the forum. Had the city granted a type of access to the menorah that went beyond that which would be available to analogous nonreligious displays, the conclusion that it endorsed the message would be quite proper. But it is extremely difficult to see, in the absence of any evidence that Lubavitch of Vermont was given access to City Hall Park unavailable to others, how Burlington has endorsed any value beyond equal access to the public forum. Although it is true that a casual observer, unfamiliar with the history of use of the park, might draw an incorrect conclusion of religious endorsement, the same could be said about a visitor to a university building who comes upon a room in which a religious student group is meeting.¹⁵³ But an observer who is reasonably informed about government's policies of equal access should perceive no more than an endorsement of pluralism. Surely, the nonendorsement test depends and should depend on the latter perception, rather than the former.

Yet in *Kaplan* the court seemed to place undue weight on the perceptions of the uninformed, and perhaps also the unreasonable, viewer. While we may assume that those objecting to the display were, for the most part, acting from a genuine commitment to separation of church and state, is it likely that they actually took the menorah to signify that Jews were politically privileged in Burlington, and that the city regarded its non-Jewish majority as "outsiders"?¹⁵⁴ Even more troubling than the ap-

¹⁵³ See *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that free exercise principles demand that religious student groups not be excluded from access to university facilities made available to analogous nonreligious groups).

¹⁵⁴ See notes 103-04 and accompanying text *supra*.

parent overvaluing of the likely reactions only of the uninformed or unreasonable is the distinct possibility that the reactions of the intolerant were also given substantial weight. The district court found that at least some of the objections to the menorah were openly anti-semitic;¹⁵⁵ some observers took offense, not at the appearance of government favoritism, but rather at the fact that Lubavitch and its display had any sort of place in Burlington. It is quite disturbing that intolerance might, however inadvertently, be the beneficiary of a decision purporting to enforce the constitutional provision most clearly meant to protect religious tolerance.

Kaplan, then, appears to misread *Allegheny* in at least one of two ways. It overvalues the perceptions of the least informed and least reasonable observers, and it seems to try to distill the subtleties of the nonendorsement test in cases involving religious displays to a clear rule that religious symbols are always forbidden except when an analogous secular symbol is very close by. The first of these analytical errors strains nonendorsement beyond its boundaries as defined by Justice O'Connor and seems almost calculated to demonstrate that the test is malleable enough to serve strict separationist ends as well as any prior Establishment Clause formula. The second, apparently seeking to provide a clear standard, produces one so artificial as to again cast doubt on the viability of anything other than Justice Kennedy's accommodationism.

Four Supreme Court Justices have endorsed the position that essentially all "passive" holiday displays do not violate the Establishment Clause.¹⁵⁶ With the departure of Justices Brennan and Marshall, only one Justice remains who has been con-

¹⁵⁵ *Kaplan v. City of Burlington*, 700 F. Supp. at 1321 n.7; see notes 18-19 and accompanying text *supra*.

¹⁵⁶ *Allegheny*, 492 U.S. at 660-63 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White and Scalia, JJ.). Only in an "extreme case," such as "the permanent erection of a large Latin cross on the roof of city hall," would a passive display become an act of coercion or proselytization. *Id.* at 661. One can have enormous fun with this language, of course. What about the permanent erection of a small Latin cross? A cross on the side of city hall? Justice Kennedy cites, apparently with approval, *Friedman v. Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), invalidating the use of a Latin cross on a county seal. This may constitute endorsement; is it clear that it reaches the level of coercion? Once again, the false sense of predictability is evident. Only by adopting an absolute rule can certainty be achieved, and Justice Kennedy, quite correctly, shies away from this.

sistently opposed to such displays.¹⁵⁷ Thus, if either Justice O'Connor or Justice Blackmun were to agree with the foregoing analysis of *Kaplan*, a majority of the Court would be assembled to label it "wrong" in the positivist sense. But such labeling is less important than the impact *Kaplan*, and any decisions following it, in the Second Circuit or elsewhere, might have as the Supreme Court decides whether the future of Establishment Clause analysis will see adoption of nonendorsement or noncoercion as the principal standard.

The future of the Establishment Clause will largely depend on the views of Justice Souter, whose views on the religion clauses are untested, and Justice Thomas.¹⁵⁸ While it is possible that these Justices may prove to be strict separationists, the fact that their political sponsors surely are not makes it unlikely. If Justices who have yet to align themselves with the nonendorsement or noncoercion camps see nonendorsement as a standard that will allow, as Justice O'Connor has stated, government to recognize the presence and even the value of religion in a pluralist society while at the same time denying it privileged status, then there is every reason to believe that nonendorsement will prevail. But if nonendorsement is seen as impermissibly indeterminate, or worse, permitting the articulation of specific applications placing religions in the position of having fewer rights than analogous nonreligious views, the alternative of noncoercion will become more attractive. This is because indeterminacy itself is seen as unacceptable, or more specifically, because it contains the potential for use for strict separationist ends. *Kaplan's* insistence that the public square, both literal and figurative, be free from religious symbols does nothing to assuage the concerns of those who find nonendorsement unacceptable. The battle of the Burlington menorah has been won by the separationist camp, but in a way which, I fear, may make it somewhat more likely that those most committed to accommodationism will ultimately

¹⁵⁷ See 492 U.S. at 637-46 (Brennan, J., concurring and dissenting in part); *id.* at 646-55 (Stevens, J., concurring and dissenting in part).

¹⁵⁸ During his confirmation hearings, Justice Thomas spoke briefly but favorably about Justice O'Connor's nonendorsement test. *Hearing of the Senate Judiciary Committee Afternoon Session*, Sept. 10, 1991, available in LEXIS, Nexis library, Federal News Service file ("I think it is an important departure from prior approaches and it's one that anyone who approaches these cases should be concerned about or at least be watchful for.").

win the war over the future of the Establishment Clause.

At the same time, it may be possible to draw on last term's Second Circuit cases to illustrate that the adoption of a noncoercion test would provide little, if any, more certainty than the nonendorsement test. The Establishment Clause claim in *Theriault* is an excellent example of the difficulty of deciding when coercion begins. If the allegations of Theriault's Establishment Clause claim are based upon fact, then the participation of a priest, minister or rabbi in prison discipline or in evaluating an inmate's eligibility for parole or other benefits, considering that at the same time the chaplain's primary duty is to provide religious guidance, warrants serious examination. It is by no means clear that this examination will vary, either in its difficulty or its outcome, based on whether the question is posed as one of nonendorsement or noncoercion.

What has happened when the state goes beyond making a chaplain available to inmates and vests the chaplain with non-trivial disciplinary or evaluative duties? Has there been an endorsement of the chaplain's religion or religion in general, in that a reasonable observer would think that a visible adherent of the chaplain's faith is likely to gain advantage, to be an "insider"? Does the fact that a chaplain may have coercive power on secular matters lend the state's coercive power to his religious activities? Does it make the chaplain's proselytization the state's proselytization?¹⁵⁹ More importantly, are the questions substantially different? Is one more pliable than the other? This is not to say that there is no difference in the way the tests would be applied by their authors. The tone of their opinions in *Allegheny* and elsewhere would lead one to expect that Justice Kennedy would be at least more likely to require some evidence of actual religious motivation by a chaplain in exercising secular duties, while Justice O'Connor would be more likely to focus on the inmates' suspicions and the uniquely coercive atmosphere of the prison.¹⁶⁰ But there is nothing in the language or logic of the noncoercion test which suggests that it could not be stretched to include subtle "coercion," which might otherwise be described as

¹⁵⁹ See notes 38-40 and accompanying text *supra*.

¹⁶⁰ Thus, Justice O'Connor's test includes both a principle of actual absence of entanglement, and the absence of a message of endorsement. See notes 103-04 and accompanying text *supra*.

endorsement.

Whatever the future of the Establishment Clause, it is unlikely to include a great deal of certainty. Application of the clause becomes easy only if it is simplified in a way that fails to acknowledge the complexity of the contemporary relationship between law and religion. In a world in which law claims the power to pervade more and more aspects of everyday life, and in which both our understanding of religion¹⁶¹ as well as the religious diversity of our communities are expanding, glib references to a "wall of separation" are remarkably unhelpful. But at the same time, to draw the line of impermissibility narrowly around the most clearly coercive practices threatens the central command of neutrality contained in the First Amendment. The challenge to those who believe in the continued vitality of the clause is to help develop the potential of the nonendorsement test. Perhaps *Theriault*, as it moves through the court system, will provide a vehicle for doing this. *Kaplan*, though, would appear to have been singularly unhelpful.

B. *The Free Exercise Clause*

While neither *Theriault* nor *Terry* presented unique free exercise issues, or articulated significant new First Amendment law, the cases are not without some interest. They stand as excellent examples of the kinds of claims that must have disturbed Justice Scalia and others in the *Smith* majority¹⁶² and led them to reject the indeterminacy of any sort of balancing test, even at the cost of possible evisceration of the Free Exercise Clause. Despite the honor paid by history to Gandhi, King and others,¹⁶³ a perceived increase in the amount of civil disobedience must be profoundly disturbing to a society, in some ways more so than merely an increase in the incidence of crime. Even while violat-

¹⁶¹ Religion itself has undergone a change since the eighteenth century world of the framers. See Bellah, *Religious Evolution*, 29 AM. SOC. REV. 358 (1964). This has caused frequent problems for courts faced with the need to address the issue of whether a belief system is a religion. See, e.g., *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1982), cert. denied, 456 U.S. 908 (1982); *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979).

¹⁶² See notes 121-32 and accompanying text *supra*.

¹⁶³ For a collection of American documents on civil disobedience, from the colonial era to the 1970s, see *CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY* (D. Weber ed. 1978).

ing social norms, most criminals do not fundamentally call the legitimacy of the norm into question. The thief, even the murderer, however their actions shock us, do not make us question our opposition to robbery or murder. Indeed, even the criminal is likely to accept, perhaps even insist on, enforcement of the norm for his benefit, against other potential or actual transgressors.

But when laws are broken under a claim of right, something more profound is happening. The norm itself, perhaps society's entire system of norms, is called into question. Society must confront the claim that its legal system is, if not invalid, at least subordinate to some other set of values. If there is general consensus regarding the worth of that other set of values, and if the list of those types of claims that are recognized as superior to those of positive law is short, accommodation of these claims of right may pose little threat to the overall system of social norms. Indeed, recognition of such claims may strengthen respect for a legal system that acknowledges its own limits.

When the number of challenges to the legal system is seen as increasing, and the challenges are made on the basis of a wide assortment of religious doctrines, some far out of the mainstream of Western religious tradition,¹⁶⁴ they become far more unsettling. The challenger is no longer perceived as fulfilling his or her duty to a higher power by adhering to a norm that, while not held by the entire community, is at least understood by most in the community to be roughly analogous to their own commitments. Rather, the fact that the claim may not be endorsed by any traditional religious community but might be entirely personal,¹⁶⁵ and that it may seem substantively bizarre, may lead many observers to suspect that the conscientious objector is not submitting himself to a mandate higher than posi-

¹⁶⁴ See, e.g., *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1982) (claim of religious rights by "naturalist" movement MOVE), *cert. denied*, 456 U.S. 908 (1982); *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430 (2d Cir. 1981) (claim by Krishna members for right to engage in San Kirtan ritual); *Robinson v. Foti*, 527 F. Supp. 1111 (E.D. La. 1981) (claim by Rastafarians, who believe in the divinity of the late Ethiopian emperor Haile Selassie, to religious status).

¹⁶⁵ A personal claim may, of course, use traditional language to describe belief, see *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989) (individual views described as Christian, and not inconsistent with mainstream Christianity), or they may be unique to the point of being bizarre, see, e.g., *United States v. Ballard*, 322 U.S. 78 (1944) (individual builds religion around claims of his own supernatural powers).

tive law, but rather claiming the right to nullify legal obligations based upon personal choice. This, of course, creates visions of anarchy.¹⁶⁶

Both *Terry* and *Theriault* present this latter type of free exercise claim. Theriault's do-it-yourself religion will strike most people not only as bizarre but also as having been created precisely for the purpose of gaining secular benefits for its founder. To most observers, then, Theriault's beliefs are not only not their beliefs but are so dissimilar that they do not even elicit a tinge of empathy. Even worse, they create the impression that by allowing them to trump community norms, the community would be falling prey to a trickster.¹⁶⁷

The religious claims in *Terry* are less strange. They are grounded in mainstream religious views. Still, relatively few of the co-religionists of the defendants in *Terry* feel that their religion compels them to oppose abortion not only in their personal lives and by legal political activity, but also by illegal activity, perhaps to the point of violence. Thus, even *Terry* evokes the specter of the individual asserting a private right of nullification against the community, in a way that looks like an act of individual choice and will, rather than as a decision to submit dutifully to the demands of a power higher than the state. And while

¹⁶⁶ See generally Richards, *Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 780 (1984) (rejecting "[t]he expansive claims of anarchism," but contending that the theory "expresses some enduring truth about the values of democracy [and] the underlying democratic ideal of the moral sovereignty of the people . . ."). The enduring dilemma, of course, is to determine the limits of deference to conscience. One way to do this is to try to separate individual acts of duty from individual assertions of will by deferring to claims which most plausibly seem like submission to demands of competing authorities for obedience, such as religious doctrine, and rejecting claims that seem to be self-generated. See generally Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (for free exercise purposes, the state should defer to decisions made to avoid "extratemporal consequences," that is, punishment in some afterlife); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980) (free exercise inquiry is similar to a conflict of laws problem).

¹⁶⁷ This is the problem at the heart of *United States v. Ballard*, 322 U.S. 78 (1944). A court may not reject a religious claim on the grounds that it is false but may on the ground that it is insincere. But how can a factfinder, in determining sincerity, totally ignore the objective reasonableness of the claim? See, e.g., *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968), rejecting the bona fides of a "religion" centered around the use of drugs and seeming to be organized for the purpose of "mocking established institutions." *Id.* at 444. See also Noonan, *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713.

the Constitution surely calls for limited government, it just as surely does not call for government by unanimous consent, one in which the individual has a right to selectively reject community decisions.

It could hardly be said, of course, that pre-*Smith* free exercise law created anything resembling anarchy. The Second Circuit's swift rejection of the Free Exercise Clause as a shield for religiously motivated civil disobedience was entirely consistent with such precedent.¹⁶⁸ This raises the question presented in *Smith*, particularly in Justice O'Connor's concurring opinion, of why the doctrinal change was thought necessary. Cases like *Theriault* may provide the answer.

The language of strict scrutiny provides some plausibility to almost any free exercise claim. The test calls for some fact-based inquiry into the fit between the state's goals and the means chosen to achieve them. Thus, courts, even if ultimately endorsing the state's action, will be reluctant to dismiss claims without a reasonably careful hearing. The test, by holding out the hope of success, encourages—or at least does not discourage—plaintiffs to pursue even weak claims. Reducing the number of disputes, or at least the number of those that must be given careful attention is, no doubt, a good thing. But whether these benefits outweigh the impediments placed by *Smith* on the practice of minority religions is far less clear.

The most frequent rejoinder to the claim that clarity and predictability are paramount virtues in framing legal rules has been that imprecise rules such as "balancing tests" permit judges to do justice in the individual case.¹⁶⁹ Yet that justification itself seems so imprecise, and so obviously begs the question of what constitutes justice that it not only fails to rebut the

¹⁶⁸ See, e.g., *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (rejecting justification defense in case involving interference with activities of abortion center), *cert. denied*, 493 U.S. 901 (1989); *United States v. Romano*, 849 F.2d 812 (3d Cir. 1988) (rejecting religion-based necessity defense to charge of damaging government military property); *United States v. Elder*, 601 F. Supp. 1574 (S.D. Tex. 1985) (freedom of religion not a defense to charge of illegally sheltering aliens from immigration authorities).

¹⁶⁹ Justice Scalia describes this position as "one image of how justice is done - one case at a time, taking into account all the circumstances, and identifying within that context the 'fair' result." This position he associates with popularly acclaimed lawgivers such as Solomon, Saint Louis (Louis IX of France), and Judge Wapner, and rejects as the "personal discretion to do justice" model. Scalia, *supra* note 4, at 1176.

claim that certainty is extremely important, but seems to bolster that claim. A more sophisticated response is, however, possible.

The value of certainty may vary in different legal contexts. These contexts may have less to do with the relative importance of the claims being asserted by the individual than with the function of the court in the overall process of defining rights and duties. Courts and those who study their behavior often seem to forget that, even under theories that allocate considerable law-making power to judges, the process of lawmaking is something of a dialogue between courts and the political branches of government.¹⁷⁰ The rules of the dialogue, particularly the question of who has the last word, vary. Not so obvious is the question of how quickly the last word should be spoken.

When a court interprets a statute or defines a common law rule, the virtues of clarity can be seen to clearly outweigh the consequences of a wrong decision. This is so because the law-making dialogue is not over. The court has said to the legislature "we think you mean" (in the case of a statute) or "we think the rule should be" (in the case of common law adjudication). In each case, the legislature may effectively express its disagreement.¹⁷¹ When the court strikes down a legislative act, it has claimed the last word to a much larger extent. A wrong decision has more serious consequences for the community,¹⁷² but our constitutional system accepts, to some extent, the risk of such consequences as a necessary price for the value of judicial review in checking legislative abuses of power. Even here, however, the lawmaking dialogue may continue. A legislature may probe the limits of its power, being told in turn, by subsequent court decisions, that it has or has not crossed the constitutional line. Leg-

¹⁷⁰ Justice Scalia does not make this distinction in his argument for predictable rules. He discusses common law, statutory interpretation, and constitutional decision making interchangeably. In each case, he discusses the reaction to Supreme Court decision making only in terms of the reaction of lower courts, not in terms of possible reaction by legislatures. Scalia, *supra* note 4.

¹⁷¹ Largely for this reason, Professor Calabresi has advocated judicial power to invalidate outmoded statutes, but without declaring them unconstitutional. Thus, if the court is wrong in its assessment of the community's view of the statute, the legislature may restore the law. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

¹⁷² For a critique of the way in which the Supreme Court attempted to decide the abortion question, once and for all, prior to the time when the legislative branches and the people had sufficient time to resolve the problem, see M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

islative persistence may itself cause the courts to reconsider their conclusions. Examples include the constitutionality of New Deal social legislation¹⁷³ and, more recently, the question of abortion rights.¹⁷⁴ In these cases and others, much has been written about instances in which the Court has arguably attempted to end discussion of controversial issues prematurely by firmly entrenching individual rights.¹⁷⁵

Less has been said about the negative consequences of prematurely dismissing the possibility that a strong antimajoritarian right might exist. If courts announce unambiguously that, with respect to a certain area of law, essentially anything goes, the likelihood that legislatures will take constitutional values into account is reduced. And surely, legislators should, at least in some cases, take those values into account in deciding to stop short of the full measure of legislative control that would be permitted by the Court.¹⁷⁶ Perhaps the starkest recent example is the failure of the proposed constitutional amendment permitting states to criminalize flag desecration.¹⁷⁷ The adoption of the amendment would, of course, be beyond judicial challenge, yet opponents successfully argued that it would impermissibly impinge on other constitutional values, and therefore was unwise.

The example of the flag amendment shows that legislators

¹⁷³ Legislative persistence and public rejection of the Court's attempts to limit economic regulation, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), led the Court to reconsider, in cases such as *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *United States v. Darby*, 312 U.S. 100 (1941).

¹⁷⁴ *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

¹⁷⁵ See, e.g., GLENDON, *supra* note 172. Professor Calabresi, although ultimately agreeing with the Court's holding in *Roe v. Wade*, 410 U.S. 113 (1973), has also written of the negative consequences of attempting to resolve a highly charged social issue without permitting significant segments of society to have their say. G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 87-114 (1985).

¹⁷⁶ It has been argued that legislators have largely lost the sense that they should factor constitutional concerns into their work, since they see constitutional questions as judicial matters. Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449 (1971).

¹⁷⁷ The proposed amendment: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States," fell short of the necessary two-thirds vote in both the Senate and the House. 136 CONG. REC. H4,087 (daily ed. June 21, 1990) (House vote); 136 CONG. REC. S8,704 (daily ed. June 26, 1990) (Senate vote).

may give weight to constitutional values even in the absence of judicial review, but most would agree that this was an exceptional case. All too often, individual rights claims are buried in the legislative process under the weight of claims of social benefit or mere efficiency.¹⁷⁸ In such cases, the only weapon the individual may have to at least gain a respectful hearing for a claim of right is the plausible possibility that a court may undo the proposed legislative product, to the inconvenience of the entire community, and not least of all, to the inconvenience of the legislators themselves. This will not assure that the individual rights claim will be accepted by the legislature, nor should it do so. But it will make it more likely that the claim will be listened to with some degree of respect, and that, at least in cases where the infringement is either inadvertent or correctable at little cost to the overall goals of the legislative program, it will be.

The Free Exercise Clause and the rule of *Smith* serve as excellent examples. *Smith* appears to stand as a green light to legislators who prefer to ignore the concerns of minorities over the burden placed by general legislation upon their religious practices. Not only need legislators not defer to free exercise claims, they need not even consider the possibility that exemptions for believers might interfere only trivially with the goals of the proposed legislation, or that effective alternative means exist to achieve those goals without placing certain believers in the position of choosing between the mandates of their religion and the law. The only source of pressure to take such claims seriously will be political, and that pressure will diminish as does the size of the group of believers involved.

But if the possibility, however small, exists that a court might find that the legislature has gone too far, the situation changes. Now there is some pressure upon the legislature to listen to minority concerns. To be sure, those concerns may not prevail, but they will be taken seriously. The risk that the statute might lead to litigation and might, in fact, be invalidated may influence legislators to at least compromise where the cost of doing so is small, that is, when the weight of the burden placed on minority religions greatly exceeds the benefits that the absence of an exemption provides to the community at large.

¹⁷⁸ See Mikva & Lundy, *supra* note 176.

Thus, the often criticized fact that *Yoder's* strict scrutiny rarely led to the invalidation of statutes of general application misses its full significance. The existence of the standard served to remind legislators of the existence of a constitutional value—the importance of individual conscience. Just as the possibility of losing at trial, however small, influences litigants to move away from extreme demands and negotiate a settlement that might maximize the welfare of both parties, the possibility of litigation may serve to move legislators toward negotiation with groups lacking political clout.

If this analysis is valid, then at least some degree of uncertainty in enunciating the scope of the Free Exercise Clause becomes a virtue, rather than a vice. Still, a strong argument can be made that the strict scrutiny of *Sherbert* and *Yoder* went too far. An imprecise test is one thing; a test that is usually applied in a way simply inconsistent with its language is something different. Perhaps strict scrutiny had to go; surely, however, something other than *Smith's* near abandonment of the notion of a Free Exercise Clause with independent significance could have been found to replace it.

Calls for reconsideration of *Smith* that offer only strict scrutiny as an alternative seem clearly unrealistic, and perhaps also unwise. On the other hand, it may not be unrealistic, and would certainly be wise, to search for alternative approaches to *Smith* that are less sweeping in the scope of their protection of free exercise values than *Yoder*, but still pay those values considerable respect. *Benjamin v. Coughlin* may serve as a useful model.

There is no evidence that the court in *Benjamin* meant to apply *Smith*. Although the decision was handed down shortly after *Smith*, *Benjamin* was argued before *Smith*, and *Benjamin* does not cite to it. Instead, *Benjamin* relies on prior cases setting forth a standard applied in the *Yoder* era to claims made by prisoners, a standard less protective than the full measure of strict scrutiny.¹⁷⁹ An advocate of vigorous application of strict scrutiny would fault *Benjamin* on the grounds that prison authorities had failed to establish that the headgear and diet regulations were the least restrictive means of achieving the state's compelling interests. A proponent of *Smith*, on the other hand,

¹⁷⁹ See *O'Lone v. Estate of Shebazz*, 482 U.S. 342 (1987); *Turner v. Safley*, 482 U.S. 78 (1987); *Pell v. Procunier*, 417 U.S. 817 (1974).

would see *Benjamin* as too deferential to the prisoners' claims regarding hairstyles. Under this analysis, once a rational state interest had been established the inquiry should have come to an end. Under either analysis, *Benjamin* was incorrect, albeit for drastically different reasons.

And yet, when all is said and done, *Benjamin* appears to be an eminently reasonable decision. It takes seriously, both in its reasoning and its holding, not only the substantial state interests involved in prison management, but also the need of respect for diverse religious practices called for by the Free Exercise Clause. *Benjamin's* balancing test will, no doubt, usually permit prison authorities to prevail, but at the same time, does not give them a constitutional blank check. The authorities, in their own interest, have an incentive to give serious consideration to religion-based claims, and to defer at least in cases where deference imposes few costs to institutional goals.

What *Benjamin* is not is a neat and clean analysis that moves with inexorable logic to an inescapable and clear conclusion. Like all balancing tests, it is imprecise, and does not give prison authorities a clear road map for the future. However, this need not be considered a fatal flaw, even to the author of *Smith*. Recently, in other First Amendment contexts, Justice Scalia has endorsed the replacement of the traditional strict scrutiny demand for the "least restrictive alternative" with a demand that the regulation only be "narrowly tailored" to satisfy a substantial interest.¹⁸⁰ In the context of commercial speech, Justice Scalia has stated that this requirement, while less protective than traditional strict scrutiny, "is far different . . . from the 'rational basis' test"¹⁸¹

To satisfy Justice Scalia's commercial speech test, government must show that it seeks to protect a substantial interest and that "the cost [has been] carefully calculated."¹⁸² This seems strikingly similar to the types of questions called for by *Benjamin*. Is the regulation really in pursuit of a substantial public good? Has the government at least considered seriously the claim of the individual? Are obvious alternatives available, such that the exemption sought clearly does not threaten the

¹⁸⁰ Board of Trustees State Univ. of New York v. Fox, 492 U.S. 469, 477-78 (1989).

¹⁸¹ *Id.* at 480.

¹⁸² *Id.*

substantial government interest?¹⁸³

Justice Scalia's test for commercial speech is not precise and highly determinate. Yet he recognizes that in light of free speech values, a test more protective of the individual than the much more predictable rational basis test is required in cases involving commercial speech. Regardless of how protective one feels toward commercial speech, it would seem clear that the First Amendment was, at the very least, intended to give religion no less protection than advertising.¹⁸⁴ Free speech cases illustrate that the alternative to traditional strict scrutiny need not be the rational basis test. An intermediate balancing test may be formulated, and this is no less true with respect to free exercise, as illustrated by *Benjamin*. Surely, civil libertarians will not fail to note the heavy irony present here. *Smith* has so altered free exercise jurisprudence that a standard once used to give limited free exercise protection to prisoners now may be championed as something that, if applied to all citizens, would provide stronger constitutional safeguards than those which now seem to exist. Yet that seems to be where free exercise law now stands, and given that fact, *Benjamin* may have more significance than its authors imagined.

A final observation may be appropriate regarding the lessons that this year's Second Circuit decisions may hold for the continuing debate over the future of the Free Exercise Clause. If the basic motivation behind *Smith* was to terminate authoritatively the kinds of free exercise claims represented by those in *Theriault*, it is at least interesting to note that the new free exercise standards may not effectively end Theriault's lawsuit. *Smith* says nothing about the first inquiry before the district court on remand, that is, whether Theriault's new faith is so similar to his previous church that his present claim is barred.¹⁸⁵ If his claim is not precluded, it would appear that at the very least, a factual inquiry is in order. Theriault's claim is that

¹⁸³ See notes 61-63 and accompanying text *supra*.

¹⁸⁴ This is, of course, a decided understatement. Professor McConnell concludes, from a review of the history of the First Amendment, that it is clear that religious liberty was, in fact, meant to receive protection beyond the general protection of belief and expression on secular matters provided by the speech and press clauses of the amendment. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990).

¹⁸⁵ See notes 36-56 and accompanying text *supra*.

prison regulations single out his faith for particular disadvantageous treatment, due to hostility to its message, and that messages similar in their impact on legitimate government interests are preferred for access to the benefits Theriault seeks.¹⁸⁶ If supported by the facts, this would seem to be precisely the type of claim, a claim of overt hostility to a particular faith that, even under *Smith*, is cognizable. Of course, the facts may not support Theriault's claim, but the inquiry must nevertheless go forward with at least some degree of uncertainty, and at some cost to the resources of the judiciary. If *Smith* can be seen as using judicial nuclear weapons for the purpose of eliminating claims seen as merely annoying pests, it is interesting to see that at least one of those pests is alive and well, crawling out from the rubble of perhaps more substantial free exercise claims dismantled by the analysis in *Smith*.

Much of what has been said here with respect to the virtues of imprecise standards in furthering free exercise values may also be applied to the debate over Establishment Clause norms. The position that all "passive" displays are constitutionally permitted since they are noncoercive provides at least apparent clarity, certainly more so than the nonendorsement principle. But one consequence of uncertainty will be to provide some practical reason for political decisionmakers to listen to claims that displays, or other government acts, label certain religious views as preferred and create the impression that those who do not share them are disfavored. Such claims should be treated with respect, even if ultimately rejected. Imprecise rules regarding the application of the religion clauses may carry with them certain efficiency costs, but that is a worthwhile price to pay for a heightened sensitivity to the concerns of religious minorities who perceive threats to their First Amendment rights.

CONCLUSION

There is something reassuring about having a single, paradigmatic case to turn to in the analysis of any legal problem. This is so even when, as has been the case with *Lemon* and *Yoder*, the leading cases have been difficult to reconcile with

¹⁸⁶ He seeks the right to use prison facilities for the observance of his religion and to distribute religious literature. *Theriault v. A Religious Office*, 895 F.2d at 105-06.

subsequent law, and contain rules that are, therefore, not very helpful in predicting outcomes. Even if the rules were vague, or otherwise defective, at least everyone knew that analysis began with the recitation of a certain three-step formula.

With *Yoder* now unavailable in free exercise cases, and *Lemon* the subject of rethinking from at least two different directions, the comfort provided by established religion clause standards is gone. If last term's religion clause cases from the Second Circuit are viewed as merely the last chapter in the *Lemon-Yoder* era, they are of little importance. The standards applied are, or may soon be, rendered obsolete by the Supreme Court, and the cases present facts that, while interesting, are similar to those which have been litigated before. It may be the very fact that the cases are rather typical religion clause claims, however, that makes them interesting and significant at this time. First, the cases illustrate why standards are changing. *Terry* and *Theriault* are examples of the types of claims that frustrate those who wish to keep what they perceive to be bizarre or extreme religious claims out of the court system. Strict scrutiny provided a forum for such claims, despite the fact that they were rejected. *Kaplan* illustrates, yet again, the need for more substance than *Lemon* provides to the standards used by courts when examining Establishment Clause claims.

In addition, the cases may tell us something about the future. *Kaplan*, and its purported application of the nonendorsement test, may help determine whether nonendorsement or noncoercion emerges as the fundamental principle of Establishment Clause jurisprudence. Unfortunately, it provides ammunition for those who argue that nonendorsement is too indeterminate a standard. *Benjamin*, on the other hand, may serve as a model for those who wish to temper the harshness of *Smith* while recognizing that reinstitution of the strict scrutiny standard of *Yoder* is exceptionally unlikely. While not intended as such, *Benjamin* may be helpful in framing a new free exercise test that, while not purporting to be absolute, will provide at least a reasonable degree of protection for what has long been seen as a central constitutional right.

