USING AN *ERUV* TO UNTANGLE THE BOUNDARIES OF THE SUPREME COURT'S RELIGION-CLAUSE JURISPRUDENCE

Shira J. Schlaff[*]

INTRODUCTION

"[T]he Court's religion-clause jurisprudence . . . has been described by scholars of all persuasions, and even by the justices themselves, as unprincipled, incoherent, and unworkable."[1] Lower courts await instruction from the Supreme Court on the ambiguities in religion clause jurisprudence.[2] Controversies that have arisen regarding a procedure that enables Orthodox Jews to carry and push objects outside on the Sabbath, elucidate many of the holes and incoherencies in First Amendment jurisprudence. This comment uses the creation of an *eruv*, the name of this procedure, as a case-study to display the ambiguities of current First Amendment law and the need for more specific guidance from the Supreme Court on what the Establishment Clause permits and forbids and what the Free Exercise Clause requires.

In order to understand the constitutional issues surrounding an *eruv*, it is important to first grasp the concept of an *eruv* and its function in Jewish law. According to Jewish law, the Bible prohibits carrying from a private domain to a public domain and carrying more than a few feet within a public domain on the Sabbath.[3] A house or apartment is generally considered to be one's private domain. Only a

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[1] ANTONIN SCALIA, A MATTER OF INTERPRETATION 109 (1998).

[2] *See, e.g.*, ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 306 (6th Cir. 2001):

> Perhaps the Supreme Court will soon have an opportunity to tell us, if it wishes, whether the *Lemon* test applies here as well, or whether this case is governed by the endorsement test, or the *Marsh* test, or some combination of some or all of the various tests on offer.

[3] The Mishnah on Shabbat lists thirty-nine categories of work prohibited on the Sabbath. MISHNAH SHABBAT 7:2. Carrying is one of the forbidden categories of work. *Id.*

major thoroughfare is considered to be a public domain.[4] However, the rabbis extended the prohibition on carrying to include areas not enclosed on all four sides, and not intended to be a thoroughfare. Such an area is known as a *carmelit*.[5] Thus, Jewish law permits one to carry objects from one room to another in a house because a house is one's private domain. It forbids one from carrying objects from one's house to a park because a park is generally not considered to be a private domain. Without an *eruv*, some are restricted to their homes on the Sabbath. According to Jewish law, pushing objects, such as baby carriages and wheelchairs, is subsumed under the prohibition of carrying.[6] Accordingly, a parent may not push a baby stroller outside, and similarly, an observant Jew may not push a person in a wheelchair on the Sabbath.

An *eruv* results from a rabbinic leniency used to reduce the impact of the prohibition on carrying within a *carmelit*. Many streets fall within the definition of a *carmelit*.[7] Understanding the procedure for creating an *eruv* in a courtyard is instructive. In order to make an *eruv*, residents must create a symbolic doorway on the side of the courtyard open to the public.[8] The second step is to obtain permission from non-Jewish residents. Then residents deposit food in a designated person's house, and a blessing, creating an *eruv* is said over the food. Only after the symbolic sharing of food is complete does the area enclosed become one private domain according to Jewish law.

Creating an *eruv* in modern cities is more complex. First, a city must be enclosed in order for the sharing of food to symbolically convert the property into a private domain. Although I will often refer to the geographical structure used to symbolically enclose an area as an *eruv*, the word *eruv* actually refers to the food used to symbolically unite the property. The enclosure is simply a prerequisite. Existing walls and fences[9] are used, but symbolic doorways are used to bridge gaps. Today, the symbolic doorway may be constructed by

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[4] Many Rabbis hold that in order for an area to constitute a public domain, it must be traversed daily by six hundred thousand people. *See* Rabbi Hershel Schachter, *The Laws of Eruvin—an Overview*, *in* HALACHAH AND CONTEMPORARY SOCIETY 131, 137-38 (1984).

[5] YOSEF GAVRIEL BECHHOFER, THE CONTEMPORARY ERUV: ERUVIN IN MODERN METROPOLITAN AREAS 13-14 (1998).

[6] Pushing a carriage is like carrying. *See also* Y. NEUWIRTH, SHEMIRATH SHABBATH, A GUIDE TO THE PRACTICAL OBSERVANCE OF SHABBAT 17:6 (1984).

[7] BECHHOFER, *supra* note 5, at 98.

[8] The symbolic doorway often consisted of two vertical poles or beams of wood, attached to a horizontal beam. MISHNAH 1, TRACTATE ERUVIN (introducing concept of *tzurat hapetach*).

[9] *See* Joshua Metzger, *The Eruv: Can Government Constitutionally Permit Jews to Build a Fictional Wall Without Breaking the Wall Between Church and State*, 4 NAT'L JEWISH L. REV. 67, 68 (1989).

hanging wire or string from pole to pole. When existing wires are used, plastic strips, known as *lechis*,[10] similar to the plastic strips used to ground telephone or cable wires,[11] must be used in order for the telephone wires and the poles to be considered part of the symbolic doorway.[12] Disputes allegedly arise because poles are often owned by the city. Additionally, where there are no natural boundaries and few poles, creating a continuous boundary may require that the Orthodox community erect its own poles on city property.

Some also view the need to obtain permission to use the area within as controversial. Since it is impractical for Jews to go from door to door seeking permission from all those who live within the geographical area, Jews request control from a single authority. In a city, Jews seek formal or informal permission from the city government or the police department. Sometimes, a city will issue a proclamation granting Jews the right to use public land encompassed within the symbolically enclosed geographical area.[13] Then, one resident of a community accepts a specified amount of food on behalf of all those within the enclosed boundary, a blessing is said over this food, and the area within becomes one collective private domain for the purpose of Jewish law.

Three distinct legal controversies have arisen concerning an *eruv*: (1) allowing the construction of the geographical boundary on city property violates the Establishment Clause;[14] (2) denying permission for the geographical boundary constitutes a violation of the Free Exercise Clause;[15] and (3) denying permission for the geographical boundary constitutes a violation of the Free Speech Clause.[16]

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[10] The entire vertical pole is considered a *lechi*. The plastic strip, therefore, is just one part of the *lechi*.

[11] Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142, 184 n.26 (D.N.J. 2001), *rev'd*, 309 F.3d 144 (3d Cir. 2002).

[12] The laws that concern an *eruv* are complex. This type of *eruv* can only be built under certain conditions. *See* Schachter, *supra* note 4, at 149.

[13] The proclamations do not have any force according to American law. Some proclamations explicitly acknowledge this. *See* Proclamation of County of Bergen (Dec. 15, 1999):

> The said *eruv* shall not be binding for any other purpose and this proclamation creates no rights, duties or obligations enforceable in any court whether in law or in equity. This proclamation shall not diminish, increase or affect any other rights granted under New Jersey Law, nor shall it be deemed to authorize any physical construction that would otherwise require permission from any local municipal county or state boards.

[14] *See, e.g.*, Br. of Amicus Curiae ACLU of New Jersey at 1, *Tenafly Eruv Ass'n* (No. 00-6051).

[15] *See, e.g.*, Pl.'s Mem. of Law at 1, *Tenafly Eruv Ass'n* (No. 00-6051). The First Amendment states, "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I.

[16] *Tenafly Eruv Ass'n*, 155 F. Supp. 2d. at 173.

More than a decade ago, two lower courts rejected Establishment Clause challenges to the construction of the geographical enclosure.[17] The Establishment Clause challenge to the allowance of an *eruv* recently reappeared.[18] In *Tenafly Eruv Association v. Borough of Tenafly*, the defendants argued that permitting erection of an *eruv* on city poles, when access to those poles is otherwise limited, raises Establishment Clause concerns.[19] In short, the Tenafly Eruv Association constructed an *eruv* without the requisite permission from the Tenafly Borough Council.[20] The Council ordered that the *eruv* be removed, and the Eruv Association requested a preliminary injunction banning removal. Since the *eruv* in *Tenafly* consisted of existing telephone wires, the central issue was whether plastic strips that Cablevision affixed to 183 utility poles in Tenafly at the plaintiffs' request could remain where they were.[21] The Establishment Clause became relevant because the Borough claimed that it had a compelling interest in avoiding both an actual Establishment Clause violation[22] and the appearance of an Establishment Clause violation.[23] Although the District Court gave force to the Establishment Clause concerns,[24] the Third Circuit held that allowing an *eruv* under the circumstances in *Tenafly* did not violate the Establishment Clause.[25]

While the discussion above deals with Establishment Clause concerns if an *eruv* is permitted, *Tenafly Eruv Ass'n* mainly focused on the possible free exercise and free speech violations if permission for an *eruv* is denied.[26] The District Court refused to grant a preliminary in-

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[17] ACLU of New Jersey v. City of Long Branch, 670 F. Supp. 1293, 1296 (D.N.J. 1987); Smith v. Cmty. Bd. No. 14, 491 N.Y.S.2d 584, 586 (N.Y. Spec. Term 1985).

[18] The Palo Alto City Attorney was confronted with Establishment Clause issues when the Orthodox community initially sought to erect an *eruv* in Palo Alto in 2000. He noted that an *eruv* raises Establishment Clause concerns, but that allowing an *eruv* probably would not violate the federal constitution. He also mentioned the promised threat of lawsuits (claiming an Establishment Clause violation). *See* Palo Alto City Att'y, Report: Legal Issues Associated With Establishing an Eruv, Dec. 9, 1999, at 6.

[19] *Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 145 ("Plaintiffs contend that this denial [to erect an *eruv*] violated their rights to Free Exercise of Religion and to Free Expression under the First Amendment . . . .").

[20] The Eruv Association had permission from Executive Pat Schuber, and did not know that it needed permission from the Borough Council as well. *See* Pl.'s Mem. of Law at 4, *Tenafly Eruv Ass'n* (No. 00-6051).

[21] Br. for Appellants at 17, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002).

[22] *Tenafly Eruv Ass'n*, 309 F.3d at 172.

[23] *Tenafly Eruv Ass'n* , 155 F. Supp. 2d at 186.

[24] *See id.* (holding that city could deny *eruv* on the basis of the appearance of an Establishment Clause violation).

[25] *Tenafly Eruv Ass'n*, 309 F.3d at 176.

[26] *Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 142.

junction holding that plaintiffs were unlikely to succeed on their claim that disallowing an *eruv* constitutes a violation of plaintiffs' free exercise or free speech rights.[27] The Third Circuit reversed.[28] First, it held that plaintiffs failed to prove a likelihood of success on their free speech claim because an *eruv* is not protected speech.[29] However, it also held that plaintiffs are likely to succeed on their free exercise claim because the Borough selectively applied its ordinance governing the use of utility poles.[30] Since the Tenafly Borough recently voted to apply for certiorari, the fight over an *eruv* in Tenafly continues.[31] Despite vast amounts of case law interpreting the First Amendment, what constitutes a violation of the Establishment Clause; what is mandated by the Free Exercise Clause; and what is a permissible accommodation, not required or prohibited by either, is far from clear.

Part I discusses Establishment Clause concerns with permitting the construction of an *eruv* on public property and Part II explores claims that denying permission for an *eruv* violates the Free Exercise Clause. Part III compares the strength of the claims under the Free Exercise and Free Speech Clauses and focuses on ways for courts to revise free exercise law in light of free speech jurisprudence.

I. ESTABLISHMENT CLAUSE CONCERNS

Section A outlines the development of current Establishment Clause jurisprudence. Section B discusses various ambiguities inherent in current jurisprudence. Section C argues that an *eruv* is a permissible accommodation under all circumstances and Section D suggests an approach that will eliminate some of the ambiguities the Court's current jurisprudence engendered.

A. *Development of Current Establishment Clause Jurisprudence*

One of the major difficulties in religion clause jurisprudence has been the struggle "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the

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[27] *Id.*

[28] *Tenafly Eruv Ass'n*, 309 F.3d at 178.

[29] *Id.* at 162.

[30] *Id.* at 168.

[31] Monsy Alvarado, *Decision to Fight on Supported in Tenafly; High Court to Have Last Word on Eruv*, THE RECORD (Bergen County), Feb. 2. 2003, at L01.

other."[32] Over time, the Supreme Court has shifted its religion clause jurisprudence to try and identify the proper course. Although the clauses may at times clash, they share a similar purpose: to minimize government involvement in an individual's religious choice.[33]

One of the Court's earliest approaches to reconciling the two clauses was the "strict separation" theory, prohibiting governmental "aid" to religion.[34] The Court laid the path for this approach in *Everson v. Board of Education.* Justice Black wrote, "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[35] The Court invalidated many statutes using the *Everson* analysis.[36]

Even during the Court's aggressive Establishment Clause days, it recognized the principle of accommodation.[37] The Court noted that by upholding a law permitting students to leave secular classes early if they left for the purpose of religious instruction, "it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs."[38]

In *Lemon v. Kurtzman*, the Court articulated a tripartite test for determining Establishment Clause violations.[39] First, *Lemon* requires that the government's action be justified by a secular purpose.[40] The

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[32] Walz v. Tax Comm'r of N.Y., 397 U.S. 664, 668-69 (1970).

[33] Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 25-26 (1997); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 45 (1997). *See also* BETTE EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION 18-45 (1997) (identifying the purposes of the religion clauses as promoting free choice, protecting the sanctity of individual religious conscience, protecting the state from religious controversy, limiting the role and power of government, and fostering independent sources of meaning); Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 839-40 (2001) (noting that Justice O'Connor believes the purpose of the religion clauses is to allow individuals to practice one's faith without government interference).

[34] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-4, at 1166 (2d ed. 1988).

[35] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (upholding the constitutionality of a New Jersey program reimbursing parents for transportation to parochial or public schools).

[36] In *McCollum v. Board of Education*, the Court invalidated a statute permitting religious teachers, employed by private religious groups, to substitute religious instruction for secular education during the school day on school premises. McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948); *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963) (holding that opening the school day with Bible readings and the Lord's prayer violates the Establishment Clause). It did not invalidate all statutes in these early years. *See* Zorach v. Clauson, 343 U.S. 306, 313 (1952) (upholding a New York statute allowing students to leave public school early in order to attend religious classes outside of school premises).

[37] *Zorach*, 343 U.S. at 314.

[38] *Id.* (emphasis added).

[39] 403 U.S. 502 (1971).

[40] *Id.*

second prong asks whether the government action has the effect of advancing religion,[41] and the last prong requires invalidation if the questionable action causes "excessive entanglement" between government and religion.[42]

Although the Court recognized that *Lemon* was a "helpful signpost[],"[43] it employed the *Lemon* test exclusively for eleven years[44] until *Larson v. Valente*.[45] *Larson* invalidated a statute on Establishment Clause grounds because the law expressed a denominational preference.[46] The *Lemon* test, the Court noted, applies to laws that ascribe a uniform benefit to all religions, but a strict scrutiny standard applies to laws that discriminate among religions.[47] In *Lynch v. Donnelly*, the Court continued to distance itself from *Lemon*, by noting its "unwillingness to be confined to any single test . . . ."[48]

Justice O'Connor's concurrence in *Lynch* introduced the endorsement test, a modification of the *Lemon* analysis.[49] Under the endorsement test, the purpose prong asks whether the "government's actual purpose is to endorse or disapprove of religion."[50] The effect prong asks whether, irrespective of the governmental purpose, "the practice under review conveys a message of endorsement or disapproval."[51] The reasonable and objective observer determines whether governmental action has the effect of endorsing religion.[52] In recent years, the majority seems to have accepted Justice O'Connor's endorsement approach,[53] since *Lemon* has been the subject of harsh

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[41] *Id.*

[42] *Id.*

[43] Hunt v. McNair, 413 U.S. 734, 741 (1973).

[44] *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980) (applying the *Lemon* test).

[45] 456 U.S. 228 (1982).

[46] *Id.* at 252.

[47] *Id.* See *Marsh v. Chambers*, which upheld the constitutionality of a public funded chaplain, and instead of using the *Lemon* analysis, the Court looked at the historical practice. 463 U.S. 783, 795 (1983).

[48] Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

[49] *Id.* at 687.

[50] *Id.* at 690.

[51] *Id.*

[52] *Id.*

[53] Justice O'Connor's approach was not embraced immediately. *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989) ("[T]he Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally."); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (using *Lemon* to invalidate a statute requiring employers to accommodate Sabbath observance of employees); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (using *Lemon* to strike down a statute providing a moment of silence for prayer or meditation in public schools). Many courts have embraced Justice O'Connor's aproach. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001) (declining to hold that allowing religious groups access to school premises when a host of other

criticism.[54] However, despite the Court's espousal of the endorsement test, it too has been the subject of rebuke.[55]

In *Texas Monthly v. Bullock*, Justice Brennan hinted at a potentially different test to determine what constitutes a permissible accommodation.[56] He looked at the scope of a law's benefit, whether benefits to religion alleviate an obstacle to the exercise of religious choice, and whether a challenged law creates an undue burden on nonbeneficiaries.[57]

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activities is allowed is a violation of the Establishment Clause because children might think the government is endorsing religion); Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (using endorsement test to invalidate student led prayer before football games in a public high school); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (invalidating a Louisiana "Creationism Act" because it endorses religion in its purpose); ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 303 (6th Cir. 2001) ("[W]e consider it most unlikely that an observer . . . . could discern an endorsement of Christianity in the words of Ohio's motto."); Am. Jewish Cong. v. Chicago, 827 F.2d 120, 128 (1987) (7th Cir. 1987) (holding nativity scene in Chicago City hall to be unconstitutional using the endorsement test understanding of *Lemon*). *But see* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (possibly creating an exception to the endorsement test for private religious expression in a traditional or designated public forum).

[54] *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., joined by Thomas, J., concurring) (comparing invocation of the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"); County of Allegheny v. ACLU, 492 U.S. 573, 597 (1989) (Kennedy, J., concurring in part and dissenting in part) (noting that the Supreme Court's decisions often question the *Lemon* test's "utility in providing concrete answers to Establishment Clause questions"); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 347-48 (1987) (O'Connor, J., concurring) (noting the difficulties inherent in the Court's use of the test articulated in *Lemon*); *Wallace*, 472 U.S. at 110 (Rhenquist, J., dissenting) ("Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions . . . .").

[55] Most of the criticism surrounding the endorsement test deals with the ambiguity in the observer standard. *See, e.g.*, TRIBE, *supra* note 34, § 14-15, at 1293 (indicating that the result of O'Connor's test depends on the religious persuasion of the observer); Brownstein, *supra* note 33, at 849 (advocating that O'Connor abandon the neutral observer and develop the meaning of the endorsement test through a series of judicial decisions); Theologos Verginis, *ACLU v. Capitol Square Review and Advisory Board: Is There Salvation for the Establishment Clause? "With God, All Things Are Possible,"* 34 AKRON L. REV. 741, 765 (2001) (noting the unpredictability of the objective observer test).

[56] *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 698 (1992).

[57] *Texas Monthly*, 489 U.S. at 15. The Court holds unconstitutional a law exempting only periodicals published by religious faiths from a state sales tax. *Id.* at 17. The Court did, however, remain faithful to the principle of accommodation. *Id.* at 18 n.8 ("[W]e in no way suggest that

B. *Ambiguities in Establishment Clause Jurisprudence*

The Court's failure to clarify which, among the tests mentioned above, it has adopted, places a hurdle before any person considering whether an *eruv* violates the Establishment Clause. It seems that the endorsement test would supply the relevant analysis. It is unclear, however, whether the endorsement test has completely supplanted the *Lemon* analysis.[58] Given the problems inherent in both *Lemon* and the endorsement test,[59] a court might opt for another available approach.

If the endorsement test supplies the relevant inquiry, the Court's jurisprudence poses a second hurdle because one needs to attribute a certain level of knowledge to the objective observer. Since judges construe the objective observer differently, it is impossible to predict the knowledge a judge would attribute to an "objective observer" of an *eruv*.[60] The inability to predict the level of knowledge imputed to an objective observer ensures that one can almost *never* be certain of the result in an Establishment Clause challenge.

C. *Analysis Under the Establishment Clause*

Both the geographical enclosure and obtaining permission, formal or informal, from a governmental authority must independently satisfy the Establishment Clause. This section argues that regardless of the test employed both the erection of a geographical boundary and the grant of a proclamation are permissible accommodations.

1. *The Lemon Analysis*

Since both a geographical enclosure and a proclamation have a secular purpose, they do not advance religion and do not result in excessive entanglement with the government; therefore, allowing them does not constitute an Establishment Clause violation under the *Lemon* analysis. The purpose prong of the *Lemon* test is rarely dispositive because the Court does not frequently "go beyond a superficial

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that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause.") (emphasis in original).

[58] *Capitol Square Review*, 243 F. 3d at 306.

[59] *See infra* notes 58-71 and accompanying text (discussing criticisms of this approach).

[60] *See infra* Part I.C.

review of the government's stated purpose."[61] One purpose for both granting a proclamation and for allowing erection of a geographical enclosure is to allow religious Jews equal access to public property on the Sabbath.[62] The proclamation does not dedicate a town to Orthodox Jews.[63] It simply places them in the same position as other citizens, who do not have a religious restriction upon them.

In addition, the Supreme Court noted, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[64] Consistent with this statement, it would also be a permissible governmental purpose for the city to lift its restrictions on the public right of way in order not to interfere with members of the Orthodox community's ability to attend synagogue. These secular purposes apply even when a city maintains a strict "no use" policy. If a city allows access to its property, it might have an additional secular purpose of complying with the Free Exercise Clause.[65]

The second prong asks whether governmental action actually advances religion. Permitting an *eruv* allows some Jews to attend synagogue on the Sabbath.[66] It also might contribute financially to a synagogue because it facilitates synagogue growth.[67] Merely permitting the removal of a barrier, however, should not and has not been considered an impermissible advancement.[68] Here, the advancement is incidental. For many Jews, an *eruv* will also profoundly impact secular activities.

An *eruv* passes the third prong of the *Lemon* test. It does not foster excessive entanglement with religion. Examining whether government action involves excessive entanglement with religion entails a review of the "character and purposes of the institutions that are

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[61] Joshua D. Zarrow, Comment, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477, 484 (1986); *but see, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (striking statute that mandated equal treatment for evolution and creation science in the classrooms based on its purpose); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (invalidating a law mandating a period of silence in schools because it had no secular purpose).

[62] *See* ACLU v. City of Long Branch, 670 F. Supp. 1293, 1296 (D.N.J. 1987).

[63] *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142, 167 (2001) (noting analogy between an *eruv* and dedicating a town in the name of a saint).

[64] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987).

[65] Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 177 n.41 (3d Cir. 2002).

[66] *See Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 146 (adopting an uncontested definition of an *eruv*).

[67] Metzger, *supra* note 9, at 86.

[68] ACLU v. City of Long Branch, 670 F. Supp. 1293, 1296 (D.N.J. 1987); Smith v. Cmty. Bd. No. 14, 491 N.Y.S.2d 584, 587 (N.Y. Spec. Term 1985).

benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[69] In *Long Branch*, the court noted that aid was minimal even though additional poles were needed, and all work was to be done at the congregation's expense.[70] In *Tenafly Eruv Association*, the Court of Appeals for the Third Circuit similarly noted that there would be no government entanglement because the borough would not monitor or support maintenance of an *eruv*.[71]

2. *The Endorsement Analysis*

Under the endorsement test, the first inquiry is whether the government's actual purpose is to endorse or disapprove of religion.[72] In accommodating the community, the city seeks not to endorse religion, but to allow Orthodox Jews access to public property on the Sabbath.[73] It might also have the interest of avoiding a potential free exercise violation.

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[69] Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

[70] *Long Branch*, 670 F. Supp. at 1296-97.

[71] Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 177 n.41 (3d Cir. 2002). *See also Long Branch*, 670 F. Supp. at 1297 (citing *Lemon*, 403 U.S. at 614) ("The fact that the city may find it necessary to ascertain that the items are being maintained correctly does not constitute improper aid or entanglement, rather it is similar to the state's burden of ascertaining whether tax-exempt property is being used for religious purposes."). Additionally, the contention that an *eruv* necessitates an ongoing relationship with the state is unfounded. Once an *eruv* is in place and the proclamation granted, it is checked weekly by the Orthodox community, and contact between government officials and the Jewish community is rare. The type of relationship between the government and the Orthodox community does not cause "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." Aguilar v. Felton, 473 U.S. 402, 414 (1985) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)); *see also Long Branch*, 670 F. Supp. at 1297 (applying the statement in *Aguilar* to the case of the *eruv*). In *Lemon*, for example, the Court invalidated a statute authorizing reimbursement to Church schools for salaries of teachers that taught secular subjects. *Lemon*, 403 U.S. at 609-10. The Court noted that "a dedicated religious person . . . will inevitably experience great difficulty in remaining religiously neutral." *Id.* at 618. The excessive entanglement in *Lemon* thus involved an ongoing, pervasive, and unavoidable intermingling between religion and the state. The *eruv*, on the other hand, involves at least a one-time relationship with the state in order to establish the boundaries of the *eruv* and to obtain the official declaration. At most, after permission is granted, the *eruv* involves periodic contact with the state.

[72] Lynch v. Donnelly, 465 U.S. 668, 690 (1983) (O'Connor, J., concurring). *Cf.* Jamin B. Raskin, *Polling Establishment: Judicial Review, Democracy, and the Endorsement Theory of the Establishment Clause—Commentary on Measured Endorsement*, 60 MD. L. REV. 761, 770 (2001) ("The real inquiry . . . should require us to ask not merely 'what viewers may fairly understand to be the purpose of the display,' but also 'what viewers may fairly understand to be the purpose of the government's placement of religious elements in the display.'").

[73] *Long Branch*, 670 F. Supp. at 1295.

The effect prong asks whether, irrespective of the government purpose, the practice under review conveys a message of endorsement or disapproval.[74] The objective observer acts as the arbiter of whether governmental action has the effect of endorsing religion. The identity of the "objective observer" and the way in which one judges endorsement is a matter of debate. The standard is the "perception of a reasonable, informed observer."[75] Courts should look at the history, length of time, location, and content of the display.[76] "[C]ourts should assume that 'the objective observer' is acquainted with the Free Exercise Clause and the values it promotes,"[77] and with "the history and context of the community and forum in which the religious display appears."[78] It is hard to believe how one could "view" an *eruv* as an endorsement of religion by any of the many "objective observer" standards. Since an *eruv* "consists of poles, wires, and plastic strips found in any modern community that has electricity, telephone, and cable-television services,"[79] an *eruv* cannot be "viewed" by most.

If, however, one posits that a "reasonable observer" shares the knowledge of a select few in the Jewish community, understands that an *eruv* is permanent, and knows an *eruv's* precise boundaries and the history of the utility poles' uses, it is still unlikely an observer would conclude that an *eruv* indicates government endorsement of Orthodox Judaism. An observer this knowledgeable is also required to be

[74] *Lynch*, 465 U.S. at 690.

[75] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring). According to Justice O'Connor, the reasonable observer is a "personification of a community ideal of reasonable behavior, determined by the [collective] social judgment." *Id.* at 780 (citing W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)). The reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 780. A display does not endorse religion in Justice O'Connor's view if one passerby would perceive governmental endorsement of the display. *Id.* According to Justice Stevens, the test is whether "a reasonable person *could* perceive a government endorsement of religion from a private display." *Id.* at 799 (Stevens, J., dissenting) (emphasis added). He adopts this understanding of the objective observer because of the importance in taking into account the perspective of the reasonable observer who may not share the particular religious beliefs it expresses. *Id. See also* ACLU v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 302-03 (6th Cir. 2001) (discussing the reasonable observer standard).

[76] County of Allegheny v. ACLU, 492 U.S. 573, 597 (1989).

[77] Wallace v. Jaffree, 472 U.S. 38, 83 (1984) (O'Connor, J., concurring) (citation omitted).

[78] *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in judgment). *See also* Zelman v. Simmons-Harris, 536 U.S. 639, 653-57 (2002) (noting that the objective observer is familiar with the history and context of private individuals' access to the property at issue).

[79] Br. for Appellants at 35, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (No. 01-3301).

aware of the tension between the Free Exercise and the Establishment Clauses and to analyze the display in light of the values the Free Exercise Clause was meant to promote.[80] Thus, in *Tenafly Eruv Association*, the Third Circuit held that a reasonable, informed observer would know that an *eruv* was allowed because "selective application of Ordinance 691 renders removing the *lechis* a free exercise violation."[81]

According to the words of the Third Circuit's opinion, the strength of an Establishment Clause claim under the endorsement test might depend on whether an ordinance was selectively enforced.[82] However, even if a city generally maintained a "no access" policy, a reasonable observer would be required to understand that an *eruv* releases a religious burden on the Jews and allows Jews to participate in secular activities on the Sabbath. This observer would understand that an *eruv* does not bestow a benefit on Orthodox Jews. Rather, it merely places Orthodox Jews in the same position as other citizens who, not having a religious restriction, are already permitted to carry objects in the public right of way on the Sabbath.

Justice Stevens might argue that if some people would perceive the governmental display as an endorsement, then an *eruv* would be an unconstitutional Establishment Clause violation.[83] The objective observer who perceives an *eruv* as an endorsement selectively chooses his knowledge. He is aware of an *eruv's* permanence, its boundaries, and its religious significance. However, he does not understand the function that an *eruv* is meant to serve: to place religious Jews in the same position as all other citizens. He also fails to consider the values of the Free Exercise Clause.[84] It is true that some observers may have this knowledge, but the fictional person who has chosen to point out only the unfavorable facts should not be the arbiter of constitutionality.

Permission from the government should also not be perceived as an endorsement of religion. Such declarations are "routinely buried among hundreds of other governmental proclamations, many of which express official recognition of and respect for religious groups

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[80] *Wallace*, 472 U.S. at 83.

[81] *Tenafly Eruv Ass'n*, 309 F.3d at 176.

[82] *Id.*

[83] *Pinette*, 515 U.S. at 797 (Stevens, J., dissenting).

[84] Allowing an *eruv* is consistent with the goal of the religion clauses to avoid governmental involvement in religious choices. Since allowing an *eruv* does not induce others to become religious, yet disallowing an *eruv* disadvantages religion, allowing an *eruv* is consistent with the ultimate goal of the religion clauses. Since an observer must be aware of the values of the Free Exercise Clause, it would appear that this policy concern would be important regardless of whether application of a city ordinance actually violated the Free Exercise Clause.

and observances."[85] Similarly, as discussed above, it should not be considered governmental endorsement because it serves merely to remove a restriction.

Applying the objective observer test to a case involving an *eruv* demonstrates its inadequacies. An *eruv* is not visible, and in most places individuals do not know of its existence. However, it is possible to imagine a judge who would impute selective knowledge to an objective observer. The flexibility of the objective observer analysis strips litigants of their ability to predict the outcome of any Establishment Clause challenge.

3. *Justice Brennan's Permissible Accommodation Analysis*

Due to the problems with the "objective observer" standard and its potential for distortion, Justice Brennan's approach to permissible accommodations seems more sensible and less prone to abuse.[86] According to Michael McConnell, a staunch supporter of accommodation, Justice Brennan articulated a tripartite analysis.[87] Brennan's test uses the corresponding treatment of secular concerns as the baseline for constitutionality, instead of employing an amorphous objective observer standard.

One must first ask whether the "benefits derived by religious organizations flowed to a large number of nonreligious groups as well."[88] If the benefits are widespread, then the accommodation does not violate the Establishment Clause.[89] The first prong of this test would be satisfied if an ordinance granted citizens a widespread opportunity to encroach on the public right of way, and the Orthodox Community built an *eruv* pursuant to that ordinance. In San Diego, in response to the Orthodox Community's petition, the city changed the Municipal Code to allow encroachments.[90] Such a law has a wide array of beneficiaries. Since an *eruv* fell within the natural perimeter

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[85] Br. for Appellants Chaim Book, Yosifa Book, & Stephen Brenner at 35, *Tenafly Eruv Ass'n*, 309 F.3d 144 (3d Cir. 2002) (No. 01-3301).

[86] Justice Brennan's approach is not the test usually employed. McConnell argues, though, that since Justice Brennan maintains a strict interpretation of the Establishment Clause, it is unlikely that the Court will be more restrictive than his approach. McConnell, *supra* note 56, at 698.

[87] *Id.* at 698-704.

[88] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 11 (1989).

[89] McConnell, *supra* note 56, at 698-99.

[90] City of San Diego, California, Minutes for Regular Council Meeting of Tues., Feb. 13, 2001, at 6-8, *available at* http://clerkdoc.sannet.gov/legtrain/Minutes/2001/min20010213rm (last visited Mar. 22, 2003).

of the permitted uses, allowing it would not constitute a violation of the Establishment Clause.

If San Diego had instead created an exception to its former no encroachment policy, courts would need to ask whether "the benefits alleviate an obstacle to the exercise of an independent religious choice," or whether they create an incentive or inducement for making that choice.[91] Since an *eruv* enables carrying and pushing objects outside on the Sabbath, the exception removes an obstacle to religious observance,[92] and would be permissible. It merely allows religious Jews to do what others can do without an *eruv*, and thus, allowing an *eruv* would not induce individuals to become religious.

The last prong of Justice Brennan's analysis suggests that challenged accommodations should be unconstitutional if they impose substantial burdens on non-beneficiaries.[93] An *eruv* poses little or no burden on non-beneficiaries. An *eruv* is not publicly funded, and poses no safety threat,[94] and is not even visible to those who are unaware of its existence. Some might argue that there is a burden on non-beneficiaries because "persons living within the *eruv* must be part of that domain whether they want to or not."[95] The concern that citizens may not opt out of a nearly invisible boundary that has no meaning on their life can hardly be considered an undue burden in light of the countervailing free exercise concerns involved.

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[91] McConnell, *supra* note 56, at 698. Some accommodations may create incentives for one to become religious. If, for example, the government affords religious people an absolute right not to work on the Sabbath, nonreligious people will be induced to spend a few hours in synagogue or Church in order to receive the reward of spending the remainder of the day at home, when they would otherwise be required to be at work. *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 604 (1999) (arguing that some preference for religion is permissible, but too much is not).

[92] The *eruv* does not actually remove the religious obstacle, but it allows Jews to carry on the Sabbath.

[93] *Texas Monthly*, 489 U.S. at 15. The two parts of this test are derived from Brennan's statement:

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.

Id. (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987)).

[94] In *Tenafly*, for example, it was undisputed that the plastic strips used for the purposes of the *eruv* were identical to those used by Cablevision in other areas of the city. Br. for Appellants Chaim Book, Yosifa Book, & Stephen Brenner at 17, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (No. 01-3301).

[95] Sullivan Aff. ¶ 6, Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142 (D.N.J. 2001) (No. 00-6051).

4. *Establishment Clause Challenge in the Free Speech Context*

Although a full discussion of why an *eruv* might be considered speech is beyond the scope of this comment, since that claim has been made, it is important to address Establishment Clause concerns in the free speech context as well.[96] In the free speech context, the

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[96] Although the District Court held that an *eruv* was considered speech, *Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 173, the Third Circuit held that plaintiffs did not meet their burden of showing that affixing *lechis* to utility poles was expressive conduct. *Tenafly Eruv Ass'n*, 309 F.3d at 162. In order for an *eruv* to be considered speech, it must convey a message, intend to convey a message, and the likelihood must be great that people will understand the message. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989). Analyzing an *eruv* as speech tests the bounds of all three prongs of the symbolic speech test.

The biggest hurdle in determining an *eruv* to be symbolic speech would be finding that it conveys a message sufficiently communicative to warrant First Amendment protection. The Third Circuit noted that an *eruv*, like a fence, simply "demarcates the space within which certain activities otherwise forbidden on the Sabbath are allowed." *Tenafly Eruv Ass'n*, 309 F.3d at 162. This conclusion is too simplistic given the complexity of an *eruv*. On one level, the geographic enclosure is not just a boundary marker because it helps effectuate a change in the status of an area, rendering it a private domain, which it was not considered to be prior to the construction of an *eruv*. An ordinary fence, however, serves only to demarcate an area and enclose the area within. Yet, according to Jewish law, even if a series of continuous boundaries are created, the demarcated area is not a private domain according to rabbinic law unless there has been a symbolic sharing of food and a blessing actually creating an *eruv* has been made. If the symbolic sharing of food, from the perspective of Jewish law creates the private domain, then creating a geographical enclosure is, like the Third Circuit said, a fence demarcating a private domain. Nevertheless, the Supreme Court has held that regularly conducted conduct may, based on the circumstances, constitute symbolic speech. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984) (noting that sleeping may be expressive). While ordinarily building a fence might not be expressive under the circumstances, it is possible that an *eruv* could be considered expressive conduct.

Whether an *eruv* satisfies the intent prong of the symbolic speech test depends not on whether speech that is primarily functional, but relays a message intrinsic to its functional capacity, is protected. The Supreme Court has not answered this question, but in holding that computer encryption triggers First Amendment analysis, the Sixth Circuit noted, "the fact that a medium of expression has a functional capacity should not preclude constitutional protection." Junger v. Daley, 209 F.3d 481, 483 (6th Cir. 2000). Rather, the question is whether the restriction focuses on the functional element and whether it withstands scrutiny. *See* Universal City Studios v. Corley, 273 F.3d 429, 449 (2d Cir. 2001) (holding that computer encryption is protected, but since the law regulated functionality element, it was upheld). If *Junger* is correct, the *eruv*'s functionality should not exclude it from First Amendment protection.

Whether an *eruv* meets the last prong necessitates a determination of whether only visible conduct is protected as speech and a determination of what percentage of the intended audience must understand the message in order for conduct to be deemed a communication. The Third Circuit's analysis assumed that the symbol must be visible and that more than a handful of individuals must recognize the symbol in order for it to be considered speech. *Tenafly Eruv Ass'n*, 309 F.3d at 162. The Supreme Court's analysis, however, has focused on whether "the message was understood by those who viewed it." Spence v. Washington, 418 U.S. 405, 409 (1974) (affixing peace symbol to flag may be expressive even though "facts fail to show that any member of the general public viewed the flag"). A rule requiring that the symbol be seen for it to be expressive may not be appropriate for an *eruv*, if one focuses on the complete geographi-

tests mentioned above still apply. Since an *eruv* passes muster under those tests, there is no violation of the Establishment Clause even if an *eruv* is considered speech. Case law clearly establishes that there is no Establishment Clause violation when religious speech is permitted in a forum in which a wide variety of groups are allowed access.[97] In *Widmar v. Vincent,* the Court rejected a university's contention that restricting religious groups, when other groups were allowed access, was necessary in order to comply with the Establishment Clause.[98] The *Lemon* test is satisfied in a public forum because the government has the secular purpose of creating a forum for the exchange of ideas,[99] and has a secular effect because benefits are widespread.[100] The Court also held that excluding religious groups from a public forum would involve more entanglement with religion than would exclusion.[101]

Similarly, if an *eruv* is considered speech, permitting it in a public forum will not involve governmental endorsement of religion since governmental property is open to a wide array of groups. Consequently, an objective observer would not conclude that the government was endorsing religion.[102] Justice Brennan's test would also be satisfied because the law has a wide array of beneficiaries.

An *eruv* should also pass Establishment Clause scrutiny even if it is considered speech, and no other groups are permitted access to the forum since it passes the *Lemon* and endorsement tests even if there is no additional purpose of complying with the Free Speech Clause. Some argue when other types of speech are disallowed from a forum, allowing an *eruv* preferences religious speech over nonreligious speech and triggers Establishment Clause concerns.[103] Allowing an *eruv* is not likely to "preference" religious speech. Each request for speech must be subject to the appropriate level of scrutiny. If a re-

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cal enclosure. Each *lechi* and pole do not convey the message that the entire structure conveys; yet, an *eruv* is sometimes too large for any individual to see the entire structure.

[97] Free speech doctrine differentiates between types of forums. *See infra* Part III.A (discussing the forum doctrine).

[98] Widmar v. Vincent, 454 U.S. 263, 276 (1981).

[99] *Id.* at 272 n.10.

[100] *Id.* at 274.

[101] *Id.* at 272 n.11.

[102] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) ("[T]here would have been no realistic danger that the . . . district was endorsing religion . . . and any benefit to religion or the Church would have been no more than incidental.").

[103] Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995); Freedom from Religion Found. v. Marshfield, 203 F.3d 487, 496 (7th Cir. 2000). *See also* Br. of Amicus Curiae ACLU of New Jersey at 1, Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142 (D.N.J. 2001) (No. 00-6051).

striction on an *eruv* fails the reasonableness test that would most likely be applied if a wide variety of groups are denied access[104] and restrictions on other forms of speech do not, permitting an *eruv* is not "preferential," but neutral.[105]

D. *Suggestions for Future Approaches*

Brennan's approach, as understood by McConnell, seems more useful in minimizing governmental involvement in religious choices than the endorsement test. The objective observer test is unpredictable. It is either is too restrictive, and does not permit governmental accommodation of religion, inducing nonreligious behavior, or conversely, does not adequately consider the effects of government action on minorities. It also is flawed because it allows constitutionality to be determined by an "objective" observer, who sometimes maintains flawed conceptions about the object in question.

An *eruv* demonstrates some advantages of the Brennan/ McConnell approach. It is more predictable, easier to apply, and more consistent with the ultimate purpose of minimizing governmental involvement in religious choices. It focuses on objective criteria that leave less room for dispute. Thus, instead of guessing about the knowledge of the objective observer, and allowing a semi- or unknowledgeable outside observer to be the arbiter of constitutionality, a litigant can look at the number of beneficiaries of a law, the effect that the exception would have on the particular religious group, and the burden that it would have on non-beneficiaries.[106]

II. FREE EXERCISE CHALLENGE

In contrast to an Establishment Clause challenge that asks whether a government *may* allow construction of an *eruv*, a Free Ex-

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[104] *See infra* Part III.B.

[105] If an *eruv* is considered symbolic speech, restrictions are likely to be invalidated even under reasonableness grounds since most circuits appear to use something more than rational basis review, *see infra* III.A, rendering neutrality and compliance with free speech concerns a reason to reject an Establishment Clause challenge. The argument that allowing an *eruv* preferences religious speech raises questions beyond the focus of this comment dealing with what is considered religious speech. The message conveyed is pragmatic, rather than religious. As such, if an *eruv* is speech, it is not necessarily religious speech. It would be akin to the posting of Church directional signs devoid of religious symbols that serve a functional purpose. *See Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 178.

[106] Although it has some advantages, it also has drawbacks. First, the extent of the burden on non-beneficiaries will not always be clear cut. Second, it might allow extensive involvement with religion.

ercise challenge asks whether a government *must* allow construction of an *eruv*. Section A of this section looks at the hallmarks of free exercise law. Section B highlights ambiguities in current law and Section C attempts to apply the Court's analysis to situations that may arise involving an *eruv*. This section will show that the outcome of a free exercise challenge with regard to construction of an *eruv* depends on the access provisions for use of public property, a county's application of these provisions, and a court's interpretation of the existing framework set forth by the Supreme Court.

A. *Relevant Constitutional Free Exercise Developments*

Employment Division v. Smith[107] and *Church of Lukumi Babalu Aye v. City of Hialeah*[108] dictate the Court's modern analytic framework for deciding free exercise challenges.[109] Under *Smith*, a law that incidentally burdens religion, but is neutral and generally applicable, is *per se* constitutional.[110] In rejecting the compelling interest test that prevailed in earlier cases when a governmental action incidentally placed a substantial burden on religion, the Court exclaimed that, strict scrutiny applied to every free exercise case "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . ."[111]

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[107] 492 U.S. 872 (1990).

[108] 508 U.S. 520 (1993).

[109] From 1963 to 1990, legislation that placed a substantial burden on religion would be struck down unless justified by a compelling governmental interest. Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753, 753 & n.4 (1999). The extent to which *Smith* altered the outcome of a free exercise challenge is a matter of debate. *See, e.g.*, Daniel O. Conkle, *The Free Exercise Clause: How Redundant and Why?*, 33 LOY. U. CHI. L.J. 95, 109 (2001) (confining narrowly the exceptions contained in *Smith*); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 884 (2001) (arguing that under *Smith* and *Lukumi*, "religious liberty will often prevail").

[110] Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990) (upholding a law that bans all use of peyote even though the law incidentally burdens religious practice without applying even minimal scrutiny).

[111] *Smith*, 494 U.S. at 888-89. In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), reinstating the compelling interest test for laws that burden religious practice, 42 U.S.C. § 2000bb (2003), but in *Boerne v. Flores*, the Supreme Court found the Act to exceed Congress's enforcement powers. *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (finding that RFRA exceeds congressional power under §5 of the Fourteenth Amendment). The status of RFRA's federal application is not clear in the aftermath of *Boerne*. Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1064 (2000). Lower courts differ on RFRA's application to federal law. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 142 (D.C. Cir. 2000) (assuming RFRA is applicable to the federal government); United States v. Sandia, 6 F. Supp. 2d 1278,

Under the *Smith* analysis, first one must look at the text to determine whether a law that burdens religion is neutral.[112] If a law does not target religion on its face, one asks whether the object of the law is to infringe upon religious practice.[113] The next step in the *Smith-Lukumi* analysis requires that one discern whether a law is "generally applicable."[114] Laws may fail the general applicability test if laws target religion "through their design, construction, or enforcement."[115]

In *Smith*, the Court, upheld a ban on peyote, even though Native Americans use it for religious reasons.[116] In *Lukumi*, a city ordinance prohibited animal sacrifice,[117] but a series of laws exempted practically all conduct except the religious exercise of the Santeria church members.[118] Accordingly, the Court noted that the law at issue fell well below the constitutional standard of general applicability.[119]

Under the *Smith-Lukumi* framework, if a law is neutral and generally applicable, it will still receive strict scrutiny if the law has in place a system of individualized exemptions.[120] In an earlier line of cases, including *Sherbert v. Verner*, the Court held as unconstitutional laws

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1281 (D.N.M. 1997) (finding RFRA inapplicable to the federal government); *see also* Edward Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410 (1998) (suggesting that the RFRA is unconstitutional); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 441 (1994) (suggesting the law is unconstitutional because it seeks to override a decision of the Supreme Court, violating the separation of powers doctrine); Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act*, 135 A.L.R. FED. 121 (2001) (discussing the applicability of RFRA to federal law). In the aftermath of *Boerne*, many states have enacted state RFRAs. *See* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 644 n.4 (1999) (listing state RFRAs). Thus, courts were generally left with interpreting the standard of *Smith*, as interpreted by *Lukumi*. In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (hereinafter "RLUIPA"), imposing more exacting scrutiny on laws that incidentally place substantial burdens on religious liberty. 42 U.S.C. § 2000cc (2000). RLUIPA is less broad than RFRA. A full discussion of its constitutionality is beyond the scope of this comment, but it has been held to be constitutional by lower courts. *See, e.g.*, Christ Universal Mission Church v. City of Chicago, No. 01C-1429, 2002 U.S. Dist. LEXIS 22917, at *24 (N.D. Ill. Sept. 11, 2002); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1211 (C.D. Cal. 2002) (holding that RLUIPA is constitutional); Freedom Baptist Church of Del. County v. Township of Middleton, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

[112] Kaplan, *supra* note 111, at 1077 (discussing *Sherbert's* "hybrid rights exceptions").

[113] *Smith*, 494 U.S. at 878-79.

[114] *See* Kaplan, *supra* note 111, at 1077 (breaking down the steps in the *Smith* analysis).

[115] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557 (1993) (Scalia, J., concurring in part and concurring in judgment).

[116] *Smith*, 494 U.S. at 905-06.

[117] *Lukumi*, 507 U.S. at 527.

[118] *Id.* at 536.

[119] *Id.* at 543.

[120] *Smith*, 494 U.S. at 884.

that denied unemployment benefits to individuals who lost their jobs for religious reasons, unless the government could prove that the law had a compelling interest and was narrowly tailored to achieve that interest.[121] *Smith* preserves *Sherbert* by creating what is called the "*Sherbert* exception." "In circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[122] Some understand *Lukumi* to have relied in part on the *Sherbert* exception, expanding its scope.[123] In *Lukumi*, the Court noted that because the ordinance "requires an evaluation of the particular justification for the killing, the ordinance represents a system of individualized governmental assessment of the reasons for the relevant conduct."[124]

In *Smith*, the Court also carved out what has been called a "hybrid rights" claim. It noted that decisions in which the First Amendment barred "application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[125] It mentioned that these lines of cases "adverted to the non-free-exercise principle involved,"[126] but it failed to further explain the mechanics of a hybrid rights claim.

B. *Interpreting Smith and Lukumi*

1. *General Applicability*

A case involving an *eruv* raises the following questions: what is the scope of generally applicable laws under *Smith* and *Lukumi*; and how many exceptions to an otherwise generally applicable law are necessary in order to strip the law of its generally applicable status? Although it is clear from *Smith* and *Lukumi* that a neutral law of general applicability receives minimal or no scrutiny, and will almost certainly

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[121] Sherbert v. Verner, 374 U.S. 398, 403 (1963); Kaplan, *supra* note 111, at 1067 (citations omitted).

[122] *Lukumi*, 508 U.S. at 537.

[123] *See, e.g.*, Rader v. Johnston, 924 F. Supp. 1540, 1553 n.23 (D. Neb. 1996).

[124] *Lukumi*, 508 U.S. at 537.

[125] *Smith*, 494 U.S. at 881 (citations omitted).

[126] *Id.* at 882 n.1.

be upheld,[127] it is less clear what showing needs to be made for a law to lose its status as neutral or generally applicable.[128] Since in many cases, ordinances governing use of utility poles will allow some uses and exclude others, a case involving an *eruv* is likely to require a more exact determination of general applicability than the Supreme Court has already supplied.

A closer look at *Lukumi* and some lower court opinions attempting to fill the gap between a law that is applied *only* against religious uses, as in *Lukumi*, and one that is uniformly applied, as in *Smith*, reveals that the Supreme Court has suggested an analytic framework for analyzing cases that fall within this gap. In *Lukumi*, the Court noted that the ordinances prohibiting animal sacrifice were underinclusive for the ends sought to be achieved. "They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does."[129]

Using the principle of underinclusiveness as its guide, some scholars argue that *Lukumi* suggests that when a law is underinclusive, it is not generally applicable. To determine whether a law is underinclusive, first one must determine the governmental interests of the restrictive law at issue. Then, one must look at whether the law leaves unrestricted conduct that endangers governmental interests more than the conduct sought to be allowed by the party seeking free exercise protection. In short, "a law burdening religious conduct is underinclusive with respect to any particular governmental interest, if the law fails to pursue that interest uniformly against other conduct that causes similar damage to that government interest."[130]

The Court of Appeals for the Third Circuit adopted a more narrow conception of underinclusiveness with regard to selective enforcement of an ordinance[131] to invalidate a police department's "no

[127] In *Smith*, the Court does not even explicitly do a rational basis review analysis. Once it determines that the law is constitutional, it holds that the ban on peyote is constitutional. *Id.* at 890.

[128] Sansom, *supra* note 109, at 768-69.

[129] *Lukumi*, 508 U.S. at 543.

[130] Duncan, *supra* note 109, at 868; Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW 25, 31 (2000) (understanding *Lukumi* to say that a law is not generally applicable if other activities that cause harm to the same governmental interests are not regulated). *See also* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 119 (2000) (arguing for a similar approach, but suggesting that *Lukumi* currently does not adopt this approach); Sansom, *supra* note 109, at 768.

[131] The Third Circuit has not fully adopted the underinclusive approach propounded above. It has looked only to what was allowed under a given ordinance, focusing on selective enforcement, rather than underinclusion.

beard" policy.[132] The city allowed exemptions for medical reasons, but not for religious reasons.[133] The court noted that the decision to allow beards for religious reasons would not undermine the Department's interest in fostering a uniform appearance any more than would an exemption for medical reasons.[134] In *Tenafly Eruv Association*, the Court noted that *lechis* are "comparable" to the postings the Borough left in place,[135] demonstrating that the ordinance had been selectively enforced.

An intermediate approach recognizes the principle of underinclusiveness, but is unwilling to consider failures to consistently enforce a statute to qualify as a secular exemption.[136] Others see the underinclusiveness principle as key, but *Lukumi* only prohibits underinclusion that "is so dramatic that religious exercise is effectively singled out for differential treatment."[137] This approach appears to be based on the Court's statement in *Lukumi* that "[t]he underinclusion is substantial, not inconsequential."[138]

2. *Individualized Assessment*

There is also confusion in the lower courts regarding the scope of the *Sherbert* exception.[139] In *Smith*, the Court mentioned that some neutral laws burdening religious activity may receive strict scrutiny because they lend themselves to "individualized governmental assessment of the reasons for the relevant conduct."[140] To the extent *Lukumi*[141] relied on the system of governmental assessments analysis, it

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[132] Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999).

[133] *Id.*

[134] *Id.* at 366. *See also* Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996) (requiring university to grant student's request for exemption from on campus residency because an exemption for religious reasons would not undermine the university's interest any more than the other exemptions).

[135] Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167 (3d. Cir. 2002).

[136] *See, e.g.*, Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991) (upholding a zoning ordinance against a Church as neutral and generally applicable even though the Church established a similarity between itself and permitted non-commercial entities); Booth v. Maryland, 207 F. Supp. 2d 394, 398 n.6 (D. Md. 2002) (mentioning that failure to consistently enforce rules against other employees does not count as a secular exemption); Robinson v. District of Columbia, No. 97-787, 1999 U.S. Dist. LEXIS 13774, at *29 (D.D.C. Mar. 31, 1999) (upholding policy when some other officers who violated the policy were not similarly disciplined).

[137] Gedicks, *supra* note 130, at 115.

[138] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

[139] *See* Kaplan, *supra* note 111, at 1062.

[140] Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

[141] *Lukumi*, 508 U.S. 520.

might stand for the proposition that any time an ordinance requires an evaluation of a particular justification, the exception applies.

Some courts adopt this analysis. The "*Sherbert* exception" has been extended, among others, to include zoning ordinances[142] and a state university's policy exempting students from an on campus living requirement.[143] In its most broad construction, heightened scrutiny applies when the *possibility* for individualized assessment exists regardless of whether an ordinance has been applied discriminatorily.[144]

At the other end of the spectrum, some strictly construe the exception and hold that only unemployment compensation cases fall within the exception's scope,[145] narrowly confining the exception to preserve only the Supreme Court's *Sherbert* line of cases. Others apply the exception only when the statute itself allows for individualized exemptions,[146] but statutory categorical exceptions may trigger strict scrutiny.[147]

3. *Hybrid Rights*

Lastly, lower courts are confused about the interpretation of the hybrid rights exception.[148] The Supreme Court has offered no guidance on what it meant with regard to the hybrid rights exception.

[142] *See, e.g.*, Keeler v. Mayor and City Council of Cumberland, 940 F. Supp. 879, 885 (D. Md. 1996) (holding that landmark preservation law falls within the *Sherbert* exception); *but see Cornerstone Bible Church*, 948 F.2d at 472 (holding that zoning ordinance does not meet the *Smith* exception).

[143] Rader v. Johnson, 924 F. Supp. 1540, 1543 (D. Neb. 1996) (holding that a university rule requiring freshmen to live on campus, while neutral on its face, was not neutral when enforced).

[144] Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) (noting that zoning necessarily involves case by case analysis).

[145] *See id.*; Jane L. v. Bangerter, 794 F. Supp. 1537, 1547 n.10 (C.D. Utah 1992) (holding that the *Sherbert* exception only applies to unemployment compensation cases).

[146] *See, e.g.*, Booth v. Maryland, 207 F. Supp. 2d 394 (D. Md. 2002) (refusing to apply heightened scrutiny to policy prohibiting correctional service workers from wearing dreadlocks where part of policy addressing facial hair had a medical exemption, but part of policy addressing hairstyles did not); Robinson v. District of Columbia, No. 97-787, 1999 U.S. Dist. LEXIS 13774, at *28 (D.D.C. Mar. 31, 1999) (refusing to apply heightened scrutiny to policy prohibiting police officer from wearing dreadlocks where part of policy addressing facial hair had individualized exemptions, but part of policy addressing hairstyles did not).

[147] *See, e.g.*, Swanson v. Guthrie v. Indep. Sch. Dist. No. I-L, 135 F.3d 694, 701 (10th Cir. 1998) (finding that school district's policy excepting fifth year seniors and special education students from a no part-time attendance policy did not require strict scrutiny of refusal to allow Christian home schooled student to attend part time).

[148] *See generally* William L. Esser IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998) (discussing different interpretations of the hybrid rights exception).

Professor Richard Duncan argued that what the Court must have meant is that a less than sufficient free exercise claim, plus a less than sufficient claim arising under a different part of the Constitution, together trigger the compelling interest test: "In other words, the cumulative effect of two or more partial constitutional rights equals one sufficient constitutional claim."[149]

Some federal courts[150] as well as state courts have accepted this interpretation of the hybrid exception. In *First Covenant Church of Seattle v. City of Seattle*, the Washington Supreme Court recognized this interpretation.[151] The Church charged the city with violating its free speech and free exercise rights for refusing to allow it to alter the Church's exterior pursuant to a Landmark Preservation Law.[152] The court applied strict scrutiny because "First Covenant's claim [involves] the Free Exercise Clause in conjunction with free speech."[153]

At least one court, however, has completely rejected application of the hybrid rights claim. The Sixth Circuit noted that "it is illogical" to hold that a state regulation violates the Free Exercise Clause if it implicates other constitutional rights but does not otherwise violate the Free Exercise Clause.[154] "[T]herefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exception less state regulations under the Free Exercise Clause."[155]

C. *Application to an* Eruv

In some circumstances, *Smith* and *Lukumi* clearly dictate that disallowing construction of an *eruv* is a violation of free exercise rights. However, whether a city violates the Free Exercise Clause will depend

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[149] Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 430-31 (1994).

[150] In *Cornerstone Bible Church v. City of Hastings*, a church argued that the city violated its free speech, free exercise, equal protection, and due process rights by excluding churches from its central business district. 948 F.2d 464, 467 (8th Cir. 1991). The Eighth Circuit held that the zoning ordinance was neutral and generally applicable, and was, therefore, subject to minimal scrutiny. *Id.* at 472. However, since the Eighth Circuit reversed the district court's summary judgment for the city on the free speech claim, it remanded for a consideration of the hybrid rights claim. *Id.* at 473.

[151] First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 182 (Wash. 1992).

[152] *Id.* at 217.

[153] *Id.* at 218.

[154] Kissinger v. Bd. of Tr. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993).

[155] *Id.* at 180.

on the way it has interpreted *Smith* and *Lukumi*. This section looks at scenarios that could involve an *eruv* and uses those scenarios as case examples to display the different approaches discussed above.

1. *Applicability of the Free Exercise Clause to* Eruv *Cases*

Before delving into *Smith* and *Lukumi*, it must be determined that the Free Exercise Clause can require the governmental action required: (1) allowing use of its utility poles to create symbolic doorways (2) issuance of permission to use the property. Defendants in *Tenafly Eruv Association* argued that the Free Exercise Clause does not require governments to allow use of government property[156] because "[t]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[157] However, the Free Exercise Clause also applies when the government "denies religious adherents access to publicly available money or property"[158] in a manner that discriminates between religiously motivated conduct and comparable secularly motivated conduct.[159] In *Sherbert,* the Court held that the state was under no obligation to give unemployment benefits; yet, once it offered unemployment benefits, it could not do so in a discriminatory fashion.[160] Similarly, the state is under no obligation to allow religious Jews access to its utility poles. However, once a governmental body tolerates access to its poles, the Free Exercise Clause is implicated to ensure that religion is afforded equal treatment.[161]

2. *Determining the Level of Scrutiny*

a. *Neutral and Generally Applicable*

A law that facially discriminates against religion and a facially neutral law that masks the discriminatory intent of the legislators and that targets religion will be invalidated.[162] In determining whether a law that is facially neutral targets religion, Justice Kennedy looked to

[156] *Tenafly Eruv Ass'n,* 309 F.3d 144, 168-69 (3d Cir. 2002).

[157] Sherbert v. Verner, 374 U.S 398, 412 (1963).

[158] *Tenafly Eruv Ass'n,* 309 F.3d at 170.

[159] *Id.*

[160] *Sherbert,* 374 U.S. at 398.

[161] *Tenafly Eruv Ass'n,* 309 F.3d at 144.

[162] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) ("The Free Exercise Clause protects against governmental hostility which is masked as well as overt.").

the events surrounding the law's enactments, "including contemporaneous statements made by members of the decisionmaking body."[163] Thus, courts should look at residents' statements at council meetings discussing an *eruv*, as well as statements by council members' to determine whether a law targets religion.[164]

Tenafly Eruv Association demonstrates the difficulty in proving discrimination from statements made by council-members. Despite blatant discriminatory comments at council meetings,[165] the District Court held that the law at issue was neutral because council-members did not explicitly state discriminatory reasons for denying permission for an *eruv*.[166]

In adopting the Religious Land Use and Institutionalized Persons Act, Senator Hatch noted that discrimination within city councils "lurks behind . . . vague and universally applicable reasons"[167] and that such forms of "discrimination are very widespread,"[168] and thus, it would be nearly impossible for an Orthodox community to succeed on these grounds. The difficulty in uncovering discrimination is exacerbated because the decision often involves a multi-member body

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[163] *Id.* at 540.

[164] *See id.* at 541 ("The minutes . . . evidence significant hostility exhibited by residents, members of the city council, and other city officials . . . .").

[165] *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142, 152-58 (D.N.J. 2001) (displaying comments from a council meeting).

[166] *Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 182.

[167] 146 CONG. REC. S7774 (daily ed. July 27, 2000) (statement of Sen. Hatch).

[168] *Id.* Senator Hatch discussed the discrimination against religious organizations generally, but there have been many instances where Orthodox Jews have been singled out. In its Amicus Brief, the Agudath Israel of America notes:

> At stake in (the Tenafly case) is not merely the narrow question of whether Tenafly is free to refuse a community group's request for permission to construct an *eruv* . . . but also whether a municipality is free to exercise its decision-making authority in a manner designed to discourage Orthodox Jews from living in the municipality.

Br. of Amicus Curiae Agudath Israel of America at 1, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (No. 01-3301). In the zoning context, an issue that arises slightly more frequently, there have been many examples of anti-Orthodox feeling. In Beachwood, Ohio, the zoning commission voted to prevent the town's Orthodox residents from constructing several religious buildings. Rona S. Hirsch, *Love Thy Neighbor?*, BALT. JEWISH TIMES, Feb. 9, 2001, at 1. A reporter explained,

> [a]t the crux of the animosity was resistance by longtime secular Jewish residents to a perceived onslaught of Orthodox families about to move in and take over their upscale neighborhood-reconfiguring houses for their large families, destroying quality public schools, and introducing a brand of Judaism they had little affinity for.

Id. Similar situations arose in Hancock Park, California, New Rochelle, New York, Longbeach, and Ramapo. Br. of Amicus Curiae Agudath Israel of American at 4-5, *Tenafly Eruv Ass'n* (No. 01-3301).

and "it is virtually impossible to determine the singular 'motive' of a collective legislative body."[169]

Since it is unlikely that a law will target religion on its face, and it will be difficult for a plaintiff to prove discrimination through legislative history alone, a case involving an *eruv* is likely to fall within one of the Court's gray areas, demanding a determination of whether an ordinance governing the use of city property is generally applicable. If a city council granted nearly all requests for use of its utility poles, but denied only the request for use of the poles by the Orthodox community, then "the effect . . . in its real operation"[170] indicates that although the law may be neutral on its face, it is not neutral in its application. It could not be deemed generally applicable because it would restrict only Orthodox Jews in operation. This case would be identical to *Lukumi*, and strict scrutiny would apply. At the other end of the spectrum, if an ordinance provided that "no person is allowed to use city property," then it would appear to fall directly under *Smith*. Minimal or no review would apply unless the ordinance fell under the *Sherbert* or "hybrid" exceptions.[171]

In many towns, many uses will be prohibited, while some are permitted. Under the Third Circuit's approach in *Tenafly Eruv Association*, a court should look at the purpose of an ordinance restricting access to the public right of way, and examine whether the religious exemption sought undermines the purpose of the ordinance to the same or lesser degree than the city's express or tacit secular exemptions to the ordinance. In *Tenafly*, the Borough tacitly or expressly granted exemptions from its ordinance, generally prohibiting the use of city property, to allow house numbers, lost animal signs, holiday displays, and orange ribbons to be hung on utility poles.[172] The court reasoned that the Borough's selective application of its ordinance "devalues Orthodox Jewish reasons for posting items on utility poles by 'judging them to be of lesser import than nonreligious reasons,'"[173] and thus, applied strict scrutiny.

The ordinance in *Tenafly* was not nearly as underinclusive as the ordinance in *Lukumi*, as others were arguably subject to the ordinance's scope,[174] but the underinclusion could potentially be considered substantial. Suppose a town with an ordinance that states "all

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[169] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993).

[170] *Id.* at 535.

[171] Sherbert v. Verner, 374 U.S. 398 (1963).

[172] *Tenafly Eruv Ass'n*, 309 F.3d at 167.

[173] *Id.* at 168.

[174] Def.'s Proposed Findings of Fact & Final Mem. of Law in Opp'n to Pl.'s Application for a Prelim. Inj. and Other Relief at 6, *Tenafly Eruv Ass'n* (No. 00-6051).

who want to use the public right of way must apply for a permit" did not enforce its ordinance against a local mall that placed Christmas lights on utility poles because Christmas lights promote shopping and will be economically beneficial to the neighborhood. However, the city has refused every one of its numerous other requests for pole use. In this hypothetical, the law does not come close to targeting religion, as every entity that previously applied for access was denied. Thus, under the approach that *Lukumi* requires, that religious exercise be singled out, an *eruv* association's claim would clearly be deemed neutral and generally applicable and minimal review would apply.

Conversely, under an interpretation adopted by the Third Circuit, heightened scrutiny would clearly apply. The permitted use, affixing Christmas lights, stands in the same relationship to the city's interests in enforcing its ordinance as does the "affixing of plastic strips to utility poles" for the purpose of allowing an *eruv*.[175] Under the Third Circuit's approach, then, what matters is only the relationship between *any* exception and the stated purpose of the ordinance, rather than the number of exceptions.

Even under an approach that does not require substantial underinclusion, an *eruv* may not always stand in the same relationship to permitted requests. An *eruv* is generally unobtrusive, but it sometimes requires that an *eruv* association erect several of its own poles in order to allow a boundary to be continuous.[176] Allowing cable companies to build utility poles does not constitute a secular exception because they further the government's purpose of facilitating tele-

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[175] One could imagine a situation where a city had an ordinance that permitted uses only if they furthered the economic interests of the city. Under such an ordinance, the city would argue that Christmas lights further the city's business. Even under this scenario, however, the Eruv Association could argue that an *eruv* encourages Orthodox Jews to move to the neighborhood, and could thereby have a significant impact on real estate prices. The city could respond, that if a group has promised to sue, an *eruv* does not further the economic interests of the city, while Christmas lights do. Thus, in such a case, *lechis* would arguably not stand in the same relationship to the purposes of the law as Christmas lights. Alternately, one could imagine a similar claim where an ordinance requires that citizens apply for permits to use city property, but further states that permits should be granted except when they have the potential for causing economic harm to the city. Here, although many uses are permitted, a city would argue that a law is not underinclusive. Orange ribbons, house signs, lost animal signs do not have the potential for causing economic harm. The city would argue that an *eruv* undermines the purpose of this version of the ordinance more than the uses that are permitted, and therefore, the ordinance is not underinclusive. This hypothetical also raises a question about how broad the city's interests may be.

[176] *See generally* Gaspar Gonzalez, *Strings Attached: Orthodox Jews in Miami Beach Consider It a Harmless Symbol, but Others Believe It Violates the U.S. Constitution*, MIAMI NEW TIMES, Feb. 21, 2002 (describing an *eruv* in Miami Beach, Florida).

communication, which an *eruv* does not.[177] Under a general underinclusive analysis, each other form of "visual clutter" should be analyzed against the types of clutter that the city has already permitted and the extent of the clutter. When a city already has many utility poles every several blocks, adding five utility poles to several hundred does not increase visual clutter any more than Christmas lights on town wires. Conversely, if a city had its wires underground, and the Jewish community needed to build all of its own utility poles, the poles might undermine the city's interest in avoiding visual blight more than any already permitted use.[178]

In short, an ordinance that flatly prohibits use of public property, but contains several exemptions within the statute will be deemed not neutral and generally applicable in some jurisdictions, if the secular exceptions are not any more consistent with the purpose of the statute than an *eruv*. A statute that prohibits access, but in practice allows many exemptions not consistent with the purpose of the ordinance, will be reviewed with strict scrutiny in fewer jurisdictions. In some jurisdictions, it appears that if an ordinance is not uniformly enforced and allows even a small number of exceptions or one exception inconsistent with the purpose of the ordinance, a lower court might apply heightened scrutiny.

b. *Individualized Assessment*

Given the various interpretations of the scope of the exception, its application to an ordinance regarding land use is not clear. In *Rader v. Johnston*, the court used a "system of individualized government assessment" as part of its general applicability analysis.[179] Under the broadest interpretation of the *Sherbert* exception, a law that allows permits without carefully delineating when a permit is allowed clearly falls within the *Sherbert* exception. Such a law invites an evaluation of the justifications for the proposed conduct. In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, a California district court noted that "zoning codes necessarily involve case-by-case evaluations of the

[177] *See Tenafly Eruv Ass'n*, 309 F.3d at 168 n.29 (noting that plastic strips for telecommunication purposes are not a secular exemption).

[178] The Third Circuit has looked only at whether exemptions to that particular ordinance render the law underinclusive, not whether the law fails to regulate other types of secular conduct. For example, if the city's interest is avoiding visual blight, the Third Circuit used underinclusion only insofar as the statute at issue permitted visual blight.

[179] Rader v. Johnston, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (quoting *Smith*, 494 U.S. at 884).

propriety of proposed activity against extant land use regulations."[180] This statement would seemingly apply to any land use regulation with a permit system, even if the policy were generally to disallow uses.

Similarly, after noting that zoning codes necessarily involve a case-by-case analysis, a Pennsylvania district judge held that the RLUIPA simply codified the *Sherbert* exception.[181] RLUIPA requires strict scrutiny when:

> the substantial burden [on religion] is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[182]

The holding that RLUIPA codifies the *Sherbert* exception is particularly significant. First, it specifically applies to land use regulation. An ordinance governing the public right of way is also a land use regulation. Additionally, RLUIPA explicitly applies to "formal or informal procedures or practices."[183] In contrast, as mentioned above, and as seen in *Robinson v. District of Columbia*, some courts will apply the *Sherbert* exception "only if the statutory framework at issue permits individualized exemptions."[184] If RLUIPA simply codifies the *Sherbert* exception, then its scope is significantly broader than many courts admit.

If the *Sherbert* exception is interpreted broadly, *Tenafly Eruv Association* falls squarely within the exception. The court noted Councilman Lipson's concern that "[e]xceptions to the no use policy are only allowed after a detailed application is made to the Council, and after a determination is made that the exception would be 'good for the town.'"[185] The standard "good for the town," is only marginally more specific than the standard of "good cause"[186] used to determine eligibility for unemployment benefits expressly rejected in *Sherbert*. Furthermore, the process Lipson described is one, like in zoning applications, which necessarily involves individualized determinations.

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[180] Cottonwood Christian Ctr. v. Cypress Redevelopment Ctr., 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) (quoting Freedom Baptist Church of Delaware County v. Township of Middleton, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002)).

[181] *Freedom Baptist Church*, 204 F. Supp. 2d at 868.

[182] Religious Land Use and Institutionalized Persons Act § 2(a)(2)(C), 42 U.S.C. § 2000cc (2000).

[183] *Id.*

[184] Robinson v. District of Columbia, No. 97-787, 1999 U.S. Dist LEXIS 13774, at *21 (D.D.C. Mar. 31, 1999).

[185] Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142, 164 (D.N.J. 2001).

[186] Sherbert v. Verner, 374 U.S. 398, 402 (1963).

Using the different situations that may arise, it is possible to see where the *Sherbert* exception and general applicability analysis outcomes may diverge. If the *Sherbert* exception applies to any land use regulation that does not specifically delineate the circumstances for an exception, then even if an ordinance were not applied in a discriminatory fashion, strict scrutiny would apply as long as a permit system were in place. The relevant question would be whether the potential exists for "individual assessment," not whether such individual assessment has been made in a discriminatory fashion. In contrast, a law would not receive strict scrutiny if it were not selectively enforced under the general applicability analysis even though the potential for "individual assessment" exists.

c. *Hybrid Rights Exception*

The hybrid rights exception is unlikely to affect the ultimate outcome of a claimant's case. First, the hybrid claim requires "a colorable showing of infringement of recognized and specific constitutional rights . . . ."[187] Therefore, the hybrid rights claim would seemingly only apply if an *eruv* is actually considered to be speech, worthy of First Amendment protection.[188] If an *eruv* is considered speech, and a court decides to apply the hybrid rights exception despite criticism,[189] it may result in heightened scrutiny of the free exercise claim. In *Cornerstone Bible Church*, a claim that would not have ordinarily received strict scrutiny under the Free Exercise Clause received strict scrutiny because of its attachment to free speech rights.[190] Accordingly, under this approach to the hybrid rights exception, if an *eruv* were considered speech, it would receive heightened scrutiny

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[187] Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (refusing to allow religious home schooled student to attend public school part-time when fifth year seniors were permitted to attend part-time). *See also* Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1337-38 (D. Utah 2001) (following the approach in *Swanson*).

[188] See text accompanying note 105 for a general discussion on whether an *eruv* can be considered speech.

[189] *See, e.g.*, Church of Lukumi Babulu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring):

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

[190] Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991).

under the Free Exercise Clause because the law burdens "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[191]

In *Cornerstone Bible Church*, however, the litigant had already prevailed on its free speech claim. The "hybrid rights" claim has no effect on the ultimate outcome of the case if a litigant can satisfy the standard of scrutiny applied to its other burdened constitutional right. Whether a hybrid rights claim can ever help a litigant seeking to erect an *eruv* will depend on the standard of scrutiny applied to a litigant's free speech claim. As will be discussed in more detail below, the standard of scrutiny for content neutral restrictions varies.[192] If the government could satisfy the standard applied in the free speech context, but could not satisfy strict scrutiny then a claimant who would otherwise lose, on both free speech and free exercise would now win on his free exercise claim. It is unlikely that the government will be able to satisfy the free speech standard.[193] Therefore, the hybrid rights claim would generally play no role. The government would be required to allow an *eruv* pursuant to the Free Speech Clause alone.[194]

3. *Applying Strict Scrutiny*

If a law is not neutral or generally applicable, it "must undergo the most rigorous of scrutiny . . . . [It] must advance interests of the highest order and must be narrowly tailored in pursuit of those interests."[195] Tenafly maintained that the relevant ordinance governing the use of utility poles sought to avoid visual clutter and maintain control over city property. Other potential justifications for disallowing an *eruv* are avoiding the appearance of an Establishment Clause

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[191] Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

[192] *See infra* Part III.A. *See also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48-49 (1987) (listing seven "seemingly distinct" standards of review that the Court has articulated for content-neutral restrictions).

[193] *See infra* Part III.A.

[194] In *Cornerstone Bible Church*, the Eighth Circuit used an analysis similar to the underinclusive analysis to determine the free speech claim, but rejected this analysis in order to determine the free exercise claim. It noted that the free speech question was "whether the Church's land use would impede the City's objective of economic vitality more or less than permitted uses." *Cornerstone Bible Church*, 948 F.2d at 470. Thus, if substantial underinclusion is required, the free exercise claim will fail, and the free speech claim may win. If substantial underinclusion is not required, the analysis for both free exercise and free speech will be the same. There would be no work for the "hybrid rights" claim, because regardless of what the label is for the standard of scrutiny, a case involving an *eruv* would necessarily fail if the law is underinclusive.

[195] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S 520, 546 (1993) (citations omitted).

violation, an actual Establishment Clause violation, controversy, and litigation fees.

The Supreme Court has held avoiding visual blight[196] and maintaining control over property[197] to be at least legitimate justifications for restrictions on speech. However, "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."[198] Thus, the Third Circuit noted that the strict scrutiny analysis parallels the discussion of whether an ordinance is neutral and generally applicable.[199] The court held that since the borough tolerated house signs, it could not have a compelling interest in refusing to allow inconspicuous *lechis*.[200]

Furthermore, even if the interest is compelling, it would probably not be narrowly tailored in any situation where strict scrutiny would apply, because some other groups would always be permitted access to the poles. In *Tenafly Eruv Association*, the Court of Appeals for the Third Circuit noted that since the borough permitted house signs, but denied permission for the nearly invisible *eruv*, its ordinance was not narrowly tailored to carry out the objective of avoiding visual clutter or maintaining control over city property.[201] Since an *eruv* would almost always be less obtrusive than any other request, a city cannot permit other groups to have access, and deny access to *eruv* seekers on the grounds that its ordinance is narrowly tailored to the compelling interest of avoiding visual clutter and maintaining control over city property. If, however, an *eruv* is significantly more obtrusive than other uses, then a government may have a compelling interest, and it might be narrowly tailored.

A city would clearly not have a compelling interest in avoiding an Establishment Clause violation or the appearance of an Establishment Clause violation. The Court repeatedly held that although avoiding the appearance of an Establishment Clause violation in the absence of an actual violation is not a compelling interest, avoiding

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[196] *See, e.g.*, City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (upholding law prohibiting the posting of signs on public property).

[197] *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50-51 (1983) (upholding exclusion of non-majority union from school's internal mail system).

[198] *Lukumi*, 508 U.S. at 546-47.

[199] Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 172 (3d Cir. 2002).

[200] *Id.*

[201] *Id.*

an actual Establishment Clause violation is compelling.[202] Since permitting an *eruv* does not violate the Establishment Clause,[203] this justification cannot be considered compelling.

The remaining interests also cannot provide the basis for withstanding strict scrutiny. The Supreme Court has held that the avoidance of controversy is not a compelling interest.[204] Given the large expense of the litigation in *Tenafly*,[205] city residents and councils might argue potential court costs as a compelling reason for denying permission for an *eruv*. If the Jewish community agrees to indemnify the city, then legal costs can no longer be a compelling or legitimate interest.

4. *Applying Minimal Scrutiny*

Rational basis review requires that an ordinance be rationally related to a legitimate governmental interest.[206] Under ordinary rational basis review, "it is normally sufficient for the decisionmakers to identify a rational justification that they could have relied upon to support their decision."[207] Despite this low standard, a neutral law of general applicability may not even receive traditional rational basis review. Although a ban on peyote could have passed rational basis

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[202] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001) (finding that the school has no valid Establishment Clause interest in avoiding an Establishment Clause violation); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 840 (1995) (finding the governmental program to be neutral toward religion); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist, 508 U.S. 384, 395 (1993) (finding the school's fears of violating the Establishment Clause to be unfounded); Widmar v. Vincent, 454 U.S. 263, 271 (1981) (same).

[203] *See supra* Part I.C.

[204] In the free speech context, the Supreme Court noted that "the avoidance of controversy is not a valid ground for restricting speech in a public forum." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 811 (1985). Since a restriction in a public forum must be justified by a compelling interest, *id.* at 800, it follows that avoidance of controversy is not a compelling interest at least in the free speech context.

[205] Richard Cowen, *Tenafly Faces $412,000 Legal Tab; Borough Taxes Fund Housing, Eruv Suits*, THE RECORD (Bergen County), Dec. 20, 2001, at I02 (noting that the borough had already spent $412,000 to fight its two cases and was likely to spend more).

[206] Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955) (requiring that to pass rational basis review, there must be a showing of a legitimate governmet interest and not just hypothetical governmental reasons).

[207] Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1390 (3d Cir. 1990) (holding that a religious organization's use of a high school auditorium did not violate the First Amendment); *see also* United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980) (upholding law at issue based on the rational basis test).

review,[208] the majority in *Smith* decided that the ban was constitutional without explicitly performing a rational basis review analysis.[209]

If no review or traditional rational basis review is applied to an ordinance restricting access to the public right of way, it is likely to be upheld. Maintaining control over city property and avoiding visual blight are clearly legitimate governmental interests.[210] These interests are still legitimate, even though the city has chosen not to pass laws that further these interests on every occasion.[211] Arguably, disallowing plastic strips is rationally related to the city's interest in maintaining control over its property.

Even under rational basis review, though, disallowing plastic strips is not "rationally related" to a city's interest in avoiding visual blight in a case like *Tenafly Eruv Association.* Since the plastic strips used for the *eruv* in Tenafly were indistinguishable from those used for telecommunication purposes, an *eruv* would not cause any additional visual blight. However, if an *eruv* requires that a city build several additional poles, the city's interest in avoiding visual blight arguably is rationally related to refusing to permit the construction of additional poles.

Since the Supreme Court cases only hold that avoiding the appearance of an Establishment Clause interest is not compelling,[212] they do not directly control the question of whether this interest is legitimate. The Court, however, affirmed the principle that there is not a strong interest in maintaining a higher standard of separation of Church and State in the presence of free exercise and/or free speech concerns.[213] In light of the struggle "to find a neutral course

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[208] *See Smith*, 494 U.S. at 906 (O'Connor, J., concurring) (finding that the ban passed muster even under the compelling interest test).

[209] *Smith*, 494 U.S. at 889-90.

[210] City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50-51 (1983).

[211] *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 733 (1990) (upholding ban on solicitation on postal service sidewalks, even though the government did not ban all activity that was disruptive); *Taxpayers for Vincent*, 466 U.S. at 811 (holding that government had a legitimate aesthetic interest in prohibiting the posting of signs on public property even though it did not ban the posting of signs on private property that cause the same harms as the posting of signs on public property).

[212] *See supra* Part II.C.4.

[213] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001) (finding that since there is no "valid Establishment Clause interest" the court need not decide whether avoiding an Establishment Clause interest can justify viewpoint discrimination); Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 762 (1995) (implying that if the Establishment Clause is not implicated, there is no interest in justifying content based restrictions on speech based on the appearance of an Establishment Clause violtion); Lamb's Chapel v. Ctr. Moriches Union

between the two Religion Clauses,"[214] allowing simply the *appearance* of the Establishment Clause to override a definitive interest in free speech and free exercise fails to recognize the need to balance these constitutional interests.[215] If a court protects the appearance of an Establishment Clause violation, then it drastically limits protection for free exercise. Additionally, rational basis review might never be appropriate for evaluating the justification of avoiding the appearance of an Establishment Clause violation. Such a justification focuses on the uniquely religious quality of speech and disallows speech solely *because* it has a religious quality, singling out religion for special treatment.

The Borough of Tenafly also argued that it had a legitimate interest in avoiding "divisiveness and strife." Avoiding controversy that would disrupt the workplace has been held to be a reasonable reason to uphold governmental restrictions on speech.[216] Allowing controversy to justify restrictions on free exercise even when the speech or religious exercise does not disrupt the purpose of the forum effectively strips religious minorities of their constitutional freedoms and implicitly sanctions discrimination. The Supreme Court's opinion in *City of Cleburne v. Cleburne Living Center* implies that controversy based on the irrational prejudices on community members is not a legitimate governmental reason for disallowing a particular action.[217] In *City of Cleburne*, the Supreme Court used a more invasive rational basis review to invalidate a city's denial of a special use permit for the operation of a group home for the mentally ill based on the Equal Protection Clause.[218] The Court said, "mere negative attitudes, or fear, unsubstantiated . . . are not permissible bases for treating a home for the mentally retarded differently from [an] apartment."[219] Although the Court in *Cleburne* did not expressly mention controversy as a legitimate reason, it discussed the controversy that arose surrounding the special use permit for the group home. Thus, *City of Cleburne* im-

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Free Sch. Dist., 508 U.S. 384, 395 (1993) (holding that unfounded fears of Establishment Clause violation do not serve as a compelling interest).

[214] Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970).

[215] *See* TRIBE, *supra* note 34, § 14-8, at 1201 ("The free exercise principle should be dominant when it conflicts with the antiestablishment principle . . . . Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment.").

[216] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 809 (1985) ("The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message.").

[217] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

[218] *Id.* at 448.

[219] *Id.*

plies that if controversy is based on irrational prejudices, then the controversy is not a legitimate governmental reason.

In *Tenafly*, the council-members similarly based their decisions on negative attitudes and irrational fears of those living within the community. Some residents felt that an *eruv* was "'like a hostile take-over' of the community."[220] Councilman Sullivan stated that one of his reasons for disallowing an *eruv* was a concern for his constituents who opposed an *eruv*.[221] In short, the controversy ultimately stemmed from the fact that residents did not want Orthodox Jews to move into the neighborhood, and absence of an *eruv* has that effect.[222]

Claimants generally would not be able to prove that council-members had the requisite discriminatory intent. If divisiveness and strife within a community are considered legitimate, government implicitly allows discrimination to trump free exercise because the community controversy is fueled by discrimination against a particular group. Thus, the council-members would purportedly base their decision, as did Councilman Sullivan, directly on the neutral reason that the decision to permit an *eruv* would engender controversy within the community or would create concern among his constituents. Indirectly, the decision would be based on the desire of the community members to exclude the minority group and discriminatory animus of the community members. Regardless of whether the avoidance of controversy and courts costs are upheld as legitimate, the government's interest in maintaining control over its property would probably be sufficient to uphold a regulation under ordinary rational basis review.

5. *Governmental Permission*

Until now, the discussion of the free exercise claim has focused only on the construction of a geographical boundary. However, as mentioned earlier, a valid *eruv* requires the permission of a governing

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[220] Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142, 161 (D.N.J. 2001) (quoting a thought expressed at a public hearing).

[221] *Id.* at 168. Charles Lipson, also a councilmember, is believed to have said the following:

> This is a very serious concern . . . and it's a concern that I have that's expressed from, by a lot of people about a change in the community . . . . [It's] become a change in every community where an ultra-orthodox group has come in . . . . [T]hey've willed a change in the state of Israel. They've willed it so much that they have stoned cars that drive down the streets on the Sabbath.

Id. at 153-54.

[222] *See, e.g.*, Stephen Brenner Aff. ¶ 2, *Tenafly Eruv Ass'n* (No. 00-6051) ("My wife and I will not be able to live with such restrictions and therefore if we are not able to have an *eruv*, we will sell our house and move elsewhere.").

authority for Jews to use the property. Just as the government has no obligation to give unemployment benefits,[223] college scholarships,[224] or access to governmental property,[225] it has no obligation *ex ante* to give the Orthodox community the requisite permission.[226]

The Free Exercise Clause, however, ensures that the government bestows benefits in a manner that does not display hostility toward religion.[227] Thus, even though a governmental proclamation is a benefit that the government would not otherwise be required to bestow upon the Jewish community, the Free Exercise Clause is implicated to the extent that other similarly situated groups have been given similar types of governmental proclamations. Plaintiffs in *Tenafly* noted that many other government declarations exist, "many of which express official recognition of, and respect for, religious groups and observances."[228] The analysis for whether refusal to grant a governmental proclamation depends on the number and types of proclamations issued. In many areas—like the analysis for construction of wires—the outcome would depend on a lower court's interpretation of *Smith* and *Lukumi.*

If a government does not issue proclamations, the Free Exercise Clause would not apply since the government is under no obligation to issue a proclamation. If a city has a tacit policy of granting proclamations, with no legal force, at almost any request, but refuses to give the Jewish community a proclamation, the policy might single religion out for discriminatory treatment. If a city granted some proclamations, but refused to grant many others, under a narrow interpretation of *Lukumi,* the policy or law would be entitled only to minimal scrutiny. Under a broader interpretation, the analysis would focus on whether a policy limiting proclamations is underinclusive: whether granting Jews a proclamation undermines government objectives in limiting the number of proclamations to the same extent

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[223] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 409-10 (1963) ("Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment.").

[224] *See, e.g.*, Davey v. Locke, 299 F.3d 748, 754 (9th Cir. 2002) (holding that Free Exercise Clause prohibits government from conditioning grant of college scholarships on recipients not majoring in theology).

[225] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (finding refusal to allow Good News Club to use school property to be viewpoint discrimination).

[226] The Free Exercise Clause is not written "in terms of what the individual can extract from the government." *Sherbert*, 374 U.S. at 412.

[227] *See infra* notes 241-243 (citing cases where the court required that benefits be bestowed upon religious groups when such benefits were bestowed on non-religious groups).

[228] Br. for Appellants Chaim Book, Yosifa Book, & Stephen Brenner at 35, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (No. 01-3301).

as proclamations already issued.[229] It is unlikely, however, that a borough would be forced to issue the requisite permission.

The above analysis demonstrates that an inquiry into the Free Exercise Clause with regard to many scenarios that could involve an *eruv* raises more questions than answers. Lower courts and scholars are divided on where to draw the line between *Smith* and *Lukumi* on what constitutes general applicability. They are also confused on the scope of the Supreme Court's exceptions. Consequently, the outcome of a free exercise challenge will differ based on whether *Lukumi* is understood to give strict scrutiny to laws that are underinclusive or only to laws that are substantially underinclusive such that religion alone falls under the law's scope. The outcome may also differ depending on whether strict scrutiny applies if a statute contains exemptions in practice, or if statutory exemptions alone trigger heightened scrutiny. In short, nearly all that is clear from the free exercise challenge is that if the Supreme Court continues to follow the *Smith* framework, it should give more specific guidance on how to determine whether a law is generally applicable, and should explain the scope of the *Sherbert* and hybrid rights exceptions.

III. LOOKING TOWARD A SOLUTION

In addition to creating confusion amongst lower courts, *Smith* fostered a debate amongst scholars and justices about whether the *Smith* framework should be abandoned.[230] Some scholars and justices think the Court should revert to the compelling interest standard employed before *Smith*.[231] Others advocate the various ways suggested within the existing *Smith-Lukumi* framework to maximize religious liberty.

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[229] If the *Sherbert* exception were extended to its broadest possible scope, then it could arguably apply in the proclamation context as well. If a city has no standards for whether or not to grant proclamations, then there is a "system of individualized assessments" in place that allows a governmental body to independently assess the value of a given proclamation.

[230] *See, e.g.*, Duncan, *supra* note 109, at 884 (arguing that *Smith* and *Lukumi* together afford the proper amount of protection without preferencing religion); Gedicks, *supra* note 130, at 121 (noting that the *Smith* doctrine erased religious exercise as a fundamental right).

[231] *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 895 (1990) (O'Connor, J., concurring); *id.* at 909 (Blackmun, J., dissenting).

Another approach looks to free speech law for guidance.[232] Generally, scholars in this camp argue that where rational basis review would be applied under a narrow interpretation of *Smith-Lukumi*, at least some form of intermediate scrutiny would be applied under the Free Speech Clause.[233] Accordingly, free exercise jurisprudence should adjust so that incidental burdens on free exercise are scrutinized at least as closely as incidental burdens on free speech.

The First Amendment's grant of protection to both religion and speech does not mean that the two should be accorded the same protection. Professor Frederick Gedicks, however, offers compelling reasons for why the Speech Clause should be used as a template for redeveloping free exercise jurisprudence. He writes:

> [T]he Free Exercise and Speech Clauses . . . both extend constitutional protection to those whose personal beliefs constrain them to oppose the government or its laws. The Free Exercise Clause extends constitutional protection to those whose religious beliefs constrain them to *act* in opposition to government; the Speech Clause extends constitutional protection to those whose personal beliefs constrain them to *speak* in opposition to the government.[234]

Two problems arise from treating religious exercise differently from speech. Given the ambiguity in free exercise jurisprudence, current law encourages litigants to classify every type of religious activity as speech in the hopes of obtaining more scrutiny of governmental activity under their free speech claim. Some would argue that the free exercise exemptions should be eliminated and free exercise claims should be brought under the Free Speech Clause.[235] This approach does not eliminate the incentive to redefine speech in broad terms to encompass all forms of religious exercise. Although the Court has classified some religious activity as speech,[236] the line between religious activity that constitutes speech and religious activity that does not is not clearly drawn.

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[232] *See, e.g.*, Frederick Mark Gedicks, *Toward a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 930 (2000) (suggesting that some free exercise claims be treated like free speech claims); Rodney A. Smolla, *Reflections on* City of Boerne v. Flores*: The Free Exercise of Religion After the Fall: The Case For Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 942 (1998) (arguing that intermediate scrutiny should be used to govern free exercise claims); Volokh, *supra* note 91, at 656 (providing reasons for and against using a reasonableness test).

[233] *See supra* Part III.B.2.

[234] Gedicks, *supra* note 232, at 931 (emphasis in original).

[235] *See, e.g.*, William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Clause*, 40 CASE. W. RES. L. REV. 357, 360 (1990).

[236] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 270 n.6 (1981) (noting that worship constitutes speech).

Yet Congress clearly did not intend for all religious exercise to be considered speech. If speech is defined broadly, statutes meant to protect religious exercise would have no effect. Since preferring religious speech over nonreligious speech constitutes a violation of the Establishment Clause and the Free Speech Clause,[237] statutes such as the Religious Land Use Act, and state and Federal Religious Freedom Restoration Acts would be meaningless. They would either be considered a violation of the Establishment Clause, or the compelling interest in complying with the First Amendment would provide a reason not to grant an exemption for religious institutions.[238] In short, affording religious exercise less protection than speech creates an entire category of litigation, determining whether a religious activity constitutes speech, the need for which would be eliminated if religion and speech were accorded similar protection.[239]

The conceptual message that arises from giving free exercise less protection than free speech is also problematic. If the government affords religious speech more protection than other forms of religious activity, it implicitly sends the message that religious speech is more important than other forms of religious activity. This message contradicts the purpose of the religion clauses. It encourages certain forms of religious activity over others and chides religious groups to define religious practice in a different light in order to benefit from maximum constitutional protection. Thus, it might interfere in an individual's religious choices.

Given these reasons for treating free speech and free exercise similarly and the large overlap between religious exercise claims and religious speech claims, understanding the standard applied to incidental burdens on free speech is crucial to adopting a logical reform of free exercise law that minimizes inconsistencies between the result of a free exercise claim and a free speech claim.

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[237] *See* Brownstein, *supra* note 111, at 627-28 (discussing the application of state RFRAs to religious speech).

[238] *See id.* at 627 ("RFRA cannot provide special protection to material because of its religious content; to do so would violate the Establishment Clause and discriminate based on the content of the material (violating the Free Speech Clause)."); Volokh, *supra* note 91, at 614-15 (discussing how one distinguishes speech from nonspeech in this context).

[239] If religion is accorded more protection than speech, then one still has the problem of distinguishing when conduct is religiously motivated, as opposed to philosophically motivated. *See infra* note 240, at 942 (noting that one of the advantages of according religious exercise the same protection as religious speech is to eliminate the need to determine when conduct is religiously motivated).

A. *Understanding Free Speech Jurisprudence*

As mentioned, scholars have argued that religion cases are more likely to succeed when brought under the Free Speech Clause.[240] Although true, where the use of public property is involved, this statement is more complex. This section looks at the standard of review if an *eruv* were considered speech.[241] It focuses only on the minimum amount of protection that would be accorded under the Free Speech Clause for the purpose of comparing the default standard in a free speech claim to the default standard in a free exercise claim.

An *eruv* would be analyzed under the Court's public forum doctrine, which is used to determine the constitutionality of regulations on the time, manner, and place of speech on public property."[242] The Supreme Court explicitly recognized three categories of forums: a public forum, an intermediate category, sometimes called a designated public forum, and a nonpublic forum. The scrutiny afforded to a law governing speech depends on the type of forum at issue and whether a law is content-neutral. When a law discriminates based

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[240] *See, e.g.*, Gedicks, *supra* note 130, at 92; Smolla, *supra* note 232, at 941-42; Volokh, *supra* note 91, at 655-56.

[241] Although the analysis looks at an *eruv* as speech for the purpose of comparison, it seems that a litigant would face significant hurdles in claiming that an *eruv* is symbolic speech. *See supra* text accompanying note 91. There is a stronger argument that an *eruv* would be protected as a facilitator of speech. Honor boxes, used to store newspapers, were entitled to constitutional protection. *See* City of Lakewood v. Plain Deale Publ'g Co., 486 U.S. 750, 772 (1988); S. N.J. Newspapers, Inc. v. N.J. Dep't of Transp., 542 F. Supp. 173, 182-83 (D.N.J. 1982). The Third Circuit rejected the argument that an *eruv* should be protected because it facilitates worship because in contrast to honor boxes, "there is no evidence that an *eruv* is inextricably linked to a communicative activity." Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 164 (3d Cir. 2002). Although an *eruv* is not inextricably linked to worship like a newspaper rack is linked to distributing newspapers, for some, it is the only way to facilitate this communicative activity. This provides a reason to extend the rationale to protect facilitators of speech, at least where the facilitating device is necessary for the speech to occur. Moreover, the geographical enclosure is inextricably linked to sending a message that an enclosed area is a symbolic private domain. If that message is deserving of constitutional protection, an *eruv* should be protected because it is inextricably linked to speech.

[242] In *United States v. O'Brien*, the Court introduced a four-part test for determining when the government is permitted to restrict speech when speech and non-speech are combined in the same course of conduct. The government may restrict conduct when it is (1) "is within the constitutional power of the government;" (2) "furthers an important or substantial governmental interest;" (3) "if the governmental interest is unrelated to the suppression of free expression;" and (4) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968). Even though an *eruv* would fall under the rubric of the *O'Brien* analysis because it involves the regulation of both speech and non-speech elements, the Supreme Court noted that the *O'Brien* test "is little, if any, different from the standard applied to time, place, or manner restrictions." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984) (using both O'Brien and the forum analysis to restrict symbolic speech).

upon the content or viewpoint of a group's message, the restriction receives strict scrutiny regardless of the forum.[243]

"[P]laces which by long tradition or by government fiat have been devoted to assembly and debate," like parks and public squares, are considered public forums.[244] The intermediate category, sometimes called a designated public forum, is one that is not traditionally open to debate, but one that the "State has opened for expressive activity by part or all of the public."[245] Restrictions on speech in a public or designated public forum must be narrowly tailored to serve a compelling governmental interest[246] and there must be ample alternative a avenues of communication.[247] Although the Court recognizes that a government need not open its property to the public,[248] once it has, the "State may not exclude speech where its distinction is not 'reasonable in light of the purposes served by the forum'"[249] and "is not an effort to suppress the speaker's activity due to a disagreement with the speaker's view."[250]

Since restrictions on an *eruv* are likely to fail even under deferential reasonableness review, a full discussion on when a law discriminates against viewpoint is beyond the scope of this comment.[251] If

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[243] Widmar v. Vincent, 454 U.S. 263, 270 (1981).

[244] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[245] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

[246] *Id. See also* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (upholding television shows' exclusions of independent candidates from candidate debate). The standard in the intermediate category is not clear. *See infra* text accompanying note 252.

[247] *See, e.g.*, *Cmty. for Creative Non-Violence*, 468 U.S. at 293.

[248] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993).

[249] Rosenberger v. Univ. of Va., 515 U.S. 819, 829 (1995).

[250] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992). *See also Forbes*, 523 U.S. at 678.

[251] In many of the Supreme Court cases, the defendant clearly discriminated against a religious viewpoint, leaving many questions unanswered for *Tenafly Eruv Association*. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 (1981). In Tenafly, the Borough argued it did not expressly open the forum to anyone. Yet, it tolerated some speakers, none of whom were related to its ultimate purpose of using utility poles for the purpose of telecommunications. The question then becomes whether a city should be allowed *post hoc* to define the category of allowable speakers. Policy reasons, however, dictate that failure to set any meaningful boundaries should not be used to insulate the State's action from First Amendment analysis. *See Forbes*, 523 U.S. at 690 (Stevens, J., dissenting) (arguing that the First Amendment does not tolerate arbitrary definitions of the scope of the forum).

In determining whether a law is viewpoint discriminatory, the extent of selective enforcement would seemingly be relevant. *See* City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("[T]here is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance."). However, in the free speech context, underinclusion will not lead to a finding of viewpoint discrimination because the Supreme Court has held that the "First Amendment imposes not an 'underinclusiveness' limitation, but a 'content discrimination' limitation . . . ." R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992). *See also* United States

there is no viewpoint discrimination, the next step is determining the relevant forum. Although, the Court has affirmed that a designated public forum receives strict scrutiny, it has not been entirely consistent in what level of scrutiny to apply in its intermediate category.[252] Although lower courts have adopted different approaches,[253] in light of the Court's recent dicta claiming that the reasonableness standard is the proper standard of review in a limited public forum,[254] this comment assumes that a limited public forum would receive only reasonableness review.

Since the forum at issue is likely to be either a limited public forum or nonpublic forum,[255] unless there is viewpoint discrimination, a law that restricts the use of utility poles and other relevant property would be reviewed under the reasonableness standard. In contrast, under *Smith,* if a law is not generally applicable, traditional rational basis review or no review is appropriate. Therefore, it is critical to understand the application of the reasonableness standard.

Distinctions drawn between speech in a nonpublic forum must be "reasonable in light of the purposes served by the forum."[256] "Consid-

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v. Kokinda, 497 U.S. 720, 734 (1990) (holding a ban on solicitation on postal service sidewalks is constitutional despite the fact that other types of potentially disruptive speech were permitted).

[252] In *Perry*, the Supreme Court described the intermediate category as a species of a public forum that arises by government "designation" and that may be created for a "limited purpose," but it did not label the forum as a designated or limited public forum. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983). It has recognized that the intermediate category consists of a designated and limited forum. *See Lee*, 505 U.S. at 678.

[253] *See* Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) ("Some courts and commentators refer to a 'designated public forum' as a 'limited public forum' and use the terms interchangeably."). Other courts recognize two distinct categories in the intermediate type of forum. A designated public forum, indiscriminately made open to the public, is an outgrowth of a public forum, and receives strict scrutiny. A limited public forum, with more specific access provisions, is a subset of a nonpublic forum. Consequently, restrictions on speech need only be reasonable. *See* PETA v. Giuliani, 105 F. Supp. 2d 294, 310 (S.D.N.Y. 2000), *aff'd*, 18 Fed. Appx. 35 (2d Cir. 2001). *See also*, Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650, 656 (2d Cir. 1995).

[254] *See* Rosenberger v. Univ. of Va., 515 U.S. 819, 829 (1995) (invalidating exclusion of religious publication from funding when nonreligious publications received funding); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) ("[B]ecause the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum.").

[255] A full discussion of classifying the type of forum is beyond the scope of this comment.

[256] United States v. Kokinda, 497 U.S. 720, 730 (1990) (holding ban on solicitation on postal sidewalks to be reasonable). Even though in *Lee*, the most recent case actually decided on reasonableness grounds, the Court does not expressly lay out the "in light of the purposes of the forum language," its analysis looks at the purpose of the forum and the effect that solicitation would have on the ultimate purpose of the forum. *Lee*, 505 U.S. at 682. In *Good News Club*, the Court stated that since the restriction was viewpoint neutral, "we need not decide whether it is unreasonable in light of the purposes served by the forum." *Good News Club*, 533 U.S. at 107.

eration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved."[257]

The Supreme Court has sent different signals on how to analyze whether a restriction is reasonable.[258] In early cases, it seems as though the reasonableness standard was a form of rational basis review.[259] The Court's most recent opinion in *Lee* suggests that the reasonableness standard is more exacting. In *Lee,* the Supreme Court upheld a ban on religious solicitation in airports, but it invalidated a ban on leafleting.[260] In her concurrence, Justice O'Connor wrote, "[b]ecause I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment . . . I cannot accept that a total ban on that activity is reasonable without an explanation as to why such a restriction 'preserves the property' for the several uses to which it has been put."[261]

The Supreme Court has held constitutional limitations on speech in a nonpublic forum to be reasonable when speech, if allowed, would "hinder [the] effectiveness" of the forum's purpose,"[262] or in-

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Good News Club involves limited public forums, not nonpublic forums, and the statement was dicta. The Court's omission of "in light of the purposes served by the forum," from its latest cases actually decided on these grounds, does at least raise the question of whether it would attribute to the "in light of the purposes of the forum" part of the test only to a limited public forum. Many lower courts similarly look at the restriction and the purpose of the forum in order to determine reasonableness. *See, e.g.*, Sammartano v. First Judicial Dist. Ct., 303 F.3d 959, 966 (9th Cir. 2002) (holding that a law banning individuals from wearing clothing bearing symbols of motorcycle organizations in federal court building was not reasonable in light of the purposes meant to be served by the forum); Grossbaum v. Indianapolis-Marion County Bldg. Auth., 100 F.3d 1287, 1299 (7th Cir. 1996) ("The only possible issue remaining is whether Rule 13 is reasonable in light of the purposes served by the City-County Building lobby.").

[257] *Kokinda*, 497 U.S. at 732 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 650-51 (1981)).

[258] *Id.* at 730.

[259] In *Perry*, a non-majority union sought to gain access to the school district's internal mail system. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). The Court held that the limitation on speech was reasonable because the restriction was "wholly consistent" with the district's legitimate interest in preserving the property for the use to which it was dedicated. *Id.* at 50-51. In addition, the Court stated that the policy "need only rationally further a legitimate state purpose." *Id.* at 54.

[260] *Lee*, 505 U.S. 830, 831 (1992) (invalidating restriction based on the reasons set forth in O'Connor's concurrence).

[261] *Id.* at 691 (O'Connor, J., concurring). Her opinion represents the narrowest majority holding and lower courts view themselves bound by her opinion. *See, e.g.*, Hawkins v. Denver, 170 F.3d 1281, 1289 (10th Cir. 1999) (upholding ban on leafleting in walkway leading to public theaters based on O'Connor's approach).

[262] *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 811 (1985).

terfere with the purpose for which the forum was established.[263] Although a majority opinion in the Supreme Court has never required "strict incompatibility,"[264] under a fact specific analysis, the Supreme Court opinions held restrictions to be reasonable only when the proposed speech presents a risk of disrupting the relevant forum.[265]

In her concurrence in *Lee*, O'Connor proposed that, at a minimum, the government must articulate a reason as to why the burdened speech is inconsistent with the purpose of the forum.[266] Before the forum analysis was concretized, the Court noted that, "the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[267]

Lower court opinions differ on the analytic approach that should be used to determine what is reasonable. Some lower courts require a determination that the proposed conduct would "'actually interfere' with the forum's stated purposes"[268] in order to uphold a restriction on speech as reasonable.[269] Others understand Justice

[263] *See* United States v. Kokinda, 497 U.S. 720, 811 (1990) (holding a ban on the solicitation on postal sidewalks to be reasonable).

[264] *Cornelius*, 473 U.S. at 808-09 ("[A] finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated . . . [e]ven if some incompatibility with general expressive activity were required . . . .").

[265] *See, e.g.*, *Lee*, 505 U.S. at 685 (noting that face-to-face solicitation in an airport "would prove quite disruptive"); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 52 (1983) (noting that the policy of limiting access to a school district's internal mail system to bargaining union prevents the schools "from becoming a battlefield for inter-union squabbles").

[266] *Lee*, 505 U.S. at 692.

[267] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (upholding a law that prohibited picketing or demonstrating on a public way within 150 feet of school building during certain hours). Justice Kennedy would use the incompatibility test to determine whether an area constitutes a public forum. *Lee*, 505 U.S. at 701 (Kennedy, J., concurring in part).

[268] United Food and Commercial Workers Union v. S.W. Ohio Reg'l Transit Auth., 163 F.3d 341, 358 (6th Cir. 1998).

[269] In *United Food & Commercial Workers Union*, the Sixth Circuit held that although the transit authority's policy of excluding controversial bus advertisements was reasonable, its application of the policy to a particular union bus advertisement was not reasonable. *Id.* at 357. Since SORTA ran pro-union ads without any detriment to SORTA's interests, it was not permitted to claim that those messages were incompatible with the purpose of the forum. *Id.* *See also* Jacobsen v. Rapid City, 128 F.3d 660, 663 (8th Cir. 1997) (refusing to uphold a ban on newsracks in an airport because there is "no evidence that placing . . . newsracks in public portions of the terminal will interfere with the Airport's principal intended use," but upholding the ban because it interfered with the city's ability to collect revenue); Air Line Pilots Ass'n Int'l v. Dep't of Aviation of Chicago, 45 F.3d 1144, 1159 (7th Cir. 1995) (ascertaining that the reasonableness of a restriction on speech in a nonpublic forum requires "a determination of whether the proposed conduct would 'actually interfere' with the forum's stated purposes"); Multimedia Publ'g v. Greenville-Spartanburg Airport, 991 F.2d 154, 159 (4th Cir. 1993) (holding that determining

O'Connor's approach in *Lee* to promote a balancing approach. The Seventh and Tenth circuits acknowledged that her approach "blurs the line between the public and nonpublic forum, suggesting a sliding-scale approach—a standard versus a rule or categories—in which the benefits and costs of free speech are balanced in particular settings."[270] Thus, in *Hawkins v. Denver* the Tenth Circuit upheld a ban on leafleting in a Galleria (an entrance way to public theaters held to be a nonpublic forum) by looking at the nature of public expression and the "extent to which it interferes with the designated purposes of the Galleria, given the Galleria's physical attributes."[271]

Circuit and district courts have also required more than mere rational basis review by upholding a restriction only when "there is evidence in the record to support a determination that the restriction is reasonable."[272] The Ninth Circuit explicitly noted that the reasonableness requirement for restrictions on speech in a "nonpublic forum requires more of a showing than does the traditional rational basis test.... [t]here must be evidence that the restriction reasonably fulfills a legitimate need."[273]

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the reasonableness of a complete ban on newsracks requires an assessment of whether they would "actually interfere" with the carrying out of the government's purposes); *but see* Sefick v. Gardner, 990 F. Supp. 587, 597 (N.D. Ill. 1998) (upholding the regulation even though the district did not articulate why the regulation is incompatible with the forum).

270 Chi. Acorn v. Metro. Pier & Exposition Auth., 150 F.3d 695, 703 (7th Cir. 1998). *See also* Hawkins v. Denver, 170 F.3d 1281, 1289-90 (10th Cir. 1999) (upholding ban on leafleting in walkway leading to public theaters). Some cases do not explicitly state that interference or incompatibility is necessary in order to uphold a restriction, but they use lack of incompatibility as a factor in upholding or invalidating a regulation. *See, e.g.*, Diloreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 968 (9th Cir. 1999), *cert denied*, 529 U.S. 1067 (2000) ("[T]he district's concerns regarding disruption and potential controversy are legitimate reasons for restricting the content of the ads, given the purpose of the forum and the surrounding circumstances . . . ."); Daily v. N.Y. City Housing Auth., 221 F. Supp. 2d 390, 405 (E.D.N.Y. 2002) (noting that opening the community center to a "multitude of groups," proffered justification for exclusion, and would not interfere with the educational and other community purposes); PETA v. Giuliani, 105 F. Supp. 2d 294, 320 (S.D.N.Y. 2000) (noting that one of the surrounding circumstances that courts look at is "the extent to which the excluded expressive activity is incompatible with the uses of the property or would interfere with the government's forum objectives"); Mehdi v. United States Postal Serv., 988 F. Supp. 721, 727 (S.D.N.Y. 1997) (upholding restriction on postal service display because "opening up post offices to seasonal displays by the public would interfere with the Postal Service's own use of decoration to further its business").

271 *Hawkins*, 170 F.3d at 1290.

272 Sammartano v. First Judicial Dist. Ct., 303 F.3d 959, 967 (9th Cir. 2002); *see also* Volokh, *supra* note 91, at 654 (noting that the reasonableness standard is a bit more demanding than rational basis review, but not much).

273 *Sammartano*, 303 F.3d at 967-68. The court rejected the government's justification for a ban on clothing with an affiliation to biker organizations because "there is no evidence in the record supporting a conclusion that clothing indicating affiliation with biker organizations is particularly likely to be disruptive." *Id.* at 968. *See also* Jacobsen v. Rapid City, 128 F.3d 660, 663

There is also confusion on the role alternative avenues of communication play in deciding the reasonableness of a regulation. Although the availability of alternative means has never become a formal part of the test for a nonpublic forum as articulated by the Supreme Court, it repeatedly supported its finding that a restriction was reasonable in a nonpublic forum because the speaker had alternative means of communication available.[274] Some lower courts continue to look at the availability of alternative means in determining whether a restriction on speech in a nonpublic forum is reasonable.[275] Thus, according to some courts, one must look at the nature of the speech, the degree of interference with the purpose of the forum, and the alternative means available.[276] There are few, if any, cases that strike down a statute in a nonpublic forum based solely on the lack of alternative modes of communication.

Despite ambiguities regarding what reasonableness entails, a restriction on an *eruv* is likely to fail. Under a meaningful rational basis review, disallowing an *eruv* is likely to be invalidated because there could be no evidence in the record to support a determination that the restriction is reasonable.[277] In *Tenafly*, the city would have difficulty claiming its asserted justifications in maintaining control over city property and avoiding visual blight when it allowed, under the

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(8th Cir. 1997) (invalidating the government's justification because it was "supported only by vague hearsay testimony"); Grossbaum v. Indianapolis-Marion City Bldg. Auth., 100 F.3d 1287, 1299 (7th Cir. 1996) (upholding a rule prohibiting displays in municipal building's lobby because "[t]he District Court found a number of reasonable justifications for the New Rule 13 and all are well within the bounds of what rational basis scrutiny permits"); Multimedia Publ'g Co. v. Greenville Spartanburg Airport, 991 F.2d 154, 159 (4th Cir. 1993) ("[I]t isn't enough simply to establish that the regulation is rationally related to a legitimate governmental objective."). The district court, however considered the fact that there was evidence in the record to support the city's justifications. *Grossbaum*, 909 F. Supp. 1187, 1205-06 (S.D. Ind. 1995).

[274] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 684 (1992) ("[I]t would be odd to conclude that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access . . . ."); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 809 (1985) ("[T]he speakers have access to alternative channels, including direct mail and in person solicitation outside the workplace."); City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984) (holding key that there were numerous other methods of communication); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53-54 (1983) (noting alternative methods of communication); Greer v. Spock, 424 U.S. 828, 839 (1976) (rejecting free speech challenge to law banning political solicitation on an army base because servicemen are free to attend political rallies off base); Pell v. Procunier, 417 U.S. 817, 827-28 (1974) (holding that law prohibiting media interview with certain inmates is constitutional because prison inmates may communicate with media by mail and through visitors).

[275] *See, e.g.*, Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 845 (6th Cir. 2000); *Jacobsen*, 128 F.3d at 664; *Multimedia*, 991 F.2d at 159; Cook v. Baca, 95 F. Supp. 2d 1215 (D.N.M. 2000); Warner v. City of Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999).

[276] *See, e.g., Jacobsen*, 128 F.3d at 664; *Multimedia*, 991 F.2d at 159.

[277] *See, e.g., Sammartano*, 303 F.3d at 967.

same ordinance, more obtrusive encroachments.[278] A city would respond by claiming that in order for a government to legitimately claim an objective, it need not adopt legislation to comprehensively address those objectives.[279] However, when a government allows speech under a particular regulation, and allows exceptions under that regulation, the government sends the message that its justifications for the particular regulation are not sufficient to justify a limitation on the particular activity exempted from the restriction.

Even more importantly, there is no evidence that could demonstrate that restricting an *eruv* reasonably fulfills a legitimate need to maintain control over city property and avoid visual blight. In *Tenafly*, the city allegedly feared that if it granted the request for a particular religious purpose, then it would be required to do so for others.[280] An *eruv* does not preclude the request of other religions.[281] It also does not require that other religions be granted access. If a religious group requests that a Christmas tree, menorah, or other visible objects be hung, those requests would be subject to the same analysis as an *eruv*. It is easy to see how a visual display might cause visual blight, but an *eruv* is usually unobtrusive and is consequently dissimilar from almost any other request.

Lastly, the Borough failed to offer any evidence that its concern of other groups seeking access was a legitimate one. Although, "the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum,"[282] *eruvs* exist in hundreds of communities across North America. If an *eruv* negatively impacted a city's ability to maintain control over its property, *Tenafly* might have offered an example from another community in which an *eruv* exists and has created problems for maintenance of city property. Instead, the comparisons drawn focused on the negative impact an *eruv* had on a community because of the influx of Orthodox Jews.[283] It is hard to imagine an

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[278] *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167 (3d Cir. 2002).

[279] United States v. Kokinda, 497 U.S. 720, 760-61 (1990) (holding that a ban on solicitation on postal sidewalks was not unreasonable even though other forms of potentially equally disruptive speech were not prohibited).

[280] Arthur Peck Aff. ¶ 2, Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142 (D.N.J. 2001) (No. 00-6051).

[281] If a religion claimed that in order to do a certain ritual, there could not exist any, even figuratively enclosed area, then the requests of the two religions would be mutually exclusive.

[282] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 810 (1985) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 52 (1982)).

[283] *See Tenafly Eruv Ass'n*, 155 F. Supp. at 166 (discussing community members' problems with an *eruv*). Councilman Sullivan made inquires into Palo Alto, which has no *eruv*, and San Diego, but he did not ask any of the communities in New Jersey that have had an *eruv* for numerous

eruv would wreak havoc in Tenafly, where it has not done so in other communities across the country.

Avoidance of controversy could provide a justification under some circumstances, and the lawsuit in *Tenafly* clearly sparked a controversy. A meaningful rational basis review would reveal that the controversy was sparked by community prejudices, rendering controversy an illegitimate reason for restricting activity.[284] Furthermore, there is no evidence to suggest that an *eruv* would disrupt the purpose of the forum.[285]

A city might claim threatened court costs as a "reasonable" reason for restricting speech in a nonpublic forum, and if a group threatens to sue, there will be evidence to demonstrate that an *eruv* will increase costs. Since an *eruv* association could indemnify the group, this reason cannot bar an *eruv*.[286]

Since an *eruv* does not actually interfere with the purpose or use of the forum, and is not incompatible with the purpose of the forum, even when the government defines the purpose, it would fail under an approach, which requires interference with the purpose or use of

years. None of the other council-members made any inquiries into the effect of an *eruv* on a community that has an *eruv*. Pl.'s Reply Mem. of Law at 10, *Tenafly Eruv Ass'n* (No. 00-6051).

[284] Avoiding controversy that would disrupt the workplace is a legitimate reason for restricting speech in a nonpublic forum. *Cornelius*, 473 U.S. at 811. The Court never held that a government can restrict speech in order to avoid controversy that has no adverse impact on the forum at issue. Understanding *Cornelius* to sanction a governmental interest in avoiding any type of controversy contradicts a "bedrock principle underlying the First Amendment," namely that the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). In fact, the principle function of the First Amendment is to invite dispute. *See id.* Since the alleged message conveyed by an *eruv* cannot be displayed in any other fashion, a rule permitting the avoidance of controversy at large would contradict this basic principle by completely banning an *eruv* simply because some members of society find the idea offensive.

[285] In *Cornelius*, the government sought to exclude political groups from its charity campaign, the relevant forum, for federal employees. Campaign workers noted that "extra effort was required to persuade disgruntled employees to contribute" and some "areas reported significant declines in the amount of contributions." *Cornelius*, 473 U.S. at 810. Thus, the controversy surrounding the inclusion of the political groups directly impeded the purpose of the forum, to raise money for charity, and there was evidence in the record that the controversy had that effect. In *Diloreto v. Downey Unified School District Board of Education*, the Ninth Circuit intimated that controversy was a legitimate justification for denying a group access to advertising space on a baseball field fence. 196 F.3d 958, 968 (9th Cir. 1999). However, the government's stated purpose was concern over "disruption" as a result of the potential controversy. *Id.*

[286] The Ninth Circuit held that preventing expensive litigation was reasonable when potential court costs would directly interfere with the purpose of the forum. *Diloreto*, 196 F.3d at 968. If court costs are viewed as a reasonable justification for restricting speech in a public forum, then the relevant question should be whether the imposition of court costs interferes with the purpose of the forum. Utility poles facilitate telecommunication, and were not created as a fundraiser.

the forum. The ultimate purpose of the forum is to facilitate safe and efficient telecommunication. The *eruv* is safe, unobtrusive, and has no negative impact on telecommunication. Additionally, because of its uniqueness, it does not require that the government open its forum to other speakers who might disrupt the forum.[287]

When the government opens the forums to groups, outside of the main purpose of the forum, Justice O'Connor asks whether the restricted activity is incompatible with the "multipurpose forum" at issue.[288] Even though the purpose of utility poles is to facilitate telecommunication, if the government has allowed access to its poles, it has created a multipurpose forum, allowing others to express messages. The question would be whether allowing an *eruv* is incompatible with this multipurpose environment. Since it is clearly not, restrictions would fail.

Under a balancing approach, a restriction on an *eruv* similarly would be unlikely to survive. The balancing approach looks at the competing interests. It looks at the extent to which the speech would interfere with governmental activity and the speech interest involved. Since an *eruv* does not interfere with the use or purpose of the forum, and the government's interests are extremely weak, there are few factors counting in the government's favor. Additionally, the unavailability of alternative means strengthens the plaintiff's interests.[289] In the context of an *eruv*, there are no alternative means.

[287] I have defined this approach as requiring interference with the *purpose* of the forum, in light of the wording of some lower courts, but there is confusion as to what is required by an incompatibility or interference approach. *Grayned* called on courts to look at the "normal activity of the property," which implies that courts look at the uses of the property. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). Another version of the incompatibility test could consider only the primary use of the property. Justice Kennedy proposed that courts look at the uses of the forum and would require that the government, rather than the plaintiff, bear the burden of proving that the speech is incompatible with the purpose of the forum. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 695-704 (1992) (Kennedy, J., concurring) (using incompatibility to determine if a forum is a public forum). Justice O'Connor's wording similarly suggests that the relevant inquiry is the "intended function" of the forum. *Id.* at 691 (O'Connor, J., concurring). If the relevant inquiry focuses on the governmental purposes for the forum, rather than use of the forum alone, there is also a question as to whether all of the stated interests may be considered. A city could state that in addition to facilitating telecommunication, it has an additional purpose of not decreasing funds. If secondary purposes are considered, then some inquiry into the government's justifications is appropriate, requiring evidence that the secondary purpose will be furthered by application of its policy. *See, e.g.*, United Food & Commercial Workers Union v. S.W. Ohio Reg'l Transit Auth., 163 F.3d 341, 358 (6th Cir. 1998).

[288] *Lee*, 505 U.S. at 690 (O'Connor, J., concurring).

[289] *See, e.g.*, Jacobsen v. Rapid City, 128 F.3d 660, 664 (8th Cir. 1997); Multimedia Publ'g v. Greenville-Spautauburg Airport, 991 F.2d 154, 159 (4th Cir. 1993).

After analyzing the reasonableness standard, it is now possible to understand why the free speech claim is more likely to succeed with regard to a geographical enclosure even when it involves the use of public property. Although free exercise might occasionally receive strict scrutiny, while a free speech claim would only need to be reasonable,[290] this would have little effect on the ultimate outcome. In free speech jurisprudence, the default is the reasonableness standard, which demands more than traditional rational basis review. In contrast, the default is minimal or no scrutiny under *Smith*, rendering a plaintiff unlikely to succeed, unless heightened scrutiny is applied.

B. Potential Ways To Bridge the Supreme Court Gaps

This next section focuses on potential ways to bridge the gap between *Smith* and *Lukumi* in light of free speech jurisprudence. I argue that minimal review for laws that are not substantially underinclusive is not a viable approach. Then I discuss strengths and weaknesses of alternative approaches.

Before discussing potential solutions, it is important to keep in mind two competing ideas regarding the purpose of the Free Exercise Clause. In *Smith*, the majority adopted the view that the Free Exercise Clause mandates only formal equality.[291] Thus, the analysis in *Smith* and *Lukumi* is designed to determine when a law targets religion.[292] A competing view recognizes that because religious groups are not similarly situated with regard to their religious obligations, laws that correspond to the majority's needs do not respect the needs of minority groups. Therefore, substantive equality, which considers differences among groups, is preferable.[293]

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[290] This would be true if, under a broad interpretation of the *Sherbert* exception, a law receives strict scrutiny. Under the Free Speech Clause, such a law would still be subject to the reasonableness standard.

[291] Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (noting that the disadvantaging of minority religions is an "unavoidable consequence" of democratic government).

[292] *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534-35 (1992).

[293] *See Smith*, 494 U.S. at 902 (O'Connor, J., concurring) (adopting this view). *See also* Brownstein, *supra* note 33, at 840; Christopher Eisgruber & Lawrence Sager, *Mediating Institutions: Beyond the Public/Private Distinction: The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1285 (1994) (arguing that states must treat religiously inspired concerns of minority religious groups with the same regard as that enjoyed by concerns of citizens generally).

1. *Generally Applicable Unless Substantially Underinclusive*

Looking carefully at cases involving an *eruv* demonstrates the problems in applying strict scrutiny only to laws that are substantially underinclusive, but no or minimal scrutiny to all other laws. Given both that the reasonableness standard appears to be more exacting than rational basis review[294] and that for a law not to be generally applicable, it must be substantially underinclusive—a large inconsistency between free speech and free exercise results. Where, for example, a land use ordinance bans all uses of governmental property and has denied all requests for use, except the use of orange ribbons, applying a reasonableness analysis would lead to invalidation, while applying rational basis review or no review would not.[295]

As I mentioned, there are several reasons why this inconsistency matters. From a practical perspective, affording more protection to free speech than free exercise encourages litigants to define religious exercise as speech, increasing the complexity of litigation. Moreover, interpreting *Smith* and *Lukumi* narrowly, according free exercise less protection than free speech, strips religious exercise of its status as a fundamental right.[296] Under such a view, religion is protected only insofar as it can be protected under the Free Speech and Equal Protection Clauses, rendering the Free Exercise Clause nearly redundant.[297]

Most importantly, in *Smith* and *Lukumi*, the Court adopted a requirement of formal, rather than substantive equality. However, by exempting a large category of laws from any form of meaningful scrutiny, the *Smith-Lukumi* framework, interpreted this way, fails to effectuate even formal equality. Allowing a governmental body to hide behind hypothetical reasons strips courts of a potentially useful tool to determine the ultimate inquiry clearly set forth in *Lukumi*: whether "the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious

[294] The Supreme Court itself appears to understand the reasonableness analysis to be more exacting than traditional rational basis review. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 685-93 (1992) (O'Connor, J., concurring). In the aftermath of *Lee*, most lower courts seem to understand the reasonableness test as some form of less deferential scrutiny than mere rational basis review. *See infra* Part III.B.4.

[295] *See supra* Part II.C.4.

[296] *See* Gedicks, *supra* note 232, at 927-28.

[297] Daniel O. Conkle, *The Free Exercise Clause, How Redundant and Why?*, 33 LOY. U. CHI. L.J. 95, 115 (2001) (arguing that although not entirely redundant, the Free Exercise Clause has limited doctrinal significance); Mark Tushnet, *The Redundant Free Exercise Clause*, 33 LOY. U. CHI. L.J. 71, 72 (2001) (arguing that contemporary constitutional doctrine may render the Free Exercise Clause redundant).

reasons."[298] In *Lukumi*, the Court noted that the Free Exercise Clause protects against governmental hostility which is "masked as well as overt."[299] Therefore, historical background, legislative or administrative history, and the effect of a law in operation are simply forms of evidence to determine whether a law targets religion.[300] Courts should not foreclose a useful tool for disclosing when a law targets religion by barring meaningful review in cases not nearly as extreme as *Lukumi*.

Both the need for, and efficacy of looking into governmental reasons is especially true in the context of an *eruv* since discrimination within city councils "lurks behind . . . vague and universally applicable reasons."[301] This need is particularly important where a law is new or is not widely used. Suppose only two groups applied for access to utility poles prior to the request for an *eruv*. One proposed use, more obtrusive than an *eruv*, was denied. Another minimally obtrusive request was granted. Under a narrow reading of *Lukumi*, the law does not target religion because it has been invoked to disallow fifty percent of those who have requested access. However, the fact that the law does not target religion does not mean that the ordinance's application to an *eruv* was not discriminatory.

In *Lukumi*, the Court noted that its equal protection cases provide guidance in determining whether a law is neutral.[302] Equal Protection doctrine allows a court to determine a city's objective from both direct and circumstantial evidence.[303] Some type of analysis, involving at a minimum an inquiry into the government's justifications, can reveal circumstantial evidence of discrimination. In *Cleburne Living Center*, the Court looked at the city's reasons and concluded that the denial was based on an "irrational prejudice."[304] Even if other groups are subject to a law, looking into the reasons for a given ordinance might disclose that an ordinance's application is similarly based on an "irrational prejudice," and thus, the law may discriminate against religion. As discussed earlier, on its surface, opposing an *eruv* because of constituents' concerns appears legitimate. Without further scrutiny, this might succeed. In reality, Councilman Sullivan's statement that he based his decision on his constituents' concerns is tantamount to saying that he based his decisions on the negative atti-

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[298] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

[299] *Id.* at 534.

[300] *Id.* at 540.

[301] 146 CONG. REC. S7774 (2000).

[302] *Lukumi*, 508 U.S. at 540.

[303] *Id.*

[304] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985).

tudes and unsubstantiated fear of community members, an action the Supreme Court expressly condemned. In short, applying no review or traditional rational basis review blocks off an avenue of uncovering circumstantial evidence of when a law targets religion.

2. *Any Underinclusion is Evidence of Discrimination*

The underinclusive analysis employed by the Third Circuit to minimize the gap between *Smith* and *Lukumi* is a viable alternative. Although the approach suggested in the Third Circuit is described as two steps, in most cases, both steps collapse into one. First, there is the analysis for general applicability. As employed, a court looks at whether the religious use undermines the purpose of the ordinance any more than secular exemptions to the ordinance. If it does not, a heightened level of scrutiny applies. If the secular exemptions similarly undermine the purpose of the ordinance, the existence of those exemptions will likely impugn the government's interest, and the ordinance is likely to fail.

In *Lukumi,* the Court noted that there are "many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct."[305] Thus, both the legislative history and substantial underinclusiveness of the ordinance constituted "strong evidence"[306] that the law's object was to suppress religious conduct. Similarly, underinclusiveness, even when not substantial, can be used as evidence of discrimination.

The former Tenafly Borough attorney, Walter Lesnevich, criticized the approach adopted by the Third Circuit. He commented that the Third Circuit's decision "is very difficult for municipal law all over New Jersey. It says if you don't enforce an ordinance 100 percent, you can never enforce it against a religious group."[307] First, he misstated the rule. A municipality would be permitted to enforce an ordinance against a religious group if the religious group's proposed use undermined the purpose of the ordinance more than allowed uses.

Although this approach does place a burden on municipalities to uniformly enforce its ordinances or suffer the consequences, such a burden is not new to constitutional analysis of discrimination. Equal

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[305] *Lukumi,* 508 U.S. at 533.

[306] *See id.* at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

[307] Charles Toutant, *Removal of 'Eruv' Markings May Violate Religious Freedom,* THE LEGAL INTELLIGENCER, Oct. 29, 2002, at 3.

protection doctrine requires that similarly situated people be treated similarly.[308] The underinclusiveness approach propounded above demands no more.

The more difficult question that arises under this approach is not whether the government should be required to enforce its ordinance against similar uses, but as a factual matter determining when a government has in fact failed to do so. The district court in *Tenafly* noted that "the Court lack[ed] sufficient information to conclude that (1) the Borough was aware the ribbons existed, and (2) that the Borough at least tacitly approved of their private maintenance in the right-of-way."[309] If the underinclusive analysis is to be used in all cases, then what constitutes incomplete enforcement should be limited. Without proof that government officials knew, or at least reasonably should have known of allowed uses, incomplete enforcement cannot be deemed evidence of discrimination. Thus, if the borough truly did not know about the orange ribbons, orange ribbons cannot be deemed as evidence of selective enforcement.

Similarly, it would not be fair to infer that a municipality selectively enforced an ordinance from individual actions of non-policy making officers. Suppose the government requires photo identification in all governmental buildings in a certain city and five hundred security guards work at different shifts at the various entrances to the governmental buildings. According to the reasoning in Lesnevich's complaint, if one of these security guards exempts people because they need to use a restroom,[310] then the government should not be entitled to enforce the regulation against religious observers who claim that it is against their religion to be photographed.[311] Once it is established that the religious reason did not undermine the government's purpose any more than the exempted reason, the next question would be whether the government was aware of the exemptions, and if so, what it did to stop them. If the government is willing to al-

[308] *See* Johnson v. Robison, 415 U.S. 361, 374-75 (1974) (noting that under the Equal Protection Clause, "all persons similarly circumstanced shall be treated alike") (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)); *cf.* Clements v. Fashing, 457 U.S. 957, 962-63 (1982) ("The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people differently.").

[309] Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142, 177 (D.N.J. 2001); *but see* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167 n.28 (3d Cir. 2002) ("[T]here is ample evidence in the record showing that orange ribbons were attached to the Borough's utility poles for a 'lengthy period of time' and that Borough officials knew about them but made no effort to remove them.").

[310] I chose this reason because it would stand in the same relationship to the government's ultimate interest in security as would a request for a religious exemption.

[311] *See* Toutant, *supra* note 307.

low a guard to continually relax the requirement to allow people to use the restroom, it cannot claim that it has a serious security interest in not relaxing its identification requirement for religious reasons, and therefore, applying the selective enforcement analysis would not place too harsh a burden on the government. In contrast, if the government repeatedly indicated that exceptions were not permitted, even if an individual guard made an exception, the governmental entity in control should not be deemed to have selectively enforced an ordinance.

The suggestion that liability could be imposed because of every exemption also belies the ultimate purpose of the underinclusive analysis. Ultimately, the question is whether the failure to uniformly enforce a law shows discrimination. The inquiry of incomplete enforcement in *Tenafly* operated as strong evidence of discrimination because the decision to allow or disallow uses of governmental property was made by a centralized governmental body, which the Third Circuit concluded tacitly approved of other uses.[312]

In short, selective enforcement (however substantial or insubstantial), legislative text, and legislative history could be used as evidence of discrimination. Given the difficulty in proving discrimination, one form of an underinclusion analysis argues that a plaintiff should be entitled to prove a prima facie case of discrimination, allowing an inference of discrimination from a borough's selective enforcement. The defendant should be entitled to rebut this evidence by proving that its actions were somehow not discriminatory. Ultimately, however, the question for the fact-finder would always remain whether the object of the law was to suppress religion.[313] Since it is difficult to establish discrimination by governmental bodies, using selective enforcement as evidence of discrimination could be a powerful tool to eradicate any type of decision-making that would devalue religious justifications.

One advantage of using underinclusion or selective enforcement as evidence of discrimination is that it has the potential to protect re-

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[312] *Tenafly*, 309 F.3d 167 n.28 (noting that the Borough officials knew of other uses).

[313] This approach is similar to the approach used to analyze employment discrimination cases under Title VII. In that context, employees in a protected class are entitled to make out a prima facie case by showing that they were treated differently from members of an unprotected class because of their memberships in the protected class. This circumstantial evidence leads to an inference of discrimination. The burden of production then shifts to the employer to articulate a legitimate nondiscriminatory reason. If the employer articulates a legitimate nondiscriminatory reason, the burden of production shifts back to the plaintiff to show that the defendant's proffered reason was pretextual. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

ligion from any form of discriminatory treatment, and thus, ensures formal equality.[314] Another advantage is that it fits within the existing framework of *Smith* and *Lukumi*, both doctrinally and theoretically. It would also offer a solution to free exercise doctrine that arises not simply in the context of using governmental property in a limited public or nonpublic forum as the reasonableness analysis is designed to do, but would provide a rule for analyzing all free exercise cases.

One difficulty that arises, in addition to the detailed factual inquiry on when a law is selectively enforced, is that the test for free exercise would be sufficiently different to once again encourage litigants to classify religious exercise as speech. In particular, the consideration of alternative means in the speech context would provide incentives for religious claimants to resort to free speech.

Lastly, it protects only formal equality. Therefore, even if a large burden falls disproportionately on a particular religious group, as long as a law was not meant to target religion and was not selectively enforced, it would be valid. Given religious differences, formal equality "virtually insures disparity of treatment since people of different interests will be treated the same."[315] Thus, a law that mandates public school attendance on Saturday for a legitimate reason is facially neutral and may satisfy the formal equality demanded by both readings of *Lukumi* discussed above.[316]

3. *Compelling Interest Test*

Prior to *Smith*, laws that placed substantial burdens on sincerely held religious beliefs were only valid if narrowly tailored to a compelling governmental interest.[317] Some Justices would have used the compelling interest test in *Smith*.[318] Members of Congress also tried to institute a compelling interest test through the Religious Freedom

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[314] If the government is allowed to define its purposes broadly, and there is no scrutiny of governmental objectives, then even this approach may not protect religious liberty because a law could arguably not be underinclusive with respect to the government's broader objectives.

[315] Brownstein, *supra* note 33, at 840.

[316] Professors Eisgruber and Sager propose that religion be treated with equal regard. One factor courts should consider is whether a law would have been enacted if the majority shared the minority's religious belief or whether the religious claimant would have been exempted had the minority's belief been shared by the majority. *See* Eisgruber & Sager, *supra* note 293, at 1285. Applied to an *eruv*, the principle of equal regard would demand an analysis of how lawmakers would have acted had the majority shared the belief that carrying on the Sabbath was prohibited.

[317] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402-03 (1943) (arguing that government's need for public safety must be greater than religious rights at issue).

[318] *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).

Restoration Act.[319] Most recently, RLUIPA instituted a test similar to the compelling interest test of *Sherbert v. Verner*.[320] RLUIPA prohibited the government from placing a "substantial burden on the religious exercise of a person . . . unless . . . it is the least restrictive means of furthering a compelling governmental interest."[321] Many states have also enacted state RFRA's with a similar compelling interest test.

In contrast to the test set forth in *Smith-Lukumi*, the compelling interest test recognizes the requirement of substantive equality. In Justice O'Connor's concurrence in *Smith*, she stated that "[t]he compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position."[322] A nondiscrimination principle reflects the same values as the Equal Protection Clause, and the Supreme Court has "recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause."[323]

This compelling interest test as stated above is problematic for several reasons. First, courts are not qualified to inquire into the centrality of a religious practice or into the substantiality of the burden. In rejecting the compelling interest test, the Supreme Court noted:

> It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith?[324]

The inability of courts to evaluate the substantiality of a religious burden on religious groups leads to what is most problematic about the compelling interest test approach. Since courts can simply determine that a law does not place a substantial burden on religious practice, the compelling interest test did not always live up to its promise of protecting religion.[325] In the case of zoning ordinances, for example, some courts found that zoning restrictions placed no

[319] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

[320] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000).

[321] *Id.*

[322] *Smith*, 494 U.S. at 895 (O'Connor, J., concurring).

[323] *Id.* at 901.

[324] *Id.* at 887.

[325] *See* Robert W. Tuttle, 68 GEO. WASH. L. REV. 861, 871 (2000) ("Despite the robust language of *Sherbert* and *Wisconsin v. Yoder*, the compelling interest test never lived up to its promise in the zoning context.").

burden on the religious community, and then applied traditional rational basis review to the zoning ordinance.[326]

Additionally, the Court of Appeals for the Third Circuit noted that a substantial burden requirement "would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment."[327] The danger of imposing a substantial burden requirement is clear from a case involving an *eruv*. The Borough of Tenafly argued that denying permission for an *eruv* did not place a substantial burden on Orthodox Jews.[328] If a court determined that absence of an *eruv* did not substantially burden religious practice, a city would be free to deny Orthodox Jews access to its poles (under the Free Exercise Clause), even if it permitted numerous other groups to use them. Thus, imposing a substantial burden threshold before conducting any type of meaningful review allows discrimination, as long as the discrimination does not impose a substantial burden.

Lastly, the compelling interest test might minimize protection for religious groups because of Establishment Clause concerns. Since preferring religious speech over nonreligious speech constitutes a violation of the Establishment Clause and the Free Speech Clause, the compelling interest test could never give protection to religious activity that constitutes speech if this standard is truly more exacting than the one applied in the free speech context. A government would always have a compelling interest in complying with the free speech or Establishment Clause for not granting an exemption for religious institutions.[329] In short, the compelling interest test can be reduced to the following: Laws that, in the mind of those not familiar with the religious practice, place a substantial burden on religious practice, which is not also speech, must be justified by a compelling interest. All other religious exercise claims would receive merely rational basis review and would be likely to fail. Thus, the compelling interest fails to provide formal equality to cases where there is discrimination, but no substantial burden, but provides substantive

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[326] *Id.*

[327] Brown v. Borough of Mahaffey, 35 F.3d 846, 849-50 (3d Cir. 1994).

[328] Br. for Appellees at 65, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (No. 01-3301).

[329] *See* Brownstein, *supra* note 111, at 627 ("RFRA cannot provide special protection to material because of its religious content; to do so would violate the Establishment Clause and discriminates based on the content of the material (violating the Free Speech Clause)."); Volokh, *supra* note 91, at 614-15 (discussing how one distinguishes speech from non-speech in this context).

equality to a small class of cases that meet the substantial burden requirement.

4. *Reasonableness Tests from Free Speech Analogue*

Until now I have discussed three approaches: one that recognizes that a law is not generally applicable only when it is substantially underinclusive, one that deems a law not generally applicable when its enforcement is underinclusive, and one that requires that a substantial burden be justified by a compelling interest. The first two fit within the Supreme Court's jurisprudence, and the last has its root in the Supreme Court's pre-*Smith* cases. This next section will discuss how the different interpretations of the reasonableness standard used in free speech doctrine (with regard to a limited or nonpublic forum) would work in the free exercise context.

Mandating inquiry into the government's purported justifications, as some lower courts have done to determine reasonableness in the free speech context and the Supreme Court did in *Cleburne Living Center* in the equal protection context,[330] would better serve the function of providing formal equality. It would prevent more discrimination by not allowing governments to hide behind universally applicable reasons when those reasons do not clearly fulfill a legitimate governmental need. It also does not thwart a government's ability to fulfill its goals. If a governmental body cannot point to at least some evidence that a regulation or its application of a regulation serves a legitimate need, then it can hardly claim an interest in enforcing a regulation. Thus, the standard gives government flexibility to enforce ordinances, while providing a court with another way to reach its ultimate goal of determining when in fact discrimination has occurred.

If the Court maintains the basic principle of *Smith*, some form of meaningful rational basis review must replace the default minimal scrutiny for laws that are deemed neutral or generally applicable if religious exercise is to receive any protection. However, abandoning *Smith* and using meaningful rational basis review is not sufficient.

In order to fully minimize the inconsistency in both analysis and result, between free speech and free exercise cases, there would need to be two standards for free exercise claims. The meaningful rational basis review would govern free exercise claims that arise involving the use of governmental property that would be deemed a nonpublic or

[330] City of Cleburne v. Cleburne Living Ctr., Inc., 472 U.S. 432, 448 (1985).

limited public forum, and a stricter standard would govern free exercise claims that implicate laws concerning the use of private property and governmental property traditionally open to the public. The different standards would be necessary because a law burdening incidental restrictions on speech on private property or in a public forum would need to be: "(1) narrowly tailored to serve a significant governmental interest, and (2) leave open ample alternative channels of communication."[331] Since the latter standard, and in particular, the alternative means requirement, would result in more frequent invalidation than merely requiring evidence of a legitimate justification, religious exercise claimants would still have a better claim under the Free Speech Clause when challenging a law in a public forum or on private property. If two standards were used, however, a free exercise claim that involved the use of public property would import the widely criticized and blurry lines of the forum analysis into free exercise jurisprudence.[332]

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[331] Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 469 (8th Cir. 1991). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (using the standard quoted above to uphold regulation on volume of amplified music in an area of New York's Central Park); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984) (using this standard to uphold ban on sleeping in certain areas of public park).

[332] Members of the Court have criticized the public forum doctrine. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 694 (1992) (Kennedy, J., concurring) ("The Court's public forum analysis in these cases is inconsistent with the values underlying . . . . the First Amendment."); United States v. Kokinda, 497 U.S. 720, 740 (1990) (Brennan, J., dissenting) (noting that public forum analysis obfuscates rather than clarifies issues at hand); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting):

> The Court's analysis transforms the First Amendment into a mere ban on viewpoint censorship, ignores the principles underlying the public forum doctrine, flies in the face of the decisions in which the Court has identified property as a limited public forum, and empties the limited public forum concept of all its meaning.

Scholars have also criticized the public forum doctrine. *See, e.g.*, David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 186 (1992); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110-11 (1986) (arguing in favor of a balancing approach, instead of rigid categories); Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1557 (1998) (discussing confusion created by doctrine); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 310 (1999) ("The Court's doctrine is crude, historically ossified, and seemingly unconnected to any thematic view of the free expression guarantee"); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (discussing different approaches); Edward J. Neveril, Comment, *"Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery*, 90 NW. U. L. REV. 1185, 1192 (1996) (arguing against categorical approach); David A. Stoll, Comment, *Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine: International Society for Krishna Consciousness, Inc. v. Lee*, 59 BROOK. L. REV. 1271, 1313-14 (1992) ("[T]he doctrine has reached such a point of disarray that it fails to offer guidance.").

Additionally, this type of review might be too deferential.[333] Using the same analysis for free speech and free exercise claims would be useful to minimize incentives to define religious exercise as speech. However, in many cases the restriction on religious exercise would be more severe than an incidental restriction on free speech. Disallowing an *eruv* prevents some Orthodox Jews from leaving their houses on the Sabbath. Similarly, a person who feels a religious duty not to let photographs be taken would be completely barred from entering a governmental building that required photo identification.[334] In contrast, bans on newspaper stands, solicitation and governmental displays in a particular area do not pose similarly substantial burdens primarily because of the availability of alternative means. Therefore, a more scrutinizing approach to incidental burdens on free exercise may be necessary.

Tenafly Eruv Association, therefore, is perhaps not a good test case for meaningful rational basis review because there is no evidence that disallowing plastic strips on utility poles actually furthers *any* legitimate governmental interest.[335] Yet, there are some cases where looking into the legitimacy of the government's justification would not uncover covert discrimination because the law is formally neutral; yet, the burden placed on the individual is sufficiently large that perhaps a standard that demands substantive equality, given religious differences, is more appropriate.

The incompatibility test, also employed to determine reasonableness, may also not be sufficient alone to protect religious exercise. Some noted that the incompatibility test did not protect free speech because "it depends on the government's own definition of the proper uses of a forum and provides no mechanism for judicial scrutiny of the government's choices."[336] Professor Steven Gey calls it a hopeless task to prove that speech is not incompatible with the pur-

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[333] *See* Volokh, *supra* note 91, at 656.

[334] *See id.* at 657 (discussing the photograph example).

[335] Professor Volokh proposes the following test case for some sort of meaningful rational basis review: an orthodox Jew challenges the placement of an electric gate at a public housing facility because Orthodox Jews cannot activate an electric gate on the Sabbath. There are many legitimate reasons for wanting an electric gate that do not implicate discrimination. There might also be legitimate reasons for not accommodating Orthodox Jews. The city might fear that it will compromise security if it gives Orthodox Jews a key to a secret back door or there may not be room to have both an electric and non-electric door. Yet, since other people are allowed access to the public building, and only Orthodox Jews are excluded, perhaps a higher standard of scrutiny would be desirable. *See id.* at 656-57.

[336] Gey, *supra* note 332, at 1561.

pose of the forum, as described by the government.[337] In cases like *Tenafly Eruv Association,* there is no conceivable way that replacing one set of plastic strips with another can be held to be incompatible with the purpose of the utility poles or with the use of utility poles for its intended purpose. In the photo identification example, however, the government would argue that allowing individuals to enter without photo identification compromises its security interests, and is, therefore, incompatible with the purpose of its forum, to provide safe governmental services. Aside from its potential for restricting free speech or free exercise if the government's asserted purposes are given complete deference, the incompatibility test would also import the widely criticized forum analysis to free exercise law.

Of the free speech analogues in the reasonableness realm, the balancing approach appears to be the best option. Applied to the free exercise context, courts would be required to look at the competing interests of the government and the burdened individual. This would entail an analysis of the nature of the forum at issue, the extent to which the proposed use would interfere with the government's purposes in restricting religious exercise, and the alternative means available of religious exercise.[338] As many have noted, the alternative means prong does not have an easy analogue in free exercise jurisprudence.[339] Alternative means of religious exercise are often not available,[340] but using the alternative means test flexibly as one factor in an analysis does, not unduly restrict the government.[341]

One advantage of this flexible approach is that it focuses the court's analysis on factors, which unlike the centrality of a religious practice, it is qualified to analyze, leading to a potentially more favorable result for religious liberty than even the compelling interest test. However, Professor Gedicks noted that the alternative means test in

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[337] *Id. See* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); *see also Lee,* 505 U.S. at 689 (O'Connor, J., concurring) (noting that face to face solicitation is incompatible with the airport's functionality). Justice O'Connor's formulation of the ultimate inquiry under the compelling interest test and her formulation of the incompatibility test resemble each other. *See* Employment Div. v. Smith, 494 U.S. 872, 905 (1990) (O'Connor, J., concurring) ("[T]he critical question in this case is whether exempting respondents from the State's general criminal prohibition will unduly interfere with the fulfillment of a governmental interest.").

[338] *See* Stoll, *supra* note 332, at 1314 (advocating a balancing approach for the Supreme Court that requires courts to look at the nature of the forum and the competing governmental and speech interests simultaneously).

[339] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights,* 109 HARV. L. REV. 1176, 1217 (1996); Gedicks, *supra* note 130, at 92.

[340] *See* Gedicks, *supra* note 232, at 937.

[341] *See* Dorf, *supra* note 339, at 1217 (arguing that the alternative means prong should be used flexibly in a free exercise context).

the free exercise context, requires that "a court determine whether the alternative satisfies the religious obligation that otherwise would have been met by the burdened practice. This, in turn, would require the inquiry into the claimant's religious beliefs that was condemned by *Smith*."[342] However, in many cases, determining whether there are alternative means does not entail an analysis of the particular religion, but of external factors.[343] Furthermore, even when it does require inquiry into religious practice, the determination may not be as controversial.[344] For example, whether an *eruv* poses a substantial burden on a religious practice would be controversial. Whether there were alternative means of the allegedly burdened practice would be a simple determination given the uncontroversial belief that Orthodox Jews may not carry objects on most streets on Sabbath without an *eruv*.

If the Court shifts away from the categorical approach in free speech jurisprudence, then the balancing approach would harmonize free speech and free exercise jurisprudence.[345] If the Court adheres to its categorical approach in free speech jurisprudence, but adopts the balancing approach for all free exercise claims, there would be a discrepancy between the analysis for laws burdening speech in what would be considered a public forum and laws burdening religion. A similar problem arises when one considers whether this standard should be used only in the context of governmental property or whether it should be applied to all free exercise claims. If it is applied to all free exercise claims, free speech still is arguably given more protection than free exercise.

Despite this discrepancy in analysis, there is less likely to be a discrepancy in result because the balancing approach has the potential for according more protection to free speech than even the compelling interest test. This would be especially true if the balancing test used meaningful rational basis review and selective enforcement in

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[342] Gedicks, *supra* note 232 , at 947-48.

[343] *See id.* at 948.

[344] *Id.*

[345] Although suggesting a reform of free speech law is beyond the scope of this comment, justices and scholars have argued in favor of a less categorical approach in free speech jurisprudence. *See* C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 110-11 (1986) (arguing in favor of a balancing approach, instead of rigid categories); David A. Stoll, *Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine: International Society for Krishna Consciousness, Inc. v. Lee*, 59 BROOK. L. REV. 1271, 1321-22 (1992) (recommending an objective balancing approach in place of the Court's current public forum doctrine). *See also* Chi. Acorn Metro. Pier & Exposition Auth., 150 F.3d 695, 703 (7th Cir. 1998) (understanding Justice O'Connor's approach in *Lee* to have adopted a standard versus a rule or categories).

order to more accurately assess the strength of governmental interests in its ordinances and application of its ordinances. Evidence proving the legitimacy of a policy and its application strengthens governmental interests. Lack of evidence weakens governmental interests. Similarly, to the extent that an ordinance is selectively enforced, it may weaken the government's interests. Lack of alternative means strengthens the claimant's interests, and availability of alternative means weakens them.

This approach might be appropriate for all free exercise claims because it focuses the court's attention on objective factors, thereby leaving less room for judicial discretion. Yet, it gives the government the flexibility it needs to pass legislation, without allowing any one factor to necessarily invalidate a law. Additionally, Establishment Clause concerns that arise with the compelling interest test will not result if free speech is treated similarly. Lastly, the alternative means prong appears to recognize more than a formal equality interest. It would require a government to recognize that in some cases even though there is no discrimination, the lack of alternative means requires the government to act differently because the right at issue deserves protection, not just from discrimination, but as an independent right.

5. *Summary*

Although I have outlined different approaches separately, in practice, many overlap. An underinclusive analysis is often used in order to determine the reasonableness of the government's justifications. In Justice O'Connor's opinion in *Lee*, she looks at the effect of leafleting compared to the effect of other activities allowed in the airport.[346] In the Sixth Circuit, which required interference, the question ultimately became, whether the use sought to be excluded interfered with the purpose of the forum *any more* than uses already permitted.[347] Similarly, as suggested above, under a balancing approach, some examination into the government's justifications and selective enforcement would play a significant role in objectifying the analysis.

I outlined the approaches separately to try and isolate the different factors and strands that might play a determinative role, but in fashioning an ultimate solution to the quagmire that currently exists,

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[346] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 690-92 (1992) (O'Connor, J., concurring).

[347] *See* United Food & Commercial Workers Union Local 1099 v. S.W. Ohio Reg'l Transit Auth., 163 F.3d 341, 349-55 (6th Cir. 1998).

it may be that strands of these approaches should be combined. At an absolute minimum, however, some type of meaningful rational basis review into the government's purported justification for the application of its ordinance is required as a default in place of minimal or no scrutiny if the Free Exercise Clause is meant to protect against religious discrimination.

6. *Statutory Considerations*

Although a full discussion of the constitutionality and application of congressional acts protecting religion is beyond the scope of this article, their application to the immediate case is worth mentioning. In the aftermath of *Boerne v. Flores*, striking down the Religious Freedom Restoration Act as applied to the states, many state legislatures adopted state RFRA's with similar standards to the compelling interest test of *Sherbert v. Verner.* Although I addressed some problems with the substantial burden requirement that often serves as a threshold for the application of the compelling interest standard, if a state RFRA existed, an *eruv* association could claim that its members cannot attend synagogue without an *eruv* on the Sabbath, constituting a substantial burden, and since there is no compelling interest for not granting permission to erect the geographical structure or to grant permission for an *eruv*, a litigant would automatically win. If courts interpret *Lukumi* narrowly, then state RFRAs would become the only way, outside of land use cases, to protect against religious discrimination claims.

I have also mentioned RLUIPA several times mainly because the reasons for its enactment are instructive. A claimant seeking to erect an *eruv* might be able to sue under RLUIPA. The adoption of the Act is particularly relevant to an *eruv* because the Act was adopted in order to counter the discriminatory effects of ad-hoc decision-making of city councils and boards. A similar type of ad-hoc decision-making is capable of occurring, and appears to be happening with regard to *eruvs*. The record demonstrated "a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any case."[348] Assuming this law can withstand constitutional scrutiny, it is possible that the laws governing utility poles are

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[348] 146 CONG. REC. S7774 (daily ed. July 27, 2000) (statements of Sen. Hatch & Sen. Kennedy).

subsumed under the Act, and would therefore, fail for all the reasons already discussed.[349]

CONCLUSION

In this comment, I have tried to show that an *eruv* demonstrates the holes in First Amendment jurisprudence. With respect to the Establishment Clause, the Court must establish the primacy of a single test for violations. An *eruv* demonstrates the need for a more predictable test to establish violations of the Establishment Clause. It also shows the advantages of Justice Brennan's tripartite permissible accommodation analysis because of its predictability and consistency with the underlying goal of securing personal autonomy with respect to religious choices in contrast to the endorsement test, incapable of producing conformity in the law, and the prediction of a particular result. With regard to free exercise challenges, *Tenafly Eruv Association* in particular would require the Supreme Court to explain its concept of general applicability and the meaning of "individualized exemptions" and hybrid exceptions that confuse the lower courts. I have tried to demonstrate how looking at an *eruv* as speech helps evaluate future approaches to the Free Exercise Clause that harmonize free speech and free exercise jurisprudence. I have argued that traditional rational basis review, and a rule that applies a compelling interest test only when the government substantially burdens religion will leave much religious exercise unprotected. Consequently, courts should require that some evidence indicate the legitimacy of the government's objectives. Additionally, I have discussed how using selective enforcement as evidence of discrimination could be a helpful tool in furthering formal equality. Lastly, I have proposed that a balancing approach that looks mainly at objective factors to determine both the government's and the individuals' interests, and then weighs the competing interests, could be applied to all free exercise cases and could prove in practice to be even more protective of religious liberty than the compelling interest standard.

Should the Supreme Court decide to grant certiorari, it should conclusively determine which test it will use to determine Establishment Clause challenges, and it should articulate a free exercise standard that, at a minimum, protects against religious discrimination.

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[349] Even if the law is upheld, there would be a question raised as to whether the evidence of discrimination that was demonstrated is sufficiently related to the type of discrimination involved in an *eruv* case to allow congress's enforcement power to extend to case of discrimination against an *eruv*. A complete discussion of this topic is beyond the scope of this comment.