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DOES *CUTTER V. WILKINSON* CHANGE THE ANALYSIS OF MANDATED DUI TREATMENT PROGRAMS?: A CRITICAL RESPONSE

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In the previous issue of the *University of Maryland Law Journal of Race, Religion, Gender and Class*, Professors Morris Jenkins, Brandene Moore and Eric Lambert of the University of Toledo, along with Professor Alan Clarke of the Utah Valley State College (A.A. proponents), argued that mandatory attendance in Alcoholics Anonymous (A.A.) as a condition for probation or incarceration did not violate the First Amendment,[1] despite A.A.'s "somewhat religious" nature, given A.A.'s unique effectiveness in treating alcoholism and the strong societal interest against negative alcohol-related conduct.[2] Further, the A.A. proponents argued that the prospect for mandatory A.A. attendance, in the face of a First Amendment challenge, improved significantly following the Supreme Court's decision in *Cutter v. Wilkinson*,[3] given the Court's supposedly less restrictive view of the Establishment Clause[4] in that case. By understating the context of *Cutter*, however, the A.A. proponents have argued for a relaxation of the Establishment Clause that is not related to the accommodation of the individual rights guaranteed by the Free Exercise Clause.[5] In other words, they have staked a position that is not supported by *Cutter*, and that would violate traditional American notions regarding the separation of church and state. State-mandated participation in A.A., a program with strong religious themes, violates the First Amendment's requirement of government neutrality towards religion because it imposes unjustified burdens on the Free Exercise rights of non-believers.

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1. U.S. CONST. amend I.

2. *See* Morris Jenkins et al., *DUI Treatment Programs and Religious Freedom: Does Cutter v. Wilkinson Change the Analysis?*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 351 (2005).

3. 125 S. Ct. 2113 (2005) (unanimously upholding the constitutionality of a provision of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2000), which imposed a strict scrutiny requirement upon government actions that substantially burden the religious exercise of state prisoners).

4. U.S. CONST. amend I.

5. *Id.*

I. THE CASE

The petitioners in *Cutter v. Wilkinson*, current and former prisoners of the Ohio penal system, claimed membership in several "'nonmainstream' religions."[6] They filed separate complaints against the respondents, officials of the Ohio Department of Rehabilitation and Correction, claiming that the prison officials had "failed to accommodate their religious exercise"[7] in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA).[8] The prison officials responded with a facial challenge of the constitutionality of the institutionalized-persons provision of RLUIPA, claiming that it violated the Establishment Clause of the First Amendment by improperly advancing religion.[9] In order to issue a single ruling on the prison officials' motion to dismiss, the individual cases were consolidated.[10]

The United States District Court for the Southern District of Ohio denied the motion to dismiss, holding that the institutionalized-persons provision of RLUIPA did not violate the Establishment Clause.[11] The court interpreted the Supreme Court's Establishment Clause precedents as supporting the use of government action to accommodate religion, even where the First Amendment did not compel such action.[12] The court thus concluded that the institutionalized-persons provision of RLUIPA did not violate the Establishment Clause, noting that a "decision to lift burdens on the

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6. 125 S. Ct. 2113, 2116-17 (2005) (the petitioners' religions included: Satanist, Wicca, Asatru, and Church of Jesus Christ Christian).

7. The petitioners claimed that the respondent failed to accommodate their religious exercise by

> retaliating and discriminating against them for exercising their nontraditional faiths, denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith.

Id. at 2117 (quoting Brief for the United States 5).

8. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2000).

9. *Id.*

10. Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 829 (S.D. Ohio 2002).

11. *Id.* at 832.

12. *Id.* (citing Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987)) (noting that the Court has found government accommodations of religious exercise valid in relation to the Establishment Clause even where the Free Exercise Clause did not compel such accommodation).

free exercise of religion is not tantamount to government endorsement of either a particular religion or religion in general."[13]

The Sixth Circuit Court of Appeals reversed, holding that the institutionalized-persons provision of RLUIPA unconstitutionally advanced religious rights without a showing that those rights were "at any greater danger of deprivation in prison than [were] other fundamental rights."[14] The court stressed the Establishment Clause's requirement of neutrality, noting that it prohibited government from "either endorsing a particular religion or promoting religion generally."[15] The court then applied the three-prong *Lemon* test,[16] finding that the institutionalized-persons provision of RLUIPA failed the first two prongs because (1) it did not have an underlying secular purpose and (2) its effects included the advancement of religion.[17] The Supreme Court subsequently granted certiorari to determine whether the institutionalized-persons provision of RLUIPA violated the Establishment Clause.

II. LEGAL BACKGROUND

The First Amendment of the United States Constitution forbids Congress from either "respecting an establishment of religion" or "prohibiting the free exercise thereof."[18] Both the judicial and legislative branches have struggled to find the appropriate safe ground between these two poles.

A law that expressly endorses religious belief is in clear violation of the Establishment Clause.[19] A law that expressly discriminates against religion is likewise in clear violation of the Free

13. *Id.* at 832.

14. Cutter v. Wilkinson, 349 F.3d 257, 267 (6th Cir. 2003).

15. *Id.* at 262 (citing Board of Educ. v. Grumet, 512 U.S. 687, 703 (1994)).

16. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [third], the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (citations omitted)).

17. *Cutter*, 349 F.3d at 262-64, 267. The court further noted that, having found violations of the first two prongs of the *Lemon* test, it had "no need to further explore the question of whether RLUIPA violate[d] *Lemon's* [third prong]." *Id.* at 268.

18. U.S. CONST. amend I.

19. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961) (invalidating Maryland law requiring public office holders to state a belief in God on the grounds that it violated the Establishment Clause).

Exercise Clause.[20] A more difficult question arises, however, when a neutral law of general applicability imposes a burden on the free exercise of a particular religion. Such questions present two interrelated issues. First, does the burden imposed by the law violate the First Amendment rights of religious practitioners under the Free Exercise Clause? Second, at what point does a legislative accommodation, granted to alleviate a government-imposed burden on religious exercise, become a violation of the Establishment Clause? The Court's approach to these issues has evolved through a series of cases, culminating in a "tug of war between Congress and the Supreme Court" regarding the appropriate standard of review for government actions that burden religious exercise.[21]

A. The Free Exercise Clause, Laws of General Applicability, and Congressional Reaction

Early in its jurisprudence, the Court made it clear that some restrictions on religious conduct are acceptable under neutral laws of general applicability that do not expressly discriminate against a particular religion. For instance, in *Reynolds v. United States*,[22] the Court upheld a federal law that criminalized bigamy against a Free Exercise challenge by a member of the Mormon religion. To hold otherwise, the Court noted, would be to "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[23]

The Court seemed to change its view in *Sherbert v. Verner*,[24] however, by applying a strict scrutiny standard to a neutral law that infringed upon the free exercise of religion. In other words, an incidental burden on religion, imposed by an otherwise neutral law of general applicability, had to be justified by "a compelling state interest."[25] Thus, in *Sherbert*, the Court concluded, after applying strict scrutiny, that the denial of unemployment benefits to a Seventh-day Adventist, who would not work on Saturdays for religious reasons,

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20. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating Tennessee law barring clergy from becoming state legislators on the grounds that it violated the Free Exercise Clause).

21. Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1088 (C.D. Cal. 2003).

22. 98 U.S. 145 (1878).

23. *Id.* at 167.

24. 374 U.S. 398 (1963).

25. *Id.* at 403.

violated the "governmental obligation of neutrality in the face of religious differences."[26] By extending this unemployment benefit to Seventh-day Adventists, the Court emphasized that it was not "fostering the 'establishment' of the Seventh-day Adventist religion."[27] Instead, it was merely ensuring that the same benefits available to "Sunday worshippers" were available to Seventh-day Adventists.[28]

Following *Sherbert*, the Court applied the strict scrutiny standard in a variety of cases involving religious burdens imposed by laws of general applicability.[29] In *Employment Division, Department of Human Resources v. Smith*,[30] however, the Court seemed to retreat from the strict scrutiny standard. *Smith* involved an Oregon law that criminalized the possession of peyote.[31] The respondents had lost their jobs after ingesting peyote at a Native American religious ceremony, and were subsequently denied unemployment compensation benefits.[32] In holding that this denial was constitutional, the Court did not apply strict scrutiny. Instead, the majority reasoned that so long as a law of general applicability only incidentally burdened the free exercise of religion, that law did not violate the First Amendment.[33] Thus, an exemption to Oregon's law for ceremonial peyote use, although constitutionally permitted, was not constitutionally compelled.[34] Interestingly, this decision did not overturn *Sherbert*, which the majority distinguished as applying only to scenarios involving "individualized governmental assessment."[35] In other words, if a state had a system for considering individual exemptions, then it "[could] not refuse to extend that system to cases of 'religious hardship' without compelling reason."[36]

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26. *Id.* at 409.
27. *Id.*
28. *Id.*
29. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that Indiana's decision to deny unemployment benefits to a man who quit his job because of his religious beliefs violated the Free Exercise Clause under strict scrutiny); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that conviction of Amish man who refused to send his daughter to school in violation of Wisconsin law was an unconstitutional violation of the Free Exercise Clause where the law did not serve "interests of the highest order").
30. 494 U.S. 872 (1990).
31. *Id.*
32. *Id.*
33. *Id.* at 878.
34. *Id.* at 890.
35. *Id.* at 884.
36. *Id.*

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act (RFRA) of 1993.[37] RFRA attempted to impose a mandatory strict scrutiny standard upon any government action that substantially burdened an individual's exercise of religion, "even if the burden result[ed] from a rule of general applicability."[38] The Court invalidated RFRA, however, inasmuch as it applied to the states, in *City of Boerne v. Flores*.[39]

In *City of Boerne*, the Court held that in enacting RFRA, Congress had overstepped its authority under section five of the Fourteenth Amendment.[40] The Court reasoned that although Congress had the authority to "enact legislation under [section five to enforce] the free exercise of religion," it had gone beyond mere enforcement by defining a substantive right under the Fourteenth Amendment.[41] In support of this conclusion, the Court noted the lack of "examples of modern instances of generally applicable laws passed because of religious bigotry" in RFRA's legislative history.[42] More importantly, the Court found that the provisions of RFRA were "so out of proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior."[43] RFRA applied to all levels of government, all federal and state laws passed before or after its enactment, and had "no termination date or termination mechanism."[44] Thus, instead of serving a remedial purpose, RFRA represented "a substantive change in constitutional protections."[45]

Following *City of Boerne*, Congress went back to the drawing board and enacted RLUIPA. It also imposed strict scrutiny on governmental action,[46] but did so in a more narrowly tailored fashion.[47] Specifically, RLUIPA addressed only two situations: land use and institutionalized persons. In addition, Congress documented

37. 42 U.S.C. § 2000bb *et seq.*

38. Cutter v. Wilkinson, 125 S. Ct. 2113, 2113 (2005) (quoting City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997) (quoting 42 U.S.C. § 2000bb-1)).

39. 521 U.S. 507 (1997).

40. *Id.* at 536.

41. *Id.* at 519.

42. *Id.* at 530.

43. *Id.* at 532.

44. City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

45. *Id.*

46. To be exact, RLUIPA prohibits the government from imposing a substantial burden on religious exercise unless that burden "furthers 'a compelling governmental interest' and does so by 'the least restrictive means.'" Cutter v. Wilkinson, 125 S. Ct. 2113, 2118 (2005) (quoting 42 U.S.C. § 2000cc-5(7)(A)).

47. *Id.*

an extensive record of infringements upon religious exercise before enacting RLUIPA.[48] After its enactment, litigants challenged the constitutionality of RLUIPA in the lower courts on a number of grounds, with the majority of the courts upholding its constitutionality,[49] although some held otherwise.[50] It was not until *Cutter*, however, that the Supreme Court considered the constitutionality of the Act.

B. The Establishment Clause, Religious Accommodation Statutes, and the Lemon *Test*

The Court has consistently maintained that between governmental action that impermissibly establishes religion and governmental action that impermissibly interferes with religious exercise, there is "room for play" for accommodation.[51] Articulating a single analytical method sufficient for the "widely disparate situations"[52] which implicate the Establishment Clause, however, has not been easy.[53]

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48. *Id.* at 2119.

49. *See, e.g.*, Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003) (upholding RLUIPA against Spending Clause challenge); Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) (upholding RLUIPA against Establishment Clause challenge); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (upholding institutionalized-persons provision of RLUIPA against Spending Clause and Tenth Amendment challenges); Westchester Day Sch. v. Vill. of Marmaroneck, 280 F. Supp. 2d 230 (S.D.N.Y. 2003) (upholding land-use provision of RLUIPA against Establishment Clause challenge); Freedom Baptist Church v. Twp. of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (upholding RLUIPA against Commerce Clause challenge).

50. *See* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003) (holding that RLUIPA exceeded congressional authority under the Fourteenth Amendment and Commerce Clause); Kilaab Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016 (E.D. Wis. 2003) (holding that the institutionalized-persons provision of RLUIPA violated the Establishment Clause).

51. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

52. Board of Educ. v. Grumet, 512 U.S. 687, 718 (1994).

53. The *Walz* court described this challenge with the following statement:

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been to sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

Walz, 397 U.S. at 668.

The Court's most notable attempt came in *Lemon v. Kurtzman*, in which the Court defined a three-part test based on the "three main evils"[54] that the Establishment Clause was intended to prohibit and "the cumulative criteria developed by the Court over many years."[55] The Court defined this test as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [third], the statute must not foster 'an excessive government entanglement with religion.'"[56] Applying this test in *Lemon*, the Court proceeded to invalidate two state laws that provided financial aid to private religious schools on the grounds that both statutes involved "excessive entanglement between government and religion."[57]

In subsequent cases,[58] as the Court applied what became known as the *Lemon* test to Establishment Clause challenges of religious accommodation statutes, individual Justices voiced various criticisms of the test. For instance, in *Larkin v. Grendel's Den, Inc.*, the Court struck down a state law that gave churches the right to veto liquor license applications for businesses within a 500-foot radius of church property.[59] In a dissenting opinion, Justice Rehnquist planted a

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54. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting *Walz*, 397 U.S. at 668) (listing the three evils: "sponsorship, financial support, and active involvement of the sovereign in religious activity").

55. *Id.*

56. *Id.* at 612-13 (quoting *Walz*, 397 U.S. at 674) (citations omitted).

57. *Id.* at 614. It should be noted that at the time of *Lemon*, the Court expressed some misgivings regarding accommodation:

> A law 'respecting' the . . . establishment of religion is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Id. at 612. This is in contrast to later opinions in which the Court or its members signaled less suspicion towards accommodation in general. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127-30 (1982) (Rehnquist, J., dissenting).

58. In 1994, Justice Blackmun estimated that the Court had used the *Lemon* test in Establishment Clause decisions "in over 30 cases." Board of Educ. v. Grumet, 512 U.S. 687, 710-11 (1994) (Blackmun, J., concurring).

59. *Larkin*, 459 U.S. at 117. The Court found that although the statute had a valid secular purpose, it nonetheless violated the second and third prongs of the *Lemon* test. *Id.* at 124-27. With regards to the second prong, the Court found that the statute's primary effect "could be seen" as advancing religion because it essentially delegated state authority to religious institutions without any mechanism for restricting the use of that authority to "secular, neutral, and nonideological purposes." *Id.* at 125 (quoting Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 780 (1973)). In addition, the Court, perhaps reflecting the same caution towards accommodation shown in *Lemon*, see *supra* note 57, also noted that the "mere appearance of a joint exercise of legislative authority by Church and State provides a significant benefit to religion in the minds of some by reason of the power conferred." *Id.* at

seed that would eventually bear much fruit in later opinions favorable to accommodation.[60] Specifically, Justice Rehnquist objected to the Court's characterization of the statute as advancing religion when the "concededly legitimate purpose of the statute was to protect citizens engaging in religious . . . activities from the incompatible activities of liquor outlets and their patrons."[61] In his view, it was impossible for such a statute to be "religiously neutral" when its legitimate purpose was to accommodate religious exercise.[62]

Additional dissatisfaction with the *Lemon* test surfaced in *Estate of Thornton v. Caldor, Inc.*,[63] where the Court held that a state law providing employees with an "absolute right not to work on their chosen Sabbath" violated the Establishment Clause.[64] Relying on the *Lemon* test for guidance,[65] the Court found that the statute favored the interests of Sabbath observers over "all secular interests at the workplace" and thus violated the second prong of the *Lemon* test by impermissibly advancing religion.[66] In a concurring opinion, Justice O'Connor articulated an alternative to the *Lemon* test, arguing that the more appropriate inquiry was whether the law "has an impermissible effect because it conveys a message of endorsement" towards a particular religious practice.[67]

Justice O'Connor repeated this message in *Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos*,[68] in which the Court once again applied the *Lemon* test, despite the appellant's contention that it was "unsuited to judging the constitutionality of exemption statutes."[69] In this instance, the Court upheld the challenged statute, noting that the first and second prongs of the *Lemon* test could reconcile laws that accommodated religious

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125-26. Finally, the Court found that the statute violated the third prong because it "enmeshes churches in the processes of government and creates the danger of '[p]olitical fragmentation and divisiveness along religious lines.'" *Id.* at 127 (quoting *Lemon*, 403 U.S. at 623).

60. *See, e.g.*, *infra* notes 69-70 and accompanying text.

61. *Larkin*, 459 U.S. at 129 (Rehnquist, J., dissenting).

62. *Id.* at 130 (Rehnquist, J., dissenting).

63. 472 U.S. 703 (1985).

64. *Id.* at 705.

65. *Id.* at 708.

66. *Id.* at 709.

67. *Id.* at 711 (O'Connor & Marshall, JJ., concurring).

68. 483 U.S. 327 (1987).

69. *Id.* at 335. The appellants argued that since a religious accommodation statute by its very nature advances religion, such a statute will always fail the second prong of the *Lemon* test. *Id.*

exercise.[70] Once again, in a concurring opinion, Justice O'Connor noted "certain difficulties inherent in the Court's use of the [*Lemon* test]" in the context of religious accommodation statutes[71] and again advocated, as an alternative, the endorsement test.[72]

The Court's growing dissatisfaction with the *Lemon* test became even more apparent in *Texas Monthly, Inc. v. Bullock.*[73] Although a majority of the Justices agreed that a statute exempting religious periodicals from a state sales tax violated the Establishment Clause, they were nonetheless unable to reach a consensus regarding their reasoning.[74] Justice Brennan, in a plurality opinion joined by Justices Marshall and Stevens, found the statute unconstitutional because it was limited solely to religious publications; it thus lacked "sufficient breadth,"[75] especially given the lack of evidence that such an accommodation was needed to alleviate a burden on religious exercise.[76] Justice Brennan's opinion was noteworthy because he did

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70. *Id.* at 335-37. Specifically, the first prong of the *Lemon* test, according to the Court, did not require the statute to be "unrelated to religion." *Id.* at 335. Rather, under *Lemon*, it was "a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* Similarly, under the second prong of the *Lemon* test, a statute was not "unconstitutional simply because it *allows* churches to advance religion." *Id.* at 337. Rather, under *Lemon*, a statute was unconstitutional if the "[*g*]*overnment itself* . . . advanced religion through its own activities and influence." *Id.* In addition, the Court dismissed objections that the statute, which exempted religious organizations from Title VII's prohibition against religious discrimination in employment, impermissibly singled out religious organizations for a benefit. *Id.* at 338. An exemption, according to the Court, was not required to come "packaged with benefits to secular activities" when the government acts to alleviate a government-imposed burden on religious exercise. *Id.*

71. *Id.* at 346-47 (O'Connor, J., concurring). Justice O'Connor noted the inherent tension between a permissible religious accommodation statute, which by its terms would seek to alleviate burdens on free exercise, and the *Lemon* test, which if strictly applied would invalidate such actions. *Id.*

72. *Id.* at 346-49 (O'Connor, J., concurring). Justice O'Connor's proposed framework would involve two steps. The first step would embrace the necessary recognition that government action that alleviates government-imposed burdens on religious exercise "*does* have the effect of advancing religion." *Id.* at 348. The second step would "separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religions organizations." *Id.* This would require an inquiry into the government's purpose to determine "whether the statute convey[ed] a message of endorsement [as perceived by] an objective observer, acquainted with the text, legislative history, and implementation of the statute." *Id.* (citing Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)). Permissible governmental accommodation, however, would first require, as a prerequisite, a determination of whether there was an "identifiable burden *on the exercise of religion* that [could] be said to be lifted by the government action." *Id.*

73. 489 U.S. 1 (1989).

74. *Id.*

75. *Id.* at 14.

76. *Id.* at 18.

not apply the *Lemon* test, but rather relied instead on the endorsement test advocated by Justice O'Connor.[77]

Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, filed a dissenting opinion, in which he took strong issue with Justice Brennan's reliance on the concept of "breadth of coverage."[78] Justice Scalia argued that "breadth of coverage" was only applicable when evaluating a statute whose object was "not religion *per se*" (in other words, an accommodation statute) but rather "secular functions that the religious institutions, along with other institutions, provide."[79] These two contexts, according to Justice Scalia, confused the application of the *Lemon* test because when evaluating an accommodation statute, the only question should be whether the statute advanced or inhibited religion, not whether it provided "breadth of coverage."[80] Thus, in the dissenters' view, some "reconciliation with the *Lemon* terminology" was necessary for accommodation statutes because state alleviation of government-imposed burdens on religious exercise was permissible.[81]

Finally, in *Board of Education of Kiryas Joel Village School District v. Grumet*,[82] a fractured Court again expressed its misgivings regarding the problematic application of the *Lemon* test in the context of religious accommodation statutes.[83] In that case, the Court held unconstitutional an act which created a special school district for a village populated by a single religious group.[84] Although the Court agreed on the decision, the Justices were again unable to reach a consensus with respect to their reasoning. Justice Souter delivered the judgment and, for some portions, the opinion of the Court.[85] He reasoned that the act violated the permissible bounds of

77. Justice Brennan favorably quoted passages from Justice O'Connor's concurring opinions in *Wallace*, *Amos* and *Estate of Thornton* throughout his opinion. *Id.* at 9 n.1.

78. *Id.* at 39 (Scalia & Kennedy, JJ., & Rehnquist, C.J., dissenting).

79. *Id.* at 40 (Scalia & Kennedy, JJ., & Rehnquist, C.J., dissenting).

80. *Id.*

81. *Id.* (citing Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987)).

82. 512 U.S. 687 (1994).

83. *Id.*

84. *Id.* at 690.

85. Four Justices (O'Connor, Blackmun, Stevens, and Ginsburg) joined Justice Souter's opinion as to Parts I, II-B, II-C, and III. *Id.* at 688-89. However, only three justices (Blackmun, Stevens, and Ginsburg) joined the opinion as to Parts II and II-A. *Id.* Thus, Justice Souter's view that the creation of the special school district invested with governmental authority based on an apparent religious qualification resulted in an impermissible "fusion of governmental and religious functions" did not command a majority of the Court. *Id.* at 703 (quoting Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982)).

accommodation because the legislature created the school district through a special, perhaps one-time act, which transferred governmental authority to a single religious group, based on a religious classification.[86] As with Justice Brennan's opinion in *Texas Monthly*, Justice Souter's opinion was also noteworthy because it did not explicitly apply the *Lemon* test.[87]

Several other Justices filed opinions which discussed, among other aspects of the case, the *Lemon* test. Justice Blackmun wrote a concurring opinion in which he argued that even though Justice Souter had not explicitly used the *Lemon* test, his reasoning was essentially based on "the second and third *Lemon* criteria."[88] Although Justice Blackmun agreed with Justice O'Connor's view that the test had to be context-sensitive, moreover, he nonetheless "remain[ed] convinced of the general validity of [its] basic principles."[89]

Justice O'Connor filed a concurring opinion in which she discussed at length the problems associated with *Lemon* as a single "unitary test" for all Establishment Clause contexts.[90] She argued that Establishment Clause challenges, as with Free Speech cases, presented different interests "in different degrees" depending on the context.[91] By using a single test to address such a wide range of situations, she warned that the test would become "so vague as to be useless."[92] Justice O'Connor thus argued that a set of tests which allowed different approaches for different contexts was necessary for Establishment Clause challenges.[93]

In a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia partially agreed with Justice

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86. *Id.* at 690.

87. *Id.* at 751 (Scalia & Kennedy, JJ., & Rehnquist, C.J., dissenting) (commenting that Justice Souter's opinion had "snub[bed]" *Lemon*).

88. *Id.* at 710 (Blackmun, J., concurring) ("I write separately only to note my disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon*.").

89. *Id.*

90. *Id.* at 718-21 (O'Connor, J., concurring in part).

91. *Id.* at 718 (O'Connor, J., concurring in part).

92. *Id.* Justice O'Connor went on to identify several additional problems with the forced use of a single test. First, "shoehorning new problems" into the test that it was not designed to accommodate "tend[ed] to deform the language of the test." *Id.* at 719 (O'Connor, J., concurring in part). Second, a bad test could prevent the courts from "deriv[ing] narrower, more precise tests from the case law" by forcing courts to dedicate their time instead to "patch[ing] up the broad test." *Id.* at 720 (O'Connor, J., concurring in part).

93. *Id.* at 721 (O'Connor, J., concurring in part) ("I think a less unitary approach provides a better structure for analysis.").

O'Connor's criticism of the *Lemon* test.[94] Its irrelevance to the Court's decision, he argued, was judicially inefficient given the significant attention the parties paid to it in their briefs and the continued reliance on it in the lower courts.[95] Justice Scalia nonetheless criticized Justice O'Connor's position, which he thought would replace *Lemon* with "nothing."[96] The proper approach, according to Justice Scalia, would involve "fidelity to the longstanding traditions of our people, which surely provide the diversity of treatment that Justice O'Connor seeks, but do not leave us to our own devices."[97]

III. THE COURT'S REASONING IN *CUTTER*

In *Cutter*, the Court unanimously upheld the constitutionality of the institutionalized-persons provision of RLUIPA against an Establishment Clause challenge.[98] In doing so, the Court once again stressed that "'there is room for play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause."[99] The Court then proceeded to hold that "on its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause."[100] Notably, the Court did not use the *Lemon* test, despite its use in the lower court, indicating in a footnote that the case was resolved "on other grounds."[101]

The Court, Justice Ginsburg writing, stressed first and foremost that the institutionalized-persons provision of RLUIPA was compatible with the Establishment Clause because it "alleviate[d] exceptional government-created burdens on private religious

94. *Id.* at 751 (Scalia & Kennedy, JJ., & Rehnquist, C.J., dissenting) ("I have previously documented the Court's convenient relationship with *Lemon*, which it cites only when useful.") (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring in judgment)).

95. *Id.*

96. *Id.*

97. *Id.*

98. Cutter v. Wilkinson, 125 S. Ct. 2113, 2125 (2005).

99. *Id.* at 2117 (quoting Locke v. Davey, 540 U.S. 712, 718 (2004) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970))).

100. *Id.* at 2121.

101. *Id.* at 2120. Justice Thomas, in his concurring opinion, likewise remarked that the Court had "properly decline[d] to assess RLUIPA under the discredited" *Lemon* test. *Id.* at 2125 (Thomas, J., concurring).

exercise."[102] To support this, the Court referenced the extensive hearings that Congress had held to document the "frivolous or arbitrary" burdens imposed upon religious practice in the prison setting.[103]

Next, the Court noted that the institutionalized-persons provision of RLUIPA avoided two potential problem areas that "our prior decisions have identified."[104] First, an accommodation of religious exercise "must be measured so that it does not override other significant interests."[105] In this regard, the Court emphasized that RLUIPA's institutionalized-persons provision did not override the significant interests of prison administrators to maintain order and safety. Instead, its legislative history showed that "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions."[106] Further, under the provisions of the act, a prison official had the first opportunity to decide whether or not to accommodate a particular religious practice before a prisoner could sue.[107] Although RLUIPA barred prison officials from inquiring whether a particular religious practice is "central" to an individual's religion, it did not prohibit an inquiry into the sincerity of a prisoner's alleged religion.[108] Thus, the Court found no reason to believe that RLUIPA, on its face, would be applied in any but "an appropriately balanced way, with particular sensitivity to security concerns."[109]

Second, an accommodation of religious exercise cannot "differentiate among bona fide faiths."[110] RLUIPA avoided this problem, according to the Court, because it "confer[red] no privileged status on any particular religious sect, and single[d] out no bona fide faith for disadvantageous treatment." The Court contrasted this to *Grumet*, where a state law specifically created a special school district for the exclusive use of a "community of highly religious Jews."[111]

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102. *Id.* (citing Board of Educ. v. Grumet, 512 U.S. 687, 705 (1994)).

103. Cutter v. Wilkinson, 125 S. Ct. 2113, 2117-19 (2005) (quoting 146 Cong. Rec. S7774, S7775 (July 27, 2000) (joint statement of Sen. Hatch (R-UT) and Sen. Kennedy (D-MA) on RLUIPA)).

104. *Id.* at 2121.

105. *Id.* at 2122.

106. *Id.* at 2123 (citing 139 Cong. Rec. S26190 (1993) (remarks of Sen. Hatch)).

107. *Id.* at 2123.

108. Cutter v. Wilkinson, 125 S. Ct. 2113, 2124 (2005) (citing 42 U.S.C. § 2000cc-5(7)(A) (2000)).

109. *Id.* at 2123.

110. *Id.*

111. *Id.* at 2123 (citing Board of Educ. v. Grumet, 512 U.S. 687 (1994)).

The Court then addressed the Court of Appeals' finding that RLUIPA "impermissibly advance[d] religion by giving greater protection to religious rights than to other constitutionally protected rights."[112] The Court responded that under the correct interpretation of *Amos*,[113] the appropriate view was that "[r]eligious accommodations . . . need not 'come packaged with benefits to secular entities.'"[114]

Justice Thomas filed a separate, concurring opinion to address a federalism argument raised by the respondents.[115] They had argued that the First Amendment barred the federal government from imposing upon state religious policy.[116] Justice Thomas agreed that, in his view, the Establishment Clause was "'best understood as a federalism provision' that protects state establishments from federal interference."[117] Justice Thomas further stated, however, that although the Establishment Clause prohibited the federal government from establishing a religion, it did not prohibit the federal government from recognizing religion.[118] Thus, the respondent's argument that the federal government could not impose upon state religious policy was, in his view, based on a misreading of the Establishment Clause.[119]

Both Justice Ginsburg's and Justice Thomas's opinions were careful to note the limited nature of the Court's decision. First, Justice Ginsburg noted that the Court expressed "no view on the validity" of the land-use provision of RLUIPA.[120] She also noted that although the respondents had challenged Congress's authority to enact RLUIPA under the Spending and Commerce Clauses, the Court of Appeals had not addressed those issues and therefore the Court did not consider them.[121] In a similar observation in his concurring opinion, Justice Thomas seemed to go one step further, noting that RLUIPA "may well exceed Congress's authority under either the Spending Clause or the Commerce Clause."[122]

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112. *Id.* at 2123 (quoting Cutter v. Wilkinson, 349 F.3d 257, 264 (6th Cir. 2003)).
113. 483 U.S. 327 (1987) (holding that religious exemptions to Title VII's prohibition against religious discrimination in employment did not violate the Establishment Clause).
114. Cutter v. Wilkinson, 125 S. Ct. 2113, 2124 (2005) (quoting Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987)).
115. *Id.* at 2125.
116. *Id.* at 2126.
117. *Id.* (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004)).
118. *Id.*
119. Cutter v. Wilkinson, 125 S. Ct. 2113, 2126 (2005).
120. *Id.* at 2119.
121. *Id.* at 2120.
122. *Id.* at 2125.

Finally, the Court emphasized that the respondents had only raised "a facial challenge" to the constitutionality of the institutionalized-persons provision of RLUIPA.[123] In other words, the respondents did not argue that under any specific facts, the application of RLUIPA would produce an unconstitutional result.[124] Thus, based on "the underdeveloped state of the record," it was not possible to conclude that the application of RLUIPA would compromise prison security or the services provided to other inmates.[125] This suggests that such a finding in the future could cast doubt on the validity of the Act.

IV. THE ARGUMENT FOR MANDATORY A.A. ATTENDANCE

The A.A. proponents argued that mandatory participation in A.A. as a condition of probation or incarceration does not violate the First Amendment, despite the "somewhat religious"[126] nature of A.A., given the unique effectiveness of A.A. in treating alcoholism and the strong societal interest in preventing harmful alcohol-related conduct. The A.A. proponents further argued that the Supreme Court's "recent and hospitable case law," most notably *Cutter*, supports their position relative to the First Amendment's Establishment and Free Exercise Clauses.[127]

To begin, the A.A. proponents argued that mandatory A.A. attendance would not violate the Establishment Clause given the Court's recent retreat from "unrealistically restrictive Establishment Clause tests."[128] The A.A. proponents conceded that mandatory A.A. attendance would not pass the Establishment Clause test introduced by the Court in *Lemon*.[129] The A.A. proponents, however, argued that, as evidenced in *Cutter*, the Court has essentially overruled this test, clearing the way for greater Establishment Clause flexibility and thus mandatory A.A. attendance.[130]

123. *Id.* at 2124 (quoting Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 831 (S.D. Ohio 2002)).

124. Cutter v. Wilkinson, 125 S. Ct. 2113, 2124 (2005).

125. *Id.*

126. Jenkins, *supra* note 2, at 379.

127. *Id.* at 356.

128. *Id.* at 382.

129. *Id.* at 355. Similarly, the A.A. proponents also conceded that mandatory A.A. attendance would not pass the "physiological coercion" test that the Court introduced in *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

130. Jenkins, *supra* note 2, at 356.

To support this position, the A.A. proponents characterized *Cutter* as an implicit rejection of the outdated *Lemon* principle that the government must maintain absolute neutrality with regards to religion.[131] In other words, by reversing the Sixth Circuit, the Court rejected the view that "the state cannot even favor a vague general religiosity."[132] By abandoning the *Lemon* test, the Court thus opened the door to a greater toleration of "somewhat religious" programs such as A.A. within the limits of the Establishment Clause.[133]

Next, the A.A. proponents argued that a Free Exercise challenge of mandatory A.A. attendance by a prisoner or probationer would fail given the unique effectiveness of A.A. as a treatment program for alcoholism, the strong state interest in preventing alcohol-related conduct, and the traditional deference to authority in the penological context.[134] As with their Establishment Clause argument, the A.A. proponents primarily drew support for this position from the Court's decision in *Cutter.*[135]

First, the A.A. proponents argued that even before *Cutter*, the Court's jurisprudence recognized the government's limited authority to infringe upon an individual's Free Exercise rights for the sake of compelling "health, safety, and general welfare" interests, especially in the penological context.[136] Thus, Free Exercise challenges, according to the A.A. proponents, are evaluated through a balancing test in which the interests of the state are judged against the "protection afforded [to an individual] under the Free Exercise Clause."[137] Mandatory A.A. attendance, according to the A.A. proponents, satisfies this standard given the social interests involved and the unique effectiveness of A.A.[138]

Second, the A.A. proponents argued that mandatory A.A. attendance passes the compelling interest tests established by Congress in RFRA and RLUIPA and by state governments in similar legislation because the Court has relaxed the meaning of these tests in *Cutter.*[139]

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131. *Id.* at 380 ("Our argument is that notwithstanding the test employed, the Supreme Court's understanding of the Establishment Clause has shifted to the point that A.A. can withstand attack no matter what the semantic overlay is.").

132. *Id.* at 381.

133. *Id.* at 382.

134. *Id.* at 382-83.

135. *Id.*

136. *Id.* at 354 (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)) (citations omitted).

137. *Id.* (quoting *Yoder*, 406 U.S. at 214).

138. *Id.*

139. *Id.* at 383.

The Court's repeated emphasis on the interests of prison administrators in *Cutter*, in other words, represents "a warning not to read RLUIPA's compelling interest and least restrictive means tests too rigorously."[140] Rather, the A.A. proponents argued that because of the historical deference shown to prison administrators, the compelling interest test is less severe in the prison or penological context than it is elsewhere.[141] In this relaxed setting, the prospects of state-mandated A.A. attendance in a challenge before the Court are therefore stronger, according to the A.A. proponents.

V. RESPONSE

In their argument for state mandated A.A. participation, the A.A. proponents have understated the accommodation context of *Cutter* and thus argued a position that far exceeds the firm boundaries of the Establishment Clause. The A.A. proponents have likewise misread the implications of *Cutter* relative to the Free Exercise Clause, finding a departure from the Court's historic stance against non-neutral state action in a case that merely reaffirmed the Court's flexibility regarding neutral laws of general applicability. Finally, the A.A. proponents have also placed undue faith in the "somewhat religious" nature of A.A. relative to the First Amendment.[142] Regardless of its primary purpose, because A.A. involves religious themes, such action ultimately represents state endorsement of religious belief over non-belief. State-mandated A.A. attendance therefore violates the First Amendment, a conclusion that *Cutter* does not change.

A. Mandatory A.A. Attendance is a Facial Violation of the Establishment Clause

In enlisting *Cutter* to support their argument for mandatory A.A. attendance, the A.A. proponents have understated the context of that case. *Cutter*, and its progeny, dealt with exceptions to neutral laws of general applicability for the purposes of religious accommodation.[143] The Establishment Clause question presented by

140. *Id.*

141. *Id. See also id.* at 377 (arguing that state courts have also shown deference to prison administrators when interpreting state laws which impose RFRA-like burdens on state action).

142. *See* Jenkins *supra* note 2.

143. *See supra* Parts II-III.

the A.A. proponents is entirely different than the question presented in religious accommodation cases such as *Cutter*. The concern of the former is whether a sufficient state interest justifies state-mandated attendance in programs with religious overtones or themes. The concern of the latter is whether the accommodation of individual Free Exercise rights, in the face of a neutral law of general applicability, violates the Establishment Clause. By building their argument for state-mandated A.A. participation on the Court's decisions regarding religious accommodation, the A.A. proponents have attempted to extend the *Cutter* line of cases far beyond the limits established by the Court's jurisprudence.

To begin, the Court has consistently held that action that expressly imposes religious belief or practice upon an individual violates the Establishment Clause.[144] The Court's decision in *Cutter* did not change that principle. Rather, in *Cutter*, the Court expressly emphasized that although there was "'room for play in the joints' between the Free Exercise and Establishment Clauses," the purpose of that space was to permit the government to accommodate Free Exercise rights without violating the limitations of the Establishment Clause.[145] In other words, the Court may have embraced a relaxed view of the Establishment Clause in *Cutter*, but that was only in recognition of individual Free Exercise rights.[146] It does not follow, as the A.A. proponents argued, that this less restrictive view of the Establishment Clause extends beyond the context of Free Exercise accommodation to permit the government to move in the opposite direction and impose religious belief upon individuals.[147]

Along the same lines, the A.A. proponents argued that the Court's apparent abandonment of the *Lemon* test in *Cutter* is further proof of its relaxed approach towards the Establishment Clause. This too, however, understates the context of *Cutter*. It is true that the Court expressly avoided the application of the *Lemon* test in *Cutter*.[148] The Court nonetheless based its subsequent analysis on its

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144. *See supra* Part II. *See also infra* note 156.

145. Cutter v. Wilkinson, 125 S. Ct. 2113, 2117 (2005) (quoting Locke v. Davey, 540 U.S. 712, 718 (2004) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970))).

146. This principle is actually older than *Cutter*. *See, e.g.*, Board of Educ. v. Grumet, 512 U.S. 687, 705 (1994) ("Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.").

147. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.").

148. *See supra* Part III.

characterization of section three of RLUIPA as a religious accommodation statute.[149] Thus, although the Court's analysis suggests that the *Lemon* test is no longer appropriate for Establishment Clause challenges of religious accommodation statutes, there is nothing in the Court's opinion to suggest that the *Cutter* analysis[150] applies outside of the context of religious accommodation, as argued by the A.A. proponents. To argue otherwise (i.e., that the *Cutter* analysis serves as the Court's replacement for *Lemon* in all Establishment Clause contexts) is to ignore the Court's own dissatisfaction with a single, unitary test for Establishment Clause challenges.[151] In addition, this argument also ignores the primary criticism of the *Lemon* test in the context of accommodation. Under *Lemon*, a court is likely to find government action to alleviate government-imposed burdens on religious exercise unconstitutional because such action advances religion.[152] The Court has criticized this aspect of *Lemon*, however, because it is impossible for the government to remain neutral towards religion when taking legitimate steps to alleviate government-imposed burdens on religious exercise.[153]

Finally, for the same reasons, the A.A. proponents overreached in arguing that by reversing the Sixth Circuit, *Cutter* represents a rejection of the Establishment Clause's requirement of government neutrality towards religion.[154] The appropriate interpretation of *Cutter* is that government recognition of religion, for the sake of alleviating state-imposed burdens on religious exercise, is not a violation of the neutrality required by the Establishment Clause, even where such accommodation only benefits religious practitioners.[155] It does not follow from *Cutter* that the government is now free to favor religion

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149. The Court emphasized that, on its face, section three of RLUIPA was a religious accommodation statute and therefore fit "within the corridor between the Religion Clauses." *Cutter*, 125 S. Ct. at 2121. In addition, the Court found that the "foremost" reason why the statute was compatible with the Establishment Clause was that it "alleviate[d] exceptional government-created burdens on private religious exercise." *Id.*

150. The analysis that the Court used in lieu of *Lemon* suggests three elements. First, the statute in question must qualify as a religious exemption statute by "alleviat[ing] exceptional government-created burdens on private religious exercise." *Id.* at 2121. Second, the statute, when properly applied by a court, must "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* Third, the statute must be "administered neutrally among different faiths." *Id.*

151. *See supra* Part II.B.

152. *Id.*

153. *Id.*

154. *See supra* Part IV.

155. *Cutter*, 125 S. Ct. at 2124 ("Religious accommodations, we held, need not 'come packaged with benefits to secular entities.'") (quoting Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987)).

over non-religion absent such a burden on individual Free Exercise rights.

To summarize, the *Cutter* analysis does not apply to state-mandated A.A. attendance because the purpose of such action is not to alleviate a state-imposed burden on individual religious exercise, but rather to impose a treatment program with religious overtones upon individuals in order to satisfy a state interest. *Cutter* represents only a narrow relaxation of the Establishment Clause, not the broad one argued by the A.A. proponents. Once state-mandated A.A. attendance is properly removed from the context of religious accommodation, and instead evaluated for what it truly represents (state-mandated religious exercise),[156] the conclusion is straightforward.[157] On its face, state-mandated A.A. attendance is a violation of the Establishment Clause because it involves state mandated religious participation.[158]

B. Mandatory A.A. Attendance Violates the Free Exercise Clause

The A.A. proponents argued that mandatory participation in A.A. does not violate the Free Exercise Clause because of the state's compelling interest in preventing alcohol-related conduct, the unique effectiveness of A.A. in treating alcoholism, and an alleged softening of the compelling interest standard for prison and penological authorities in *Cutter*.[159] This position again understated the context of the *Cutter* line of cases.

First, this article concedes that the state has a compelling interest in preventing alcohol-related conduct and that A.A. is an effective tool for combating alcoholism for those individuals who voluntarily embrace its methodology.[160] The state's interest and A.A.'s effectiveness are nonetheless insufficient to overcome the constitutional shortcomings of state-mandated A.A. participation.

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156. *See infra* Part V.C for an argument as to why A.A. is best characterized as representing religious exercise.

157. The A.A. proponents conceded that without their (overly broad) interpretation of *Cutter*, their "analysis [would] plainly [fail]." Jenkins, *supra* note 2, at 356.

158. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'").

159. Jenkins, *supra* note 2, at 354, 383.

160. This article, moreover, does not take issue with offering A.A. as an optional choice for individuals referred to alcohol treatment, so long as secular alternatives are also available to those individuals.

Specifically, the A.A. proponents placed excessive reliance on *Cutter* and *Yoder*, looking to these cases for the proposition that a compelling state interest can justify mandatory A.A. participation, especially given a less strict compelling interest test.[161] Neither of these cases applies to this situation, however, because in both cases the central dispute involved exceptions to religiously neutral laws of general applicability.[162] Neither *Yoder* nor *Cutter* stands for the proposition that given a sufficiently important interest, the state can trespass upon an individual's Free Exercise rights by mandating participation in a religious program. Rather, these cases simply stand for the proposition that given a sufficiently strong state interest, the state may regulate individual religious exercise through a neutral law of general applicability.

Similarly, it may be that, as the A.A. proponents argued, *Cutter* reflects a less stringent stance[163] on the compelling interest test for Free Exercise challenges through RLUIPA, RFRA, and equivalent state legislation. That notion is inapplicable to the problem of state-mandated A.A. participation, however, because such action does not involve a *neutral* law of general applicability. Rather, state-mandated A.A. participation is *biased against* religious belief because A.A. effectively targets the legitimate religious beliefs of atheists and agnostics.[164] The Court has consistently recognized that the First Amendment protects both the rights of traditional believers and the rights of nonbelievers.[165] Because A.A. contains a message that is

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161. *See supra* Part IV.

162. For instance, *Yoder* involved a Free Exercise challenge of a Wisconsin law that applied "uniformly to all citizens of the State and [did] not, on its face, discriminate against religions or a particular religion." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). Specifically, the law mandated school attendance for minors until the age of 16. *Id.* In other words, the plaintiff sought an exemption from a neutral law of general applicability because of a conflict with his religious beliefs. *Id.* at 235. In weighing the interests of Wisconsin and the Free Exercise rights of the plaintiff, the Court stated that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

163. *See Cutter*, 125 S. Ct. at 2123 (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)) (noting that "context matters" when applying the compelling interest standard).

164. *See infra* Part V.C.

165. Justice Stevens addressed the legitimacy of both religious and non-religious belief in Wallace v. Jaffree, 472 U.S. 38 (1985).

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the

antagonistic towards atheists and agnostics, it therefore contains a message that is antagonistic towards religious belief. On its face, such bias against religious belief arguably violates the Free Exercise Clause.[166] Even if it is does not, however, it is clear from the Court's jurisprudence that a non-neutral law that burdens religious exercise is subject to true strict scrutiny, not the relaxed version the A.A. proponents discerned in *Cutter*.[167] Under true strict scrutiny, state-mandated A.A. participation cannot survive a Free Exercise challenge, given the availability of secular alternatives.[168]

> underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.

Id. at 52-55. *See also* Mitchell v. Helms, 530 U.S. 793, 873 (2000) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947)) ("No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.").

166. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (citing McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)) (a law that "target[s] religious beliefs as such is never permissible").

167. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 542 (a non-neutral law that burdens individual Free Exercise rights must "undergo the most rigorous of scrutiny"). Further, the compelling interest test applied in such cases is "not 'water[ed] . . . down' but 'really means what it says.'" *Id.* (quoting Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 888 (1990)). It can be argued that *Lukumi* is not exactly applicable to the present case because, unlike the statute in *Lukumi*, mandatory participation in A.A. does not impose either "criminal [or] civil sanctions on any type of religious service or rite." Locke v. Davey, 540 U.S. 712, 720 (2004). State-mandated A.A. participation nonetheless qualifies as a "harsh" disapproval of religious belief because it requires atheists and agnostics to choose between their legitimate religious beliefs and a state benefit (i.e., probation). *Id.* at 720-21 (describing a state action as a "mild" disapproval of religious belief because it did not (a) impose criminal or civil sanctions on religious exercise, (b) deny ministers the right to participate in government, or (c) force a choice between religious belief and a government benefit) (citations omitted).

168. For example, SMART Recovery is a secular alternative to A.A. *See* SMART Recovery, http://www.smartrecovery.org (last visited Mar. 20, 2006). It claims recognition by a variety of medical organizations including the U.S. Department of Health and Human Services, and claims to sponsor more than 300 face-to-face meetings around the world. *Id*; *see also* Save Our Selves (SOS) International, http://www.secularsobriety.org (last visited Mar. 20, 2006); Rational Recovery, http://www.rational.org (last visited Mar. 20, 2006); and LifeRing, http://www.unhooked.com/index.htm (last visited Mar. 20, 2006). In addition to in-person meetings, many of these groups also offer online meetings that allow individuals to participate remotely in the event that a local group does not exist in their immediate area.

Finally, even if *Cutter* is the appropriate standard for the evaluation of mandatory A.A. attendance, it is unlikely that such action would survive a Free Exercise challenge, notwithstanding *Cutter's* arguably less stringent stance[169] on the compelling interest test. First, it is true that the Court emphasized the importance of considering the interests and burdens imposed on non-beneficiaries when evaluating the proposed accommodation of religious exercise.[170] The Court, however, also signaled a strong concern for the Free Exercise rights of individuals in "state-run institutions—mental hospitals, prisons, and the like—in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise."[171] Once again, this shows that the primary concern of the *Cutter* analysis was the burden imposed upon individual religious exercise. From that point of view, *Cutter* represents a victory for the religious freedom of individuals in penological settings. The A.A. proponents, on the other hand, characterized *Cutter* as a "draw" between Congress and the Court, the result of which is a weaker compelling interest standard, at least in the penological context. Even accepting, *aguendo*, that this is true, it only applies to disputes involving neutral laws of general applicability. It does not follow that the same principle applies when the state attempts to impose a religious program upon an individual in conflict with that individual's religious beliefs.

C. The "Somewhat Religious" Nature of A.A. Does Not Absolve the State from a First Amendment Violation When the State Mandates Participation in A.A.

In response to the argument that mandatory A.A. attendance violates the First Amendment by coercing an individual to participate in a religious activity, the A.A. proponents countered that A.A. is only "somewhat religious." In other words, the A.A. proponents argued that the A.A. program does not overtly endorse religion because A.A. allows each person to define for themselves the nature of God as he or she understands Him, does not adopt any particular religion, and in fact allows for a higher power that need not be God at all.[172] In

169. *See Cutter*, 125 S. Ct. at 2123 (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)) ("context matters" when applying the compelling interest standard).

170. *Id.* at 2123.

171. *Id.* at 2121.

172. *See* Jenkins, *supra* note 2, at 367.

addition, the A.A. proponents argued that the primary purpose of A.A. is not to advance religion but rather to treat alcoholism.[173] These arguments ultimately fail, however, because the point is not whether the primary purpose of state-mandated A.A. is the endorsement of religion, but whether the endorsement of A.A. by the government, regardless of its otherwise legitimate goals, ultimately endorses religion.

To begin, a strong argument exists that, contrary to the position of the A.A. proponents, A.A. is more than "somewhat religious." The famous "Twelve Steps" of the A.A. program repeatedly mention "God."[174] In fact, the third step involves a decision "to turn [one's] will and [one's] life over to the care of God."[175] In addition, the A.A. program, through its literature, expresses a viewpoint that repudiates atheism and agnosticism:

> We, who have traveled this *dubious* path [i.e. - atheism or agnosticism], beg you to lay aside prejudice, even against organized religion. We have learned that whatever the human frailties of various faiths may be, those faiths have given purpose and direction to millions. People of faith have a logical idea of what life is all about.[176]

Because of these themes, the A.A. program is most properly characterized as religious exercise,[177] and therefore state-mandated

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173. *Id.*

174. *Id.* at 368. *See also* Griffin v. Couglin, 88 N.Y.2d 674, 681 (1996).

> Thus, God is named or referred to in five of the 12 steps. "Working" the 12 steps includes confessing to God the "nature of our wrongs" (Step 5), appealing to God "to remove our shortcomings" (Step 7) and seeking "through prayer and meditation" to make "contact" with God and achieve "knowledge of His Will" (Step 11 [emphasis supplied]). The 12 Traditions include a profession of belief that "there is one ultimate authority—a loving God as He may express Himself in our group conscience.

Id. at 681.

175. Jenkins, *supra* note 2, at 366.

176. ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS BIG BOOK 39, as reprinted in *Griffin*, 88 N.Y.2d at 682 (emphasis added).

177. *See Griffin*, 88 N.Y.2d at 683.

> The foregoing demonstrates beyond peradventure that doctrinally and as actually practiced in the 12-step methodology, adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization. Followers are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe.

attendance in A.A. as a condition of probation is state-mandated attendance in religious exercise. Such action represents a clear violation of the Establishment Clause.[178]

Further, the argument that the primary purpose of A.A. is not the endorsement of religious belief is beside the point. Mandatory A.A. attendance would still violate the Establishment Clause as long as the government's action inevitably advanced or endorsed religion.[179] The Court's jurisprudence supports the principle that an endorsement of religion, even if secondary to an otherwise secular state interest, is a violation of the neutrality required by the Establishment Clause.[180] As argued above, moreover, *Cutter* does not forsake the requirement of neutrality; rather, it allows the government to recognize religion, for the purpose of alleviating government-imposed burdens on religious exercise. It simply does not follow that this accommodation of religious exercise somehow weakens the Court's historic resolve against state endorsement of religious belief, even if such belief is only a side-effect of an otherwise legitimate purpose.

VI. CONCLUSION

Published studies suggest that regular religious participation leads to reduced rates of crime and drug use.[181] Surely, our

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Id. *But see id.* (Bellacosa, J., dissenting). It is worth noting that the Court has rightly expressed some misgivings regarding the ability of judges to evaluate or determine the sincerity, importance, or nature of religious belief. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). Congress, however, through RLUIPA, has provided a very broad definition of "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2000). It would seem that under such a definition, A.A. would qualify as religious exercise given its reoccurring spiritual themes.

178. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 596 (1992) ("the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice").

179. Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 783-84 n.39 (1973) ("Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.").

180. *See* School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (striking down a state law that required students to read from the Bible every morning despite state's argument that the underlying purpose was "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature").

181. *Economics Focus*: *Wealth from Worship*, ECONOMIST, Dec. 24, 2005, at 100.

government has a very strong interest in combating these social ills. If the arguments of the A.A. proponents are accepted, does it not follow that the government could mandate other programs with religious themes to probationers and prisoners in order to address other social problems? Such an outcome would result in an America that many of us would not recognize, an America rife with corrosive divisions between those who have religion, and those who do not.[182]

Fortunately, although *Cutter* represents an important victory for the Free Exercise rights of individuals in the face of sometimes over-burdensome laws of general applicability, it does not give the state the power to impose religious belief upon individuals. The A.A. proponents have sought to take *Cutter* one step beyond its accommodation context, thereby giving the government a power it has never enjoyed in the United States. When *Cutter* is considered within the appropriate context as a question of religious accommodation, however, the arguments for mandatory A.A. attendance fail to withstand scrutiny. At most, *Cutter* represents a readjustment of the neutral zone that separates the limits of the Establishment Clause from the boundaries of the Free Exercise Clause. It does not represent a new power on the part of the government to mandate religious participation.

> At the microeconomic level, several studies have concluded that religious participation is associated with lower rates of crime, drug use and so forth. Richard Freeman, [a] Harvard economist, found 20 years ago that churchgoing black youths were more likely to attend school and less likely to commit crimes or use drugs.

Id.

182. *See, e.g.*, Engel v. Vitale, 374 U.S. 421, 431-32 (1962).

> [The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.

Id.