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RETHINKING THE SUPREME COURT'S HANDS-OFF APPROACH TO QUESTIONS OF RELIGIOUS PRACTICE AND BELIEF

Samuel J. Levine*

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Introduction

In recent years, the United States Supreme Court has shown an increasing unwillingness to engage in deciding matters that relate to the interpretation of religious practice and belief. Justices have provided various rationales for the Court's approach. Some Jus-

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An earlier draft of this Article was written for Kent Greenawalt's Seminar on Church and State at Columbia University School of Law. I thank Professor Greenawalt for the opportunity to present my paper to the seminar, and I thank him as well as the seminar participants for their helpful comments and encouragement. I also received comments and encouragement from Mark Tushnet, Irene Merker Rosenberg, Vincent Blasi, Teresa Collett, and Victor Barall.

tices have suggested practical justifications for their reluctance to examine closely religious beliefs, declaring that courts are "ill equipped" to deal with such questions,¹ which these Justices consider beyond judicial competence.² Other Justices have cited constitutional considerations to support their view that courts should refrain from deciding questions of religious interpretation.³

While these Justices have articulated valid concerns, courts should not allow these concerns to deter them from making decisions vital to the effective adjudication of Free Exercise and Establishment Clause (collectively, "Religion Clauses") cases. Courts do not consider it beyond their competence to decide complex scientific questions when such decisions are necessary to adjudicate a case. Similarly, courts should decide questions of religious interpretation when the failure to do so would prevent a meaningful resolution of a case. Nor should the constitutional concerns, suggested vaguely by some Justices, deter the courts from making decisions that are truly necessary to protect the more concrete principles of the Religion Clauses.

In fact, it appears that as a result of the Court's increasing refusal to consider carefully the religious questions central to many cases, the Court often tends to group together religious claims and practices, regardless of the relative validity or importance of a particular practice within a religious system. This approach may lead to a number of disturbing results, some of which have already evidenced themselves in Supreme Court decisions in both Free Exercise and Establishment Clause cases.

In Free Exercise Clause cases, grouping together all religious claims may require courts to accept and protect to the same degree all claims which appear to have a basis in religious belief. Courts may thus lose the ability to reject claims of relatively minor or even questionable religious significance. In such cases, courts may grant unnecessary and improper protections and exemptions to professed adherents, resulting in potential burdens on the government and society as a whole that could otherwise be avoided.

1. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981).

2. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring); *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990); *Lyng v. Northwest Indian Cemetery*, 485 U.S. 439, 457-58 (1987); *Thomas*, 450 U.S. at 716.

3. See, e.g., *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring); *County of Allegheny*, 492 U.S. at 678 (Kennedy, J., concurring in part and dissenting in part); *Lyng*, 485 U.S. at 457-58.

Conversely, grouping together religious claims in Free Exercise Clause cases may lead courts to the opposite extreme of adopting an approach that allows sharp limitations on all religious claims, regardless of the more substantial nature of some claims. It is arguable that this latter danger is manifested in the reasoning expressed by many Justices in the decisions leading up to and including *Employment Division v. Smith*,⁴ the landmark decision that greatly restricted religious liberties, and which prompted Congress to enact the Religious Freedom Restoration Act.

Paralleling the dangers in Free Exercise Clause cases, there are two kinds of dangers that may result from courts' grouping together religious practices in cases involving the Establishment Clause. If courts are willing to attribute the same religious character to any practice related to religion, ignoring the different levels of religious meaning and motivation within different practices, courts may adopt one of two similarly opposing positions. One possibility is that courts will engage in an undesirably broad application of the Establishment Clause, finding that the government may not support any practice with even a remote connection to religion, and thus preventing even proper governmental accommodation of largely secular expression. If, instead, courts take a more narrow view of the Establishment Clause, then grouping together many practices despite differing levels of religious character may lead courts thereby to allow the government to engage in the impermissible establishment of practices with a substantial religious component.

Finally, the various dangers in both Free Exercise and Establishment Clause jurisprudence may be exacerbated by the fact that the Supreme Court has continuously broadened the range of the kinds of religious questions it refuses to consider. If courts continue to evade deciding these religious questions, their approach will perpetuate the unfortunate results that are already evident in a number of Supreme Court decisions.

Part I of this Article discusses some early cases, prior to 1981, in which the Supreme Court first expressed its hands-off approach to deciding questions of religious practice and belief. This Part suggests that in these decisions, as a result of a proper concern for religious autonomy, the Court already began the process of expanding the principle of judicial non-interference, at the cost of sacrificing effective adjudication of important constitutional issues.

4. 494 U.S. 872 (1990).

Part II critiques the Court's approach in Free Exercise Clause cases, identifying different problems that have arisen as a result of the Court's approach. Tracing the development of the Court's Free Exercise Clause jurisprudence, this Part argues that the Court's decision in *Employment Division v. Smith* was, in part, a result of the Court's increasing reluctance to decide questions involving religious interpretation.

Part III identifies problems that may arise out of the Court's approach in Establishment Clause cases. Though these problems may not always be readily apparent, a close look at the opinions of certain Justices suggests the emergence of problems parallel to those in Free Exercise Clause cases. Finally, this Article concludes with the hope that the Court will acknowledge the need to reconsider its approach and adopt a new willingness to examine more closely questions relating to religious practice and belief.⁵

I. The Basic Principles

It is troubling that an approach which prevents courts from closely examining religious principles and practices can often result in less than desirable outcomes. On the other hand, it is sensible that courts should not serve as a theology board and should try to refrain from judicially imposed religious interpretation. Indeed, based on this logic, in recent years the Supreme Court has increasingly avoided addressing issues that require consideration of the nature of religious practice and belief. Nevertheless, in light of some of the results and trends, both unfortunate and potentially dangerous, that have emerged from Supreme Court decisions, it may be time for the Court to reexamine its past decisions and reconsider its future treatment of cases involving religious questions.

A. Church Property Disputes

An early and important expression of the Court's unwillingness, on constitutional grounds, to engage in interpretation of religious beliefs is found in cases involving church property disputes, such as the 1965 case, *Presbyterian Church v. Mary Elizabeth Blue Hull*

5. In another context, I suggested that the Supreme Court's inability or unwillingness to look closely at religious practice and belief, from the perspective of religious adherents, prevented the Court from producing law that incorporates an understanding of minority religions. See Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153 (1996).

Memorial Presbyterian Church.⁶ In *Presbyterian Church*, the Court considered the question of “whether the restraints of the First Amendment . . . permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine.”⁷ The Court concluded that “[t]o reach those questions would require the civil courts to engage in the forbidden process of interpreting and weighing church doctrine.”⁸ Yet, a careful look at the facts of the case may suggest that the Court’s holding in *Presbyterian Church* has limited relevance to other cases.

The dispute in *Presbyterian Church* arose when two local churches withdrew from a general church organization, believing that the general church had violated that organization’s constitution and had departed from church doctrine.⁹ The general church established an Administrative Commission that took control of the local churches’ property on behalf of the general church, and the local churches filed suit. The Georgia State Courts held that, under Georgia law, the general church’s control over the property depended on its adherence to its doctrine as it existed at the time of the local churches’ affiliation.¹⁰

On appeal, the United States Supreme Court held that the Georgia court’s “departure-from-doctrine” approach violated the First Amendment by requiring civil courts to determine “the interpretation of particular church doctrines and the importance of those doctrines to the religion.”¹¹ The Court’s decision emphasized that the departure-from-doctrine standard was created by state law, not by church law.¹² The Court noted that the law, therefore, would improperly require the state, instead of the church, to interpret church doctrine, and that any church decision on the matter would be “at most . . . tangential” to the “state-fashioned departure-from-doctrine standard.”¹³ Moreover, the Court stated, even if the church had applied the state standard, a court’s review and enforcement of the church decision would likewise violate the First Amendment.¹⁴

6. 393 U.S. 440 (1969).

7. *Id.* at 441.

8. *Id.* at 451.

9. *See id.* at 442.

10. *See id.* at 443-44.

11. *Id.* at 450.

12. *See id.* at 451.

13. *Id.*

14. *See id.*

It is notable that the Court expressly acknowledged that it would be permissible for a court to “engag[e] in the narrowest kind of review of a specific church decision—i.e., whether the decision resulted from fraud, collusion or arbitrariness.”¹⁵ Though the Court did not define or discuss these categories of permissible review, it would seem that to identify fraudulent religious decisions by the church, a court would be required to engage in some analysis of the religious issues underlying the church decisions. Similarly, such an analysis would appear necessary in a court’s evaluation of the possibly fraudulent nature of an individual’s religious claim.

B. Church Tribunal Decisions—*Serbian Eastern Orthodox Diocese v. Milivojevic*

The question of how to interpret the Court’s decision in *Presbyterian Church* arose in *Serbian Eastern Orthodox Diocese v. Milivojevic*.¹⁶ In *Milivojevic*, a Bishop was defrocked by the Church hierarchy. The Illinois Supreme Court held that the Bishop’s removal and defrockment should be set aside as “arbitrary,” finding that the Church’s conduct did not conform with the Church’s constitution.¹⁷ The majority of the United States Supreme Court, relying on a number of cases including *Presbyterian Church*, held that the Illinois court, in rejecting the decisions of the highest ecclesiastical tribunals, “impermissibly substitute[d] its own inquiry into church polity and resolutions based thereon of those disputes.”¹⁸

Ironically, the three Justices who issued concurring and dissenting opinions in *Milivojevic* were Justices White, Stevens and then-Justice Rehnquist, three Justices who would later call for broad limitations on court involvement in interpreting religious questions.¹⁹ In a short concurring opinion, Justice White observed that the majority’s opinion was predicated on an understanding of the Serbian Orthodox Church as a hierarchical church and the American-Canadian Diocese, which was involved in the case, as part of that Church. Justice White stated that, in his view, “[t]hese basic issues are for the courts’ ultimate decision, and the fact that church

15. *Id.* The Court cited approvingly the approach in *Gonzalez v. Archbishop*, 280 U.S. 1 (1929), the facts of which, it stated, allowed “civil courts [to] adjudicate the rights . . . simply by engaging in the narrowest kind of review . . .” *Presbyterian Church*, 393 U.S. at 451.

16. 426 U.S. 696 (1976).

17. 328 N.E.2d 268 (Ill. 1975), *rev’d*, 426 U.S. 696 (1976).

18. *Milivojevic*, 426 U.S. at 708.

19. See discussion *infra* Parts II.B-C.

authorities may render their opinions on them does not foreclose the courts from coming to their independent judgment.”²⁰ Thus, according to Justice White, if church tribunals render a judgment, based on religious interpretation and regarding church structure, courts still have the duty and authority to make an independent judgment, which may require a religious interpretation different from that of the church tribunals. The majority’s approach likely would preclude such an inquiry into church polity, through which a court potentially could resolve disputes in a manner that differs from the interpretation of the church.

Justice Rehnquist’s dissenting opinion, joined by Justice Stevens, identified a more fundamental problem in the majority’s approach. Justice Rehnquist quoted the majority view that “‘a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.’”²¹ As Justice Rehnquist noted, however, this principle does not free the courts from analyzing religious questions, because:

even this rule requires that proof be made as to what these decisions are, and if proofs on that issue conflict the civil court will inevitably have to choose one over the other. In so choosing, if the choice be a rational one, reasons must be adduced as to why one proffered decision is to prevail over another. Such reasons will obviously be based on the canon law by which the disputants have agreed to bind themselves, but they must also represent a preference for one view of that law over another.²²

As Justice Rehnquist explained, the Illinois courts made such a rational decision, “on the basis of testimony from experts on the canon law at issue, that the decision of the religious tribunal involved was rendered in violation of its own stated rules of procedure.”²³ Thus, Justice Rehnquist presented a reasonable method for courts to fulfill the obligation of adjudicating disputes regarding religious doctrine, through rational reasoning based on expert testimony. This method is, in fact, similar to the way courts adjudicate disputes involving equally technical scientific issues.

Moreover, Justice Rehnquist limited the applicability of the cases cited by the majority, including *Presbyterian Church*, noting that “[t]he rule in those cases, one which seems fairly implicit in the history of our First Amendment, is that the government may not

20. *Milivojeich*, 426 U.S. at 725 (White, J., concurring).

21. *Id.* at 726 (Rehnquist, J., dissenting) (quoting *Milivojeich*, 426 U.S. at 713).

22. *Id.* at 726-27 (Rehnquist, J., dissenting).

23. *Id.* at 727 (Rehnquist, J., dissenting).

displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect.”²⁴ Addressing *Presbyterian Church* in particular, Justice Rehnquist stressed that the Court’s decision was in the context of the state’s application of a state-created rule based upon “departure from doctrine.”²⁵

Finally, apart from Justice Rehnquist’s argument, the very logic of the majority’s decision in *Milivojevich* could have limited the application of the Court’s hands-off approach to the context in which it was decided. The majority opinion expressly predicated the Court’s decision on the proposition that courts should not substitute their interpretation for that of a religious tribunal. In addition to its constitutional basis, the Court’s view rests on the sound policy consideration of respect for the autonomy of religious institutions as well as a recognition that a church tribunal likely will be a more qualified interpreter of church doctrine than a secular court. However, in a case of a genuine dispute between parties regarding church doctrine, particularly when no religious tribunal has rendered an opinion, the majority’s rationale would not apply. In such a case, then, it would seem both proper and necessary for a court to adjudicate the matter.

II. Free Exercise Cases

A. *Thomas v. Review Bd. Ind. Employment Sec. Div.*

Five years after *Milivojevich*, the Supreme Court was indeed faced with a dispute between parties regarding religious interpretation, in the absence of a decision by a religious tribunal. In *Thomas v. Review Bd. Ind. Employment Sec. Div.*,²⁶ a Jehovah’s Witness terminated his employment after being transferred from a roll foundry to a department that produced turrets for military tanks.²⁷ Pursuant to what he claimed to be religious principles against working on the production of weapons, Thomas quit his job.²⁸ Despite finding that Thomas’s religious beliefs precluded his work at the department, an administrative referee and the Review Board both concluded that under Indiana statute he was not entitled to unemployment compensation.²⁹ The Indiana Court of Ap-

24. *Id.* at 733 (Rehnquist, J., dissenting).

25. *Id.*

26. 450 U.S. 707 (1981).

27. *See id.* at 710.

28. *See id.* at 709.

29. *See id.* at 711-12.

peals reversed, holding that the denial of benefits was an unconstitutional violation of Thomas's free exercise rights.³⁰ The Indiana Supreme Court vacated the decision of the Court of Appeals, finding, in part, that Thomas's decision to quit was based on a "personal philosophical choice" rather than on religious belief.³¹

The United States Supreme Court reversed. The Court noted that the Indiana court considered it significant that another member of the Jehovah's Witnesses did not object on religious grounds to working on tank turrets.³² The Court rejected the Indiana court's approach, stating, without citation to precedent, that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of his faith."³³ Therefore, based on the principle that "[c]ourts are not arbiters of religious interpretation,"³⁴ the Court refused to engage in an analysis of whether Thomas had presented a viable view of the beliefs of Jehovah's Witnesses. Instead, without explanation, the Court apparently chose to accept Thomas's interpretation, stating only that "[o]n this record, it is clear that Thomas terminated his employment for religious reasons."³⁵ Having thus concluded that Indiana's unemployment benefits scheme conflicted with Thomas's religious practice, the Court applied the stringent compelling interest standard to the government program and held that the state program violated Thomas's free exercise rights.³⁶

The Court's approach in *Thomas* represented an expanded level of judicial non-interference toward religious interpretation, beyond the deferential approach of the majority in *Milivojeovich*. In *Milivojeovich*, the Court merely held that courts should not contradict the religious interpretations of religious tribunals. In *Thomas*, however, the Court held that even when no religious tribunal has ruled on a matter, it is still outside the judicial function to make a decision on religious interpretation.³⁷ Justice Rehnquist's dissent-

30. See *id.* at 712.

31. See *id.* at 712-13.

32. See *id.* at 715.

33. *Id.* at 716.

34. *Id.*

35. *Id.*

36. See *id.* at 718-19.

37. Additionally, although the opinion focused on the role of the courts in adjudicating questions of religious interpretation, the Court in *Thomas* seemed to reject the very notion of recognizing, in consideration of a Free Exercise Clause claim, a somewhat standard view within a specific religious system. While the Court may have understandably found it more difficult to identify viable views in the absence of a ruling

ing opinion in *Milivojeovich*, therefore, appears even more responsive to the majority's approach in *Thomas*. Justice Rehnquist's reasoned analysis in his *Milivojeovich* dissent allows and requires courts to decide questions of religious interpretation when necessary in order to adjudicate a case. Unlike the majority in *Thomas*, which considered courts "ill equipped"³⁸ to resolve such matters, Justice Rehnquist recognized that courts can decide these questions by engaging in standard judicial conduct of relying on expert testimony and making a rational determination on that basis.

Moreover, given the facts of *Thomas*, the Court's preference for non-interference raises additional questions. While it may generally be desirable for courts to avoid deciding between different perceptions of a particular faith, the Court's overriding concern for such judicial non-interference may have prevented it from addressing fully the central issue in the case. The Court failed to explain the basis for its conclusion that Thomas's claim was entitled to the powerful protections of the Free Exercise Clause. Indeed, dissenting in *Thomas*, Justice Rehnquist asserted that the Court failed even to make clear whether it accepted or rejected the Indiana Supreme Court's finding that Thomas's decision was a personal philosophical choice.³⁹ Although Justice Rehnquist may have overstated his argument—as the Court did find Thomas's decision a religious one—his comment points to the vague and incomplete nature of the Court's analysis.

The Court's failure to provide a complete analysis is significant because, as the Court acknowledged, "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause. . . ."⁴⁰ This principle was the basis for the Indiana court's requiring a showing that Thomas's claim was based on his religion.⁴¹ Additionally, because Thomas's professed religion was that of the Jehovah's Witnesses, it is reasonable to require that his religious claim be based on the religious principles of the Jehovah's Witnesses. Thus, the Indiana court, quite sensibly, considered the view of another member of the Jehovah's Witnesses in trying to determine whether Thomas's claim was grounded in a viable interpretation of his own professed

by a religious tribunal, the analysis in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), may suggest that courts have the ability, and therefore the duty, to rule on the viability of individual views. See *infra* notes 42-63 and accompanying text.

38. See *Thomas*, 450 U.S. at 715-16.

39. See *id.* at 723 n.1 (Rehnquist, J., dissenting).

40. *Id.* at 713.

41. See *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 391 N.E.2d 1127, 1131 (Ind. 1979), *rev'd*, 450 U.S. 707 (1981).

religion. Certainly, the views of another adherent were not dispositive; nevertheless, the fact that Thomas's interpretation was disputed by another Jehovah's Witness at least suggested the need for further investigation by a court. Without such investigation, the Supreme Court was unable to demonstrate how it determined that Thomas's claim was truly religious in nature, rather than merely personal and philosophical.

The 1972 landmark case, *Wisconsin v. Yoder*,⁴² in which the Court decided the issue of whether the Amish way of life constituted a religion, is perhaps instructive. In *Yoder*, the Court expressed the principle, cited in *Thomas*, that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief."⁴³ The Court distinguished such claims from those which are "personal and philosophical," and therefore "do not rise to the demands of the Religion Clauses."⁴⁴ In explaining that the Amish way of life was indeed religious in nature, the Court provided extensive citations from the uncontested testimony of expert witnesses in the fields of religion and education.⁴⁵ The Court concluded that "we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."⁴⁶

The Court did note in *Yoder* that "a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question."⁴⁷ Nevertheless, the Court recognized that even this delicate question must be answered, because "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct on which society as a whole has important interests."⁴⁸ While the Court did not delineate a precise method for determining what beliefs qualify as religious in nature, its determination that the Amish belief was a religious one was based on expert testimony, as well as on the fact that the belief was shared by an organized group and was closely related to a daily lifestyle.⁴⁹

42. 406 U.S. 205 (1972).

43. *Id.* at 215.

44. *Id.* at 216.

45. *See id.* at 209-12.

46. *Id.* at 216.

47. *Id.* at 215.

48. *Id.* at 215-16.

49. *See id.* at 216-19.

In *Thomas*, however, the Court accepted the viability of Thomas's interpretation of the religion of the Jehovah's Witnesses based on his claim alone, without any further showing.⁵⁰ Unlike the Court's careful analysis in *Yoder*, the Court in *Thomas* did not present any expert testimony to indicate that Thomas's belief was religious in nature or shared in any way by an organized group.⁵¹ To the contrary, the fact that Thomas's co-religionist disagreed with his interpretation of their religion at least raised the possibility that Thomas's beliefs were not generally shared by Jehovah's Witnesses.⁵² In light of the Court's approach in *Yoder*, it is surprising that the court so willingly concluded that Thomas maintained a valid religious claim.

Even under *Yoder*, there is no reason to assume that, to succeed, a religious claim must represent the dominant view of a particular religion or denomination. Nevertheless, it seems that *Yoder* would require that in order to be considered religious in nature, a claim must at least represent more than the radically variant view of a single individual.⁵³ Therefore, a finding that Thomas's claim was valid arguably depended on a showing that his perception of his religion was at least a viable one, even if disputed by many or even

50. See *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

51. See *id.* at 715-16.

52. See *id.*

53. As the Tennessee Supreme Court observed, when faced with a claim that it considered to be of questionably religious nature,

most of the free exercise cases decided by the United States Supreme Court have involved the religious beliefs and practices of well established religions, well documented beliefs and practices long adhered to, so that the Court has not been called upon to explicitly articulate what constitutes a religious belief that is entitled to First Amendment protection.

Tennessee v. Hodges, 695 S.W.2d 171, 173 (1985).

Nevertheless, in considering the allegedly religious basis for the claim, the court relied in part on the analysis in *Yoder*, that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has an important interest." *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)). Therefore, the court emphasized the importance of determining whether the claimant was "the sole adherent to his asserted religious belief and practice." *Id.*

Though the United States Supreme Court has not defined religion under the First Amendment, a number of scholars have attempted to offer potential working definitions. See, e.g., Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 748-49 n.138-41 (1996) (citing these and other attempts to develop a definition of religion, as well as critiques of such efforts).

the vast majority of his co-religionists.⁵⁴ While the dominant view of the religion may not be dispositive, the Court could have required at least some expert testimony that Thomas's views were a viable way of interpreting his own professed religious system.⁵⁵

For reasons of both policy and constitutional principle, then, it may have been preferable for the Court in *Thomas* to require that Thomas at least demonstrate that his interpretation represented more than merely his individual view of his religion. On a policy level, according constitutional protection to all personal religious interpretations would seem to endanger the "very concept of ordered liberty" that the Court in *Yoder* insisted must be maintained.⁵⁶

54. Indeed, under the specific circumstances surrounding Thomas's resignation, it seems that there was a strong basis for the Court to have required a showing that Thomas's claim was supported by a viable interpretation of his religion. In considering whether his work was permissible for a Jehovah's Witness, Thomas initially approached one of his co-religionists, who responded that he did not feel that their religion prohibited them from the work. Thomas then approached other members of the congregation, who agreed to decide whether he would violate his religion by continuing his work. See *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 391 N.E.2d 1127, 1128-29 (Ind. 1979), *rev'd*, 450 U.S. 707 (1981). As the record did not reflect whether they made this decision, it is possible that Thomas ultimately decided the matter himself, despite his earlier reliance on the determination of others. See *id.* at 236. It is not clear, then, that even Thomas himself would have considered his interpretation to be a viable interpretation of his own professed religion. Moreover, even if he had, there was reason for the Court either to doubt the sincerity of such a claim or to reject his interpretation as too variant.

55. In some religions or religious systems, particularly those with a clearly delineated hierarchy of religious tribunals, it may be difficult for those who espouse a minority viewpoint to claim that it represents a "viable interpretation" of a religious system. In such a situation, one solution may be for adherents to the minority viewpoint to claim that, because their interpretation varies significantly from that of the hierarchy, the law should consider them to be followers of a different religious system. If this system represents the view of at least a small number of people, it may be seen as shared by an organized group.

It is possible, though, that those holding a minority viewpoint may not wish to portray themselves as followers of a different religion. Alternatively, they may be able to rely on expert testimony of theologians to show that the interpretations of the religious tribunals, even if ultimately authoritative as official doctrine, do not preclude the viability of minority interpretations.

56. *Yoder*, 406 U.S. at 215. Furthermore, it is possible that the Free Exercise Clause was intended to protect, if not only dominant or mainstream interpretations of religious systems, at least only viable ones, excluding variant individual views. The Free Exercise Clause offers powerful protections, which could be reasonably believed to apply to limited situations. Such a theory is particularly sensible for cases in which an individual is not forced to violate religious principles, but, as was the case in *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 391 N.E.2d 1127 (Ind. 1979), *rev'd*, 450 U.S. 707 (1981), is only denied a benefit for refusing to violate individually interpreted religious beliefs.

In his dissenting opinion, Justice Rehnquist identified one such potential danger, concluding that the Court's approach would apparently allow individuals to "quit their jobs, assert they did so for personal reasons, and collect unemployment insurance."⁵⁷ Justice Rehnquist warned that "[w]e could surely expect the State's limited funds allotted for unemployment insurance to be quickly depleted."⁵⁸ Again, Justice Rehnquist's analysis is premised on his somewhat exaggerated view that the majority did not make clear whether it considered Thomas's claim to be religious in nature. Nevertheless, Justice Rehnquist's warning is important in that it identifies just one of many dangers to society that can result from too broad a definition of religious claims entitled to the protections of the Free Exercise Clause.⁵⁹

57. *Thomas*, 450 U.S. at 723 n.1 (Rehnquist, J., dissenting).

58. *Id.*

59. Another illustration of the problems that could result from the Court's broad application of free exercise protections is the hypothetical case of a prisoner who maintains a personal interpretation of religious belief requiring a daily diet consisting of steak.

Indeed, prisoners' religious claims present particularly difficult problems, as evidenced by some of the debate surrounding the Religious Freedom Restoration Act ("RFRA"), which the Supreme Court recently declared unconstitutional. See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). The Supreme Court decision of *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), established that prisoners' free exercise claims should be considered under a reasonableness standard. See *id.* at 350-51. However, under RFRA, see *infra* Part II.G., prisoners were apparently entitled to strict scrutiny of prison regulations. As a result, one Senator repeatedly proposed an Amendment to RFRA, to prevent the application of the Act to prisons. In support of the Amendment, he cited such actual claims as: a prisoner who believed that his religion entitled him to a healthy lifestyle as defined by what food he wanted; a satanic group in prison that requested unbaptized baby fat for candles; and skinheads in prison who claimed the right to receive, under their religious beliefs, hateful, bigoted, anti-Semitic and racist literature from around the country. See 141 CONG. REC. S.10895 (daily ed. July 28, 1995) (statement of Sen. Reid).

While the government would presumably attack the sincerity of a prisoner who requests, on religious grounds, a daily diet of steak, a court could find that the prisoner expresses sincerely held religious beliefs. Under the Court's analysis in *Thomas*, 450 U.S. 707, the government would then have to counter the prisoner's claim by asserting a sufficient governmental or penological interest. Such a showing would have been particularly difficult under the compelling interest test, apparently required under RFRA. See, e.g., *Sasnett v. Sullivan*, 91 F.3d 1018 (8th Cir. 1996) (striking down, under RFRA, prison regulations on jewelry, including crucifixes), *vacated Sullivan v. Sasnett*, 117 S. Ct. 2502 (1997) (vacating *Sasnett v. Sullivan* pursuant to *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997)).

Alternatively, the government may argue that the wide-ranging First Amendment protection of religious freedoms, especially those of prisoners, should be limited to traditional or mainstream religions. Even if a court accepted such an argument, however, the prisoner could still prevail. Under *Thomas*, it seems, if a prisoner simply claims that the requirement to eat steak is based on a sincerely held interpretation of a traditional or mainstream religion, a court would be unable to question the viability

On a level of constitutional principle, as the Court in *Thomas* acknowledged, the Religion Clauses protect only those claims rooted in religious belief.⁶⁰ If an individual believes in a way of life which is shared by no one else, even if the individual asserts that the belief is religious in nature, such a belief seems closer to what the Court in *Yoder* termed a “subjective evaluation and rejection of the contemporary secular values accepted by the majority.”⁶¹ Indeed, the Court’s emphasis in *Yoder* on the fact that the Amish belief was shared by an organized group appears to have been offered in part to counter any arguments that the Amish belief system resembled Thoreau’s philosophically-based rejection of the social values of his time and isolation at Walden Pond.⁶²

of the interpretation, and therefore would have to accept that the claim was based on the professed religion.

In any event, the application of RFRA to prison claims apparently would have presented a significant burden on both court and prison administration. *See* Brief for Amici States of Ohio et al., *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (No. 95-2074). The Amici States argued that RFRA “has dramatically increased the volume of inmate litigation and created unique burdens for prison administrators, States’ Attorneys General and other State officials.” *Id.* at *2. The States also cited attempts by prisoners to rely on RFRA to “cloak [racist] agendas in ‘religion,’” and to justify possession of drugs in prison. *Id.* at *4 (citing *Ocks v. Thalacker*, 90 F.3d 293 (8th Cir. 1996)).

In fact, opponents of RFRA claimed that “RFRA has undermined the very goal it was designed to advance—sensitivity to the religious beliefs of prison inmates.” *Id.* at

*5. For example, these advocates have observed that:

the unprecedented volume of inmate demands under RFRA has undermined the ability of religious services personnel to maintain the type of “pastoral” relationships with inmates necessary for the effective delivery of religious services. Some prison systems, such as the Colorado and Oklahoma Departments of Corrections, have become so frustrated with the impact of RFRA that they have discontinued all State-funded chaplaincy programs.

Id. at *5-6 (citations omitted).

Thus, according to these advocates, the effect of RFRA on the religious rights of prisoners represented yet another scenario in which an unworkable extension of free exercise protections has resulted, ironically, in a curtailment of religious liberties.

60. *See Thomas*, 450 U.S. at 713.

61. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

62. *See id.* at 215. In addition, despite Justice Douglas’s claim to the contrary, the majority’s sensible distinction in *Yoder* between a religious belief and a purely philosophical belief does not appear to represent a “retreat” from *United States v. Seeger*, 380 U.S. 163 (1965) and *United States v. Welsh*, 398 U.S. 333 (1970). *See Yoder*, 406 U.S. at 247-48 (Douglas, J., dissenting in part).

In *Seeger* and *Welsh*, the Court made clear that it was interpreting not the word “religion” found in the Free Exercise Clause of the Constitution, but only the term “religious training and belief” used in a congressional statute exempting conscientious objectors from military training and service. The Court determined in *Seeger* that the rationale behind the exemption for conscientious objectors is that “‘in the forum of conscience, duty to a moral power higher than the state has always been main-

Thus, the Court's approach in *Thomas*, granting Thomas protection based on his unsupported interpretation of his professed religion, is problematic, and may represent a departure from the approach in *Yoder*. The Court in *Thomas* did acknowledge that "[o]ne can . . . imagine an asserted claim so bizarre, so clearly non-religious in motivation, as to not be entitled to protection under the Free Exercise Clause," but concluded "that is not the case here."⁶³ Yet, while Thomas's claim may not have been clearly non-religious in motivation, it is not clear from the Court's description and analysis that Thomas's claim warranted the legal protections of the Free Exercise Clause. Nevertheless, the Court applied the compelling interest standard to Thomas's claim, holding that the state violated his First Amendment rights.

Justice Rehnquist's dissent in *Thomas* is also important because it contains an early manifestation of the view that the majority of the Court ultimately accepted, in *Employment Division v. Smith*,⁶⁴ under Chief Justice Rehnquist: "[w]here, as here, a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform the statute to the dictates of religious conscience of any group."⁶⁵ Notably, despite his opposition to the majority view, Justice Rehnquist's view would also result in judicial non-interference in questions of religious interpretation. Justice Rehnquist's approach appears to leave little room for judicial consideration of the nature of religious claims, as courts would instead likely decide the constitutionality of a statute by focusing primarily on the "purpose and effect" of the statute.

Justice Rehnquist disagreed not only with the majority's approach in *Thomas*, but with the very notion, found in such earlier

tained.'" *Seeger*, 380 U.S. at 170 (quoting *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting)).

Indeed, it is clear from the Court's analysis that the phrase "religious training and belief" in the statute was interpreted far more broadly than any reasonable interpretation of the word "religion" in the Constitution. For example, the Court in *Welsh* stated that the statute exempted those who objected to war based on "moral" or "ethical" grounds, including "those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy." *Welsh*, 398 U.S. at 342.

63. *Thomas*, 450 U.S. at 715.

64. See *Employment Div. v. Smith*, 494 U.S. 872 (1990). The majority in *Smith* distinguished its case from the line of cases that emerged from *Yoder*, 406 U.S. 205 and *Sherbert v. Verner*, 374 U.S. 398 (1963), which generally required a compelling interest test.

65. *Thomas*, 450 U.S. at 723 (Rehnquist, J., dissenting).

cases as *Sherbert v. Verner*,⁶⁶ that strict scrutiny should be applied to a "general statute." Nevertheless, the strength and later influence of Justice Rehnquist's dissent were probably enhanced by his specific objections to the majority's approach in *Thomas*, which employed judicial non-interference to expand free exercise protections. Justice Rehnquist argued in a footnote that "even if I were to agree that *Sherbert* was correctly decided, I would still dissent on the grounds that today's decision unjustifiably extends *Sherbert*."⁶⁷ Perhaps a more moderate majority view in *Thomas*, carefully analyzing Thomas's religious claim and limiting strict scrutiny to laws involving a viable and/or substantial free exercise claim, would have been able to withstand Justice Rehnquist's attacks.⁶⁸ Instead, Chief Justice Rehnquist ultimately would succeed in requiring increased deference to legislatures, in *Employment Division v. Smith*. Ironically, the Court's approach in *Smith* would rely in part on the very principle of judicial non-interference that the majority in *Thomas* used to expand free exercise protections.

B. *United States v. Lee*

Less than a year after *Thomas*, in *United States v. Lee*,⁶⁹ the Court was faced with another case in which the interpretation of religious belief was a central issue; again, the Court opted for judicial non-interference. Lee, a member of the Old Order Amish, argued that he should be exempted from social security requirements, claiming that the payment of social security taxes and the receipt of benefits interfered with his free exercise rights.⁷⁰ The government challenged Lee's claim, asserting that payment of social security taxes would not threaten the integrity of the Amish religious belief or practice.⁷¹ The Court therefore identified the "preliminary inquiry" in the case as "whether the payment of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish."⁷²

Rather than offering a substantive analysis to answer this question, the Court instead quoted from its decision in *Thomas*, stating

66. 374 U.S. 398 (1963).

67. *Thomas*, 450 U.S. at 723 n.1 (Rehnquist, J., dissenting).

68. Indeed, it appears that Justice Rehnquist might have preferred such an analysis on the part of the Court, as he criticized the majority for what he saw as a failure to decide whether Thomas's claim was in fact religious in nature. *See id.*

69. 455 U.S. 252 (1982).

70. *See id.* at 254-55.

71. *See id.* at 257.

72. *Id.* at 256-57.

that “[c]ourts are not arbiters of scriptural interpretation” and that it was beyond “the judicial function and judicial competence” to determine whether Lee or the government had correctly interpreted the Amish faith.⁷³ Employing the same logic it had applied in *Thomas*, the Court “therefore accept[ed] appellee’s contention that both payment and receipt of social security benefits is forbidden by the Amish faith.”⁷⁴ Having concluded on this basis that participation in the social security system interfered with Lee’s free exercise rights, the Court required that the government demonstrate a compelling state interest.⁷⁵

The Court’s analysis raises the same questions as does the analysis in *Thomas*. Consistent with its approach in *Thomas*, the Court offered no evidence to support Lee’s claim that the Amish faith could or should in fact be interpreted to prohibit his participation in the social security system. Nevertheless, without any investigation into Lee’s professed religion, the Court applied the compelling interest standard, based solely on the presumptive acceptance of Lee’s interpretation.

The Court further relied on *Thomas* in support of its conclusion that Lee’s claim was entitled to First Amendment protections because it was not “so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.”⁷⁶ However, the premise that Lee’s claim was not bizarre or clearly nonreligious may not lead to the conclusion that his claim was adequately religious in motivation to warrant the constitutional protections reserved for religious beliefs. Nevertheless, as in *Thomas*, the Court did not find it necessary to establish that Lee’s claim was a viable interpretation of the Amish faith, which was the basis of his professed religious beliefs. Instead, the Court found it sufficient to merely cite the case of “[a]t least one other religious organization,” Sai Baba, that had sought an exemption to the social security system.⁷⁷ Yet, Lee’s claim was based on his interpretation of the faith of his own religious organization, the Amish; the religious beliefs of a member of the Sai Baba seem hardly relevant to a question of whether Lee’s claim was properly based in Amish religious belief.

73. *See id.* at 257 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)).

74. *Lee*, 455 U.S. at 257.

75. *See id.*

76. *Id.* at 257 n.6 (quoting *Thomas*, 450 U.S. at 715).

77. *See United States v. Lee*, 455 U.S. 252, 257 n.6 (1982).

Thus, as in *Thomas*, as a result of the majority's unwillingness to examine carefully the nature of a religious claim, the Court in *Lee* allowed for a broad application of free exercise protections. Ultimately in *Lee*, the Court found a government interest sufficient to oppose Lee's claim.⁷⁸ Nevertheless, the Court's approach again reveals the potential danger that judicial non-interference can result in improper protections to individuals at an unnecessary cost to the rest of society.

Moreover, as illustrated by Justice Stevens's concurring opinion in *Lee*, the refusal on the part of judges to analyze religious claims can potentially result in the opposite danger, of less than sufficient protection for valid free exercise claims. Concurring in the judgment, Justice Stevens offered his own rationale for what he considered to be the need for courts to refrain from careful analysis of religious claims. Justice Stevens described the "overriding interest in keeping the government . . . out of the business of evaluating the relative merits of differing religious claims."⁷⁹ As a result of this overriding interest, Justice Stevens advocated a "strong presumption" against claims of tax exemption on religious grounds.⁸⁰ Thus, if the majority view provided additional protections to religious claims, Justice Stevens's view—also based on the principle of judicial non-interference in religious questions—can lead to strong limitations on religious liberties.

In addition, Justice Stevens's approach suggested a new application of judicial non-interference. While the majorities in *Thomas* and *Lee* had stated that courts should not decide religious disputes among adherents, Justice Stevens extended the range of judicial non-interference to include treating equally the claims of different religions, without investigating the specific natures of the different practices.

Justice Stevens further declared that "[t]he risk that governmental approval of some and disapproval of other [religious claims] will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."⁸¹ Justice Stevens thereby added the constitutional dimension of the Establishment Clause to the argument that courts should refrain from

78. *See id.* at 259-60.

79. *Id.* at 263 n.2 (Stevens, J., concurring).

80. *See id.*

81. *Id.* at 263 n.2 (Stevens, J., concurring).

deciding religious issues, though he did not adduce any case law to support such a reading of the Establishment Clause.⁸²

Finally, Justice Stevens's concurrence in *Lee* was significant because it interpreted the majority opinion in a manner consistent with the approach later adopted by the majority in *Employment Division v. Smith*.⁸³ Justice Stevens wrote that "[t]he Court's analysis supports a holding that there is virtually no room for a 'constitutionally required exemption' on religious grounds from a valid tax law that is entirely neutral in its general application."⁸⁴ In a footnote, Justice Stevens further referred to "an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability."⁸⁵ Eight years later, in *Smith*, Justice Stevens would join in the majority opinion's endorsement of this view.⁸⁶

C. *Goldman v. Weinberger*

Four years after *Lee*, Justice Stevens applied the same reasoning in his concurring opinion in *Goldman v. Weinberger*.⁸⁷ Goldman, an Orthodox Jew, challenged Air Force regulations that prohibited him from wearing a yarmulke while indoors, thus causing him to violate his religious beliefs. The majority rejected Goldman's claim, on the basis of deference to military judgment that such a regulation was necessary to maintain uniformity.⁸⁸ In his dissenting opinion, Justice Brennan argued that the Court should more carefully analyze and protect Goldman's free exercise rights. Specifically, Justice Brennan suggested that cases involving different

82. *See id.* It may be significant that in his concurring opinion in *Goldman v. Weinberger*, 475 U.S. 503 (1996), in which he again called for judicial non-interference in religious questions, Justice Stevens quoted from his concurrence in *Lee*, but omitted the sentence that invoked the Establishment Clause. *See id.* at 513 n.6 (1986) (Stevens, J., concurring) (quoting *Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

83. 494 U.S. 872 (1990).

84. *Lee*, 455 U.S. at 263 (Stevens, J., concurring).

85. *Id.* at 263 n.3 (Stevens, J., concurring).

86. In the same footnote in *Lee*, Justice Stevens also began to set the framework for the Court's rejection of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), as generally requiring a compelling interest standard for burdens on religious exercise in *Employment Div. v. Smith*, 494 U.S. 872 (1990). Unlike Justice Rehnquist, who had written in his *Thomas* dissent that *Sherbert* was wrongly decided, *Thomas v. Review Bd.*, 450 U.S. 707, 722 (1981) (Rehnquist, J., dissenting), Justice Stevens distinguished *Sherbert* and called *Yoder* an "exception." *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring).

87. 475 U.S. 503 (1986).

88. *See id.* at 509-10.

religious headgear in the military should be examined individually, according to the interests of "functional utility, health and safety considerations, and the goal of a polished, professional appearance."⁸⁹

In addition to agreeing with the majority's logic, Justice Stevens rejected Justice Brennan's argument on other grounds as well, writing that "[t]he interest in uniformity . . . has a dimension that is of still greater importance for me . . . the interest in uniform treatment for the members of all religious faiths."⁹⁰ Justice Stevens refused to distinguish between the type of headgear worn by adherents to different religions, concluding that "[t]he Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application."⁹¹ In support of his view, Justice Stevens cited to his concurring opinion in *Lee*, stating that the government should not "evaluat[e] the relative merits of differing religious claims."⁹²

Thus, as in *Lee*, Justice Stevens's concurring opinion in *Goldman* extended the application of the principle that courts should not engage in interpreting religious beliefs. Under Justice Stevens' approach, courts must not only treat equally all claims within a single religion, but must treat equally all religious claims relating to practices that share some similarity—in this case, religious practices involving headgear. Justice Stevens rejected Justice Brennan's approach, which offered a framework for the meaningful consideration of different religious practices. Instead, Justice Stevens employed the principle of judicial non-interference to allow for broader limitations on free exercise rights.⁹³

Justice Stevens also echoed the logic of his *Lee* concurrence in justifying the government restriction on religious practice as being based on "a neutral, completely objective standard."⁹⁴ Significantly, in *Goldman*, Justice Stevens was joined in this approach by Justices Powell and White⁹⁵ who, like Justice Stevens, would again

89. *Id.* at 519 (Brennan, J., dissenting).

90. *Id.* at 512 (Stevens, J., concurring).

91. *Id.* at 513 (Stevens, J., concurring).

92. *Id.* at 513 n.6 (Stevens, J., concurring) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

93. Justice Stevens's relative lack of concern for Free Exercise rights may be evidenced by his citation in *Goldman* primarily to Establishment Clause cases, even though *Goldman* asserted a Free Exercise claim. *See id.* at 513 n.6 (Stevens, J., concurring).

94. *Id.* at 513 (Stevens, J., concurring); *see also Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring).

95. *See Weinberger*, 475 U.S. at 510.

defer to "neutral" laws restricting religious practice, in joining the majority opinion in *Smith*.

Justice Brennan's dissent in *Goldman* not only offers a method for distinguishing between different religious practices; it also reflects a willingness to appreciate the nature of the burden that the Air Force regulations placed on Goldman's religious practice. Justice Brennan's careful analysis rejected the majority's unconvincing depiction of Goldman's religious life under the regulations as merely "objectionable."⁹⁶ In fact, as Justice Brennan noted, Goldman was asked "to violate the tenets of his faith virtually every minute of every workday."⁹⁷ Thus, Justice Brennan recognized that Goldman asserted a "substantial First Amendment claim," which required the government to demonstrate a compelling state interest.⁹⁸

Justice Brennan's most stinging criticism of the majority is probably his statement that "[t]he Court . . . evades its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel."⁹⁹ Justice Brennan's criticism was primarily aimed at the fact that the Court adopted an extremely deferential standard for military settings. Yet, Justice Brennan appears to have been similarly troubled by the basic attitude reflected in the Court's treatment of religious freedoms. Justice Brennan seems to have recognized that the Court not only expressed unnecessary deference to military judgment but, at the same time, abdicated its judicial responsibility of carefully considering Goldman's free exercise rights, choosing instead a uniform rejection of the right to religious headgear, regardless of religious significance or unobtrusiveness of practice.

D. *Bowen v. Roy*

Less than three months after *Goldman*, the emerging differences between Justices on the Court found fuller expression in the various opinions in *Bowen v. Roy*.¹⁰⁰ In *Roy*, Native Americans challenged, as an unconstitutional burden on their religious beliefs, regulations that conditioned their receipt of welfare benefits on the

96. *Id.* at 514 (Brennan, J., dissenting).

97. *Id.*

98. *Id.* at 516 n.2 (Brennan, J., dissenting).

99. *Id.* at 515 (Brennan, J., dissenting).

100. 476 U.S. 693 (1986).

assignment of a Social Security number to their daughter.¹⁰¹ As announced in Chief Justice Burger's majority opinion, the Supreme Court vacated a District Court injunction permanently restraining the use of the Social Security number that had already been issued to the daughter.¹⁰² However, the majority of the Court did not agree with Chief Justice Burger's own opinion, which advocated the denial of a religious exemption to the Social Security number requirement of the welfare laws.¹⁰³

In his opinion, in which he was joined only by Justices Powell and Rehnquist, Chief Justice Burger endorsed the view that a statute that is "wholly neutral in religious terms and uniformly applicable" can be distinguished from the statutory scheme challenged in *Sherbert* and *Thomas*, and therefore did not have to withstand strict scrutiny.¹⁰⁴ Chief Justice Burger wrote that the compelling interest standard was "not appropriate in this setting" because, "in the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude."¹⁰⁵ Therefore, he concluded, "[a]bsent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."¹⁰⁶

In Justice O'Connor's dissenting opinion, joined by Justices Brennan and Marshall, she observed that, in contrast to the views of Chief Justice Burger and those who joined his opinion, "five Members of the Court agree that *Sherbert* and *Thomas* . . . control the outcome of this case."¹⁰⁷ Rejecting Chief Justice Burger's attempts to distinguish *Roy* from *Sherbert* and *Thomas*, Justice O'Connor argued that "[t]he Court simply cannot, consistent with its precedents, distinguish this case from the wide variety of factual

101. See *id.* at 695.

102. See *id.* at 695-701.

103. See *id.* at 701-12 (opinion of Burger, C.J.).

104. *Id.* at 703, 708 (opinion of Burger, C.J.).

105. *Id.* at 707 (opinion of Burger, C.J.).

106. *Id.* at 707-08 (opinion of Burger, C.J.).

107. *Id.* at 731 (O'Connor, J., concurring in part and dissenting in part). In addition to herself and Justices Brennan and Marshall, who joined her opinion, Justice O'Connor counted Justices Blackmun and White. See *id.* at 716 (Blackmun, J., dissenting in part); *id.* at 733 (White, J., dissenting).

situations in which the Free Exercise Clause indisputably imposes significant constraints upon government.”¹⁰⁸

In her sharpest response to Chief Justice Burger’s opinion, Justice O’Connor criticized the “new standard to be applied to test the validity of Government regulations under the Free Exercise Clause,” a standard which “has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides.”¹⁰⁹ Chief Justice Burger, in turn, countered with an important and sharply worded footnote, stating that:

[i]t is readily apparent that virtually *every* action that the government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection. For example, someone might raise a religious objection, based on Norse mythology, to filing a tax return on Wednesday (Woden’s day). Accordingly, if the dissent’s interpretation of the Free Exercise Clause is to be taken seriously, then the Government will be unable to enforce any generally applicable rule unless it can satisfy a federal court that it has a “compelling government interest.” While libertarians and anarchists will no doubt applaud this result, it is hard to imagine that this is what the Framers intended.¹¹⁰

Of course, Justice O’Connor and the other dissenters were far from anarchists. Nevertheless, Chief Justice Burger identified a danger that can result from the application of the compelling interest standard to all claims that are related to religious beliefs. In his dissenting opinion in *Thomas*, Justice Rehnquist expressed his disapproval of *Sherbert*, but his criticism of the majority opinion focused on what he referred to as the “unjustifiabl[e] exten[sion]” of *Sherbert* to claims not religious in nature.¹¹¹ Here, Chief Justice Burger envisioned a different danger, that the application of strict scrutiny to government rules affecting any practice purported to be based in a religious belief would unduly burden governmental functions.

Like Justice Rehnquist’s dissent in *Thomas*, Justice Burger’s criticism of a broad application of the compelling interest test was strengthened by the fact that those he criticized failed to differentiate between different types of religious claims. Starting with *Pres-*

108. *Id.* at 731 (O’Connor, J., concurring in part and dissenting in part).

109. *Id.* at 727 (O’Connor, J., concurring in part and dissenting in part).

110. *Id.* at 707 n.17 (opinion of Burger, C.J.).

111. *See Thomas v. Review Bd.*, 450 U.S. 707, 723 n.1 (1981) (Rehnquist, J., dissenting).

byterian Church and *Thomas*, the members of the Court and the Court as a whole had increasingly refused to examine the nature of religious claims. As a result, under the view that Justice O'Connor ascribed to the majority of the Court, it appeared that the government would have to show a compelling interest for any law affecting any practice connected in some way with religion. Chief Justice Burger refused to accept that only a compelling government interest could defeat an individual's opposition to filing tax returns on a Wednesday based on Norse mythology.

There are a number of ways to approach a potential solution to Chief Justice Burger's objection. Although she did not address the objection directly, Justice O'Connor presented an analysis that implicitly answered Chief Justice Burger's predictions of anarchy. Observing that "[o]ur precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption," Justice O'Connor acknowledged that "[t]he Government here has clearly and easily met its burden of showing that the prevention of welfare fraud is a compelling state interest."¹¹² Justice O'Connor concluded, however, that the Government had failed to show how a religious exemption to the requirement to obtain a Social Security number would harm the compelling interest in preventing welfare fraud.¹¹³

Under Justice O'Connor's analysis, it does not appear particularly difficult for the government to identify a sufficiently compelling interest for the purposes of justifying a restriction on religious practice. In *Roy*, the government "clearly and easily" put forth such an interest,¹¹⁴ but Justice O'Connor found that the regulation was not related to that interest. Her analysis implies, however, that fears of anarchy were exaggerated, because courts could uphold restrictions on religion as long as the restrictions were in fact related to a seemingly broad range of compelling government interests.

Nevertheless, this approach may not completely answer the legitimate concern that Chief Justice Burger raised. Although the precise intention of his reference to Norse mythology is not entirely clear, Chief Justice Burger apparently wished to focus on the possibility that an individual could object to a law on the basis of an obscure religious belief. Given the Court's reluctance to investi-

112. *Bowen v. Roy*, 476 U.S. 693, 732 (1986) (O'Connor, J., concurring in part and dissenting in part).

113. *See id.*

114. *Id.*

gate the nature of religious claims, courts would have no effective means to evaluate the validity of the potential plethora of objections to laws on religious grounds. Instead, in all cases, courts would require the government to assert a compelling interest for the law. Even if Justice O'Connor's analysis would allow for a broad range of compelling interests, it seems likely that at least a significant number of claims would succeed because courts would find, as Justice O'Connor did in *Roy*, that the law did not relate to the compelling interest.

A more satisfying answer to Chief Justice Burger's objection, then, might indeed be based on a willingness to closely examine the nature of the asserted religious claim. One approach could relate Chief Justice Burger's objection in *Roy* to the concern he had expressed in his majority opinion in *Yoder*, that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct on which society as a whole has important interests."¹¹⁵

In both cases, based on a concern for societal order, Chief Justice Burger called for limits on the types of claims that warrant the stringent protections of the Free Exercise Clause. In *Yoder*, his solution involved restricting free exercise claims to those rooted in religion; he found the Amish lifestyle religious in nature, under the Religion Clauses, in part because it was "shared by an organized group, and intimately related to daily living."¹¹⁶ Perhaps a similar analysis would find that a religious claim based in Norse mythology, presumably not based on a religious system with the characteristics of the Amish way of life, would not qualify for free exercise protections. Such an analysis would thus prevent the anarchy which Chief Justice Burger feared.

This solution, however, would likewise not seem to satisfy Chief Justice Burger, in part because it apparently contradicts the logic of his majority opinion in *Thomas v. Review Bd. Ind. Employment Sec. Div.*¹¹⁷ The Court in *Thomas* held that Thomas's religious claim deserved free exercise protection, even though the Court did not determine whether his claim represented the view of an organized group, the Jehovah's Witnesses of which he professed to be a member, or was his own individual interpretation. Based on the principle of judicial non-interference into religious claims, the Court did not require a showing that Thomas's view was shared by

115. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

116. *Id.* at 216.

117. 450 U.S. 707 (1981).

a religious group. Similarly, it could follow, even an individual claiming to adhere religiously to Norse mythology would have to be granted free exercise protections.

Alternatively, then, a different answer to Chief Justice Burger's objections to Justice O'Connor's approach might involve a closer analysis of the nature of the burden that a law places on a religious practice. Such an analysis might consider the importance of the practice to the professed religious system, restricting a compelling interest test to those laws which prevent religious practices in a way that substantially inhibits adherents' religious behavior. Such an approach, however, was expressly rejected by Justice O'Connor herself, writing for the Court less than two years later in *Lyng v. Northwest Indian Cemetery*.¹¹⁸

E. *Lyng v. Northwest Indian Cemetery*

Lyng sharply illustrates the danger to religious freedoms that can result from courts' unwillingness to consider carefully the nature of the religious burden posed by government action. In *Lyng*, the government permitted the timber harvesting in, and construction of a road through, a portion of a National Forest that traditionally had been used for religious purposes by members of three Native American tribes in northwestern California.¹¹⁹ The Native American respondents argued that the government's proposed action would severely burden their religious exercise, and that therefore the Court should employ a compelling interest test.¹²⁰ The Court cited its decision in *Bowen v. Roy*,¹²¹ which rejected a similar free exercise claim. The Native American respondents had suggested a number of distinctions between *Roy* and their own case, explaining the severity of the burden that the government's proposal would place on Native American religious practices.¹²² The Court rejected the possibility of any such analysis, stating that:

[t]his Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy*, and accordingly cannot weigh the adverse effects on the appellees in *Roy* and compare them with the adverse effects on respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's

118. 485 U.S. 439 (1988).

119. See *id.* at 441-42.

120. See *id.* at 447.

121. 476 U.S. 693 (1986).

122. See *Lyng*, 485 U.S. at 449.

spiritual activities should be subjected to a different constitutional analysis than the other.¹²³

Based on this logic, the Court ruled out comparing the nature of the effect that different restrictions could have on different religious practices.¹²⁴

The Court's logic is less than convincing. The Court's analysis was premised on the uncontroversial principle that it could not determine the truth of the religious beliefs underlying the claims in *Roy* and in *Lyng*. This statement simply repeated the well-established principle that courts may not decide the truth or falsity of a sincerely held religious belief.¹²⁵ It does not necessarily follow, however, as the Court concluded, that courts may not look at the effect of government action on sincerely held religious beliefs.¹²⁶ On the contrary, it would seem sensible that, in considering a free exercise claim, courts should try to determine the nature of the burden on the free exercise of religion.

The majority opinion is also troubling because, through its analysis in *Lyng*, the Court appeared to again introduce a new limitation on a court's ability to consider carefully religious claims.¹²⁷ It is perhaps telling that the Court did not cite any cases to support the notion that courts should not look to the precise nature of the burdens that laws place on religious practices. Instead, it was Justice Brennan, joined by Justices Blackmun and Marshall in dissent, who cited precedent. Justice Brennan argued that courts should "require some showing of 'centrality'" on the part of religious adherents in order to trigger the government's obligation to put forth a compelling interest.¹²⁸ To support his argument, Justice Brennan cited *Yoder*, in which the Court "treated the objection to the compulsory school attendance of adolescents as 'central' to the Amish faith."¹²⁹ Likewise, Justice Brennan concluded, in order to apply strict scrutiny to the law in *Lyng*, the Court had to find, as in *Yoder*,

123. *Id.* at 449-50 (citation omitted).

124. While the Court's holding relied in part on the view that the government's action did not coerce the respondents into acting contrary to their religious beliefs, the holding also emphasized the Court's rejection of the respondents' contention that the Court should inquire into the nature of the potential burden on the Indians' religious practices. *See id.* at 450-51.

125. *See* *United States v. Ballard*, 322 U.S. 78, 86 (1944).

126. *See Lyng v. Northwest Indian Cemetery*, 485 U.S. 439, 452 (1988).

127. *See id.*

128. *Id.* at 474 (Brennan, J., dissenting).

129. *Id.*

that the government regulation “poses a substantial and realistic threat to undermining or frustrating their religious practices.”¹³⁰

An important aspect of Justice Brennan’s dissent was the identification and demonstration of the dual-nature of the dangers that can result from the majority’s approach of grouping together religious claims. The most obvious problem in the majority approach was apparent in its direct result, that it failed to protect the Native Americans’ substantial religious claims. As Justice Brennan poignantly put it, “[i]ronically, the Court’s apparent solicitude for the integrity of religious belief and its desire to forestall the possibility that courts might second-guess the claims of religious adherents leads to far greater inequities than those the Court postulates . . . sacrific[ing] a religion at least as old as the Nation itself” to build a road that “two lower courts found had only the most marginal and speculative utility.”¹³¹

Yet, Justice Brennan was also wary of the other problem that can result from treating all religious claims with the same level of deference, the possibility that a relatively substantial government interest will not be protected against a less than substantial religious interest. Addressing this concern, Justice Brennan wrote that “I don’t think it is enough to allege simply that the land in question is held sacred. Rather, adherents challenging a proposed use of federal land should be required to show that the decision places a substantial and realistic threat of frustrating their religious practices.” According to Justice Brennan, only once the adherents have made such a showing is the government required to respond with a showing of a sufficiently compelling government interest.¹³² Thus, as Justice Brennan’s analysis demonstrates, if courts continue to refuse to engage in a careful analysis of religious claims, they face two potential dangers. At times, as in *Lyng*, courts may elect not to apply the compelling interest standard for substantial religious claims. In other cases, courts may apply a compelling interest test for less than substantial religious claims; *Lee* was arguably such a case.

Despite the careful nature of his analysis, Justice Brennan’s approach in *Lyng* raises further questions, in part because even Justice Brennan was reluctant to evaluate fully the nature of religious claims. The majority criticized Justice Brennan’s call for a showing

130. *Id.* at 475 (Brennan, J., dissenting).

131. *Id.* at 476-77 (Brennan, J., dissenting).

132. *See id.* at 475 (Brennan, J., dissenting).

of the “centrality” of a religious practice, arguing that such a requirement:

offers us the prospect of this Court’s holding that some sincerely held religious beliefs and practices are not ‘central’ to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent’s approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.¹³³

Although the majority did not identify the precedents or constitutional principles that would prevent a court from ruling on whether religious adherents misunderstood their own religious beliefs, the majority’s argument was consistent with the principles found in such cases as *Thomas v. Review Bd. Ind. Employment Sec. Div.*¹³⁴ and *United States v. Lee*.¹³⁵

The majority’s argument was particularly effective because the principles of judicial non-interference established in these cases had been accepted by virtually the entire Court, including Justice Brennan. As a result of his own unwillingness to analyze religious beliefs, Justice Brennan’s response to the majority’s criticism proposed neither a method nor a justification for courts to explore the centrality of a religious practice. Instead, Justice Brennan reasoned that “Native Americans would be the arbiters of which practices are central to their faith.”¹³⁶ Predictably, such a response did not satisfy the majority, which characterized Justice Brennan’s definition of a “showing of ‘centrality’” as merely “an assertion of centrality.”¹³⁷ Here, the Court hinted to the concern for order that Chief Justice Burger had raised in *Roy*. Under the majority’s understanding of Justice Brennan’s approach, courts would be required, based on the mere assertions of professed religious adherents, to apply broadly the compelling interest standard. Indeed, Justice Brennan did not explain how a court could deny any assertion of the centrality of a religious practice. It is unclear how, without such authority, a court would be able to place workable

133. *Id.* at 457-58.

134. 450 U.S. 707 (1981).

135. 455 U.S. 252 (1982).

136. *Lyng v. Northwest Indian Cemetery*, 485 U.S. 439, 475 (1988) (Brennan, J., dissenting).

137. *Id.* at 457.

limitations on the range of claims that would require the government to offer a compelling interest for its laws.

Thus, as a result of the apparently universal adoption of judicial non-interference in religious interpretation, the members of the Court were forced to select the lesser of two dangers. They had to choose either to burden the government and society by applying the compelling interest test whenever adherents asserted the centrality of a practice, or to restrict religious liberties by refusing to consider carefully the particular burden that different laws placed on different practices. As he had in the past, Justice Brennan, along with the dissenters, opted for protection of religious liberties, while the majority of the Court reflected the increasing trend toward protecting government and societal interests.

F. *Employment Division v. Smith*

In 1990, almost two years to the day after *Lyng*, the majority of the Court finally adopted a fully developed version of the approach that had been suggested by Justices Rehnquist, Stevens, and White in earlier cases. In *Employment Division v. Smith*,¹³⁸ the newly-appointed Justices Kennedy and Scalia completed the five Justice majority which rejected the application of the compelling interest test for a "valid and neutral law of general applicability."¹³⁹ The majority reasoned that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to"¹⁴⁰ challenges to "an across-the board criminal prohibition to a particular form of conduct."¹⁴¹ Therefore, the Court held that, notwithstanding respondents' religious beliefs, Oregon could deny respondents unemployment compensation when their dismissal resulted from a violation of the general prohibition against the ingestion of peyote. The majority opinion is disturbing on a number of grounds.

In terms of faithfulness to precedent, the majority stated that the Court's decisions "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion

138. 494 U.S. 872 (1990).

139. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

140. *Id.* at 885.

141. *Id.* at 884.

prescribes (or proscribes).’”¹⁴² Yet, in reality, the majority of the Court had never accepted the notion that a “neutral law of general applicability” that burdened religious practice did not have to withstand strict scrutiny.

It is telling that the primary case on which the majority in *Smith* relied was *United States v. Lee*.¹⁴³ The citation to *Lee* was, in fact, to Justice Stevens’s concurring opinion in that case, not to the majority opinion. As late as 1986—four years after *Lee*—in *Bowen v. Roy*,¹⁴⁴ Justice O’Connor had observed that a majority of the Court still endorsed the compelling interest standard, without permitting an exception for neutral laws. Likewise, in her concurring opinion in *Smith*, Justice O’Connor criticized the majority’s reliance on Justice Stevens’s opinion in *Lee* to reject the compelling interest standard. Instead, citing a number of Court decisions including the majority opinion in *Lee*, Justice O’Connor wrote:

Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector “is essential to accomplish an overriding government interest” or represents “the least restrictive means of achieving some compelling state interest.”¹⁴⁵

In addition to arguing that the majority approach was inconsistent with the Court’s earlier decisions, Justice O’Connor found that the majority abdicated the Court’s judicial responsibility to consider carefully each case coming before it. Thus, she concluded:

[T]he sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply th[e compelling interest] test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling.¹⁴⁶

Although they disagreed about the proper standard to apply to neutral laws that burden religious practices, both the majority and Justice O’Connor were of the view that courts should not judge the

142. *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (1982) (Stevens, J., concurring)).

143. 455 U.S. 252 (1982).

144. 476 U.S. 693, 732 (1986) (O’Connor, J., concurring).

145. *Employment Div. v. Smith*, 494 U.S. 872, 899 (1990) (O’Connor, J., concurring) (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Bd.*, 404 U.S. 707, 718 (1981)).

146. *Id.* at 899 (O’Connor, J., concurring).

centrality of specific religious beliefs and practices to religious adherents. Thus, the majority repeated its rejection of Justice Brennan's suggestion in *Lyng* that the compelling interest test be limited to when the conduct prohibited by the law is central to the adherent's religious beliefs.¹⁴⁷ As in *Lyng*, the Court expressed dissatisfaction with the possibility that a court would "contradict a believer's assertion that a particular act is 'central' to his personal faith."¹⁴⁸

In addition, the majority elaborated on its criticism of Justice Brennan's approach, identifying the precedents that it had referred to but not cited in *Lyng*.¹⁴⁹ However, a close look at some of the cases cited suggests that the Court's unwillingness to judge the centrality of religious practices was not supported directly by earlier decisions, but instead represents the adoption on the part of the Court of yet another extension of the hands-off approach to deciding issues involving religious interpretation.

For example, the Court relied on Justice Stevens's concurring opinion in *Lee*, which had argued that courts should treat equally the religious claims of different religions, without investigating the specific natures of the different claims. Based on this principle, the majority in *Smith* refused to consider the centrality of religious practices, asserting that "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"¹⁵⁰ Thus, the Court cited to a concurring opinion, which itself presented a novel approach to judicial non-interference in religion cases, an approach which had still not been adopted by the majority of the Court; by analogy, the Court then extended even further the measure of non-interference.

The *Smith* majority's adoption of Justice Stevens's concurrence in *Lee* also serves as a further demonstration of some of the problematic effects that have resulted from the Court's unwillingness to consider the nature of individual religious claims. In *Lee*, the majority of the Court relied on *Thomas*¹⁵¹ to extend the range of free exercise rights, refusing to decide whether Lee had correctly interpreted his religion and therefore presuming that Lee's claim represented a valid interpretation of Amish belief. Justice Stevens'

147. See *id.* at 886-87.

148. *Id.* at 887.

149. See *id.* at 886.

150. *Id.* at 887 (quoting *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring)).

151. 450 U.S. 707 (1981).

concurrence in both *Lee* and *Goldman*,¹⁵² however, relied on the reasoning in *Thomas* to narrow the range of free exercise rights. Justice Stevens' reasoning enabled courts to avoid judging the validity of religious interpretations, based on a strong presumption against religious exemptions. As Justice Brennan had anticipated in his dissent in *Lyng*, by adopting Justice Stevens' view, the majority in *Smith* accepted the resulting broad restrictions on free exercise rights.¹⁵³

The majority in *Smith* further elaborated on its rejection of Justice Brennan's approach in *Lyng*,¹⁵⁴ stating that, "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."¹⁵⁵ However, the context of these warnings is important. In fact, it appears that the cases that the *Smith* majority cited are of questionable value in supporting the Court's conclusion that courts should not consider the centrality of religious practices. For example, the majority cited such cases as *Thomas v. Review Bd. Ind. Employment Sec. Div.*,¹⁵⁶ which involved an intrafaith dispute over religious interpretation, and *Presbyterian Church*,¹⁵⁷ which merely held invalid either a court's

152. See *Goldman v. Weinberger*, 475 U.S. 503 (1986).

153. It is interesting that two years after *Smith*, in *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Souter justified the government's freeing the Native American Church from federal laws prohibiting peyote use as "simply respect[ing] the centrality of peyote to the lives of certain Americans." *Id.* at 629 (Souter, J., concurring). Justice Souter's acceptance of the government's ability to determine the centrality of the use of peyote in the Native American Church may suggest that he would not resist the Court's making similar determinations.

It is notable that in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), Justice Souter criticized the *Smith* majority and agreed with the Justices in *Smith* who endorsed the application of a compelling state interest test when a law substantially burdened religious conduct. See *id.* at 562-63 (Souter, J., concurring in part and concurring in the judgment). Similarly, in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), Justice Souter expressed "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence," and called for "reargument permitting plenary reexamination of this issue." *Id.* at 2186. (Souter, J., dissenting).

In addition, it is significant that Justice Breyer joined in Justice O'Connor's dissenting opinion, which stated that "in light of both our precedent and our Nation's tradition of religious liberty, *Smith* is demonstrably wrong," and that "we should reexamine our holding in *Smith*, and . . . return to a rule that requires government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest." *Id.* at 2177-78 (O'Connor, J., dissenting).

154. *Lyng v. Northwest Indian Cemetery*, 485 U.S. 439, 474-75 (1988).

155. *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990).

156. See *id.* (citing *Thomas v. Review Bd.*, 450 U.S. 707 (1981)).

157. See *id.* (citing *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969)).

rejection of a church tribunal's religious interpretation or—according to Justice Rehnquist's dissent in *Milivojeovich*—a state-created law involving interpretation of church doctrine. These cases do not stand for the proposition that courts may not consider the centrality of a religious practice.

Perhaps the most questionable as well as revealing citation was to *United States v. Ballard*.¹⁵⁸ In *Ballard*, the Court established the important principle that it was unable to determine the truth or falsity of religious beliefs.¹⁵⁹ In citing *Ballard*, the majority in *Smith* echoed the Court's logic from *Lyng*, equating the inability to judge the plausibility of a sincerely held religious belief with the asserted inability of courts to consider the place of a certain practice within a religious system.¹⁶⁰ Thus, the majority's conclusion actually extended the principles established in the cases on which it was premised.

Justice O'Connor, who had written the majority opinion in *Lyng* criticizing Justice Brennan's approach, agreed with the majority in *Smith* that courts should not judge the centrality of a religious practice.¹⁶¹ Yet, she also maintained that the Court should continue to apply the compelling interest test to laws that burdened religious practice.¹⁶² The combination of these positions left Justice O'Connor vulnerable to criticism. Indeed, again in a footnote,¹⁶³ the majority engaged in a criticism similar to but more expansive than that which Chief Justice Burger had levelled against Justice O'Connor in *Bowen v. Roy*.¹⁶⁴

Analyzing the combined logic of Justice O'Connor's two positions, the majority concluded that "[t]his means, presumably, that compelling-interest scrutiny must be applied to generally applicable laws that regulate or prohibit *any* religiously motivated activity, no matter how unimportant to the claimant's religion."¹⁶⁵ The majority found such a result untenable, arguing convincingly that:

dispensing with a "centrality" inquiry is utterly unworkable. It would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church.

158. 322 U.S. 78 (1944).

159. *See id.*

160. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

161. *See id.* at 906-07 (O'Connor, J., concurring in the judgment).

162. *See id.*

163. *Id.* at 885 n.2.

164. 476 U.S. 693 (1986); *see supra* Part II.D.

165. *Smith*, 494 U.S. at 887 n.4 (emphasis in original).

There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered.¹⁶⁶

The majority's criticism of Justice O'Connor's opinion and its acceptance of the alternative approach to general laws that burden religious practice represent perhaps the ultimate illustration of the problems in free exercise jurisprudence that result from judicial non-interference in religious questions. The majority accurately observed that under Justice O'Connor's views, the government would apparently be required to show a compelling interest for a law that burdens any religious practice, regardless of the relative significance of the practice within a religious system.¹⁶⁷ Thus, similar to Chief Justice Burger's observation in *Bowen v. Roy*,¹⁶⁸ it appears that Justice O'Connor's adherence to judicial non-interference in issues of religious interpretation, coupled with her adherence to the compelling interest test, yields too broad a range of claims against which government actions must withstand strict scrutiny.¹⁶⁹

One answer to the majority's criticism may lie in another statement in Justice O'Connor's opinion, which calls for determining "whether the burden on the specific plaintiffs before us is constitutionally significant."¹⁷⁰ As Justice O'Connor does not define or elaborate in any way on the notion of a "constitutionally significant" burden, its meaning is not entirely clear. In fact, the majority suggested that this standard contradicts Justice O'Connor's rejection of centrality.¹⁷¹ In any event, requiring that a religious burden

166. *Id.* (emphasis in original).

167. *See id.* at 889 n.5.

168. 476 U.S. at 707 n.17.

169. *Employment Div. v. Smith*, 494 U.S. 872, 889 n.5 (1990).

170. *Id.* at 899 (O'Connor, J., concurring).

171. *See id.* at 887-88 n.4. The majority put forth a similar argument to reject the position advanced by Justice Blackmun, in a dissenting opinion in which he was joined by Justices Brennan and Marshall. Like the other members of the Court, Justice Blackmun agreed that courts should not consider the centrality of religious practices, but he insisted that courts should not ignore "the severe impact of a State's restrictions on the adherents of a minority religion." *Id.* at 919 (Blackmun, J., dissenting). To support this approach, Justice Blackmun cited to the Court's analysis in *Wisconsin v. Yoder*, which found that, because "education is inseparable from and a part of the basic tenets of their religion . . . [, just as] baptism, the confessional, or a sabbath may be for others," enforcement of the compulsory education law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972)). Justice Blackmun applied a similar analysis to the claim of the religious adherents in *Smith*, detailing and documenting

be constitutionally significant may place workable limitations on religious claims that can be refuted only by a compelling state interest.

Alternatively, as in *Roy*, Justice O'Connor may have implicitly responded to the majority's criticism by showing that, in practice, applying the compelling interest test to a broad range of religious claims need not be unworkable because the government may often be able to satisfy the test. In *Smith*, Justice O'Connor found that the government has a compelling interest in regulating peyote use, and that granting a religious exemption "will unduly interfere with fulfillment of the governmental interest."¹⁷²

Nevertheless, the majority rejected Justice O'Connor's analysis, again echoing Chief Justice Burger's criticism in *Roy*:

If the "compelling interest" test is to be applied at all . . . it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them [W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.¹⁷³

Finally, the majority added that it did not:

suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but . . . that courts would constantly be in the business of determining whether . . . the "constitutiona[l] significan[ce]" of the "burden on the specific plaintiffs" . . . suffices to permit us to confer an exemption [I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.¹⁷⁴

the Native American belief that "the peyote plant embodies their deity, and eating it is an act of worship and communion . . . the essential ritual of their religion." *Id.* at 919 (Blackmun, J., dissenting).

172. *Id.* at 905 (citing *United States v. Lee*, 455 U.S. 252, 259 (1982) (O'Connor, J., concurring)).

173. *Id.* at 888 (emphasis in original).

174. *Id.* at 889 n.5.

The majority acknowledged that its approach would disadvantage minority religions, but stated that this result was preferable to “a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”¹⁷⁵

Thus, the debate in *Smith* is both striking and illuminating because both the majority and Justice O'Connor employed the same principle of refusing to consider the centrality of a religious practice. While Justice O'Connor used this principle to expand the protections afforded free exercise claims, the majority relied on Justice O'Connor's adoption of the principle to demonstrate the problems that could result from her views. The majority thereby ultimately succeeded in relying on the principle of judicial non-interference in religious questions to produce a more narrow interpretation of the Free Exercise Clause.

G. The Religious Freedom Restoration Act

In reaction to *Smith*, in 1993 Congress enacted the Religious Freedom Restoration Act. The Act stated that “[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability” unless the government “demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling interest test.”¹⁷⁶ The declared purpose of the Act was to “restore the compelling interest test as set forth in” *Sherbert* and *Yoder* “and to guarantee its application to all cases where free exercise of religion is substantially burdened.”¹⁷⁷ The Act appeared to be an encouraging step towards requiring courts to engage in a more careful analysis of free exercise claims, in order to decide whether a substantial burden exists.

Nevertheless, scholars and courts alike raised many questions regarding the interpretation, constitutionality and proper application of the Act.¹⁷⁸ Among other important issues, application of the

175. *Id.* at 890.

176. 42 U.S.C. § 2000bb-1(a), (b).

177. 42 U.S.C. § 2000bb(b)(1).

178. See, e.g., Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 333-59; Eugene Gressman & Angela C. Carmella, *The RFRA Revision of*

Act's reference to a "substantial[] burden" on religious exercise appeared to require courts to engage in the kind of investigation into religious beliefs that Supreme Court Justices have increasingly and nearly uniformly rejected. In any event, the Supreme Court did not have to address these questions, as it declared the Act an unconstitutional extension of Congress' power.¹⁷⁹

III. Establishment Clause Cases

In Establishment Clause cases, courts are sometimes required to consider the religious significance of a practice. Unlike in Free Exercise Clause cases, though, the issue in Establishment Clause cases usually does not concern the centrality or the importance of a practice within a religious system. Instead, courts are often confronted with the question of whether a particular practice is in fact religious and/or sectarian in nature, and therefore must not be improperly "established" by the government. Nevertheless, although the focus of courts' analysis will differ in the two types of cases, the dangers that may result from an unwillingness to examine carefully practices in Establishment Clause cases parallel the dangers of such an approach in Free Exercise Clause cases.

If a court does not examine the religious nature of specific practices when called upon to determine the acceptable form and extent of government involvement in those practices, one of two troubling results may arise. One possibility is that, unwilling or unable to make actual findings, the court will decide generally to minimize the religious qualities of different practices. In so doing, the court might allow the government improperly to participate in or endorse, and thus help establish, what is truly a religious practice.

The alternate danger is that a court may group together practices as being largely religious in nature, regardless of the actual secular or nonsectarian value of a particular practice. In this scenario, a court could preclude the government from engaging in permissible accommodation of what may often be positive and productive societal activities.

In contrast to the parallel dangers arising in Free Exercise Clause cases, the potential dangers that may result from judicial non-interference in evaluating religious practices in Establishment Clause cases are not always manifested in as direct a manner in the

the Free Exercise Clause, 57 OHIO ST. L.J. 65 (1996); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994).

179. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

opinions of Supreme Court Justices. Moreover, unlike the cases that led up to and resulted in *Employment Division v. Smith*,¹⁸⁰ the Supreme Court's Establishment Clause jurisprudence has not developed gradually towards a landmark decision, representing a new and arguably problematic approach on the part of the Court as a whole. Nevertheless, a close look at some of the opinions in Establishment Clause cases suggests that the dangers indeed find expression in the Court's consideration of Establishment Clause questions as well.

A. *County of Allegheny v. American Civil Liberties Union*

An illustration of the potential problems that may result from courts' non-interference in analyzing the religious nature of certain practices can be found in Justice Kennedy's opinion in *County of Allegheny v. American Civil Liberties Union*.¹⁸¹ Notably, Justice Kennedy was joined in this opinion by Chief Justice Rehnquist and Justices White and Scalia, three Justices who, in free exercise cases, also endorsed the view that courts should play a limited role in determining issues that involve questions relating to interpreting religious belief and practice.¹⁸²

In *Allegheny*, the Court considered the constitutionality of the government's permitting the display of a creche in the county courthouse, and the display of a menorah in the City-County Building.¹⁸³ In his majority opinion addressing the display of the creche, in which he was joined by Justices Stevens, O'Connor, Brennan and Marshall, Justice Blackmun observed that the creche "use[d] words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear."¹⁸⁴ Justice Blackmun interpreted the phrase appearing on the creche—"Glory to God in the Highest"—as meaning "Glory to God because of the birth of Jesus."¹⁸⁵ Justice Blackmun concluded that "[t]his praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service."¹⁸⁶ Based on this reasoning, the majority held that the display of the creche violated the Establishment Clause because, through it, Allegheny County celebrated Christmas "in a way that has the effect of en-

180. See *supra* Parts I, II.

181. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

182. See *supra* Parts II.B-C, F.

183. *Allegheny County*, 492 U.S. at 579.

184. *Id.* at 598.

185. *Id.*

186. *Id.*

dorsing a patently Christian message: Glory to God for the birth of Jesus.”¹⁸⁷

The Court’s decision regarding the display of the menorah was more complex. Although the majority of the Court held that the display of the menorah did not violate the Establishment Clause, there was no Opinion of the Court in this regard. Instead, Justice Blackmun wrote an opinion expressing his rationale for why the display of the menorah was constitutionally valid, while Justice Kennedy and those joining in his opinion presented a different analysis for upholding the display of the menorah. A look at the different approaches among the Justices in considering the religious nature of the menorah helps illustrate some of the problems that may result when questions of religious practice arise in Establishment Clause cases.

Justice Blackmun based his reasoning on the premise that, although the menorah “is a religious symbol . . . the menorah’s message is not exclusively religious.”¹⁸⁸ To support this premise, Justice Blackmun engaged in an extensive analysis of the religious and cultural aspects of the menorah.¹⁸⁹ After describing the religious symbolism and use of the menorah in connection with the holiday of Chanukah, Justice Blackmun added that “Chanukah, like Christmas, is a cultural event as well as a religious holiday.”¹⁹⁰

Justice Blackmun elaborated on the comparison between Christmas and Chanukah, observing that “[j]ust as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity.”¹⁹¹ Moreover, Justice Blackmun noted the “socially heightened status of Chanukah,” which, he suggested, “reflects its cultural or secular dimension.”¹⁹² Thus, comparing the legal status of Christmas to that of Chanukah, Justice Blackmun reasoned that “[b]ecause government may celebrate Christmas as a secular holiday,” such as by allowing the display of a Christmas tree in a public place, “it follows that government may also acknowledge Chanukah as a secular holiday,” by allowing the display of a menorah.¹⁹³ In short, Justice Blackmun concluded that in the context in which it stood, “the display of the menorah [was] not an

187. *Id.* at 601.

188. *Id.* at 613 (Opinion of Blackmun, J.).

189. *See id.* at 582-87 (Opinion of Blackmun, J.).

190. *Id.* at 585.

191. *Id.*

192. *Id.* at 587.

193. *Id.* at 615.

endorsement of religious faith, but simply a recognition of cultural diversity.”¹⁹⁴

Justice Kennedy contended that neither the creche nor the menorah violated the Constitution. Although he concurred with Justice Blackmun’s ruling upholding the display of the menorah, Justice Kennedy strongly disagreed with Justice Blackmun’s approach, on several grounds. In his final argument, Justice Kennedy criticized Justice Blackmun for “assum[ing] the difficult and inappropriate task of saying what every religious symbol means.”¹⁹⁵ After noting the complexity of the menorah’s religious significance, Justice Kennedy further asserted that “[t]his Court is ill equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its so doing.”¹⁹⁶

Therefore, instead of relying on an analysis of the religious and cultural aspects of the menorah, Justice Kennedy offered a different approach for upholding the display of not only the menorah, but of the creche as well. Justice Kennedy’s approach recognized a “tradition of government accommodation and acknowledgment of religion that has marked our history from the beginning.”¹⁹⁷ Justice Kennedy found “well within” this tradition the government’s interest in allowing the display of the creche and the menorah, “to acknowledge . . . the historical background and the religious . . . nature of the Chanukah and Christmas holidays.”¹⁹⁸

Through this approach, Justice Kennedy did apparently avoid the need to analyze the precise nature of the religious meaning behind the creche and the menorah. Nevertheless, Justice Kennedy’s approach raises a number of questions. In fact, the potential problems that can result from Justice Kennedy’s approach may be more disturbing than those he identified in his exaggerated depiction of Justice Blackmun’s requiring the Court to sit as a “national theology board.”

One question raised by Justice Kennedy’s approach involves the issue of how courts can be expected to decide cases relating to religious practices if courts do not analyze carefully the religious nature of those practices. As Justice Blackmun noted in his response to Justice Kennedy’s criticism, “[a]ny inquiry concerning the government’s use of a religious object to determine whether that use

194. *Id.* at 619.

195. *Id.* at 678 (Kennedy, J., concurring in part and dissenting in part).

196. *Id.*

197. *Id.* at 663.

198. *Id.*

results in an unconstitutional religious question requires a review of the factual record concerning the religious object—even if the inquiry is conducted pursuant to Justice Kennedy’s . . . test.”¹⁹⁹ Justice Blackmun further reasoned that “[s]urely, Justice Kennedy cannot mean that this Court must keep itself in ignorance of the symbol’s conventional use and decide the constitutional question knowing only what it knew before the case was filed.”²⁰⁰

Thirteen years earlier, in his dissenting opinion in *Serbian Eastern Orthodox Church v. Milivojevic*,²⁰¹ Justice Rehnquist had employed a similar approach. In *Milivojevic*, Justice Rehnquist argued that in order to adjudicate a case involving interpretation of canon law, courts would inevitably be required to choose one interpretation over another. For this choice to be a rational one, he further explained, courts would have to consider different reasons for each interpretation. Finally, Justice Rehnquist praised the Illinois courts for basing their decisions on the information presented by expert testimony.²⁰² Similarly, Justice Blackmun insisted that, for courts to adjudicate the issue of whether the government has improperly endorsed a symbol, courts first must make a rational decision regarding the religious nature of the symbol.

In addition, Justice Stevens, who had joined Justice Rehnquist’s dissent in *Milivojevic*, again expressed similar sentiments in his opinion in *Allegheny*, joined by Justices Brennan and Marshall. Although he disagreed with Justice Blackmun’s conclusion regarding the religious nature of the menorah, finding instead that the menorah was “unquestionably a religious symbol,”²⁰³ Justice Stevens did not share Justice Kennedy’s aversion to a careful analysis of the religious nature of the menorah. Instead, consistent with the approach he had endorsed in *Milivojevic*, Justice Stevens based his conclusion on the expert testimony of a rabbi who had disputed the notion that Chanukah could be viewed as a secular holiday.²⁰⁴

Another question raised by Justice Kennedy’s approach involves the potential danger that his deference to government “acknowledge[ment] of these holidays [and] their religious component,”²⁰⁵ based on “our strong tradition of government accommodation and

199. *Id.* at 614 n.60 (Opinion of Blackmun, J.).

200. *Id.*

201. 426 U.S. 696 (1976).

202. *See supra* Part I.B.

203. *Allegheny County v. ACLU*, 492 U.S. 573, 654 (1989) (Stevens, J., concurring in part and dissenting in part).

204. *See id.* at 654 n.15 (Stevens, J., concurring in part and dissenting in part).

205. *See id.* at 664 (Kennedy, J., concurring in part and dissenting in part).

acknowledgement,"²⁰⁶ may narrow too greatly the range and strength of the Establishment Clause. According to the logic of Justice Kennedy's refusal to allow the Court to "say[] what every religious symbol means,"²⁰⁷ it appears that the government would be allowed to "accommodate" and "acknowledge" even those practices of an unequivocally religious and sectarian nature.²⁰⁸

It is interesting that, despite his criticism of Justice Blackmun's careful analysis of the relative religious and secular aspects of the menorah, Justice Kennedy himself referred a number of times to the secular aspects of Chanukah and Christmas. Such language may serve in part to counter the suggestion that Justice Kennedy would allow the improper government endorsement of a clearly religious practice. In any event, Justice Kennedy's apparent emphasis and perhaps partial reliance on the secular nature of these holidays seems to weaken his criticism of Justice Blackmun's approach.

For example, Justice Kennedy expressed his approval for what he referred to as the government's acknowledgment of the "religious, as well as secular, nature of the Chanukah and Christmas holidays."²⁰⁹ He further described government participation in "its citizens' celebration of a holiday that contains both a secular and religious component," insisting that "enforced recognition of only the secular aspect would signify . . . callous indifference toward religious faith."²¹⁰

Most significantly, in explaining his reasoning for upholding the display of both the creche and the menorah, Justice Kennedy actually cited sections of Justice Blackmun's analysis to support the assertion that "[b]oth [the creche and the menorah] are the traditional symbols of religious holidays that over time have acquired a secular component."²¹¹ Indeed, Justice Kennedy's obser-

206. *Id.*

207. *Id.* at 678.

208. Justice Kennedy did allow for some limitations on government acknowledgment and accommodation of religion, in an "extreme case." *Id.* at 661. For example, he agreed that a city would be prohibited from allowing the "obtrusive year-round religious display" of a large Latin cross on the roof of city hall. *Id.* Yet, Justice Kennedy emphasized that he would object to such a display not because it represents "government speech about religion . . . but because such an obtrusive year-round display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* Thus, Justice Kennedy apparently would not object if the government would accommodate a less obtrusive yet unequivocally religious practice or symbol.

209. *Id.* at 663.

210. *Id.* at 663-64.

211. *Id.* at 573.

vation is merely a condensed and somewhat moderated version of Justice Blackmun's analysis, which Justice Kennedy criticized for turning the Court into a "national theology board."²¹²

Moreover, such an analysis is inconsistent with Justice Kennedy's assertion that courts should avoid determining the meaning of religious symbols.²¹³ If courts may determine that a symbol has taken on a secular component, it is not clear why courts may not also determine the extent to which a symbol has acquired that secular component. If, according to Justice Kennedy, the government is less likely to violate the Establishment Clause when a religious symbol has a secular component, it should follow that the government is conversely more likely to violate the Establishment Clause when the secular component is relatively minor. It would be proper, then, and apparently necessary, for a court to try to determine, as did Justice Blackmun, the extent of the relative secular components of both the creche and the menorah.

Despite the contradiction inherent in his own analysis, Justice Kennedy characterized the majority's view as inconsistent, proclaiming that "were I required to choose between the approach taken by the majority and a strict separationist view, I would have to respect the consistency of the latter."²¹⁴ Justice Kennedy seemed to acknowledge that, while his approach was "consistent" in result in *Allegheny*, allowing for the display of both the creche and the menorah, it did not have the intellectual consistency of a "strict separationist view."

Justice Kennedy did not adopt this separationist approach, or even explain what specific views would form the basis for such an approach. Nevertheless, he seemed to consider the separationist approach a viable alternative, at least preferable to Justice Blackmun's analysis. Perhaps Justice Kennedy envisioned a type of separationist who would advocate an extreme—and indeed consistent—form of his own approach, rejecting any attempt to analyze an activity's religious nature. Such a separationist might be unwilling even to acknowledge what the majority—and Justice Kennedy—described as the secular component of the menorah dis-

212. *Id.* at 678.

213. *See id.* Indeed, the majority found such an inconsistency in Justice Kennedy's approach inevitable, arguing that "[a]ny inquiry concerning the government's use of a religious object to determine whether the use results in an unconstitutional religious preference requires a review of the factual record concerning the religious object—even if the inquiry is conducted pursuant to Justice Kennedy's . . . test." *Id.* at 614 n.60.

214. *Id.* at 678 (Kennedy, J., concurring in part and dissenting in part).

play. The separationist could therefore be compelled to find unconstitutional the government accommodation of any activity with a religious component, such as the display of the menorah, regardless of any secular nature of the activity; even the recognition of an obviously secular component requires a consideration of the meaning of a religious symbol. This approach, an extension of Justice Kennedy's view though based on similar logic, would indeed result in a certain measure of consistency, as courts consistently would strike down government attempts to accommodate religion. One unfortunate result, though, would be a grouping together of activities, regardless of their relative secular nature, resulting in a decrease in permissible government accommodation of expression, as illustrated by the example of the menorah.

In fact, this danger is not merely hypothetical, but appears to have found actual expression in Justice Souter's concurring opinion in *Lee v. Weisman*.²¹⁵

B. *Lee v. Weisman*

The Establishment Clause plays a vital role in prohibiting the government from favoring or endorsing religion. Despite the importance of the principles underlying the Establishment Clause, however, courts should not prevent the government from supporting activities that do not involve religious endorsement. A close look at Justice Souter's concurring opinion in *Lee v. Weisman*²¹⁶ suggests that the application of his approach might lead to such unfortunate results.

In *Weisman*, the Court held that a public high school's allowing members of the clergy to offer prayers at graduation ceremonies violated the Establishment Clause. After considering the nature of high school graduations, the majority framed the issue in the case as "whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform."²¹⁷ The majority concluded that, through the prayer, the school "compel[led] or persuade[d] a student to participate in a religious exercise," in violation of the Establishment Clause.²¹⁸

Though he concurred with the majority's holding, Justice Souter wrote a separate opinion to respond to the "nonpreferentialist" ar-

215. 505 U.S. 577 (1992).

216. *Id.* at 609 (Souter, J., concurring).

217. *Id.* at 599.

218. *Id.*

gument, which he described as distinguishing between “sectarian” religious practices and those that would be “ecumenical enough to pass Establishment Clause muster.”²¹⁹ Justice Souter first responded on historical grounds, providing extensive documentation to support his contention that the Framers rejected the nonpreferentialist position.²²⁰

Following his historical argument, Justice Souter expressed his concern that “[s]imply by requiring the inquiry [as to whether a practice is sectarian or ecumenical], nonpreferentialists invite the courts to engage in comparative theology.”²²¹ He therefore rejected the nonpreferentialist approach, because “I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.”²²² Yet, Justice Souter did not explain why he deemed it beyond the competence of courts to decide whether a particular practice is sectarian or ecumenical. Instead, he merely noted that the prayer at issue in *Weisman* was, in his view, Theistic in nature, failing to account for the beliefs of adherents to non-Theistic religions.²²³ However, even accepting the conclusion that the particular prayer in *Weisman* was not ecumenical in nature need not invalidate the nonpreferentialist approach that would call for government accommodation of a truly ecumenical prayer, one that is “sufficiently generic” to encompass non-Theistic beliefs as well.²²⁴

Moreover, it would seem that in order to consider properly whether government support of a particular practice violates the Establishment Clause, courts should not avoid inquiring as to whether that practice—or prayer—is sectarian or ecumenical. If a court’s competence is to include adjudicating difficult cases that come before it, a court must examine, in cases such as *Weisman*, the sectarian or ecumenical nature of a practice. Courts should not rely on an aversion to “comparative theology” to avoid difficult decisions in cases relating to religion, any more than courts would find it plausible to avoid deciding cases relating to complex scientific questions, on the ground that such analysis is beyond their competence.

219. *Id.* at 616 (Souter, J., concurring).

220. *See id.* at 612-16 (Souter, J., concurring).

221. *Id.* at 616 (Souter, J., concurring).

222. *Id.* at 616-17 (Souter, J., concurring).

223. *See id.* at 617 (Souter, J., concurring).

224. *Id.*

Indeed, in dissenting to the First Circuit's decision in *Weisman*, which the Supreme Court affirmed, Judge Campbell expressed such faith in the ability of the courts. Judge Campbell responded to the concern, voiced in the District Court decision by Chief Judge Boyle and later echoed in Justice Souter's opinion, fearing "church-state entanglement if the courts must determine what prayers are nonsectarian enough to pass muster."²²⁵ Though concededly "troubled" by this concern, Judge Campbell insisted that it was "reasonably simple to separate sectarian from nonsectarian utterances."²²⁶

Furthermore, though he concurred in the Court's decision in *Weisman*, Justice Blackmun's careful analysis of the prayer at issue suggests that courts are competent to consider the religious nature of a practice. Based on the substance of the prayer, Justice Blackmun found "no doubt" that the invocation was "a religious activity."²²⁷ In fact, citing the prayer's quotation to the Book of the Prophet Micah, Justice Blackmun found that "the religious message it promotes is specifically Judeo-Christian."²²⁸ If it is possible, under this approach, to find a prayer clearly religious, and to identify the precise nature of its religious message, perhaps it is likewise possible to find a different prayer, or a different practice, ecumenical—or even secular—in nature.²²⁹

Of course, Justice Souter's rejection of the prayer in *Weisman* was not based solely on his rejection of "comparative theology." Justice Souter rejected, on historical grounds, the very concept of a nonpreferentialist approach to the Establishment Clause. The majority similarly rejected as unconstitutional the government support of a "civic religion . . . which is tolerated when sectarian exercises

225. *Weisman v. Lee*, 908 F.2d 1090, 1098 (1st Cir. 1990) (Campbell, J., dissenting), *aff'd*, *Lee v. Weisman*, 505 U.S. 577 (1992).

226. *Weisman*, 908 F.2d at 1098. Judge Campbell was also optimistic that most adherents to any religious or ethical system would "find it is appropriate and meaningful for public speakers to invoke the deity not as an expression of a particular sectarian belief but as an expression of transcendent values and of the mystery and idealism so absent from much of modern culture." *Id.* at 1098-99.

227. 505 U.S. at 603 (Blackmun, J., concurring).

228. *Id.* at 604 n.5 (Blackmun, J., concurring).

229. Indeed, after admonishing the Court not to engage in comparative theology, Justice Souter himself engaged in a theological analysis of the prayer in *Weisman*, to the extent that he found it unacceptable to non-Theistic religious adherents. *See id.* at 617 (Souter, J., concurring). If Justice Souter considered courts competent to find that a religious practice is not sufficiently generic for some believers, it is not clear why he should rule out courts' ability to similarly determine that a different practice is permissibly nonsectarian under the Establishment Clause.

are not.”²³⁰ Moreover, Justice Souter observed that the particular prayer in *Weisman* “embodie[d] a straightforwardly Theistic premise,”²³¹ while Justice Blackmun found the religious message of the prayer to be “specifically Judeo-Christian.”²³²

Nevertheless, in other cases, Justice Souter’s approach would appear to lead to too broad an application of the Establishment Clause, preventing the government from engaging in even the proper support of certain practices. For example, if a practice has a religious component but also an overriding secular component, it seems that Justice Souter’s approach could prevent a court from even considering the relative religious and secular nature of the practice. One possible result would be a presumptive rejection of government support for any practice that has even the slightest religious component, despite the potential benefit of the practice to society.²³³

An alternative danger could arise if Justice Souter’s approach is applied by a court generally favoring government support for religious activities. Unable to consider the relative religious or secular components of a particular practice, such a court may adopt a presumptive acceptance of government support for a largely religious practice merely because the practice has a secular component. The result could be improper government support of truly religious practices, in violation of the Establishment Clause.

Conclusion

In concluding his dissent in *Milivojeovich*, Justice Rehnquist offered a reasonable and balanced view of whether courts should involve themselves in deciding religious questions. He stated that “while there may be a number of good arguments that civil courts . . . should, as a matter of the wisest use of their authority, avoid adjudicating religious disputes to the maximum extent possible, they obviously cannot avoid all such adjudications.”²³⁴ It appears that since *Milivojeovich*, the Supreme Court has heeded the first part of Justice Rehnquist’s prescription, that courts should avoid adjudicating religious disputes—and questions—whenever possi-

230. *Id.* at 589.

231. *Id.* at 617 (Souter, J., concurring).

232. *Id.* at 604 n.5 (Blackmun, J., concurring).

233. A similar danger may result from the approach of the “separationist” appearing in Justice Kennedy’s opinion in *County of Allegheny v. ACLU*, 492 U.S. 573, 678 (1989). See *supra* Part III.A.

234. *Serbian Eastern Orthodox Diocese v. Milivojeovich*, 426 U.S. 696, 735 (1976) (Rehnquist, J., dissenting).

ble. In fact, the Supreme Court has gradually extended the degree of judicial non-interference that it deems appropriate in cases involving religious questions.

Yet, the end of Justice Rehnquist's prescription seems to have gone largely ignored by the Court. While there are a number of good arguments to support the wisdom of courts' avoidance of adjudicating religious disputes, courts cannot—and should not—avoid all adjudication of religious questions. Recent cases demonstrate some of the dangers that have arisen and could potentially increase in both Free Exercise Clause and Establishment Clause cases as a result of the Court's hands-off approach to religious questions.

In Free Exercise Clause cases, by grouping together different religious practices, courts may grant improper protections to professed adherents, resulting in unnecessary burdens on government and society, or, conversely, may permit unduly harsh governmental limitations on religious liberties. Parallel dangers exist in Establishment Clause cases. In refusing to examine carefully the religious character of different practices, courts may prevent proper accommodation of largely secular expression, or allow impermissible establishment of practices of a substantially religious nature. On balance, then, it appears that the Supreme Court should reexamine the results of its Religion Clause jurisprudence, and adopt a willingness to consider more carefully questions of religious practice and belief.