

Note

RELIGION AND REHABILITATION: THE REQUISITION OF GOD BY THE STATE

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INTRODUCTION

Eddie Jones was sentenced to prison, having pled guilty to driving under the influence of alcohol (DUI).¹ The judge suspended the sentence, on the condition that Jones successfully complete a program for substance abuse treatment and education while residing at an Iowa correctional facility.² As part of the program, Jones, an atheist, was required to recite from the *Alcoholics Anonymous Big Book*—the so-called Bible for Alcoholics Anonymous (AA)³—the following: “We will intuitively know how to handle situations which used to baffle us. We will suddenly realize that God is doing for us what we could not do for ourselves.”⁴ Jones refused to say the passage and, as a result, his prison sentence was reimposed.⁵

Jones is not the only DUI offender to have faced the difficult choice between incarceration and participation in a religiously-oriented alcohol rehabilitation program. In response to high levels of drunk driving in the United States,⁶ most state legislatures have enacted laws that require alcohol education and treatment programs for

1. See *Jones v. Smid*, No. 4-89-CV-20857, 1993 WL 719562, at *1 (S.D. Iowa Apr. 29, 1993).

2. See *id.*

3. See Richard W. Thoreson & Frank C. Budd, *Self-Help Groups and Other Group Procedures for Treating Alcohol Problems*, in TREATMENT AND PREVENTION OF ALCOHOL PROBLEMS: A RESOURCE MANUAL 157, 171 (W. Miles Cox ed., 1987).

4. *Jones*, 1993 WL 719562, at *2.

5. See *id.*

6. In 1995, 1,033,280 DUI arrests were made. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1995: UNIFORM CRIME REPORTS 211 (1996).

DUI offenders.⁷ To satisfy the treatment requirement, convicted drunk drivers may have to participate in self-help programs such as AA. Thus, for some convicted drunk drivers, the successful completion of a self-help program may stave off a prison stay or lessen the severity of probation terms. In addition to those who must participate in rehabilitation programs as a condition of probation, prisoners are sometimes confronted with trying decisions regarding alcohol-related self-help programs. Prisoners are often granted a choice between participation in such programs and foregoing benefits such as visitation rights and earlier parole.

In numbers and methodology, AA reigns supreme in the self-help world. Most substance abuse self-help programs that are not officially part of AA are, nevertheless, based on AA's system of recovery which employs religious tenets and prayer. Since its inception in the 1930s, AA has spawned more than one hundred derivative groups, including such self-help programs as Gamblers Anonymous and Narcotics Anonymous.⁸ According to AA's own statistics, there are over 50,000 support groups with over 1.1 million members in the United States.⁹ AA has a substantial presence in correctional facilities; more than 2000 AA groups are located in penal institutions in North America.¹⁰ Because AA relies on religious practices in its treatment of people with drinking problems,¹¹ state-imposed participation in AA and, more generally, government support of AA raises significant constitutional issues under the Establishment Clause.¹²

7. See generally AMERICAN INS. ASS'N, DIGEST OF STATE LAWS RELATING TO DRIVING UNDER THE INFLUENCE OF ALCOHOL *passim* (1986); NATIONAL SURVEY OF STATE LAWS 105-21 (Richard A. Leiter ed., 2d ed. 1997).

8. See ERNEST KURTZ, A.A.: THE STORY 191 (1988).

9. See Alcoholics Anonymous World Servs., Inc., *Membership* (visited Oct. 26, 1997) <<http://www.alcoholics-anonymous.org/factfile/doc07.html>>.

10. See *id.*

11. See *infra* Part I.A.

12. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. While this Note deals primarily with the relationship between AA and the Establishment Clause, state-directed participation in AA may also be unconstitutional under the Free Exercise Clause, which states that "Congress shall make no law . . . prohibiting the free exercise [of religion]," U.S. CONST. amend. I, and the doctrine of unconstitutional conditions, which provides that the "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989). For further discussion of mandatory participation in AA in light of the Free Exercise Clause, see *infra* note 351. The unconstitutional conditions doctrine, as it relates to mandatory AA participation, is discussed in Part V, *infra*.

The increasing use of AA as an instrument of rehabilitation by state judicial and penal systems has encouraged debate over whether to include participation in AA as a probationary condition or as part of a prison's rehabilitative regime. Many Americans believe that groups such as AA benefit society. A number of factors contribute to this conclusion: Americans have become more familiar with and increasingly reliant on support groups,¹³ more interested in the role of personal responsibility in the amelioration of social problems,¹⁴ and more frustrated with crime.¹⁵ In addition, Americans—a very religious people¹⁶—are increasingly willing to employ religious means to achieve secular ends. In turn, support groups are impacting religion in America. One commentator has posited that the contours of Americans' religious beliefs are being transformed and informed by support groups; he describes the proliferation of support groups as "redefining how Americans think about the sacred."¹⁷

Members of Congress have demonstrated their willingness to use alternative and novel solutions to endemic social problems with the proposed American Community Renewal Act of 1997, sponsored by Rep. J.C. Watts (R-Okla.) and Sen. Spencer Abraham (R-Mich.).¹⁸

13. See Anthony Lewis, *Are We Joiners or Losers*, ATLANTA J. & CONST., Dec. 27, 1995, at A7 (citing a 1994 Gallup poll that found 40% of Americans are members of support groups).

14. Emblematic of this trend, two recent mass rallies in Washington, D.C., the Million Man March, see R.W. Apple, Jr., *The March on Washington, Ardor and Ambiguity*, N.Y. TIMES, Oct. 17, 1995, at A1, and the Promise Keepers gathering, see Michael Reagan, *Promises and Commitment*, WASH. TIMES, Oct. 5, 1997, at B3, stressed the role of personal responsibility in remedying social ills.

15. In a *New York Times*/CBS News Poll conducted in the fall of 1994, more Americans (23%) ranked crime as the "the most important problem facing this country today" than any other issue. Katharine Q. Seelye, *The 1994 Campaign, Voters Disgusted with Politicians as Election Nears*, N.Y. TIMES, Nov. 3, 1994, at A1 (internal quotation marks omitted).

16. The United States is a religious country; 94% of Americans believe in God or a Universal Spirit. See GALLUP ORG., RELIGION IN AMERICA 1992-1993: GALLUP REPORT 18 (1993) ("The proportion of Americans saying they believe in God or a universal spirit has ranged from 94-99 percent over the years, with the rate holding constant at about 94 percent in recent years.").

17. ROBERT WUTHNOW, SHARING THE JOURNEY: SUPPORT GROUPS AND AMERICA'S NEW QUEST FOR COMMUNITY 16 (1994).

18. S. 432, 105th Cong. (1997). For an outline of the American Community Renewal Act of 1997 and remarks by its lead sponsor in the Senate, see 143 CONG. REC. S2206-02, S2212-14 (daily ed. Mar. 12, 1997) (statement of Sen. Abraham). The Act was first introduced in the House in May 1996. See H.R. 3467, 104th Cong. (1996). When the Act was first introduced, proponents emphasized the partnership it would create between the state and religious institutions in the fight against substance abuse. See 142 CONG. REC. H4908 (daily ed. May 14, 1996) (statement of Rep. Chabot). Utah Sen. Orrin Hatch explained in the *Congressional Record* that the Act would "allow . . . neighborhood groups, including religious institutions, the same

The Act would provide for taxpayer funding of religious treatment programs that require clients “to actively participate in religious practice, worship, and instruction.”¹⁹ By ordering states to “treat religious education and training of personnel as having a critical and positive role in the delivery of program services,”²⁰ the Act may have the effect of overriding state licensing standards for substance abuse counselors.²¹ Perceiving the perilous entanglement between church and state that the Act portends, disparate groups such as the American Baptist Churches USA, B’Nai B’rith, and the National Association of Alcoholism and Drug Abuse Counselors have all registered their opposition to the legislation.²² Perhaps this opposition is founded at least in part on the often overlooked justification for the Establishment Clause that Roger Williams, the founder of the colony of Rhode Island, first proffered—that the separation of church and state exists to protect the religious from the secular as much as to protect the secular from the religious.²³

Several courts have addressed government involvement with AA as part of the rehabilitative functions of state probationary and penal systems. These courts have found an Establishment Clause violation in connection with government support of AA only when an individual has been coerced into participating.²⁴ Because the Supreme Court has observed that the presence of coercion is *sufficient* for an Estab-

access to federal funds that is enjoyed by other drug treatment and counseling facilities.” 142 CONG. REC. S9024 (daily ed. July 29, 1996). Supporters hope passage of the Act will end “[d]iscrimination against effective religiously based programs.” *Id.* They contend that “[t]axpayer funding for drug treatment should be tied strictly to results . . . [and that] religiously based programs should be eligible for funding.” *Id.*

19. H.R. 3467, § 582(g)(2)(A).

20. *Id.* § 585(b)(i).

21. See Charles Leventosky, *Double-Barreled Bad Idea Should Be Shot Down Pronto: Bill Would Fund Religious Institutions and Mandate Religion in Substance Abuse Counseling*, SUN-SENTINEL (Fort Lauderdale), Aug. 2, 1996, at 15A (observing that the bill has a provision that may exempt substance abuse counselors affiliated with religious organizations from state educational requirements).

22. See *id.*

23. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 6 (1965) (noting Roger Williams’s view that “worldly corruptions . . . might consume the churches if sturdy fences against the wilderness [are] not maintained”); see also *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (stating that the “union of government and religion tends to destroy government and to degrade religion”); James Madison, *Government and Religion Must Be Separate*, in *THE COMPLETE MADISON* 299, 309 (Saul K. Padover ed., 1953) (stating that “[r]eligion flourishes in greater purity, without than with the aid of Gov[ernment]”).

24. See *infra* Parts II & III.

lishment Clause infringement,²⁵ these courts, with respect to individual claimants, are correct to emphasize coercion. But they are wrong to *require* coercion as a necessary element of an Establishment Clause claim. By making imperative a finding of coercion, the Establishment Clause is rendered a “virtual nullity,”²⁶ as the Free Exercise Clause exists to protect individuals from governmental religious compulsion. While the Free Exercise Clause focuses on the relationship between the individual and government, the Establishment Clause is primarily concerned with the relationship between religion and government. In particular, the Establishment Clause was “intended to erect ‘a wall of separation between church and State.’”²⁷ Over the years, the Supreme Court has worked assiduously to prevent the intermingling of religion and the state by striking down government policies and actions that advance religion.²⁸ In light of the longstanding emphasis on the separation of religion and government in Establishment Clause jurisprudence, those courts that have considered government involvement with AA and require the presence of coercion in order to find an Establishment Clause violation possess an unduly restrictive view of the Clause. By disregarding the principle of separation of religion and the state, these courts allow for unconstitutional government support of religion.

With these larger issues in mind, this Note explores the constitutionality of state-mandated participation in AA and, more generally, government involvement with AA. Part I examines the religious aspects of the AA system, considers whether AA falls under the constitutional definition of religion, and discusses the current Establishment Clause tests employed by the Supreme Court. Part II surveys cases which have considered the constitutionality of AA as a probationary condition. Part III addresses the conditioning of prisoner privileges on participation in AA. Special attention is paid to the oft-asserted rationale that making a right contingent on participation in AA is reasonably related to the legitimate state penological interest in rehabilitation of prisoners and, therefore, constitutional. Part IV argues that courts which focus on coercion in analyzing government involvement with AA allow for unconstitutional relationships be-

25. See *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring).

26. *Id.* at 621 (Souter, J., concurring).

27. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

28. See *infra* text accompanying note 57.

tween the state and AA to persist. It next contends that the constitutionally sound framework of analysis for state involvement with AA is the principle of the separation of church and state, rather than the coercion standard. This Part concludes with a discussion of taxpayer-funding of religious organizations that provide counseling services. Finally, Part V contends that state-imposed participation in AA is more appropriately considered outside the ambit of the Establishment Clause. To this end, Part V addresses mandatory AA participation under the doctrine of unconstitutional conditions.

I. ALCOHOLICS ANONYMOUS, THE CONSTITUTIONAL DEFINITION OF RELIGION, AND THE ESTABLISHMENT CLAUSE

A. *The Religious Aspects of Alcoholics Anonymous*

Although it is often referred to as a secular organization, AA has its roots in Christianity. Bill Wilson and Robert Smith, the founders of AA, were strongly influenced by the teachings of the Oxford Group, a religious organization that advocated a return to the ethos of early Christianity, with a particular emphasis on its aggressive evangelicalism.²⁹ Nondenominational and theologically conservative, the Oxford Group was formed in Britain in the early twentieth century and reached its peak in the late 1920s and early 1930s.³⁰ The Oxford Group's principles of admitting fault and seeking recovery through God form the basis of AA's philosophy;³¹ indeed the lineage of each of AA's Twelve Steps can be traced to the teachings of the Oxford Group.³²

The chief text in the AA canon is *The Big Book*,³³ which contains interpretive analyses of AA's principles of recovery as well as the

29. See KURTZ, *supra* note 8, at 50.

30. See *id.* at 9, 48.

31. See CHARLES BUFE, ALCOHOLICS ANONYMOUS: CULT OR CURE? 36-39 (1991). Historian Ernest Kurtz contends that AA's practices were "directly and consciously derived" from the "Five Procedures"—meant to recapture the spirit of primitive Christianity—of the Oxford Group: "(1) to give in to God; (2) to listen to God's directions; (3) to check guidance; (4) restitution; and (5) sharing" one's sins for the benefit of others. KURTZ, *supra* note 8, at 49. For the authoritative scholarly treatment of the Oxford Group, see WALTER H. CLARK, THE OXFORD GROUP: ITS HISTORY AND SIGNIFICANCE (1951).

32. See BUFE, *supra* note 31, at 41.

33. ALCOHOLICS ANONYMOUS WORLD SERVS., INC., ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM (3d ed. 1976) [hereinafter THE BIG BOOK].

personal stories of selected members. *The Big Book* also sets forth the Twelve Steps, which form the foundation of AA's system of recovery³⁴ and are routinely recited at AA meetings:

1. We admitted we were powerless over alcohol—that our lives had become unmanageable.
2. Came to believe that a Power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God *as we understood Him*.
4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.
6. Were entirely ready to have God remove all these defects of character.
7. Humbly asked Him to remove our shortcomings.
8. Made a list of all persons we had harmed, and became willing to make amends to them all.
9. Made direct amends to such people wherever possible, except when to do so would injure them or others.
10. Continued to take personal inventory and when we were wrong promptly admitted it.
11. Sought through prayer and meditation to improve our conscious contact with God *as we understood Him*, praying only for knowledge of His will for us and the power to carry that out.
12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.³⁵

In addition to reciting the Twelve Steps at AA meetings, members frequently engage in group prayer.³⁶

34. See G. AIKEN TAYLOR, *A SOBER FAITH: RELIGION AND ALCOHOLICS ANONYMOUS* 45 (1953). Taylor characterizes the Twelve Steps as the "creed" of AA, and asserts that they serve a similar role for AA as the Nicene Creed does for the Christian faith. See *id.*

35. THE BIG BOOK, *supra* note 33, at 59-60.

36. See Thoreson & Budd, *supra* note 3, at 166; see also Warner v. Orange County Dep't of Probation, 870 F. Supp. 69, 71 (S.D.N.Y. 1994) (stating that AA sessions attended by plaintiff opened with the Serenity Prayer and closed with the Lord's Prayer), *aff'd*, 115 F.3d 1068 (1997); O'Connor v. California, 855 F. Supp. 303, 306 (C.D. Cal. 1994) (noting that AA meeting closed with the Lord's Prayer); Ron Gasbarro, *Another Road to Recovery: A New Group Offers Alternative to Alcoholics Anonymous*, WASH. POST, May 14, 1991, at D5 (quoting a former AA participant as stating: "[t]hey [AA] made us say the Lord's Prayer"). The Serenity Prayer asks God to "[g]rant [believers] the serenity to accept the things we cannot change,

In his writings on AA, Bill Wilson, the chief scribe of the organization, posits religion as the wellspring of AA's founding principles. Wilson, in a manner not unlike St. Augustine,³⁷ relates the key to the beginning of his recovery as a willingness "to believe in a Power greater than [himself]" and to "turn in all things to the Father of Light who presides over us all."³⁸ He continues:

As soon as we admitted the possible existence of a Creative Intelligence, a Spirit of the Universe underlying the totality of things, we began to be possessed of a new sense of power and direction, provided we took other simple steps. We found that God does not make too hard terms with those who seek Him.

. . . .

Instead of regarding ourselves as intelligent agents, spearheads of God's ever advancing Creation, we agnostics and atheists chose to believe that our human intelligence was the last word, the alpha and the omega, the beginning and end of all. Rather vain of us, wasn't it?

courage to change the things we can, and the wisdom to know the difference." See *THE BIG BOOK*, supra note 33, at 382. The Lord's Prayer reads:

Our Father who art in heaven,
Hallowed be thy name,
Thy kingdom come,
Thy will be done,
On earth as it is in heaven.
Give us today our daily bread;
And forgive us our debts,
As we also have forgiven our debtors;
And lead us not into temptation,
But deliver us from evil.

Matthew 6:9-13 (Revised Standard Version).

37. St. Augustine documented his lifelong search for a theistic religion and discovery of God in *Confessions* SAINT AUGUSTINE, *CONFESSIONS* (Henry Chadwick trans., 1991) (c. 400 A.D.). Before relating his final, rapturous conversion to Christianity, Augustine discussed his earlier surrender to worldly temptations: "[I]n my unlovely state I plunged into those lovely created things which you made. You were with me, and I was not with you. The lovely things kept me far from you." *Id.* at 201. Augustine found God by turning away from secular excess and paying heed to God's persistent call: "You called and cried out loud and shattered my deafness. You were radiant and resplendent, you put to flight my blindness. . . . You touched me, and I am set on fire to attain that peace which is yours." *Id.*

The necessity of conversion and submission for recovery is prevalent in AA literature and philosophy. Ernest Kurtz, a historian of AA, regards conversion, or what Bill Wilson liked to call "deflation," as a core AA idea. KURTZ, supra note 8, at 23. He notes the profound influence that the religious philosophy of William James had on Wilson; Wilson was particularly influenced by James's ruminations on conversion in *The Varieties of Religious Experience* See *id.* at 23-24 & nn. 51-53.

38. *THE BIG BOOK*, supra note 33, at 12, 14.

We, who have traveled this dubious path, 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.³⁹

Some of Wilson's other writings further depict the injection of monotheistic religious influence into AA. He discusses the need to enlist God in the struggle against alcoholism: "It was evident that a solitary self-appraisal . . . wouldn't be nearly enough. We'd have to have outside help if we were surely to know and admit the truth about ourselves—the help of God."⁴⁰

Not only can God help an individual to fight alcoholism, God also has a role in the AA movement itself as Divine Protector:

[W]e decided that hereafter in this drama of life, God was going to be our Director. He is the Principal; we are His agents. He is the Father, and we are His children. Most good ideas are simple, and this concept was the keystone of the new and triumphant arch through which we passed to freedom.⁴¹

In addition to infusing Judeo-Christian tenets into the principles of AA,⁴² Wilson posited the AA group in which individuals participate as a religious entity.⁴³ According to AA philosophy, disbelievers who first accept the AA group as a higher power are more likely eventually to embrace monotheistic principles.⁴⁴

39. *Id.* at 46, 49.

40. ALCOHOLICS ANONYMOUS WORLD SERVS., INC., AS BILL SEES IT 248 (1967) [hereinafter AS BILL SEES IT].

41. THE BIG BOOK, *supra* note 33, at 62; *see also* Bill W., *When A.A. Came of Age*, in ALCOHOLICS ANONYMOUS COMES OF AGE 48 (Bill W. ed., 1957) (stating that "[t]he conscience of Alcoholics Anonymous as moved by the guidance of God" assures the future of the organization).

42. In an extensive treatment of the shared themes of Christianity and AA, one observer has noted that within the Twelve Steps one can discern "[v]irtually every major Christian truth." TAYLOR, *supra* note 34, at 59. The commentator further contends that the triumphs of AA are derived not from discovery of something new; rather, to serve in the battle against alcoholism, the founders of AA incorporated Christianity's "key to successful living: dependence upon God." *Id.* at 72.

43. *See* AS BILL SEES IT, *supra* note 40, at 73, 191 (observing that for many initiates to AA the group itself is the higher power).

44. *See* ALCOHOLICS ANONYMOUS WORLD SERVS., INC., TWELVE STEPS AND TWELVE TRADITIONS 107-09 (13th ed. 1983) [hereinafter TWELVE STEPS AND TWELVE TRADITIONS]. Wilson elaborates on the progression of AA initiates from believing in their self-help group as a higher power to believing in God:

Notwithstanding the permeation of its methodology and texts with references to God, prayer, and salvation, AA refuses to be characterized as a religion. *The Big Book* specifically disclaims affiliation with any "faith, sect, or denomination."⁴⁵ Nevertheless, AA does stress the spiritual nature of its program.⁴⁶

B. Alcoholics Anonymous and the Constitutional Definition of Religion

To determine if government involvement with AA violates the Establishment Clause, it is first necessary to ascertain whether AA is

For the time being, we who were atheist or agnostic discovered that our own group, or A.A. as a whole, would suffice as a higher power. . . . Looking at those who were only beginning and still doubted themselves, the rest of us were able to see the change setting in. From great numbers of such experiences, we could predict that the doubter who still claimed that he hadn't got the "spiritual angle," and who still considered his well-loved A.A. group the higher power, would presently love God and call Him by name.

Id. at 107-09.

45. THE BIG BOOK, *supra* note 33, at xiv. For cases which accept AA's disavowal of religiosity, see, for example, *Boyd v. Coughlin*, 914 F. Supp. 828, 833 (N.D.N.Y. 1996) (accepting AA's disavowal of religiosity because the AA literature "unequivocally states that the references do not reflect any concept of organized religion"); *Jones v. Smid*, No. 4-89-CV-20857, 1993 WL 719562, at *2 (S.D. Iowa Apr. 29, 1993) (accepting the assertion that in Iowa's Operating While Intoxicated program, which is based on AA, "clients who do not believe in God are offered alternatives to expressing a belief in God, so that they can complete the program"); *Stafford v. Harrison*, 766 F. Supp. 1014, 1017 (D. Kan. 1991) (holding that AA does not constitute a religion); *Griffin v. Coughlin*, 626 N.Y.S.2d 1011, 1015 (N.Y. App. Div. 1995) (finding that the inclusion of AA's Twelve Steps in a prison's substance abuse program did not make the program a religious exercise); and *State v. McGill*, 442 S.E.2d 166, 168 (N.C. Ct. App. 1994) (concluding that AA is a "support group for recovering alcoholics" and is "reasonably related" to defendant's rehabilitation).

46. *The Big Book*, in a section entitled "Spiritual Experience," discusses at great length the significance of spirituality in AA's program of recovery:

The terms "spiritual experience" and "spiritual awakening" are used many times in this book which, upon careful reading, shows that the personality change sufficient to bring about recovery from alcoholism has manifested itself among us in many different forms.

....

... With few exceptions our members find that they have tapped an unsuspected inner resource which they presently identify with their own conception of a Power greater than themselves.

Most of us think this awareness of a Power greater than ourselves is the essence of spiritual experience. Our more religious members call it "God-consciousness."

....

We find that no one need have difficulty with the spirituality of the program. *Willingness, honesty and open mindedness are the essentials of recovery.*

THE BIG BOOK, *supra* note 33, at 569-70.

a religion for constitutional purposes. Although most of the Supreme Court's pronouncements on the constitutional definition of religion have resulted from disputes about Free Exercise claims, there is only one definition of religion for constitutional purposes.⁴⁷ The constitutional definition of religion encompasses "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinated or upon which all else is ultimately dependent [and] which occupies in the life of its possessor a place parallel to that filled by [] God."⁴⁸ In order to be deemed religious for constitutional

47. The Supreme Court has never specifically addressed the question of whether there should be distinct constitutional definitions of religion for analysis under the Establishment and Free Exercise Clauses. That the Court has never squarely considered this issue, despite numerous calls for it to do so, weighs heavily against the notion that a bipartite definition of religion exists. In *Everson v. Board of Education*, Justice Rutledge disputed, in dicta, the propriety of this notion. See 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting). He stated that the word "[r]eligion appears only once in the [First] Amendment" and that it does not possess "two meanings, one narrow to forbid an establishment and another, much broader, for securing the free exercise thereof." *Id.* (Rutledge, J., dissenting) (internal quotation marks omitted). Although it has been recognized that considerable tension arises between the Religion Clauses when the constitutional definition of religion is the same for both, see, e.g., *Sherbert v. Verner*, 374 U.S. 398, 415-17 (1963); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 1183-88 (2d ed. 1988); WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT: CASES AND MATERIALS* 1102-03 (2d ed. 1995), the Court has not seen fit to develop Clause-specific definitions of religions. Instead, the Court has interpreted the Religion Clauses differently to reflect their distinct purposes: The Court views the Free Exercise Clause expansively, to favor government accommodation of an individual's religious practices, while it interprets the Establishment Clause narrowly, to circumscribe government propagation of religion. See Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 695 (1992). The Court's different modes of interpretation for the Religion Clauses minimizes the need for a bifurcated definition of religion. Indeed, the Court has noted the complementary nature of the Religion Clauses. See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (stating that the First Amendment "specifically and firmly fix[es] the right to free exercise of religious beliefs, and buttressing this fundamental right [is] an equally firm, even if less explicit, prohibition against the establishment of any religion by government").

48. *United States v. Seeger*, 380 U.S. 163, 176 (1965). *Seeger* represents the culmination of the long evolution of the constitutional definition of religion. In early cases the Court defined religion in monotheistic terms. See, e.g., *Davis v. Beason*, 133 U.S. 333, 342 (1890) (characterizing religion as "one's views of his relations to his Creator"); *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (referring to Thomas Jefferson's belief that religion is "a matter which lies safely between man and his God" (citation omitted)). In 1961, the Court broadened the constitutional definition of religion to include nontheistic religions. See *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (extending constitutional recognition of religion to nontheistic religions, including "Buddhism, Taoism, Ethical Culture [and] Secular Humanism"). Justice Harlan argued that the constitutional definition of religion in *Seeger* should be expanded further, to include strongly held moral views. See *Welsh v. United States*, 398 U.S. 333, 357-59 (1970) (Harlan, J., concurring) (contending that intensity of moral conviction, rather than an arbitrary constitutional line between religion and nonreligion, should be dispositive in arguments for exemption from the draft).

purposes, the belief "need not be acceptable, logical, consistent, or comprehensible to others."⁴⁹ Observers have interpreted the aforementioned language very broadly to encompass any belief system that relies on a "higher reality"⁵⁰ or a "transcendental reality."⁵¹

To determine whether AA is a religion under the Establishment Clause, courts cannot defer to AA's definition of itself.⁵² Instead, courts must examine the nature of the organization in practice.⁵³ Participation in the AA system entails participation in activity that under Supreme Court precedent must be characterized as religious. Further, an examination of AA literature reveals that its dominant

Commentators agree that no bright line exists between religious and secular belief systems for constitutional purposes. See, e.g., Jesse Choper, *Defining Religion in the First Amendment*, 1982 U. ILL. L. REV. 579, 604 (stating that it is "very difficult, if not impossible, to distinguish transcendental ideologies from those commonly considered to be based on secular premises"); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519, 1565 (1983) (stating that "[t]here simply is no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else"); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 848-73 (1995) (examining the attempted separation of the religious and secular in Supreme Court jurisprudence).

49. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). Moreover, Establishment Clause claimants do not have to prove the truth of their beliefs. The Court has stated "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." *United States v. Ballard*, 322 U.S. 78, 86 (1944).

50. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 805 (1984) (contending that the presence of a "higher reality," that is, the "faith that some higher or deeper reality exists than that which can be established by ordinary existence or scientific observation," should be decisive when determining whether a belief system falls under the constitutional definition of religion).

51. Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 240, 285-86 (1989) (arguing that religion is characterized for constitutional purposes by the role "transcendental reality plays in imposing obligations" on believers).

52. See *supra* notes 45-46 and accompanying text. Even if courts erroneously rely on AA's self-description that it is "spiritual" rather than "religious" in determining whether it is a religion for constitutional purposes, courts should still find that AA is a religion. If the AA group itself is a higher power, as its co-founder contends, see *supra* text accompanying notes 43-44, courts should find that AA participation is a religious exercise.

53. For example, in *Meek v. Pittinger*, the Supreme Court invalidated a Pennsylvania loan program of instructional material and equipment "earmarked for secular purposes" and available to both public and nonpublic schools. 421 U.S. 349, 363-66 (1975). The Court found that it "would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize . . . [the statute] as channeling aid to the secular without providing direct aid to the sectarian." *Id.* at 365; see also *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (holding that a Kentucky statute requiring the posting of the Ten Commandments in public school classrooms had no secular legislative purpose, regardless of the state's insistence that the statute served a secular end).

theme reflects elements common to most theistic religions.⁵⁴ Thus, despite AA's assertions of secular allegiances and its disavowal of any intent to impose a particular concept of God on participants, courts should conclude that AA is a religion. And several prominent courts have done so, including the United States Courts of Appeals for the Second and Seventh Circuits and the New York Court of Appeals.⁵⁵ AA, monotheistic in its creed and dogmatic in its practice, shares those traits which characterize organized religion today.⁵⁶

C. Establishment Clause Tests

1. *The Separation of Church and State.* For over fifty years the Supreme Court has stressed the separation of church and state as the foundation of Establishment Clause jurisprudence. This principle of separation "relate[s] primarily to institutional political arrangements, rather than to the effects such arrangements have on individual citizens."⁵⁷ The principle of separation embraces the ideal of the secular state, in which religion and government are segregated to ensure that the former flourishes freely while the latter is not theocratic.

The test set forth in *Lemon v. Kurtzman*⁵⁸ has served for over twenty-five years as the governing standard for determining whether a government practice violates the Establishment Clause. The *Lemon* test addresses government support of religious institutions, and rests on the principle of separation of church and state. In *Lemon*, the Court examined the constitutionality of state-funding programs that provided aid to sectarian schools by reimbursing the cost of textbooks, instructional material, and teachers' salaries in certain secular subjects.⁵⁹ To assist in its determination of whether this

54. See *supra* Part I.A.

55. See *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1075 (2d Cir. 1997) (finding AA meetings that began and ended with group prayer to be "intensely religious events"); *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (holding that a prison's Narcotics Anonymous Twelve Step drug-treatment program was based on monotheistic tenets); *Griffin v. Coughlin*, 673 N.E.2d 98, 102 (N.Y. 1996) (concluding that AA possesses elements such as belief in a Supreme Being and religious proselytizing), *cert. denied*, 117 S. Ct. 681 (1997).

56. See *infra* text accompanying notes 336-44 (discussing AA's status as a "pervasively sectarian" organization).

57. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 463.

58. 403 U.S. 602 (1971).

59. See *id.* at 606-07.

government practice violated the Establishment Clause, the Court laid out a three-part test. In order to be deemed constitutional, the action: 1) must have a "secular legislative purpose;"⁶⁰ 2) must have a "principal or primary effect . . . that neither advances nor inhibits religion;"⁶¹ and 3) "must not foster an excessive governmental entanglement with religion."⁶² In *Lemon*, the Court struck down the contested state programs, finding that they promoted excessive entanglement between religion and government.⁶³

Because of its elasticity,⁶⁴ *Lemon's* three-part test has left Establishment Clause jurisprudence in a state of chaos.⁶⁵ This muddle has led the Court to disregard the *Lemon* test on occasion,⁶⁶ and to fashion alternative tests.⁶⁷ Indeed, recent Establishment Clause cases have referred to *Lemon* only in passing.⁶⁸ One observer has noted that seven members of the current Court have disassociated themselves from *Lemon*.⁶⁹ Nevertheless, despite criticism from several

60. *Id.* at 612 (citation omitted).

61. *Id.* (citation omitted).

62. *Id.* at 613 (citation and internal quotation marks omitted).

63. *See id.* at 615.

64. *See* Michael A. Berg, *The Religious Right, Constitutional Values, and the Lemon Test*, 1995 ANN. SURV. AM. L. 37, 73 (stating that the *Lemon* test's inconsistency results in large measure from "uncertainty as to whether the presence of any legitimate secular purpose will satisfy the Establishment Clause, or whether the actual or primary purpose of the legislation must be secular") (internal quotation marks omitted); Gey, *supra* note 57, at 469 ("Because of *Lemon's* slippery nature, the slightest factual distinction makes each Establishment Clause case a whole new ball game.").

65. Chief Justice Rehnquist and Justice Scalia have been especially critical of *Lemon*. *See* *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (stating that the "*Lemon* test has caused this Court to fracture into unworkable plurality opinions"); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (remarking that the application of the *Lemon* test has made a "maze of the Establishment Clause").

66. *See* McConnell, *supra* note 47, at 696-708 (noting the increasing irrelevance of *Lemon*); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 425-30 (1996) (examining the movement toward "multiple principles" in Establishment Clause jurisprudence).

67. *See infra* notes 71-79, 81-92 and accompanying text.

68. *See* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) (relying on principle of government neutrality towards religion); *Board of Educ. v. Grumet*, 512 U.S. 687, 697, 703-04 (1994) [hereinafter *Kiryas Joel*] (holding that the creation of a special school district for a religious enclave violated the Establishment Clause principle that the government may not exhibit "favoritism" toward any religious sects). *But see* *Agostini v. Felton*, 117 S. Ct. 1997, 2014-18 (1997) (employing the "excessive entanglement" prong of the *Lemon* test to uphold a New York statute which provided indirect aid to religious schools).

69. *See* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 328 (noting that Chief Justice Rehnquist and Justices

members of the Court, *Lemon* has not been overruled.⁷⁰ Although the Court's application of the *Lemon* test has not resulted in a secular state shorn of religious influence, the test's guiding principle is that religion and government, at their most basic levels, are incompatible. *Lemon's* *raison d'être* is often overlooked as it is vilified by justices and their academic supporters.

Justice O'Connor has been especially critical of *Lemon*, urging that Establishment Clause jurisprudence be "freed from the *Lemon* test's rigid influence."⁷¹ Justice O'Connor's frustration with *Lemon* led her to discuss an alternative approach that focuses on government endorsement of religion in *Lynch v. Donnelly*.⁷² "[Government] endorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."⁷³ Justice O'Connor's recognition of the dangers of government endorsement of religion is consistent with the principle of separation. Indeed, Justice O'Connor proposed the endorsement test as a clarification of the *Lemon* test.⁷⁴ She recast the purpose and effect prongs of *Lemon* in terms of perception: "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."⁷⁵

In *County of Allegheny v. ACLU*,⁷⁶ the Supreme Court formally adopted Justice O'Connor's endorsement inquiry as an Establishment Clause test.⁷⁷ The endorsement test considers whether a "reasonable observer" would view the challenged governmental prac-

Breyer, Kennedy, O'Connor, Scalia, Souter, and Thomas have distanced themselves from *Lemon*).

70. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 n.7 (1993). One commentator has noted that the Court's refusal to overrule *Lemon* "reflects its unwillingness to legitimize the sectarian political culture" that the critics of the principle of separation supposedly desire. Gey, *supra* note 57, at 471.

71. *Kiryas Joel*, 512 U.S. at 721 (O'Connor, J., concurring).

72. 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

73. *Id.* at 688 (O'Connor, J., concurring).

74. See *id.* at 687 (O'Connor, J., concurring).

75. *Id.* at 690 (O'Connor, J., concurring).

76. 492 U.S. 573 (1989).

77. See *id.* at 593.

tice as conveying a message of religious endorsement.⁷⁸ While members of the Court differ over the level of knowledge that should be attributed to the reasonable observer, most justices who favor the endorsement test would ascribe a collective knowledge of community history to the reasonable observer.⁷⁹

Although the endorsement test has been employed primarily in cases involving the constitutionality of public religious displays, the Court has not proscribed its use in other contexts. Lower courts, for example, have found the endorsement test helpful in examining the constitutionality of school prayer and state religious holidays.⁸⁰

78. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-79 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

79. See *id.* at 780-81 (O'Connor, J., concurring in part and concurring in the judgment). The endorsement test is not without its critics. Among members of the Court, Justice Kennedy is most skeptical, regarding the test as overinclusive. See *County of Allegheny*, 492 U.S. at 670-71 (Kennedy, J., dissenting) (stating that few national historical traditions that recognize the part religion plays in our society could withstand scrutiny under the endorsement test). On the other hand, Justice Stevens regards the endorsement test as underinclusive. While he agrees that the standard is that of the "reasonable observer," Justice Stevens contends that the quantum of knowledge attributed to the reasonable observer should not be based on collective community standards. See *Pinette*, 515 U.S. at 799 (Stevens, J., dissenting). He would find an Establishment Clause breach "[i]f a reasonable person could perceive a government endorsement of religion." *Id.* (Stevens, J., dissenting) (emphasis added). Like Justice Stevens, Professor Tribe regards the collective community knowledge "reasonable observer" standard as insufficient to restrict government support of religion. See TRIBE, *supra* note 47, § 14-15, at 1293. Professor Tribe contends that the proper perspective is that of the "reasonable non-adherent," *id.* § 14-15, at 1295-96, which is necessary to counter majoritarian pressures:

When deciding whether a state practice makes someone feel like an outsider, the result often turns on whether one adopts the perspective of an outsider or that of an insider. Judges must recognize the range of possible responses and cannot avoid selecting among them. For many adherents of the majority's religion . . . the endorsement threshold is quite high. But the opposite extreme also presents problems. For some especially sensitive non-adherents, the threshold may be unacceptably low and may cast doubt on free exercise accommodations and on practices that have outgrown their religious roots.

It seems clear that, in deciding whether a government practice would impermissibly convey a message of endorsement, one should adopt the perspective of a non-adherent; actions that reasonably offend non-adherents may seem so natural and proper to adherents as to blur into the background noise of society.

Id. § 14-15, at 1293 (footnotes omitted).

80. See, e.g., *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (applying the endorsement test to a state statute that permitted students to initiate prayers at various compulsory and noncompulsory events); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 968 (5th Cir. 1992) (employing endorsement test to determine the constitutionality of prayer at high school graduation ceremony); *Koenick v. Felton*, 973 F. Supp. 522, 527 (D. Md. 1997) (using endorsement test to determine whether a state statute authorizing a public school holiday for Easter violated the Establishment Clause).

2. *The Protection of Individual Religious Liberty.* A second principle—the protection of individual religious liberty—has also been emphasized in Establishment Clause jurisprudence, albeit to a much lesser degree than the principle of separation. Some justices and academics have advocated the abandonment or marginalization of the principle of separation; they urge the Supreme Court to analyze Establishment Clause cases by assessing the coercive effect of government actions on an individual's religious beliefs or practices.⁸¹

Unlike the principle of separation, which seeks to prevent the intermingling of church and state, the coercion standard's guiding principle is that government actions that advance religion are permissible unless such actions coerce an individual to act or believe in conformity with a religion against his will. Separation of church and state is no longer an end; rather it is occasionally required as a means to protect individual religious liberty. So long as the religious liberties of individuals remain protected, the coercion standard allows for some injection of religion into governmental affairs and of the government into religion.

In *Lee v. Weisman*,⁸² the Supreme Court focused not on separation, but on the protection of individual religious liberty; this change of focus led to the Court's announcement of a new Establishment Clause test that specifically addressed government coercion of individuals to participate in religious activities. Under the "coercion" test, a government practice violates the Establishment Clause if it compels a person to declare a religious belief or participate in a re-

81. Justices Kennedy, *see infra* text accompanying notes 82-92, and Scalia, *see infra* note 92, have most strongly emphasized individual religious liberty in Establishment Clause cases. In academia, Professors McConnell and Choper are among the staunchest critics of the principle of separation. *See generally, e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986). *See also* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 34-39, 122-23 (1993) (decrying the "potential transformation of the Establishment Clause from a guardian of religious liberty into a guarantor of public secularism," which would strip religions of their status as autonomous intermediate institutions between the individual and the state); M.G. "Pat" Robertson, *Squeezing Religion Out of the Public Square—The Supreme Court, Lemon, and the Myth of the Secular Society*, 4 WM. & MARY BILL RTS. J. 223, 224 (1995) (criticizing efforts to exclude religious ideals and ideas from the political and lawmaking process).

82. 505 U.S. 577 (1992).

ligion.⁸³ Writing for the Court, Justice Kennedy opined: “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”⁸⁴ In *Lee*, public school officials selected a rabbi to give a “nonsectarian” invocation and benediction at the graduation ceremony.⁸⁵ Neither the fact that students could remain silent during the prayer nor the fact that the prayer was nondenominational persuaded the Court that the action was permissible.⁸⁶ In its analysis, the Court emphasized that, for the nonbeliever, the innocuous, nonsectarian prayer may appear to be an exercise of the “machinery of the State to enforce a religious orthodoxy”⁸⁷ rather than a communal expression of shared values.

The Court found the degree of state coercion extremely unsettling, even though the prayer lasted for less than two minutes and students were not required to recite it. The Court stressed its “heightened concerns” of psychological and religious coercion in the school setting.⁸⁸ It further found that the school district’s supervision and control of the ceremony and the requirement that students maintain respectful silence during the prayer constituted public pressure to participate, even if the pressure was subtle and indirect.⁸⁹ Furthermore, given the milieu of a high school graduation ceremony, the Court noted that silence for some dissenters can connote acceptance of the prayer or participation itself.⁹⁰ Objectors are caught between Scylla and Charybdis; participate in or accept the state’s religious viewpoint by maintaining respectful silence during the prayer, or pro-

83. *See id.* at 587. Although *Lee* represents the formal pronouncement of the coercion test in Establishment Clause jurisprudence, the Court has discussed coercion on numerous prior occasions in connection with the Establishment Clause. *See, e.g.,* *School Dist. v. Ball*, 473 U.S. 373, 385 (1985) (maintaining that a student’s religious beliefs should be “free of any coercive pressures from the State”); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (stating the government may not “coerce anyone to attend church, to observe a religious holiday, or to take religious instruction”); *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947) (stating that “[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs”).

84. *Lee*, 505 U.S. at 587.

85. *See id.* at 587.

86. *See id.* at 588-89, 593.

87. *Id.* at 592.

88. *Id.*

89. *See id.* at 593.

90. *See id.* at 597.

test and risk uncertain consequences.⁹¹ The Court regarded both choices as unacceptable.⁹²

* * *

For centuries, commentators have debated the appropriate boundaries between church and state. Professor Stanley Fish has asserted that this dialogue “has not advanced one millimeter beyond the terms established by John Locke”⁹³ over three hundred years ago. Locke wrote:

I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will always be arising⁹⁴

In response to Locke’s challenge to “settle the just bounds” of church and state, traditional legal scholars have attempted to explicate the imponderables of the Establishment Clause with intrepid analyses of the Court’s opinions, seeking to identify patterns that reconcile irreconcilable results and principles that the Court is sure to follow in the future. But, invariably, the Court deviates from patterns and principles as they are identified and the cycle of scholarship begins anew. Others have taken a more philosophical bent, empha-

91. *See id.* at 593.

92. *See id.* at 586-87. Justice Scalia, dissenting in *Lee*, proposed a more robust coercion standard that does not include psychological coercion. *See id.* at 636 (Scalia, J., dissenting). He would find an Establishment Clause violation only if an individual is legally coerced to act in accordance with a religion. *See id.* at 640 (Scalia, J., dissenting) (characterizing legal coercion as “coercion of religious orthodoxy and of financial support by force of law and threat of penalty”).

In addition to *Lemon* and the endorsement and coercion tests, the Supreme Court has adopted a “history and tradition” test to address certain Establishment Clause issues. In *Marsh v. Chambers*, the Court considered whether a state legislature’s policy of opening each of its legislative sessions with a prayer violated the Establishment Clause. *See* 463 U.S. 783, 784 (1983). The Court held that such practices, extant for over 200 years, are not unconstitutional, as they are “deeply embedded in the history and tradition of this country.” *Id.* at 786. Because AA participation as a condition of probation or as a requirement for prisoner privilege is not a practice “deeply embedded” in America’s history or tradition, *Marsh* is inapposite for the determination of the constitutionality of state-imposed AA participation.

93. Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2258 (1997)

94. *Id.* (quoting JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), reprinted in JOHN LOCKE: A LETTER CONCERNING TOLERATION IN FOCUS 12 (John Horton & Susan Mendus eds., 1991)).

sizing in various fashions the unique definitional, moral, and constitutional problems that religion's special characteristics engender. In the end, the philosophical tack yields no firmer conclusions about the Court's decisionmaking process except that it rarely follows the various principles set forth by the legal philosophers. The continuing debate in the wider academy and among members of the Court is testament to Professor Fish's assertion that Locke's challenge has not adequately been met.

Abstruse philosophical expositions on the relationship between religion and government are of little solace to judges who have dockets to clear; they cannot afford to be paralyzed by the inscrutability of the Establishment Clause. Despite conflicting precedent and rancor in the academy, judges must decide how to address church-state issues. This Note contends simply that judges, in choosing the coercion test, have selected the wrong approach to assess government support of AA. The coercion test's track record since *Lee v. Weisman* militates against judges using it as the exclusive means to dispose of AA cases. Since its pronouncement, the coercion test has provided the basis for a Supreme Court Establishment Clause decision in only one instance.⁹⁵ In *Lee* itself, Justices Blackmun and Souter filed concurring opinions, both joined by Justices O'Connor and Stevens, which emphasized the principle of separation of church and state rather than the protection of individual religious liberty.⁹⁶ The rest of this Note demonstrates why judges who refuse to consider government involvement with AA in light of the separation principle fail to carry out the mandate of the Establishment Clause.

II. ALCOHOLICS ANONYMOUS AND PROBATION

Trial courts often sentence offenders to probation in lieu of prison. Courts impose probation as a sanction for a crime; individu-

95. In a one-sentence memorandum opinion issued the same term *Lee* was decided, the Supreme Court vacated a Fifth Circuit decision, which allowed for prayer at a high school graduation ceremony, and remanded for further consideration in light of *Lee*. See *Jones v. Clear Creek Indep. Sch. Dist.*, 505 U.S. 1215 (1992) (mem.), *vacating and remanding* 930 F.2d 416 (5th Cir. 1991).

96. See *Lee*, 505 U.S. at 600 ("[The Establishment Clause's] purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.") (Blackmun, J., concurring) (internal quotation marks omitted); *id.* at 627 (observing that the "principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence") (Souter, J., concurring).

als placed on probation must abide by the conditions set by the court. If an offender violates his probationary conditions, he can be incarcerated following a judicial proceeding.⁹⁷ Probation conditions are mainly derived from two sources. First, statutes may mandate or suggest probation conditions. Second, most judges have statutory authority to devise probation conditions.⁹⁸ Although the discretion given to judges is broad, it is not boundless, especially when a probationer's constitutional rights are at issue.⁹⁹ While a probationer's special status diminishes certain of his constitutional rights,¹⁰⁰ any restriction must be narrowly drawn to further a legitimate goal of probation.¹⁰¹ Probation conditions should further the rehabilitation of the probationer; this purpose has been cited as the primary goal of rehabilitation.¹⁰²

Offenders convicted of DUI are frequently eligible for probation in place of imprisonment. State drunk driving laws often create a post-conviction system in which the DUI offender's alcohol problem is evaluated for its seriousness.¹⁰³ After the offender's alcohol problem is classified according to statutory guidelines, the probation department recommends a prescribed rehabilitation program to the sentencing judge.¹⁰⁴ If the offender's drinking problem meets the

97. See NEIL P. COHEN & JAMES J. GOBERT, *THE LAW OF PROBATION AND PAROLE* § 1.01, at 4 (1983). Parole is often confused with probation. Whereas probation is given in place of incarceration, an individual is eligible for parole only after serving a portion of his prison sentence. See *id.* In addition, parole is granted through an administrative procedure rather than a judicial one. See *id.*

98. See *id.* § 1.04, at 13.

99. See *id.* § 5.03, at 193 (noting that “[c]onditions constricting constitutionally protected rights are closely scrutinized by courts”).

100. Cf. *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979) (stating that a condition of probation is not “necessarily invalid simply because it affects a probationer’s ability to exercise constitutionally protected rights”).

101. See *United States v. Conseulo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975).

102. See COHEN & GOBERT, *supra* note 97, § 1.03, at 9; see also *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980) (stating that the “primary purpose of probation is to rehabilitate the offender”).

103. For a description of Illinois’ statutory post-conviction system to determine the proper punishment and rehabilitation for a DUI offender, see *Youle v. Edgar*, 526 N.E.2d 894, 896-99 (Ill. App. Ct. 1988).

104. See Christopher K. Smith, Note, *State Compelled Spiritual Revelation: The First Amendment and Alcoholics Anonymous as a Condition of Drunk Driving Probation*, 1 WM. & MARY BILL RTS. J. 299, 306 (1992). These rehabilitative programs, in turn, sometimes mandate participation in self-help programs such as AA in addition to or in satisfaction of the rehabilitation requirement of the offender’s sentence. See Michael G. Honeymar, Jr., Note, *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does It Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437, 438 (1997).

statutory criteria for required participation in AA or a self-help program, the probation department further recommends participation in such a group as a probationary condition to the sentencing judge.¹⁰⁵ The court generally follows the probation department's recommendation.¹⁰⁶ Although the sentencing judge remains the final arbiter of the offender's probation conditions, the legislature's imprimatur on AA participation as a condition of probation is unmistakable.¹⁰⁷

Regardless of whether a state has enacted a post-conviction framework for guilty drunk drivers, offenders may still be compelled to participate in AA as a probationary condition by sentencing judges.¹⁰⁸ Judges sentencing DUI offenders may specifically impose AA or may simply require offenders to participate in any number of state-approved self-help programs. Judges have been known to either require AA participation for every first time DUI offender that comes before them¹⁰⁹ or to mete out such a sentence only for recidivist drunk drivers.¹¹⁰ While there are no statistics bearing on the frequency with which judges specifically impose AA as a probationary condition for DUI offenders, AA's status as the dominant self-help program suggests that it is very high.

Federal courts have twice addressed the constitutionality of requiring AA attendance as a condition of probation.¹¹¹ In *Warner v.*

105. In some jurisdictions, a judge's lack of specificity in setting probation conditions may be tantamount to a requirement that the drunk driving offender participate in AA because of a probation department's preference for AA. Lacking explicit guidance from the sentencing judge, the DUI offender's probation officer will often instruct the probationer to attend AA. Richard B. Golden, a lawyer representing parties in several challenges to mandatory AA participation as a condition of probation, observed that, while alternatives to AA do exist, probation officials do not think that they are "satisfactory" and, moreover, that it is a "standard condition [throughout the country] that probationers in DWI cases attend AA." Frank J. Murray, *Courts Hit Sentencing DWIs to AA, Fault Religious Beliefs*, WASH. TIMES, Nov. 4, 1996, at A10.

106. See Smith, *supra* note 104, at 306; see also *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1070 (2d Cir. 1997) (describing probation department's post-conviction recommendations, including a provision that offender attend AA, that were followed by the sentencing judge).

107. See Smith, *supra* note 104, at 307.

108. See COHEN & GOBERT, *supra* note 97, § 1.04, at 12.

109. See, e.g., Smith, *supra* note 104, at 307 (noting a Massachusetts court that sentences every convicted drunk driver to AA for up to thirty weeks).

110. See, e.g., Jeri Row, *DWI Rules Too Lenient, Officials Say*, NEWS & RECORD (Greensboro, N.C.), July 16, 1995, at B1 (reporting that local judges routinely require AA participation as a probation condition for habitual drunk drivers).

111. In a less rigorous fashion, an Illinois state court considered whether AA attendance is constitutional as a condition of probation. See *Youle v. Edgar*, 526 N.E.2d 894, 899 (Ill. App. Ct. 1988) (holding that AA attendance as a condition of probation is constitutional).

Orange County Department of Probation,¹¹² the United States Court of Appeals for the Second Circuit held that a New York county's probation department violated the Establishment Clause under the coercion test when it required a convicted drunk driver to attend AA as a condition of probation.¹¹³ In *O'Connor v. State of California*, the United States District Court for the Central District of California held that a county's requirement that a DUI offender attend an alcohol treatment program, where AA was the principal recommended program, did not violate the Establishment Clause under the *Lemon* test.¹¹⁴

A. *Warner v. Orange County Department of Probation*

Robert Warner was convicted of three alcohol-related driving offenses over slightly more than a year's time.¹¹⁵ As a condition of his three-year sentence of probation, Warner was required to "attend Alcoholics Anonymous at the direction of [his] probation officer."¹¹⁶ The sentencing judge did not offer any alternative rehabilitation programs to Warner. The judge followed the recommendation of the probation department which, as a matter of policy, specifically recommends AA therapy to the court for DUI cases.¹¹⁷ A self-described atheist, Warner filed suit, claiming that mandatory participation in AA as a probationary condition violated the Establishment Clause.¹¹⁸ Warner alleged that his forced participation in AA was unconstitutional because of AA's emphasis on God and spirituality in its pro-

112. 115 F.3d 1068 (2d Cir. 1997).

113. See *Warner*, 115 F.3d at 1075-77. The *Warner* case has undergone several iterations. For the sake of clarity, the district court's rejection of the probation department's motion to dismiss Warner's section 1983 claim is designated *Warner I*. See *Warner v. Orange County Dep't of Probation*, 827 F. Supp. 261, 269 (S.D.N.Y. 1993). The district court's consideration of the merits of Warner's section 1983 claim is called *Warner II*. See *Warner v. Orange County Dep't of Probation*, 870 F. Supp. 69, 70-74 (S.D.N.Y. 1994). The Second Circuit's decision affirming the basic holding of *Warner II* and remanding to determine whether Warner consented to AA as a condition of probation is referred to as *Warner III*. See *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1069-82 (2d Cir. 1997). The district court's finding on remand that Warner's failure to object to required attendance at AA meetings did not constitute a waiver of his section 1983 claim is designated *Warner IV*. See *Warner v. Orange County Dep't of Probation*, 968 F. Supp. 917, 924 (S.D.N.Y. 1997).

114. See 855 F. Supp. 303, 303-04 (C.D. Cal. 1994).

115. See *Warner I*, 827 F. Supp. at 262.

116. *Id.*

117. See *Warner III*, 115 F.3d at 1075.

118. See *Warner I*, 827 F. Supp. at 263.

gram of recovery.¹¹⁹ He particularly disagreed with the use of a prayer invoking “the Lord” at the beginning of AA meetings and the encouragement he received at sessions to read *The Big Book*.¹²⁰ He sought injunctive relief and compensatory damages under 42 U.S.C. § 1983 (section 1983).¹²¹

In *Warner I*, the district court held that Warner stated a valid claim under section 1983 and denied the probation department’s motion to dismiss.¹²² Recognizing that the tenuous status of *Lemon* cautioned against “undue reliance” on it, the court based its decision on both *Lemon* and *Lee*.¹²³ In its application of the coercion test, the court stated that, because of Warner’s potential confinement, the pressure to conform to AA’s spiritual system of recovery “seemed considerably more forceful” than that brought to bear on the schoolchildren in *Lee*.¹²⁴

In *Warner II*, the district court considered the merits of Warner’s section 1983 claim. The court held that the probation condition that required Warner to participate in AA violated the Establishment Clause.¹²⁵ In its analysis, the court abandoned *Lemon* and relied solely on *Lee*, examining whether the probation department’s actions ran afoul of *Lee*’s dictate that the “government may not coerce anyone to support or participate in religion.”¹²⁶ Because Warner was faced with incarceration if he did not participate in AA, the court found that the probation department’s requirement that Warner attend AA was a coercive measure, and therefore that it violated the Establishment Clause.¹²⁷

119. *See id.*

120. *See id.*

121. *See id.* Section 1983 provides redress for any citizen of the United States who is deprived of his constitutional rights, privileges, or immunities. *See* 42 U.S.C. § 1983 (1994). Under section 1983, state and local government officials are liable to the injured party in an action at law, a suit in equity, or any other appropriate proceeding for redress. *See id.*

122. *See Warner I*, 827 F. Supp. at 269.

123. *Id.* at 266.

124. *Id.* at 268.

125. *See Warner II*, 870 F. Supp. 69, 72-73 (S.D.N.Y. 1994).

126. *Id.* at 72 (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

127. *See id.* While this determination was sufficient under *Lee* to find that the state was acting in a manner that advanced religion, the court also analyzed whether the probation department’s policy of mandating AA attendance for probationers had the effect of “establish[ing] a [state] religion or religious faith.” *Id.* Significantly, the court stated that the probation department’s policy, while not intending to establish a religious faith, nevertheless “tend[ed] towards a state-mandated and state-approved religion” in a stronger manner than either *Lee* or *County of Allegheny*. *Id.* at 73. This tension between the protection of individual

In *Warner III*,¹²⁸ the Second Circuit affirmed the district court's finding in *Warner II* that Warner's probationary condition constituted forced participation in a religious activity.¹²⁹ The Second Circuit found that the program which Warner attended "placed a heavy emphasis on spirituality and prayer, in both conception and in practice."¹³⁰ Observing that participants in the program were told to "pray to God"¹³¹ for succor in their battle against alcoholism and that meetings began and adjourned with "group prayer,"¹³² the Second Circuit had "no doubt" that the meetings Warner attended were "intensely religious events."¹³³

The *Warner III* court next applied the coercion test to Warner's claim. In finding state coercion, the court noted that if Warner had failed to attend his AA meetings he would have violated his probation and been subject to incarceration.¹³⁴ In addition, the court stated that "[t]he probation department's policy, its recommendation, and its printed form all directly recommended A.A. therapy to the sentencing judge, without suggesting that the probationer might have any option to select another therapy program, free of religious content."¹³⁵ The Second Circuit had little difficulty concluding that Warner's probationary condition violated the Establishment Clause and, in so doing, rejected alternative Establishment Clause analyses offered by the probation department.¹³⁶ The court left open the ques-

religious liberty and the more traditional Establishment Clause concern for the separation of church and state is discussed further in Part IV.A, *infra*.

128. 115 F.3d 1068 (2d Cir. 1997).

129. *See id.* at 1075, 1077.

130. *Id.* at 1075 (quoting *Warner II*, 870 F. Supp. at 71).

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.*

135. *Id.*

136. *See id.* at 1074-77. The *Warner III* court rejected as inapposite the probation department's *Marsh v. Chambers* analysis, *see id.* at 1076, and declined to employ *Lemon*, *see id.* at 1076 n.8. The court also refuted the defendant's assertion that *Lee* was inapplicable because the more mature Warner was subjected to less social pressure to participate in religion than the schoolchildren in *Lee*. *See id.* at 1075-76. The court argued that Warner was subject to *more* pressure than the children in *Lee*, who were exposed to only two minutes of prayer. *See id.* at 1076. The court stated that:

Warner, in contrast, was required to participate in a long-term program of group therapy that repeatedly turned to religion as the basis of motivation. And when he appeared to be pursuing the Twelve Steps of the A.A. program with insufficient zeal—"Thirteen Stepping" in A.A. parlance—the probation officer required that he attend "Step meetings" to intensify his motivation. Warner was also paired with another member of A.A. as a method of enhancing his indoctrination into the group's

tion whether the state would have violated the Establishment Clause if Warner had been “offered a reasonable choice of therapy providers.”¹³⁷

Dissenting in *Warner III*, Judge Winter argued that a different result obtains under *Lemon*.¹³⁸ Judge Winter attacked the majority’s Establishment Clause logic as “endanger[ing] any number of ubiquitous penal programs” and threatening sentencing, probation, and penal institutions.¹³⁹ Unlike the majority, Judge Winter refused to focus exclusively on the coercion test, and instead utilized *Lemon*. Judge Winter found that: 1) the secular purpose prong of the test is easily met by the state’s legitimate interest in rehabilitating its prisoners; 2) any advancement of religion is “incidental;” and 3) the large degree of control the state wields over the lives of inmates justifies its provision of religious programs in the prison setting.¹⁴⁰

Interpreting the record differently from the majority, Judge Winter concluded that Warner had initially embraced the condition of probation in the hope that the sentencing court would respond favorably and be more lenient. He noted that Warner began attending AA meetings on the advice of counsel in order to impress the sentencing judge before any involvement by the probation office.¹⁴¹ Judge Winter reasoned that Warner’s proactive stance towards AA amounted to a waiver of any constitutional claim the probationer may have had.¹⁴² Judge Winter also noted that Warner failed to ob-

approach to recovery from alcoholism. Most importantly, failure to cooperate could lead to incarceration.

Id.

137. *Id.* at 1075.

138. *See id.* at 1080-81 (Winter, J., dissenting).

139. *Id.* at 1080 (Winter, J., dissenting). Judge Winter presented prison chaplains and community service at soup kitchens operated by religious organizations as examples of programs that would be invalid if the majority’s argument was followed to its logical conclusion. *See id.* (Winter, J., dissenting).

140. *See id.* at 1080-81 (Winter, J., dissenting). Judge Winter supported his finding of no excessive government entanglement (the third prong of the *Lemon* test) with Second Circuit case law holding that the state is bound to offer “some congregate programs of a sectarian nature.” *Id.* at 1081 (Winter, J., dissenting) (citing *Salahuddin v. Coughlin*, 993 F.2d 306, 308 (2d Cir. 1993)).

141. *See id.* at 1078 (Winter, J., dissenting).

142. *See id.* at 1078-79 (Winter, J., dissenting). The notion that a probationer can waive his constitutional rights has long been in disrepute. Early theories characterized probation as an “act of grace.” *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935) (stating that “[p]robation . . . comes as an act of grace to one convicted of a crime”). Probation conditions were not reviewable because the defendant did not have a substantive right to probation. *See id.* at 492-93. The offender could either accept the probation conditions as offered or select the alternative—jail. In

ject to the condition at the sentencing hearing and took no appeal; it was not until after sentencing that Warner complained to his probation officer about the religious aspects of AA. Why Warner's actions and attitude should be determinative in an Establishment Clause case is never fully articulated by Judge Winter.¹⁴³

Judge Winter then criticized the court's reliance on coercion. He noted that while coercion is often a factor in finding an Establishment Clause violation, it is a not necessary factor. Under Judge Winter's interpretation of the Establishment Clause, Warner's preference for a secular program and the pressure applied to him by the state to attend a religiously-oriented program is of no moment in ascertaining the constitutional validity of the program itself:

If attendance at A.A. meetings as a condition of probation violates the Establishment Clause, it is because such a condition entails governmental sponsorship of religion over nonreligion. Following the logic of Establishment Clause jurisprudence, it would seem to me that such a condition is a violation whether or not the only person directly affected, the probationer, preferred a religiously oriented program over a secular one.¹⁴⁴

In sum, according to Judge Winter, a choice between a religiously-based AA program and alternative secular options would not cure an Establishment Clause infirmity.¹⁴⁵

1973, the Supreme Court repudiated the "act of grace" theory. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973) (stating that a probationer cannot be denied due process on the basis that probation is an "act of grace"). Despite this disavowal, many lower courts still viewed probation as a contractual relationship in which the offender waives any objection to the probation conditions in return for a suspended jail sentence. See Bruce D. Greenberg, *Probation Conditions and the First Amendment: When Reasonableness Is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 57-60 (1981). However, some courts recognized the stark inequities inherent in a bargain where an offender chooses probation conditions, no matter how repugnant, over incarceration. See, e.g., *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 788 (9th Cir. 1982) (stating that the choice is "illusory" for a defendant who must accept "arguably impermissible conditions of probation or suffer incarceration"). Congress ended this judicial debate in 1984 when it passed the Sentencing Reform Act, 18 U.S.C. §§ 3551-3586, 28 U.S.C. §§ 991-998 (1994), which provided that probation constitutes a sentence in itself. See S. REP. NO. 98-225, at 68 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3251. This legislative proclamation made it clear that probation conditions, like prison sentences, are reviewable by the judiciary.

143. Ironically, Judge Winter suggests that a different outcome would result if Warner had brought a Free Exercise claim. Judge Winter observes that Warner may have had a viable Free Exercise claim, noting that compulsory attendance at an activity with a substantial religious component as part of a penal sentence is constitutionally suspect. See *Warner III*, 115 F.3d at 1081 (Winter, J., dissenting).

144. *Id.* at 1080 (Winter, J., dissenting).

145. See *id.* (Winter, J., dissenting).

On remand, the district court considered Judge Winter's contention that Warner had forfeited his Establishment Clause rights and determined that Warner's failure to object to mandatory AA attendance as a condition of probation did not constitute a forfeiture of his right to bring a section 1983 action.¹⁴⁶ The district court observed that Warner's inaction may have been "decidedly influenced by the possibility that any objections or non-compliance could lead to a jail sentence or revocation of probation."¹⁴⁷ In addition, the court recognized that Warner's failure to commence legal proceedings until after two years of mandatory AA attendance did not constitute a waiver but resulted from the slow realization that mandatory AA participation violated his constitutional rights.¹⁴⁸ The court's torturous analysis of Warner's odyssey from an opportunist AA participant to a probationer whose atheist convictions were under siege by the state demonstrates the difficulty in employing approaches like the *Lee* coercion test, which assess an individual's subjective motivations, beliefs, and responses to government action.

B. O'Connor v. California

In *O'Connor v. California*,¹⁴⁹ the United States District Court for the Central District of California held that requiring a DUI offender to attend an alcohol treatment program as a condition of probation did not violate the Establishment Clause.¹⁵⁰ Edward O'Connor was convicted of DUI.¹⁵¹ As part of his probation, the Orange County Municipal Court ordered O'Connor to enroll in the county's alcohol and drug education program for eighteen months.¹⁵² Additionally, the sentencing court stipulated that O'Connor had to attend weekly self-help meetings in order to fulfill the county's additional program requirement.¹⁵³ Two self-help programs, AA and Rational Recovery,

146. See *Warner IV*, 968 F. Supp. 917, 924 (S.D.N.Y. 1997).

147. *Id.* at 923.

148. See *id.* at 923-24.

149. 855 F. Supp. 303 (C.D. Cal. 1994).

150. See *id.* at 304.

151. See *id.*

152. See *id.*

153. See *id.* In addition to requiring DUI offenders to participate in the county's alcohol education program, California state law allows counties to institute additional program requirements for convicted drunk drivers. See *id.* at 305. At the time of O'Connor's conviction, the "additional program" requirement was loosely defined by state law: "The drinking driver program shall ensure that a variety of options are available which take into account the unique needs of each participant." CAL. CODE REGS. tit. 9, § 9860(a) (1992) (amended 1995). In re-

were pre-approved by Orange County as meeting the county's requirements for its "additional program."¹⁵⁴ During O'Connor's probation, Rational Recovery, a secular alternative to AA,¹⁵⁵ met in Orange County only five times a week; AA meetings were held much more frequently. He attended both programs, dividing his time roughly between them based on their compatibility with his schedule.¹⁵⁶ O'Connor filed a motion with the Municipal Court requesting that the terms of his probation be modified so as not to include participation in a self-help program. O'Connor argued that because of his circumstances, mandated participation in a self-help program was tantamount to a requirement to participate in AA. O'Connor's motion was denied on the ground that there was an alternative program

sponse to *O'Connor's* finding of a spiritual component in AA, *see infra* text accompanying notes 158-59, the California Department of Alcohol and Drug Programs recognized the religious nature of AA, *see* CAL. CODE REGS. tit. 9, § 9860(c)(1) (1995) (referring to AA as a "sectarian" group), and amended the "additional program" requirement to ensure that rehabilitative options would be available to participants who refused to attend AA. *See id.* § 9860(c). A county must inform the participant of nonsectarian alternatives to AA if it lists AA as a self-help group that a participant can attend to fulfill the additional program requirement. *See id.* § 9860(c)(1). If these alternatives do not exist, or are not practical or accessible, *see id.* § 9860(c)(2)(B), the county must provide alternatives to self-help group meetings. *See id.* § 9860(c). These alternatives allow participants to satisfy the additional program requirements through activities such as community service and attendance at DUI-victim panels. *See id.* § 9860(b)(2)-(7) (listing alternatives to self-help group meetings). For a more thorough treatment of California's response to the *O'Connor* decision, *see* Honeyman, *supra* note 104, at 468-71.

154. *See O'Connor*, 855 F. Supp. at 305. While attendance at these programs is not necessary to comply with the additional program requirement, other treatment approaches must be specially-approved by the county. *See id.*

155. Rational Recovery was founded in 1986 by Jack Trimpey, a social worker who had become disillusioned with AA. *See* Connie Lauerman, *Is AA Still the Way?, Those Who Find the 12 Steps of Alcoholics Anonymous Too Tall an Order May Find These Alternatives More to Their Liking*, CHI. TRIB., Jan. 2, 1997, at A1. Rational Recovery has roughly 600 treatment centers in the U.S. and Canada which serve less than 10,000 clients. *See* Honeyman, *supra* note 104, at 465 n.132. Trimpey has criticized the cult-like nature of AA, stating that "[i]t demands complete devotion from its members. You must literally turn your life over to the movement and attend meetings for the rest of your life." Lauerman, *supra*. Rational Recovery relies on self-recovery to battle alcoholism, viewing recovery group meetings such as AA as "unnecessary." *Frequently Asked Questions About Rational Recovery* (visited Nov. 15, 1997) <<http://www.rational.org/recovery/Q%26A.html>> (on file with the *Duke Law Journal*). Rational Recovery's approach involves teaching people how to recognize their addictive voice—the source of the desire to drink—and how to defeat it. *See* Lauerman, *supra*. Rational Recovery's literature describes itself as being "a program that is free from religion" and a home for people "who have received unwanted, unconstitutional, religious indoctrinations in the course of addiction treatment." *Frequently Asked Questions About Rational Recovery, supra*. Rational Recovery suggests that twelve-step programs are religions and may compete with established faiths. *See id.*

156. *See O'Connor*, 855 F. Supp. at 305-06.

—Rational Recovery—available for him to attend.¹⁵⁷ A short time thereafter, O'Connor filed suit in district court, alleging that California and Orange County's endorsement and promotion of AA violated the Establishment Clause.

The *O'Connor* court began by addressing the religiosity of AA. The *O'Connor* court acknowledged that participants in the program are encouraged to believe in a higher power and that AA was founded on "monotheistic principles."¹⁵⁸ The court was also aware that the AA meetings attended by O'Connor ended with participants holding hands while reciting the Lord's Prayer.¹⁵⁹ Despite the religious nature of AA and the religious aspects of O'Connor's own AA experience, the court found that state endorsement of a program that merely incorporates God does not give rise to an Establishment Clause violation.¹⁶⁰

Designating *Lemon* as the "prevailing" test for Establishment Clause analysis,¹⁶¹ the court applied the three-part test and held that no constitutional violation had occurred.¹⁶² Under *Lemon's* first prong, the court found that the principle and primary effect of the county's policy of encouraging participation in AA is to treat substance abuse, rather than to advance any particular religious belief.¹⁶³ In examining the second prong of *Lemon*, the court viewed the presence of alternatives as significant in determining that the state is not endorsing AA.¹⁶⁴ The court reasoned that the availability of optional programs foreclosed any state endorsement of the religious message of AA; it regarded any state involvement with AA as simply advancing the more general concept of "self-help."¹⁶⁵ Addressing the third prong of *Lemon*, the *O'Connor* court characterized the level of entanglement between the county and AA as "arms-length," noting that AA does not receive any funding from the government and that the county only recommends the program as a means of fulfilling the "additional program" requirement.¹⁶⁶

157. *See id.* at 304.

158. *See id.* at 307-08 & n.6.

159. *See id.* at 306.

160. *See id.* at 308.

161. *See id.* at 306.

162. *See id.* at 307.

163. *See id.*

164. *See id.* at 308.

165. *See id.*

166. *See id.*

C. *Incidental Benefits to AA in the Probation Context*

For the *Warner III* and *O'Connor* courts, the presence or absence of choice between secular and religiously-oriented self-help groups was decisive. In finding an Establishment Clause breach, the *Warner III* court stressed that Warner had not been granted a choice between religious and secular programs. In *O'Connor*, the court emphasized that O'Connor had the ability to choose a nonreligious support program instead of AA; this led the court to find no Establishment Clause violation. Thus, according to the *Warner III* and *O'Connor* courts, AA attendance as a probationary condition only gives rise to an Establishment Clause violation if it is compulsory. These courts suggest that the absence of mandatory AA attendance cures any Establishment Clause infirmity associated with probationary conditions that require participation in self-help groups.¹⁶⁷ The necessary implication of this position is that any benefits derived by AA from arrangements where the state requires participation in a self-help group are incidental and therefore constitutional. This reading of the Establishment Clause is unduly permissive given AA's dominance within the self-help field.

On a number of occasions, the Supreme Court has stated that religious organizations may receive attenuated or incidental benefits from neutral government programs affecting a wide variety of recipients.¹⁶⁸ Therefore, a probation referral system that offered both secular and religiously-oriented rehabilitation programs to probationers might not violate the Establishment Clause if the overall system were neutral. Although neutrality is, at best, an ambiguous concept in Establishment Clause jurisprudence,¹⁶⁹ a probation referral

167. For further discussion of the relationship between coercion and the Establishment Clause, see Part IV.A.

168. See, e.g., *Agostini v. Felton*, 117 S. Ct. 1997, 2016 (1997) (holding that a program providing remedial instruction to children on a neutral basis at sectarian schools by government employees does not violate the Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) (holding that state funding of a sign-language interpreter for a deaf student at a sectarian school was permissible as a neutral service); see also Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 660-65 (1992) (arguing that the Establishment Clause does not foreclose involvement of religious institutions in public programs or from receiving public funds).

169. See Fish, *supra* note 93, at 2266 (stating that "neutrality . . . has meaning only within some particular set of background conditions; as a rule or measure it will always reflect decisions and distinctions it cannot recognize because it unfolds and has applications within them"); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 314 (1987) (observing that the "pervasive

system could only approach constitutional neutrality if, at a minimum, secular self-help programs exist that meet frequently at close proximity to probationers. In addition, the state, whether it be in the form of a sentencing judge or a probation department, must be cognizant of secular alternatives and must not assume that a probationary condition mandating participation in a self-help group requires participation in AA. Many probation referral systems, however, either do not provide a secular option, or, if they do, they do not endorse it as strongly in word and deed as they support the nonsecular program (AA). Although not documented, reasons for the lack of government support for secular alternatives to AA probably include AA's success in treating alcoholics,¹⁷⁰ its pervasiveness,¹⁷¹ and its self-funding policy.¹⁷² It is interesting to note that these reasons are practical: AA's religious ethos, while perhaps instrumental in its success and popularity, is probably not a factor that most administrators and bureaucrats consider when deciding which treatment program to support.

One commentator has suggested that probation referral systems that allow the probationer to choose from a range of self-help groups are analogous to situations where the Supreme Court has allowed indirect aid to religion.¹⁷³ For example, in *Witters v. Washington Department of Services for the Blind*,¹⁷⁴ the Supreme Court found that a state did not violate the Establishment Clause when it paid a blind student's tuition at a Christian college through a generally-applicable aid program.¹⁷⁵ Crucial to the Court's holding was its distinction between direct and indirect aid; the Court observed that aid reached religious institutions "only as a result of the genuinely independent

commitment to neutrality [in Establishment Clause jurisprudence] has not yet generated any clear and convincing account of what neutrality actually entails").

170. While AA is widely regarded as being effective in helping some people with drinking problems, the system of recovery is not without its critics. Its efficacy has been questioned by those who consider misguided, and sometimes counterproductive, AA's conviction that lifetime abstinence is the only cure for alcoholism. See Nancy Shute, *The Drinking Dilemma*, U.S. NEWS & WORLD REP., Sept. 8, 1997, at 61-62 (reporting that AA's "drastic remed[ies]" may not be the best treatment for all problem drinkers); cf. Thoreson & Budd, *supra* note 3, at 158-59 ("Although clinical support abounds for the use of group methods [for treating alcoholism], empirical support remains weak.").

171. See *supra* text accompanying notes 9-10.

172. See *infra* note 312.

173. See Honeyman, *supra* note 104, at 459-60.

174. 474 U.S. 481 (1986).

175. See *id.* at 487-89.

and private choices of aid recipients.”¹⁷⁶ The constitutionally-mandated principle of government neutrality between religion and nonreligion was maintained by the government “because the individual, and not the state, made the decision to support the religious institution.”¹⁷⁷

As in *Witters*, the Court in *Mueller v. Allen* allowed a religious organization to receive incidental benefits from a government program.¹⁷⁸ In *Mueller*, the Court held that a state tax deduction for specified educational expenses did not violate the Establishment Clause, even though the deduction could be used by parents of children attending sectarian schools.¹⁷⁹ Characterizing any such aid to religion as indirect, the Court observed that the aid became available “only as a result of numerous private choices of individual parents of school-age children.”¹⁸⁰

Upon closer inspection, the analogy between indirect aid cases such as *Witters* and *Mueller* and probationary conditions that require participation in self-help groups falls apart. In *Witters* and *Mueller*, the grant recipients chose between an assortment of schools—public, private and sectarian. The public option, however, was always available, as the state is obligated to provide education for children through the secondary level. It is unlikely that the Court would have upheld these aid programs if the secular choice was impractical, costly, or nonexistent. If the secular alternative is illusory, the benefit of government support necessarily accrues to the sectarian offering. This is what transpires with a probation referral system that allows the probationer to choose between AA and a nonreligious alternative, or among unspecified self-help groups. In the self-help universe, AA dominates in both numbers and methodology, while acceptable secular alternatives are comparatively scarce and unproven. In most states and counties where some secular alternatives are available, such alternatives serve merely to distract attention from the state’s close relationship with AA and provide an illusion of neutrality. Examined from a different angle, it is arguable that DUI rehabilitation requirements only exist because AA does. By sheer force of AA’s numbers and the dearth of secular alternatives, it is far-

176. *Id.* at 487.

177. Honeyman, *supra* note 104, at 459.

178. *See* 463 U.S. 388, 397-99 (1983).

179. *See id.*

180. *Id.* at 399.

fetched to characterize a probationer's choice as "genuinely independent and private."¹⁸¹ Thus, the crucial barrier of individual choice between government and AA crumbles, thereby impermissibly linking the government to delivery of rehabilitation services by a religious organization.

The Court has also justified the indirect support of religious groups as sometimes necessary because of the demands of the Free Exercise Clause¹⁸² and other First Amendment rights such as freedom of association and free speech.¹⁸³ In *Rosenberger v. Rector and Visitors of the University of Virginia*,¹⁸⁴ a recent case that permitted indirect funding of a religious organization, the Court stated that the "guarantee of [religious] neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."¹⁸⁵

181. *Witters*, 474 U.S. at 487.

182. In *Wisconsin v. Yoder*, the Court invalidated the state's refusal to exempt fourteen and fifteen year old Amish students from the requirement of attending school until the age of sixteen. See 406 U.S. 205, 234 & n.22 (1972). The Court determined that the Free Exercise Clause necessitated exemptions for these Amish children. See *id.* at 234. While recognizing that this accommodation gave rise to tension with the Establishment Clause, the Court regarded the harm to the principle of government neutrality as minimal. See *id.* at 234 n.22.

183. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981) (holding that a public university's policy of not allowing student religious groups to meet in university facilities that were uniformly available to other groups violated the religious groups' freedom of association).

184. 115 S. Ct. 2510 (1995).

185. *Id.* at 2521. In *Rosenberger*, a student organization that published a newspaper from a Christian perspective brought suit against the University of Virginia, challenging the university's refusal to pay the printing costs of the newspaper. See *id.* at 2511-12. The university's policy was to allow student groups that disclaimed official university approval of their activities to apply for funding from a general student activities fund. See *id.* at 2511. Wary of the strictures of the Establishment Clause, the university denied funding to print the newspaper based on its religious focus. See *id.* at 2511-12. The Court held that the university's denial of funding amounted to viewpoint discrimination and that the provision of funding would not violate the Establishment Clause. See *id.* at 2524.

In a concurring opinion, Justice O'Connor cautioned that no categorical answers should be drawn from the Court's decision. Situating the case at the "intersection of the principle of government neutrality and the prohibition on state funding of religious activities," O'Connor viewed the decision as fact-driven. *Id.* at 2525-26 (O'Connor, J., concurring). She noted that the Christian newspaper was competing for readership with fifteen other student publications of "non-religious, anti-religious and competing religious" slants; this diminished the danger that the university would be perceived as endorsing a religious viewpoint. *Id.* at 2527 (O'Connor, J., concurring). Justice O'Connor also observed that the case would be different if a particular religious viewpoint threatened to dominate the forum. See *id.* (O'Connor, J., concurring). Because of the paucity of secular alternatives to AA, it tends to dominate the self-help group arena; consequently, the government should refrain from promoting this dominance by endorsing or supporting AA.

Rosenberger is inapposite in the self-help context because of AA's dominance. Probation referral systems that channel probationers into AA threaten the right to free exercise and vitiate the government principle of neutrality among religions and between religion and nonreligion, while perpetuating AA's preeminent position in alcohol treatment. The Court has not validated the indirect support of religious organizations where that support causes such great harm to the Establishment Clause, and to a lesser degree, to the marketplace of ideas.

III. ALCOHOLICS ANONYMOUS IN PRISON

A. *Constitutional Rights of Inmates*

Historically, prisoners were regarded as "slave[s] of the State," who forfeited their liberty and personal rights upon conviction.¹⁸⁶ State correctional facilities had free rein to institute draconian policies and regulations governing prison conditions and inmate behavior. Prior to the 1970s, federal courts refused on various grounds to intervene to protect the constitutional rights of prisoners, motivated by the notion that courts are not equipped to supervise the treatment of inmates.¹⁸⁷ The federal judiciary's longstanding refusal to entertain complaints alleging deprivation of constitutional rights became known as the "hands-off" doctrine.¹⁸⁸

The Supreme Court first addressed the question of a standard of review for state prison regulations in 1974. Justice White's declaration in *Wolff v. McDonnell* signaled the end of the hands-off doctrine: "There is no iron curtain between the Constitution and the prisons of this country."¹⁸⁹ The Court's new-found concern for the

186. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871). See generally DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 82 (1971) (describing the harsh conditions endured by inmates in the nineteenth century).

187. See, e.g., *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir. 1951) (stating that "it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined"). Federalism was also cited as a basis for courts' refusals to entertain prisoners' constitutional claims. See, e.g., *Siegel v. Ragen*, 180 F.2d 785, 788 (7th Cir. 1950) (declaring that the federal government has no power to control or to regulate the internal discipline of state penal institutions).

188. See generally Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795.

189. 418 U.S. 539, 555-56 (1974).

rights of prisoners coincided with its more general interest in protecting the rights of "discrete and insular minorities."¹⁹⁰ Lacking access to the political system, discrete and insular minorities cannot effectively defend their own interests.¹⁹¹ While not wholly blameless for their political disempowerment, prisoners, in a sense, are the ultimate discrete and insular minority, because their disenfranchisement precludes their access to the legislature to defend their constitutional rights. Prisons are not democracies and prison administrators, buffeted by overcrowding and pinched by financial shortfalls, do not necessarily regard the protection of inmates' constitutional rights as a paramount concern. It is therefore the proper role of the judiciary to protect the constitutional rights that prisoners retain.

Under *Wolff*, the federal judiciary can no longer take a complete *laissez-faire* approach to state prison regulation; however, some commentators have detected a drift toward the spirit of the hands-off doctrine of the past, as evidenced by increased judicial deference to the discretion of prison administrators.¹⁹² Indeed, vestiges of the federal judiciary's hands-off approach toward state prison regulations manifest themselves in the arguments of those judges who possess a more restrictive view of the constitutional rights of prisoners.

On numerous occasions, the Court has stated that individuals do not forfeit all their constitutional rights upon incarceration.¹⁹³ On the other hand, prisoners do not retain all the rights of ordinary citizens;

190. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

191. See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1296-97 (1982).

192. See Peter Keenan, 192 ANN. SURV. AM. L. 507, 538-39 (1989) (noting the increasing deference given to the decisionmaking authority of prison officials by the Court and warning of the danger this might pose to the constitutional rights of prisoners); see also Cheryl Dunn Giles, Note, *Turner v. Safley and Its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219, 220, 229-31 (1993) (observing movement in the federal judiciary toward the hands-off doctrine).

193. In *Wolff*, the Court listed those areas in which a prisoner retains his constitutional rights during incarceration:

Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. They retain right of access to the courts. Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law.

418 U.S. at 555-56 (citations omitted) (typeface altered); see also *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (stating that inmates retain certain protections afforded by the First Amendment, including the "right to communicate [their] views to a willing listener, including a willing representative of the press").

some rights are removed by the nature of incarceration¹⁹⁴ and others by “valid penological objectives,” such as the rehabilitation of prisoners, institutional security, and deterrence of crime.¹⁹⁵ To ascertain which constitutional rights of prisoners can be abridged or circumscribed and which ones must remain intact, the Supreme Court in *Turner v. Safley*¹⁹⁶ set forth a refined rational relationship test for the constitutional rights of inmates.¹⁹⁷ In constitutional law, the selection of the rational-basis standard of review is significant. When this standard is applied to governmental action, the action is almost always upheld. Under rational-basis scrutiny, governmental actions are struck down only if the government has acted in a completely arbitrary and irrational fashion or if the action was in pursuit of an illegitimate objective.¹⁹⁸

In a five-to-four decision, the *Turner* Court held that a prison regulation that impinges on an inmate’s constitutional rights will be valid if it is “reasonably related to legitimate penological interests.”¹⁹⁹ To aid this determination, the Court set forth four factors for consideration: 1) there must be a valid, rational connection between the regulation and a legitimate government interest; 2) if alternative means of exercising the asserted right are available, courts should defer to prison authorities; 3) courts should assess the ramifications that accommodation of the right will have on guards, prisoners, and prison resources; and 4) courts should consider the availability of alternative regulations, the absence of which weighs in as evidence of reasonableness.²⁰⁰ Writing for the majority, Justice O’Connor stressed that the last factor does not demand that the state act in a way that is “least restrictive” of prisoners’ rights; rather, the existence of an easily-implemented alternative which accommodates the pris-

194. For example, the fundamental right to travel. The notion that prisoners lose certain rights as a necessary result of incarceration was first clearly set forth by the Court in *Price v. Johnston*, 334 U.S. 266, 285 (1948) (“Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”).

195. *Pell*, 417 U.S. at 822 (stating that inmate rights may be limited by “valid penological objectives”); see also *Procunier v. Martinez*, 416 U.S. 396, 412 (1974) (“The identifiable government interests at stake in this task are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of prisoners.” (internal citations omitted)).

196. 482 U.S. 78 (1987).

197. See *infra* text accompanying notes 210-13 (considering possible exceptions to *Turner*).

198. See *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

199. *Turner*, 482 U.S. at 89.

200. See *id.* at 89-91.

oner's asserted right at *de minimis* cost to a valid penological interest serves only as evidence that the regulation may be an "exaggerated response" by prison authorities to their stated concern.²⁰¹ Furthermore, the burden of proving the existence of easily implemented alternatives falls on the inmate, not on the prison authorities.²⁰² Suffusing the majority's evaluation of penological objectives is a commitment to the "considered judgment of prison administrators" and the respect and deference the Constitution allows for the judgment of prison officials.²⁰³

201. *Id.*

202. *See id.* at 90-91.

203. *Id.* at 91. It is not only in prisons that the Court takes a more generous approach to the limitation of First Amendment rights. In the "special context" of the armed services, burdens on Free Exercise rights may be justified if rationally related to a legitimate military objective. This is due in large part to the Court's recognition that the "military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974); *see also* *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (rejecting an officer's challenge to an Air Force regulation restricting the wearing of headgear indoors and accepting the Air Force authorities' claim that uniformity in dress was essential to military order and *esprit de corps*). With only one exception, however, the Court, has not addressed the relationship between the Establishment Clause and the military. *See Gillette v. United States*, 401 U.S. 437, 460 (1971) (holding that the Military Selective Service Act's exemption of conscientious objectors from military service served neutral principles and did not violate the Establishment Clause). Government provision of chaplains poses an Establishment Clause question, but the Court has not passed on this practice in the military setting. The Second Circuit, however, has upheld federal funding of military chaplains. *See Katcoff v. Marsh*, 755 F.2d 223, 224 (2d Cir. 1985); *cf. Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (holding that government funding of legislative chaplains is not a violation of the Establishment Clause). *But see* James Madison, *Detached Memoranda*, 3 WM. & MARY Q. 534, 558-60 (E. Fleet ed., 1946) (condemning use of public money for legislative or military chaplains). Thus, the special context of the armed forces calls for great deference to military authorities and their regulations when addressing Free Exercise claims of soldiers but does little to illuminate the relationship between the Establishment Clause and the military. While it appears that the Court would approve government funding of military chaplains, the special context of the military by no means sanctions a coercive, proactive government role in propagating religion. The military chaplain does not seek to convert soldiers in the same vein as prison AA programs attempt to convert inmates with drinking problems to AA's religio-philosophy. Participation in the chaplain's ministries is not a requirement for good standing or advancement in the military, while for some inmates and probationers participation in AA is the difference between incarceration and freedom. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 298 (1964) (Brennan, J., concurring) (noting that "there is no element of coercion in the appointment of military or prison chaplains; the soldier or convict who declines the opportunities for worship would not ordinarily subject himself to the suspicion or obloquy of his peers").

The special context of the armed services does not translate into minimal scrutiny for government actions that advance religion in the military, nor should it do so by analogy in the prison. At most, the government may provide substitutes, such as the military or prison chaplain, in order to ameliorate infringement of Free Exercise guarantees in highly regulated environments. This deviation from the spirit of separation between church and state is limited; in response to the derogation of the right of free exercise, state involvement in religion may be

In *O'Lone v. Estate of Shabazz*, the Supreme Court adopted the *Turner* analysis for prison Free Exercise cases.²⁰⁴ The case arose when New Jersey prison authorities denied a request by Muslim inmates to attend Islamic services.²⁰⁵ The prisoners were assigned to a work detail that labored on Friday afternoon, during religious services.²⁰⁶ State prison officials argued that the prisoners' attendance at these services would disrupt the rehabilitative program of the inmates and, moreover, that the prison offered other opportunities for Muslim inmates to practice their faith.²⁰⁷ Applying the *Turner* four-factor reasonableness test, the Court ruled in favor of the prison authorities.²⁰⁸ In so doing, it refuted the contention that more rigorous scrutiny is appropriate when a religious practice is proscribed by prison authorities. Instead, the Court stated that while the presence or absence of alternatives has its place in the overall reasonableness analysis, the prison's rejection of alternative means of worship did not provide a basis for heightened scrutiny.²⁰⁹

Although the Supreme Court has stated that "the standard of review . . . adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights,"²¹⁰ several courts have refused to apply the *Turner* reasonableness standard to prisoners' Eighth Amendment claims.²¹¹ In light of the Eighth Amendment exception that has been carved out of *Turner*, and the Court's observations regarding the special nature of Establishment Clause rights,²¹² it is unclear whether the Court meant for *Turner* to apply to inmates' Establishment Clause claims. Although the Supreme Court has not passed on the relationship between *Turner* and

countenanced to some extent. On the other hand, "special context" does not stand for the wholesale abandonment of the Establishment Clause. Because of the principle of separation of church and state, the Establishment Clause has a vitality independent of any particular individual's rights; this vitality remains unadulterated in any milieu, including a prison.

204. See 482 U.S. 342, 349 (1987). It has been noted that in most cases prior to *O'Lone* lower courts required something more than a legitimate governmental interest and a means rationally related to its achievement. See Geoffrey S. Frankel, Note, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1624 (1991).

205. See *O'Lone*, 482 U.S. at 345.

206. See *id.* at 345-47.

207. See *id.* at 351-52.

208. See *id.* at 350-53.

209. See *id.* at 349 n.2.

210. *Washington v. Harper*, 494 U.S. 210, 224 (1990).

211. See, e.g., *Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993) (declining to apply *Turner* to a body search conducted by men at a women's prison).

212. See *infra* notes 308-09 and accompanying text.

O'Lone and the Establishment Clause, one federal district court has stated that, absent accommodations to the Free Exercise rights of others, a prisoner's Establishment Clause rights should not be limited by the mere fact of incarceration.²¹³

B. Griffin v. Coughlin

A divided New York Court of Appeals in *Griffin v. Coughlin*²¹⁴ held that David Griffin, an atheist inmate, was unconstitutionally deprived of family visitation privileges after he refused to participate in the AA-based substance abuse treatment program at a correctional facility in Ulster County.²¹⁵ The prison authorities made Griffin's eligibility in the prison's Family Reunion Program²¹⁶ contingent upon his participation in the prison's Alcohol and Substance Abuse Treatment Program (ASAT).²¹⁷ Griffin, who had long expressed his atheistic views on religion to correctional authorities, objected to the program's reliance on religious principles, and requested that he be excused from the substance abuse program because of its adherence to those principles.²¹⁸ The facility's grievance committee denied Griffin's request and he filed suit, claiming that the prison's policy of requiring participation in the substance abuse program in exchange for eligibility in the Family Reunion Program violated the Establishment Clause.²¹⁹ The New York Supreme Court for Ulster County dismissed Griffin's complaint and the Appellate Division affirmed, relying in large measure on AA's stated policy that it does not promote a particular conception of God.²²⁰

213. See *Scarpino v. Grossheim*, 852 F. Supp. 798, 804-05 (S.D. Iowa 1994) (stating that the *Lemon* test supersedes the *Turner* approach when addressing Establishment Clause claims). *But cf.* *Boyd v. Coughlin*, 914 F. Supp. 828, 831-32 (N.D.N.Y. 1996) (suggesting that if a prison regulation fails the *Lemon* test it may still be held constitutional under *Turner*).

214. 673 N.E.2d 98 (N.Y. 1996), *cert. denied*, 117 S. Ct. 681 (1997).

215. See *id.* at 99.

216. The Family Reunion Program provides some inmates the chance of receiving selected visitors. See *id.* Prison authorities specify certain criteria which must be met by the inmate, including a clean disciplinary record and enrollment in a substance abuse treatment program if deemed appropriate by prison officials. See *id.* at 120 (Bellacosa, J., dissenting).

217. See *id.* at 100. The prison authorities required Griffin to take part in the treatment program because he had a history of heroin use. See *id.*

218. See *id.*

219. See *id.* at 100-01.

220. See *Griffin v. Coughlin*, 626 N.Y.S.2d 1011, 1012 (N.Y. App. Div. 1995), *rev'd*, 673 N.E.2d 98 (N.Y. 1996), *cert. denied*, 117 S. Ct. 681 (1997). The Appellate Division also emphasized that Griffin, unlike Warner, did not demonstrate that the particular program he attended engaged in religious exercise such as group prayer. See *id.* at 1014 ("[T]he A.A. program that

Addressing the threshold question of whether the prison's substance abuse program was a religion for constitutional purposes, the New York Court of Appeals found that the program incorporated the practices and precepts of AA.²²¹ The court then analyzed AA literature and concluded that it "reflect[s] the traditional elements common to most theistic religions"²²² and expresses the aspiration that each AA participant "ultimately commit to a belief in the existence of a Supreme Being"²²³ and engage in proselytization.²²⁴ The *Griffin* court determined that the program, in appropriating AA texts and practices, "embrace[d] and reinforce[d] worship in the A.A. mold."²²⁵

After concluding that AA is a religion for constitutional purposes, the court briefly noted that the ASAT program was unconstitutional under the endorsement test.²²⁶ The court next considered whether the prison coerced Griffin into participating in ASAT. The court observed that no secular program was offered to atheists as a substitute for ASAT.²²⁷ As a result, the court found that the state exercised coercive power when it conditioned Griffin's eligibility for the

[Warner] experienced placed a heavy emphasis on spirituality and prayer, in both conception and in practice." (quoting *Warner II*, 870 F. Supp. 69, 71 (S.D.N.Y. 1994), *aff'd*, 115 F.3d 1068 (2d Cir. 1997)). For the Appellate Division, the mere fact that the program was "modeled" after AA was insufficient to give rise to an Establishment Clause violation. *See id.* at 1015.

221. *See Griffin*, 673 N.E.2d at 101.

222. *Id.* at 102. The court emphasized that God is named or referred to in five of the Twelve Steps. *See id.* The court quoted the AA basic doctrinal writings extensively, attempting to show that they are not merely "deistic symbols and allusions," *id.* at 103 (quoting *id.* at 112 (Bellacosa, J., dissenting)), but are, instead, tracts which favor a concept of God "which is not merely 'a conscientious social belief, or a sincere devotion to a high moralistic philosophy.'" *Id.* at 103 (quoting *Welsh v. United States*, 398 U.S. 333, 348 (1970) (Harlan, J., concurring)).

223. *Id.* at 102.

224. *See id.*

225. *Id.* at 103. The court had no doubt that the AA sessions at the prison were religious exercises:

The A.A. volunteers who are invited to conduct the prison self-help group meetings of inmates in the ASAT Program, where the 12 steps are worked, can reasonably be expected to be wholeheartedly imbued with and committed to the religious precepts predominating in the A.A. basic texts. It, therefore, is highly unlikely that the religious indoctrination of A.A. volunteer leaders would not affect the tone and content of A.A. sessions for inmates.

Id. at 107.

226. *See id.* at 105. For further discussion of the *Griffin* court's application of the endorsement test, see *infra* notes 300-03 and accompanying text.

227. *See Griffin*, 673 N.E.2d at 105.

Family Reunion Program on his participation in the prison's substance abuse program.²²⁸

As in *Warner III*, the court relied on *Lee v. Weisman*; the *Griffin* court noted that the Supreme Court in *Lee* was unanimous in its condemnation of state compulsion to participate in a religious exercise.²²⁹ The court quoted *Lee's* premise that "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."²³⁰ The *Griffin* court found that the prison employed the "machinery of the state" to compel attendance of inmates at AA meetings, thereby creating a captive audience ripe for religious indoctrination.²³¹

In a vigorous dissent, Judge Bellacosca, joined by Judge Ciparick, concluded that for Establishment Clause purposes, the program is "overwhelmingly secular."²³² He wrote that the basic texts of AA, *The Big Book* and the Twelve Steps, "[s]ubstantially . . . reflect suggested secular and spiritual guideposts [and] not compulsory religious commandments or tenets of some New-Age or even Old-Time religion."²³³ In sum, Judge Bellacosca reasoned that the program's goal of participant sobriety was paramount; its religious packaging did not amount to a "constitutionally objectionable religious core."²³⁴

Judge Bellacosca criticized the majority for enabling the petitioner to use his Establishment Clause claim as a "sword to justify repression of religion or its adherents from any aspect of public life."²³⁵ He perceived the majority's approach to the Establishment Clause as unnecessarily expansive and absolutist; he was particularly troubled by the majority's concern for coercion in a preternaturally coercive setting.²³⁶ Judge Bellacosca viewed the reasoning from the school

228. *See id.* at 108.

229. *See id.* at 106 n.6.

230. *Id.* at 106 (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)) (internal quotation marks omitted). The *Griffin* court also addressed *Lemon*, but focused primarily on the "endorsement" refinement of the second prong of the test. *See id.* at 108; *see also* *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (stating that the "endorsement or disapproval" of religion by the state constitutes a violation of the Establishment Clause).

231. *Griffin*, 673 N.E.2d at 106 (internal quotation marks and citations omitted).

232. *Id.* at 112 (Bellacosca, J., dissenting). The dissent conceded that ASAT places heavy emphasis on spirituality, but rejected the constitutional equation of spirituality with religion. *See id.* at 118-19 (Bellacosca, J., dissenting).

233. *Id.* at 113 (Bellacosca, J., dissenting).

234. *Id.* at 114 (Bellacosca, J., dissenting).

235. *Id.* at 117 (Bellacosca, J., dissenting) (internal quotation marks and citations omitted).

236. *See id.* at 116-17 (Bellacosca, J., dissenting).

prayer cases as inapplicable to the prison environment because incarceration fails to replicate the “particular risk of indirect coercion” inherent in schools.²³⁷ Emphasizing the “heightened concern”²³⁸ that the United States Supreme Court has exhibited for the protection of freedom of religion in elementary and secondary schools, Judge Bellacosa argued that a different level of constitutional analysis obtains for mature adults in prisons, resulting in reduced access to Establishment Clause safeguards.²³⁹

To parry the majority’s Establishment Clause thrust, the dissent advances prison regulation jurisprudence as a defense.²⁴⁰ Considering the Supreme Court’s application of a rational basis test to inmates’ Free Exercise claims in *O’Lone*, it is of little surprise that Judge Bellacosa would regard the prison prescription of religion as constitutionally unproblematic. Judge Bellacosa reasoned that prison authorities, under the *Turner* rubric, have wide discretion to regulate participation in the Family Reunion Program by setting eligibility requirements, including mandatory attendance at alcohol treatment programs.²⁴¹ Judge Bellacosa emphasized that Griffin had a choice to participate in the visitation program—a benefit to which he is not absolutely entitled by the state.²⁴² He argued that the constitutionality of this choice must be considered in the context of the prison official’s broad discretion to regulate participation in the Family Reunion Program.²⁴³ Based on the discretionary nature of the program, Griffin’s election to participate in it, and the fact that no prisoner is unqualifiedly entitled to it, Judge Bellacosa contended that the prison’s policy of requiring AA attendance in exchange for visitation rights is constitutional under *Turner*.²⁴⁴

237. *Id.* at 122 (Bellacosa, J., dissenting) (quoting *Lee v. Weisman*, 505 U.S. 577, 592 (1992)).

238. *Id.* (Bellacosa, J., dissenting) (internal quotation marks and citations omitted).

239. *See id.* at 120-22 (Bellacosa, J., dissenting) (citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)).

240. *See id.* (Bellacosa, J., dissenting); *see also supra* text accompanying notes 199-203 (discussing the rational basis test applied to infringements on prisoners’ constitutional rights).

241. *See id.* at 120.

242. *See id.* at 120-21 (Bellacosa, J., dissenting); *see also Doe v. Coughlin*, 518 N.E.2d 536, 541 (N.Y. 1987) (stating that the guidelines of the Family Reunion Program created no legitimate prisoner expectation that they would be afforded visits, and generally allowed broad discretion by prison authorities).

243. For additional discussion on the constitutionality of this choice, *see* Part V.

244. *See Griffin*, 673 N.E.2d at 120-21 (Bellacosa, J., dissenting).

Judge Bellacosa also found the ASAT program constitutional under the *Lemon* test. He determined that: 1) the program possessed the secular purpose of treating and reducing substance abuse among inmates;²⁴⁵ 2) had a principal effect of preparing alcohol-dependent inmates for a return to society;²⁴⁶ and 3) did not delegate the state's authority so as to give rise to impermissible governmental entanglement with religion.²⁴⁷

C. Kerr v. Farrey

In *Kerr v. Farrey*,²⁴⁸ the Seventh Circuit held that a prison's policy of rating an inmate as a higher security risk when he failed to attend the facility's religion-based drug rehabilitation program violated the Establishment Clause. In *Kerr*, the district court relied on *Turner* and *Lemon* to conclude that the prison's rehabilitation program, which was based on AA, was constitutional. The Seventh Circuit, however, reversed, rejecting the district court's reliance on *Turner* and its terse *Lemon* analysis.²⁴⁹

At the time of filing, James Kerr was incarcerated at the Oakhill Correctional Institution, located in Wisconsin.²⁵⁰ Inmates at Oakhill with chemical dependence problems were required to attend meetings of Narcotics Anonymous (NA), the only drug-abuse program at the prison.²⁵¹ Oakhill had a policy of classifying inmates as higher security risks if they failed to attend the treatment program after being instructed to do so by prison officials.²⁵² The elevation of an Oakhill inmate's security risk rating had the potential to impact negatively on the inmate's parole eligibility.²⁵³

Kerr objected to what he perceived as NA's deterministic view of God and its association of a belief in God with successful recovery from addiction.²⁵⁴ Meetings that he attended began with a Christian

245. *See id.* at 118-19 (Bellacosa, J., dissenting).

246. *See id.* at 119-21 (Bellacosa, J., dissenting).

247. *See id.* at 122 (Bellacosa, J., dissenting).

248. 95 F.3d 472 (7th Cir. 1996).

249. *See id.* at 476.

250. *See id.* at 474.

251. *See id.* The NA program at Oakhill encouraged participants to read the NA book which contains the Twelve Steps of AA and many references to God and spirituality. *See id.* at 474-75.

252. *See id.* at 475.

253. *See id.*

254. *See id.* at 474.

prayer, and he was encouraged to read the NA book, similar in content to *The Big Book*.²⁵⁵ Kerr filed suit under Section 1983, seeking an injunction to prevent prison administrators from compelling him and others to participate in NA; he also sought to have any negative references about his reluctance to attend NA meetings expunged from his prison records.²⁵⁶

Although the court recognized the continued validity of the *Lemon* test,²⁵⁷ it did not feel bound to apply it. Instead, it formulated its own Establishment Clause test. The court distilled its test from the line of Supreme Court cases decided around the principle that the “government may not coerce anyone to support or participate in religion or its exercise.”²⁵⁸ When a plaintiff claims that the state is coercing him to subscribe to a religious belief or participate in a religious exercise, the court regarded three points as crucial: “[F]irst, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?”²⁵⁹ The court answered the first question in the affirmative, since prison officials required Kerr to attend the meetings.²⁶⁰ Turning to the second prong, the court deemed this state action coercive as a result of the possible adverse consequences for Kerr’s parole if he did not attend.²⁶¹ Lastly, the court concluded that the object of this coercion—the Oakhill NA program—was decidedly religious.²⁶² Through a “straightforward reading” of the Twelve Steps (which the NA program incorporates), the court determined that Oakhill’s NA program is based on monotheistic principles.²⁶³ Thus, according to the court’s ad hoc coercion test, the prison’s policy of compelling Kerr to attend NA meetings was unconstitutional.

D. Jones v. Smid

In *Jones v. Smid*,²⁶⁴ the United States District Court for the Southern District of Iowa rejected an inmate’s claim that the Fort

255. *See id.* at 475.

256. *See id.*

257. *See id.* at 479.

258. *Id.* at 476 (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

259. *Id.* at 479.

260. *See id.*

261. *See id.*

262. *See id.* at 479-80.

263. *See id.* at 480.

264. No. 4-89-CV-20857, 1993 WL 719562 (S.D. Iowa Apr. 29, 1993).

Des Moines Correctional Facility's substance abuse treatment program violated the Establishment Clause. Eddie Jones had been sentenced to prison for five years after having been convicted of his third DUI offense.²⁶⁵ The sentence, however, would be suspended, provided that Jones successfully complete the Fort Des Moines prison's Operating While Intoxicated program (OWI), patterned after AA, while residing at the facility.²⁶⁶ As part of his rehabilitation, he was required to recite a promise from *The Big Book* that read in part: "We will intuitively know how to handle situations which used to baffle us. We will suddenly realize that God is doing for us what we could not do for ourselves."²⁶⁷ After Jones, an atheist, objected to this feature of the program, counselors told him that he was allowed to substitute phrases such as a "power other than myself" for "God" or, instead of reciting the promise, write out what the words in the promise mean to him.²⁶⁸ Refusing to pursue these alternatives, Jones was transferred out of the program and therefore failed to meet the terms of his probation.²⁶⁹ As a result, a warrant was issued for Jones' arrest.²⁷⁰ A short time later, his probation was revoked and his sentence was reimposed.²⁷¹ Jones then filed suit under Section 1983, alleging that the prison had instituted a religious program in violation of the Establishment Clause.²⁷²

The district court situated its Establishment Clause analysis within the prison setting, emphasizing that "[a] court may not substitute its judgment on 'difficult and sensitive matters of institutional administration' for the determinations of those charged with the task of running a prison."²⁷³ While the *Jones* court recognized that "[i]nmates retain protection[s] afforded by the First Amendment," it noted that these rights are circumscribed by the special characteristics of the prison environment and can be superseded by legitimate penological objectives of the prison system.²⁷⁴

265. *See id.* at *1.

266. *See id.*

267. *Id.* at *2.

268. *See id.*

269. *See id.* at *1-2.

270. *See id.* at *1 n.1.

271. *See id.*

272. *See id.* at *1.

273. *Id.* at *3 (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987)).

274. *Id.*

The court next considered whether AA is a religion for constitutional purposes. The court subscribed to AA's pronouncements in its literature that it is a spiritual program and should not be characterized as a religion.²⁷⁵ In this regard, the court found the Third Step, where the definition of God is left to the individual, especially persuasive.²⁷⁶ The court concluded that the prison program is a legitimate means to advance the state interest in rehabilitating substance abusers before their release into society.²⁷⁷ With little rigor, the court then applied the *Lemon* test and found the treatment program constitutional.²⁷⁸

E. Alcoholics Anonymous, Turner, and the Establishment Clause

As the preceding survey of cases indicates, the application of *Turner* to inmates' Establishment Clause claims has a devastating effect. Because *Turner* is essentially a rational basis test, prisoners' Establishment Clause claims will almost always lose when assessed under *Turner*. The court in *Jones v. Smid*, the lower court in *Kerr v. Farrey*, and the dissent in *Griffin* succumbed to the seductive call of *Turner* and found prison treatment programs modeled on the precepts of AA to be constitutional.²⁷⁹ *Turner* is driven by a general valuation of prisoners' constitutional rights: valid prison interests, as identified by prison administrators, define the extent of inmates' constitutional rights. Unguided (and untrammelled) by a Supreme Court decision that addresses the intractable conflict between the Establishment Clause and legitimate penological interests, judges that apply *Turner* to Establishment Clause claims effectively allow prison

275. See *id.* at *4.

276. See *id.*

277. See *id.* at *5.

278. See *id.* In finding the program constitutional, the court disregarded the coercion issue and intimated that prison officials who compelled inmates to participate in the AA-modeled program were doing such prisoners a favor:

The goal of the OWI program is to keep individuals in the program until completion, thereby increasing their chance for rehabilitation. Individuals who complete the OWI program are eligible for early parole. [The program manager] testified that except for one client, he has recommended early parole for every client who has completed the OWI program.

Id. at *7.

279. See *supra* text accompanying notes 240-44, 249, 273-74; see also *Boyd v. Coughlin*, 914 F. Supp. 828, 834 (N.D.N.Y. 1996) (noting that since a rational relationship existed between required participation in the AA program at issue and the government's desire to reduce inmate alcohol abuse, alleged infringement upon a prisoner's First Amendment rights was permissible).

officials to impose their own interpretations of proper church-state relations on inmates.

Refusing to apply *Turner* to prisoners' Establishment Clause claims, the New York Court of Appeals in *Griffin v. Coughlin* and the Seventh Circuit in *Kerr v. Farrey* correctly held that state-imposed mandatory AA participation for inmates in exchange for benefits such as visitation privileges and parole eligibility are unconstitutional. The *Griffin* and *Kerr* courts recognized the unique nature of the Establishment Clause and its applicability to a class whose constitutional rights are otherwise diminished by the circumstances of confinement. The courts did not fall prey to the siren of *Turner*, which obscures and weakens the Establishment Clause in those situations where the power of the state over its citizens is greatest.

As discussed, the Supreme Court has not specifically addressed whether *Turner* applies to inmates' Establishment Clause claims.²⁸⁰ As a result of the Court's application of the *Turner* factors in *O'Lone v. Shabazz*, several lower courts have assumed that *Turner* covers both Religion Clauses.²⁸¹ Although complementary, the Religion Clauses are not fungible. The purpose of the Establishment Clause is to prevent the government from advancing, supporting or endorsing religion, while the Free Exercise Clause aims to protect an individual's ability to practice religion. Because the constitutional definition of religion is broad and largely left to the individual, the possible range and number of claims under the Free Exercise Clause is practically limitless. If the government has to consider individuals' religious beliefs before acting, the potential reach of the Free Exercise Clause would paralyze government's ability to function. The Court, however, has ruled that the Constitution does not require this sort of governmental accounting.²⁸² Thus, to a degree, *O'Lone* can be countenanced as in accord with Free Exercise thinking because it constrains the reach of the Free Exercise Clause in the prison setting, thereby allowing prison administrators to enact necessary regulations in furtherance of legitimate goals of the penal system. In contrast to vesting rights in individuals, the Establishment Clause places an obli-

280. See *supra* text accompanying notes 212-13.

281. See *supra* note 279 and accompanying text.

282. For example, in *Lyng v. Northwest Indian Cemetery Protective Association*, the Court held that the federal government could build a road through federal land even if such a course of action made impossible traditional religious rituals of American Indians. See 485 U.S. 439, 441-42 (1988). The Court stated that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 452.

gation on government not to advance, endorse, or support religion. The Court has never reviewed Establishment Clause claims with the lowest form of constitutional scrutiny, the rational basis test.

Vigorous criticism of *Turner's* undifferentiated approach to prisoners' First Amendment claims by members of the Court support *Turner's* inapplicability to Establishment Clause claims. Dissenting in *Turner*, Justice Stevens argued that the "Court's rather open-ended 'reasonableness' standard makes it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of administrative concerns . . . rather than on the basis of evidence that the restrictions are needed to further an important governmental interest."²⁸³ If the reasonableness standard can be met by finding no more than a "logical connection" between the prison regulation and a legitimate penological interest as perceived by prison authorities, Justice Stevens concluded that the standard is "virtually meaningless."²⁸⁴ He argued that the *Turner* standard condones disregard for inmates' constitutional rights by allowing deferential trial courts and imaginative wardens to produce "plausible" administrative concerns in response to prisoners' Establishment Clause claims.²⁸⁵ In order to better protect the constitutional rights of prisoners, Justice Stevens advocated the implementation of a sliding scale of scrutiny for inmates' constitutional claims, with the level of scrutiny dependent on the nature of the right asserted.²⁸⁶

283. *Turner v. Safley*, 482 U.S. 78, 101 n.1 (1987) (Stevens, J., dissenting).

284. *Id.* at 100 (Stevens, J., dissenting) (emphasis omitted).

285. *Id.* at 100-01 (Stevens, J., dissenting). Indeed, courts applying the *Turner* test have been loath to find a regulation unreasonable on the basis that a reasonable alternative exists. *See, e.g.,* *Washington v. Harper*, 494 U.S. 210, 226-27 (1990) (finding that an inmate's liberty interest in refusing treatment with antipsychotic drugs must accede to the state interest in prison safety and security despite the presence of alternatives such as physical restraint or seclusion); *Kahey v. Jones*, 836 F.2d 948, 951 (5th Cir. 1988) (stating that courts must defer to the discretion of prison officials despite the inmate's provision of a practicable alternative to a contested regulation); *see also* Keenan, *supra* note 192, at 523 (arguing that the *Turner* Court's emphasis on deference in the application of its own test sent the message to lower courts that they should uncritically affirm the decisions of prison authorities).

286. Justice Stevens approvingly cited *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985), as making an "attempt to strike a fair balance between legitimate penological concerns and the well-settled proposition that inmates do not give up all constitutional rights by virtue of incarceration." *Turner*, 482 U.S. at 101 n.1 (Stevens, J., dissenting). In *Abdul Wali*, the Second Circuit established three standards, with the applicable standard contingent on the nature of the asserted right. *See* 754 F.2d at 1033. The least deferential standard was applied where the assertion of the right was not presumptively dangerous; the court required "prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary

Justice Brennan, dissenting in *O'Lone v. Estate of Shabazz*,²⁸⁷ also voiced a general objection to the *Turner* standard of review. While noting that incarceration by its nature changes a person's position in society, Justice Brennan contended that in reviewing an infringement of an inmate's constitutional rights the initial premise must be that "prisoners retain constitutional rights that limit the exercise of official authority against them."²⁸⁸ From this starting point, the demands of prison security and rehabilitation require the limitation or cessation of certain rights; however, Justice Brennan stressed that the Constitution was not adopted to enhance "efficiency" or "reliance on administrative expertise."²⁸⁹ Categorical deference to prison authorities offers the remaining constitutional rights of prisoners to the altars of efficiency and bureaucracy without reference to the extent or type of deprivation of rights.²⁹⁰ Justice Brennan discussed the import of differing levels of scrutiny in establishing that the protection of certain rights is of more serious concern than others.²⁹¹ To elucidate this point, Justice Brennan proffered an example: from the perspective of the *Turner* test, "restricting use of the prison library to certain hours warrants the same level of scrutiny as preventing inmates from reading at all."²⁹²

The *Turner* rational-basis test fails to adequately protect the religious freedom of prisoners. Several reasons militate against applying this test to Religion Clause claims. First, an asserted penological objective need only be based on a probable concern. Often, an abstract recitation of a legitimate penological objective—security, deterrence, or rehabilitation—is enough to satisfy the general reasonableness requirement of *Turner*.²⁹³ Second, the importation of

to effectuate the governmental objective involved." *Id.* On the other end of the deference spectrum, if the asserted right was "inherently inconsistent" with the penological objective, the *Abdul Wali* court required near total deference to the judgment of prison officials. *Id.*

287. 482 U.S. 342 (1987).

288. *Id.* at 355 (Brennan, J., dissenting).

289. *Id.* at 356 (Brennan, J., dissenting).

290. *See id.* (Brennan, J., dissenting).

291. *See id.* at 357 (Brennan, J., dissenting). Justice Brennan advocated the *Abdul Wali* framework of analysis, *see supra* note 286, for prisoners' constitutional rights claims. *See O'Lone*, 482 U.S. at 358-59 (Brennan, J., dissenting) (viewing the *Abdul Wali* approach as taking seriously the "Constitution's function of requiring that official power be called to account when it completely deprives a person of a right that society regards as basic").

292. *Id.* at 356 (Brennan, J., dissenting).

293. *See, e.g., Hadi v. Horn*, 830 F.2d 779, 781, 784-85 (7th Cir. 1987) (holding that a prison policy prohibiting Islamic services was valid because inmate-led services could turn into "gang

Turner, a free speech case, into the religious context of *O'Lone* fails to address adequately the different qualities of speech and religion. The *Turner* test first asks "whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression."²⁹⁴ Speech regulations which burden an inmate's free expression may still be justified so long as the restriction at issue is one of time, place, and manner as opposed to one based on content.²⁹⁵ In contrast, religion is not usually amenable to time, place, and manner restrictions, as the practice of most religions is defined by ritual, which in turn is given meaning by the concepts of time, place, and manner. Next, the second *Turner* factor—whether easily implemented, alternative means of exercising an asserted constitutional right exist so as to compensate for the circumscription or proscription of a constitutional right—recognizes that speech, at least most of the time, can be conveyed effectively in a multitude of ways. Religion, on the other hand, as the Court has noted, is subjective; the value of alternatives can only be measured by the affected individual.²⁹⁶

Additionally, the burden of the fourth *Turner* factor—whether ready alternatives exist that fully accommodate the prisoner's rights at *de minimis* cost to legitimate penological interests—is extremely difficult for prisoners to carry.²⁹⁷ First, by virtue of their positions, prison administrators have much greater access than courts or prisoners to information that would illuminate the likely costs and overall feasibility of alternative regulations. Second, the creation of alternative secular treatment programs likely can only be accomplished at more than a *de minimis* cost; attendant costs of bureaucratic duplication and paying professionals to administer alternative, religion-free treatment programs virtually ensures that an inmate will not satisfy *Turner's* fourth prong. Finally, and perhaps most importantly,

meetings" despite the fact that there had never been any security problems at any past services).

294. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

295. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

296. *See supra* notes 48-51 and accompanying text.

297. *See Boyd v. Coughlin*, 914 F. Supp. 828, 834 (N.D.N.Y. 1996) (observing that the creation of an alternative treatment program would adversely affect the prison system financially and administratively); *Jones v. Smid*, No. 4-89-CV-20857, 1993 WL 719562, at *7 (S.D. Iowa Apr. 29, 1993) (stating that a plaintiff did not offer "easy and ready alternatives" to a prison program modeled on AA's Twelve Steps). Not surprisingly, the aforementioned cases both held state-imposed attendance at AA meetings in prison to be constitutional. *See Boyd*, 914 F. Supp. at 834; *Jones*, 1993 WL 719562, at *9.

the alternative means factor is at loggerheads with the Establishment Clause. Either the right to be free from state establishment of religion exists or it does not; by definition, it cannot be made hierarchical.

Turner facially treats all constitutional rights of prisoners in the same fashion, regardless of the qualitative differences in asserted interests. But it must be conceded that certain rights are more compelling and fundamental than others. An inmate's Establishment Clause rights against the state cannot and should not be equated with prison regulations concerning beard length or attire. *Turner*, however, does not differentiate among constitutional claims and the result is a rational relationship test applied to inmates' Establishment Clause claims. Thus, in the prison setting, where the power of the state over its citizens reaches its zenith, there is no meaningful constraint on government authorities seeking to advance religion.

Over fifty years ago, Justice Jackson noted the danger of pliable and deferential principles of justification. He wrote that such principles lie "about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds [these] principle[s] more deeply in our law and thinking and expands [them] to new purposes."²⁹⁸ As the discussion of *Jones* and Judge Bellacosa's dissent in *Griffin* demonstrates, the rational relationship test of *Turner* enables courts to deny serious consideration to inmates' Establishment Clause claims and therefore to uphold state establishment of religion. This result could not be what the Supreme Court had in mind when it enunciated the *Turner* test.

IV. STRENGTHENING THE WALL OF SEPARATION BETWEEN CHURCH AND STATE

A. *The Establishment Clause and Coercion*

The preceding discussions of AA cases demonstrate that for state-supported AA programs to pass constitutional muster, secular alternatives must exist and serious state compulsion must not be present. These common factors have been decisive in cases addressing religiously-oriented substance abuse programs, despite governmental

298. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (referring to the majority's construction of the Due Process Clause to justify the internment of Japanese-Americans during World War II).

coercion not being a prerequisite to prove an Establishment Clause violation. The Supreme Court has stated that “[t]he Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”²⁹⁹ This makes it difficult to discern why the *Warner III* and *O’Connor* opinions in the probation context, and the *Griffin* and *Kerr* opinions in the prison setting, strongly emphasize coercion; it may be that this mode of analysis makes these decisions more palatable to both an embattled penal system and a public fed up with crime.

While the *Warner III*, *O’Connor*, and *Kerr* courts ignored the impact of government support for and involvement with AA on the separation of church and state, the *Griffin* court did not; as a result, the *Griffin* opinion is schizophrenic. At the onset of its opinion, the *Griffin* court noted that it would find ASAT’s incorporation of AA doctrine and practices unconstitutional without a finding of coercion.³⁰⁰ The court reasoned that the program violated the Establishment Clause principle prohibiting government endorsement of religion,³⁰¹ which stems from the more basic proposition that the church and state should remain separate. After it acknowledged that ASAT violated the endorsement test, the court returned to this theme only after engaging in a coercion analysis.³⁰² But after a determination

299. *Engel v. Vitale*, 370 U.S. 421, 430 (1962); see also *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring) (observing that “the Court has repeatedly recognized that a violation of the Establishment Clause is not predicated on coercion”); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 786 (1973) (stating that “proof of coercion . . . [is] not a necessary element of *any* claim under the Establishment Clause”) (emphasis added).

300. As stated by the court:

even if we were to agree with the Appellate Division’s holding that the governing principles and practices of A.A., as incorporated in the ASAT Program, do not necessarily require an atheist participant to accept the existence of God in the religious sense, or to engage in religious activity, we would, nonetheless, find that the . . . ASAT program violates . . . the Establishment Clause

Griffin v. Coughlin, 673 N.E.2d 98, 101 (N.Y. 1996), *cert. denied*, 117 S. Ct. 681 (1997) (citations omitted).

301. See *id.* (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). In concluding that the inclusion of AA as a part of the ASAT program violated the Establishment Clause under the endorsement test, the *Griffin* court found it “unimaginable that inmates in the inherently authoritarian atmosphere of a prison would not perceive that such a mandatory, exclusive program, facially containing expressions and practices that ha[ve] always been religious, favors inmates who adhere to those beliefs, and symbolically condones the religious proselytizing those expressions literally reflect.” *Id.* at 108 (internal quotation marks and citations omitted).

302. See *id.* at 105-06.

that the prison program itself is unconstitutional under the endorsement test, any assessment of coercion under *Lee* is superfluous. While it is true that AA's exclusivity in a coercive substance abuse regime strengthens the perception of government endorsement of religion, exclusivity and coercion are not necessary for such a finding. The presence of an alternative, secular program, while perhaps helpful in staving off a Free Exercise claim, should be of little consequence in a court's Establishment Clause analysis. At no time does the majority specifically address this issue; it simply states that the "decisive factor" in the opinion was the application of coercive pressure by the state, not the importation of AA tenets and practices into ASAT. Indeed, the holding is limited to the prohibition of the coercive elements of the program (i.e., making Griffin's eligibility in the Family Reunion Program contingent upon his participation in the prison's substance abuse regimen) and does not interfere with an inmate's voluntary participation in ASAT as it is presently constituted.³⁰³ The *Griffin* court retreated from what could have been a broad and proper holding, eliminating all state support for religious rehabilitative enterprises in New York prisons, limiting its ruling to the coercive aspects of the ASAT program.

Judge Winter, dissenting in *Warner III*, perceived the church-state issue most clearly when he chided the majority for its fixation on inmate choice of treatment programs as a panacea for an otherwise valid Establishment Clause claim. Judge Winter viewed the state's sponsorship of religion over non-religion as pivotal and observed that the "government may not support religious practices even when those engaged in them have freely chosen to [engage in the practices]."³⁰⁴ He elaborated with a hypothetical derived from the facts of *Lee v. Weisman*: "[the student's] constitutional claim could not be satisfied by an offer of an additional ceremony at the high school graduation allowing speakers of her choice to express whatever spiritual or atheistic views—or disagreements with the spiritual or atheistic views of others—that were congenial to her."³⁰⁵

The prison in many respects is similar to the public school. Both are owned and operated by the state. Prisoners and pupils are cap-

303. *See id.* at 110.

304. *Warner III*, 115 F.3d 1068, 1080 (2d Cir. 1997) (Winter, J., dissenting).

305. *Id.* (Winter, J., dissenting).

tive audiences with diminished constitutional rights.³⁰⁶ The Supreme Court has, for the most part, purged public schools of government-supported religious exercise whether the religious practice is elective or not. The prison should not be a haven for state-sponsored religion even if inmates are given a choice to participate in religious programs.³⁰⁷

B. The Public and Government Funding of Religiously-Oriented Counseling

The fact that the general bar against taxpayer standing in suits against the government contains a narrow exception for Establishment Clause claims³⁰⁸ highlights the difference between most constitutional rights, which are of a private concern, and Establishment Clause rights, which are decidedly public in nature. The Establishment Clause disables government; when the state circumvents this constitutional disability and advances religion, all citizens are affected. In *Flast v. Cohen*, the Court recognized that while injuries to individual taxpayers may be slight when the government impermissi-

306. For a review of prisoners' constitutional rights, see *supra* note 193. With regard to students, the Supreme Court has held several times that they possess limited constitutional rights under certain circumstances. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-66 (1995) (finding that random drug testing of high school athletes without individualized suspicion was a reasonable search under the Fourth Amendment); *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) (holding that searches can be conducted at public schools if such searches are reasonably related to objectives of the search and are not excessively intrusive).

307. In what may be a harbinger of even greater cooperation between religion and government in rehabilitation, a prisoner program in "religious immersion" was recently instituted in Texas. Gustav Niebuhr, *Using Religion to Reform Criminals, Texas Tries Immersion in Faith to Put Inmates on Right Path*, N.Y. TIMES, Jan. 18, 1998, at A12. The "Prison Fellowship" program is Christian-based and occupies a wing of a prison building where participants live and pray together. See *id.* The program involves worship services, faith-based study groups, parenting classes, and "anger management." See *id.* (internal quotation marks omitted). The Texas program, although privately financed and voluntary, see *id.*, raises similar constitutional concerns as AA does in the prison context. These concerns include, among other things, the granting of benefits based on participation in the program and governmental entanglement with religion.

308. See *Flast v. Cohen*, 392 U.S. 83, 85 (1968). *Flast v. Cohen* set forth two conditions that a taxpayer must meet to have standing to sue the government. First, there must be a "logical link" between the plaintiff's taxpayer status and the subject matter of the suit. *Id.* at 102. Second, there must be a "nexus" between the taxpayer's status and the constitutional violation alleged. *Id.* at 102-03. This nexus is provided by a specific constitutional limitation on Congress' power to tax and spend. See *id.* Establishment Clause claims have been the only suits to meet *Flast's* taxpayer suit requirements. See VAN ALSTYNE, *supra* note 47, at 853 n.14 (stating that "[o]nly the establishment clause has been identified as sufficient to anchor taxpayer standing to litigate expenditures not provided for within the same statute levying the tax").

bly supports religion, there is a unique connection between the Establishment Clause and the spending of tax dollars that demands an exception to the general bar against taxpayer suits.³⁰⁹

While AA has a laudable secular goal of helping alcoholics overcome their disease, the dangers of state-imposed participation should not be disregarded by the public. Judges, wardens, or legislators who impose AA as a sentencing condition channel potential believers to a religion. The coercive effect of the judge's pen, the legislator's bill, or the warden's command is undeniable: Participate or face a less desirable alternative such as incarceration.

Beyond providing a steady stream of potential converts to AA, the state runs the risk of ceding a large measure of control over its drunk driving and prisoner rehabilitation policies to what is arguably a religious organization. Where there is no secular self-help program to which convicted drunk drivers can be referred, or in which prisoners can be placed, the government becomes dependent on that sole provider. Although some forms of cooperation between the state and religious organizations are not precluded by the Establishment Clause,³¹⁰ the Supreme Court has insisted that there be "no concert . . . or dependency" between the government and religious institutions.³¹¹ The more states emphasize AA in their responses to the drunk driving problem or prisoner rehabilitation strategies, the further the relationship between the state and AA moves toward impermissible concert or dependency.

As the preceding discussion indicates, the public has the right to question the constitutionality of government support of religiously-oriented counseling and rehabilitation services³¹² in prisons and via

309. *Flast*, 392 U.S. at 102; see also *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (stating that since *Flast v. Cohen* "we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges").

310. See *supra* notes 174-80 and accompanying text.

311. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

312. It must be noted that AA is officially a self-sustaining organization that does not accept outside contributions. See *Alcoholics Anonymous World Servs., Inc., Financial Policy* (visited Oct. 26, 1997) <<http://www.alcoholics-anonymous.org/factfile/doc17.html>>. Members can contribute up to \$1,000 a year. See *id.* The organization also derives support from the sale of AA literature. See *id.* AA's reliance on small, voluntary contributions and book sales for its financial health underscores the importance of a continuous stream of new members for the organization's ability to survive and thrive. Other programs based on the Twelve Step paradigm, but technically not under the purview of AA, may not adhere as scrupulously to this ban on outside funds.

probation referral systems.³¹³ The Supreme Court has stated that the Establishment Clause “absolutely prohibit[s] government-financed . . . indoctrination into the beliefs of a particular religious faith.”³¹⁴ The issue of funding is particularly relevant in prison-based programs because even if self-help meetings in this setting are staffed by AA volunteers,³¹⁵ the overall prison program in terms of administration, facilities, and overhead is paid for with tax dollars. Additionally, prison programs may not always be able to procure volunteers to conduct self-help meetings and may instead have state employees run meetings.

To inform this discussion, it is helpful to consider *Bowen v. Kendrick*,³¹⁶ a 1988 case in which the Supreme Court considered the constitutionality of government funding of religious organizations that provided family planning services. In *Bowen*, a five to four decision, the Supreme Court held that the Adolescent Family Life Act (AFLA)³¹⁷ did not facially violate the Establishment Clause.³¹⁸ AFLA provided federal grants to public or nonprofit private organizations for services and research in the areas of teenage pregnancy and sexuality.³¹⁹ AFLA did not explicitly disqualify religious organizations from receiving federal grants or otherwise suggest that religious affiliation should be a criterion for not selecting an organization.³²⁰ AFLA, moreover, enlisted the services of religious organizations in providing counseling about family planning.³²¹

313. It can be argued that because governments channel probationers to AA through their probation referral systems, they, for all intents and purposes, “fund” AA in the probation context. These recruits may contribute money to AA and bring in new members themselves, thereby perpetuating the organization. Because of the attenuated nature of this funding, the incidental benefit analysis, *see supra* Part II.C, is perhaps more appropriate for the probation setting. Therefore, this section focuses on the funding of prison-based AA programs, but, in many respects, is still relevant to the funding of AA in the probation context.

314. *School Dist. v. Ball*, 473 U.S. 373, 385 (1985).

315. *See Griffin v. Coughlin*, 673 N.E.2d 98, 107 (N.Y. 1996) (noting that AA volunteers are “invited” to run prison self-help meetings in the ASAT program), *cert. denied*, 117 S. Ct. 681 (1997).

316. 487 U.S. 589 (1988).

317. Pub. L. No. 97-35, sec. 955, §§ 2001-2011, 95 Stat. 357, 578-92 (1981) (codified as amended at 42 U.S.C. § 300z (1994)).

318. *See Bowen*, 487 U.S. at 622.

319. *See id.* at 593-94. Although AFLA is still on the books, the particulars of the Act have been amended substantially. The discussion of AFLA in this Note is in the past tense to reflect the version of the Act that the *Bowen* Court addressed in 1988.

320. *See Bowen*, 487 U.S. at 608.

321. *See* 42 U.S.C. § 300z(a)(8)(B).

The Court analyzed the constitutionality of AFLA under the *Lemon* test. In an opinion by Chief Justice Rehnquist, the Court found that "the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood" was the primary purpose of AFLA, thereby satisfying the first prong of *Lemon*.³²² Turning to *Lemon*'s second prong, the Court stated that the principal effect of AFLA was not the advancement of religion; the Court emphasized that there was nothing "pervasively sectarian"³²³ about the counseling services which the religious organizations provided in connection with premarital sex and teenage pregnancy.³²⁴ The Court found it unsurprising that the government's secular concerns coincided with religious teachings on a social issue such as teenage sexuality.³²⁵ Addressing the third part of the test, the Court found no excessive government entanglement with religious grantees.³²⁶ The Court noted that AFLA's monitoring function exists only to ensure that money is not being misappropriated and not to enforce federal guidelines about the content of advice given or the values instilled by religious organizations in their provision of counseling.³²⁷ Thus, the Court determined that AFLA was not unconstitutional on its face. But the Court did rule that it may be unconstitutional "as applied," remanding for consideration whether specific grants to religious organizations may have the primary effect of advancing religion.³²⁸

Of crucial importance to the outcome in *Bowen* was the Court's refusal to find that grantees of a religious orientation were necessarily pervasively sectarian in their provision of teenage counseling.³²⁹ Since AA's sole purpose is to treat alcoholism, the conclusion that AA is a pervasively sectarian institution necessarily means that its provision of alcohol treatment is pervasively sectarian. Normally, when the Court determines that an organization is pervasively sec-

322. *Bowen*, 487 U.S. at 602.

323. *Id.* at 610.

324. Such services include pregnancy testing, adoption counseling, child care, and consumer education. These services, the Court reasoned, are not converted into religious activities because they are carried out by religious organizations. *See id.* at 613.

325. *See id.*

326. *See id.* at 615-17.

327. *See id.* at 616-17.

328. *Id.* at 620-22.

329. *Id.* at 610-11. This makes AA unlike the religious organizations in *Bowen* which provided family planning counseling and other religious services. Hence, this section considers whether AA itself is a pervasively sectarian organization for constitutional purposes.

tarian, government aid to these institutions must undergo a rigorous evaluation as to whether the provision of that aid impermissibly advances religion, rather than a less stringent *Lemon* examination.³³⁰ At times, the Court has gone so far as to infer or to assume that the effect of pervasively sectarian institutions receiving government benefits is the propagation of religion.³³¹ Although there is no authoritative definition of “pervasively sectarian” in Establishment Clause jurisprudence, several cases suggest characteristics that merit consideration in the examination of the sectarianism of a state-funded religious organization. These attributes include a high frequency of individuals attending who share a common religious denomination;³³² allegiance to religious dogma;³³³ indoctrination;³³⁴ and direction of programs by members of religious orders.³³⁵

At the onset of this analysis, it must be noted that since the definition of a pervasively sectarian institution is uncertain and malleable, any labeling of AA as such can be easily dismissed or justified by boundary shifting. “Religious denominations” can be defined narrowly to encompass only those groups traditionally regarded as religious sects such as Presbyterianism, Conservative Judaism, or Unitarianism. AA probably fails this type of designation. It would be more appropriate in our increasingly pluralistic society, however, to expand the concept of religious denomination to encompass any sincere religio-philosophical system by which numbers of people, in

330. *See id.* at 610.

331. For example, in *School District v. Ball*, the Court stated that pervasively sectarian schools “may impermissibly advance religion” in three manners:

First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

473 U.S. 373, 385 (1985).

332. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 768 (1973) (listing “religious restrictions on admission” as a characteristic of pervasively sectarian schools) (internal quotation marks omitted).

333. *See id.* (stating that pervasively sectarian schools often “require obedience by students to the doctrines and dogmas of a particular faith”).

334. *See* Tilton v. Richardson, 403 U.S. 672, 681-82 (1971) (noting that “religious indoctrination” is prevalent at “typical sectarian” institutions of higher learning).

335. *See* Wolman v. Walter, 433 U.S. 229, 234-35 (1977) (emphasizing in a school-funding case “that most principals [of the schools at issue] are members of a religious order within the Catholic Church”).

whole or in part, lead their lives. AA also mirrors traditionally religious denominations in its annual meeting, the General Service Conference of Alcoholics Anonymous.³³⁶ These conventions appear to be similar to, *inter alia*, meetings of the U.S. Conference of Catholic Bishops and the Southern Baptist Convention in that they discuss organizational direction, tenets of faith, deviations from orthodoxy, membership, and public relations.

AA relies heavily on "religious dogma." The Twelve Steps for members of the AA Fellowship are similar in purpose to the Ten Commandments. Both function as "sacred texts" for constitutional purposes³³⁷ and provide adherents with roadmaps for successful living. Additionally, *The Big Book* proclaims that for an alcoholic to overcome his addiction he has "to quit playing God."³³⁸ Skepticism of the idea that man is God, or that man can actually comprehend God, is a feature of the world's three great monotheistic religions.³³⁹ AA's admonition to participants to stop playing God, and instead to look to a higher power for guidance constitutes religious dogma, along the same lines that various strands of Jewish, Christian, and Islamic philosophies have set forth.³⁴⁰

Furthermore, the AA system can be regarded as under the direction of members of a "religious order." Based in part on the principles of the Oxford Group,³⁴¹ a religious organization which advocated a return to the spirit of early Christianity,³⁴² AA's founders highly valued sharing the good news of one's own salvation. AA spread through the dedication and diligence of a small cadre of true believers seeking out alcoholics to whom they could impart their knowledge and experience of a proven path to sobriety.³⁴³ Bill Wilson, a co-founder of AA, himself became revered as a living saint by some members of the Fellowship.³⁴⁴

336. See KURTZ, *supra* note 8, at 162-63.

337. See *Stone v. Graham*, 449 U.S. 39, 41 (1980) (stating that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths").

338. THE BIG BOOK, *supra* note 33, at 62.

339. See generally KAREN ARMSTRONG, A HISTORY OF GOD: THE 4,000 YEAR QUEST OF JUDAISM, CHRISTIANITY AND ISLAM 170-208 (1993) (discussing various attempts by monotheistic philosophers to make the concept of God accessible to man).

340. See generally *id.* at 209-256 (relating various Judaic, Islamic, and Christian philosophers' efforts to personalize God and his Word).

341. See KURTZ, *supra* note 8, at 48-52.

342. See *id.* at 50.

343. See *id.* at 100.

344. See *id.* at 101.

AA arguably possesses all the characteristics that the Court has identified as indicative of a pervasively sectarian organization and therefore should be regarded as such for constitutional purposes. As a result, under the more intense scrutiny given to pervasively sectarian organizations that receive government benefits, taxpayer funding of AA programs should be held unconstitutional.

If AA were not deemed pervasively sectarian in its provision of alcohol treatment, funding of prison-based AA programs would still have to survive the *Lemon* test. In assessing government funding of AA in prisons, courts can easily dispense with *Lemon's* first and third prongs. Because AA promotes the state's legitimate interest in rehabilitating its prisoners by providing alcohol treatment, prison-based AA programs satisfy the secular purpose requirement of *Lemon*. Such programs, however, fail the test's third prong, which states that a government action must not create an excessive government entanglement with religion. Prison administrators oversee and heavily regulate all aspects of prison life, including rehabilitation regimes.³⁴⁵ The government's intense involvement with prison treatment programs based on AA necessarily fosters an excessive government entanglement with religion.

Prison-based AA programs also fail *Lemon's* second prong, which prohibits the government from taking actions that advance religion. That AA is providing counseling services informs this conclusion. On a number of occasions, the Court has emphasized the inherent risk that counselors will impart their religious beliefs during the course of instruction, whether deliberately or inadvertently.³⁴⁶ Justice Blackmun underscored this danger:

The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.³⁴⁷

Relying on *Lemon*, the Court repeatedly has struck down programs which have no effective means of guaranteeing that aid will be

345. See 18 U.S.C. § 4042(a) (1994).

346. See, e.g., *School Dist. v. Ball*, 473 U.S. 372, 388 (1985) (observing that teachers may "subtly (or overtly) conform their instruction to the environment in which they teach").

347. *Bowen v. Kendrick*, 487 U.S. 589, 641 (1988) (Blackmun, J., dissenting).

used exclusively for secular purposes.³⁴⁸ Aid to organizations performing secular and sectarian functions has only been upheld in situations where such a program has survived a searching inquiry to ensure that no state funds flow to the organization's religious activities.³⁴⁹ Because AA's secular service of alcohol treatment is inseparable from its religious philosophy, the Court's credo that the Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"³⁵⁰ and *Lemon's* second prong are violated by state-funding to AA. Thus, regardless of whether AA is a pervasively sectarian organization, prison-based AA programs funded by taxpayer dollars almost certainly are unconstitutional under *Lemon*.

V. ALCOHOLICS ANONYMOUS, THE RIGHT/PRIVILEGE
DISTINCTION, AND THE DOCTRINE OF UNCONSTITUTIONAL
CONDITIONS

Much of this Note has criticized the narrow interpretations of the Establishment Clause by various courts. In essence, these courts contend that a government action only violates the Establishment Clause if that action coerces an individual to participate in a religious activity. As has been discussed, this spare reading of the Establishment Clause does great injury to the principle of separation of church and state because of its emphasis on the individual. If courts must assess an individual's claim that he was coerced into participating in a religious practice such as AA, they should employ more tailored analytical frameworks. More specifically, courts should look to Free Exercise Clause jurisprudence and the doctrine of unconstitutional conditions for guidance because they focus on individuals rather than

348. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 254 (1977) (striking down field trip aid program as "an impermissible direct aid to sectarian education"); *Meek v. Pittenger*, 421 U.S. 349, 365 (1975) (invalidating an equipment loan program to sectarian schools because of insufficient mechanisms for "channeling aid to the secular without providing direct aid to the sectarian"); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) (holding that aid to nonpublic schools for cost of state-mandated tests was unconstitutional because the state failed to "assure that the state-supported activity is not being used for religious indoctrination").

349. See, e.g., *Hunt v. McNair*, 413 U.S. 734, 742-45 (1973) (finding that a general revenue bond benefitting a Baptist college was constitutional because it excluded from participation facilities used for religious purposes); *Tilton v. Richardson*, 403 U.S. 672, 681 (1971) (upholding federal grants for construction of college and university facilities because there was "no evidence that religion seeps into the use" of the facilities in question).

350. *Ball*, 473 U.S. at 385.

institutional arrangements, which is the traditional province of the Establishment Clause. As a full exposition of the relationship between AA and the Free Exercise Clause is beyond the scope of this Note,³⁵¹ this Part considers only the unconstitutional conditions doctrine. This Part explains briefly the doctrine's history, assesses various courts' treatment of claims in light of the doctrine, and concludes that mandatory AA participation violates the doctrine.

A. *Right-Privilege Distinction*

Under the old "right-privilege" distinction, the Due Process Clause applied only when the government took an individual's prop-

351. Following is a summary of recent developments in Free Exercise Clause doctrine and a list of cases that have addressed state-imposed participation in AA under the Clause.

With the invalidation of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4 (1994) (requiring all laws substantially burdening the free exercise of religion to be the least restrictive means of furthering a compelling government interest), by the Supreme Court in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2160 (1997), claimants will have a more difficult time proving that mandatory participation in AA burdens their rights under the Free Exercise Clause. As a result of *Flores*, the test to determine whether a government action constitutes a Free Exercise Clause violation is once again contained in the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990). See *Flores*, 117 S. Ct. at 2160. In *Smith*, the Court held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest advanced by the least restrictive means. See 494 U.S. at 885. The return to *Smith* requires a much weaker showing by the government; no longer, as under RFRA, is a compelling state interest and the least restrictive means of furthering that interest required to justify an infringement of Free Exercise rights. See *id.*

Two federal courts have rejected claims by prisoners that state-imposed participation in AA violates the Free Exercise Clause. See *Jones v. Smid*, No. 4-89-CV-20857, 1993 WL 719562, at *8 (S.D. Iowa Apr. 29, 1993) (holding that an inmate's right to Free Exercise was not violated during his mandatory participation in a prison's substance abuse treatment program because his participation did not seriously burden his religious beliefs); *Stafford v. Harrison*, 766 F. Supp. 1014, 1018 (D. Kan. 1991) (denying an inmate's claim that his Free Exercise rights were violated by his required participation in an AA-modeled substance abuse program because the program did not cause the inmate to "abandon or contravene" his faith).

Several other courts have considered AA in connection with the right to Free Exercise, but only in passing. See *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1081 (2d Cir. 1997) (Winter, J., dissenting) (stating that "[c]ompulsory attendance at religious ceremonies as part of a penal sentence [implicates] . . . the Free Exercise Clause and might well require the provision of a choice between secular and sectarian programs"); *Kerr v. Farrey*, 95 F.3d 472, 481 (7th Cir. 1996) (stating that plaintiff failed to develop adequately his Free Exercise claim that Narcotics Anonymous burdened his belief in free will); *Boyd v. Coughlin*, 914 F. Supp. 828, 833-34 (N.D.N.Y. 1996) (rejecting plaintiff's Free Exercise claim because he failed to demonstrate that a belief or practice of his had been adversely affected by state action); *Feasel v. Willis*, 904 F. Supp. 582, 586 (N.D. Tex. 1995) (stating that it was not "clearly established" that mandatory participation in AA violated the Free Exercise Clause).

erty or invaded his bodily integrity.³⁵² When the government denied an individual benefits such as employment or welfare, the Due Process Clause was inapplicable.³⁵³ This “tough-minded distinction between constitutionally protected rights and unprotected governmental privileges” bludgeoned constitutional claims associated with governmental largess.³⁵⁴ In 1970, the Supreme Court in *Goldberg v. Kelly*³⁵⁵ rejected the right-privilege distinction. In *Goldberg*, the Court extended procedural safeguards to government benefits in order to protect recipients from unwarranted termination or denial of such benefits.³⁵⁶

The majority opinions in *O'Connor* and *Jones*, and the dissents in *Warner III* and *Griffin* come perilously close to resurrecting the repudiated right-privilege distinction. An underlying but not fully articulated rationale for judges to find mandatory AA programs constitutional is the justification that the greater power to withhold a benefit includes the lesser power to condition its receipt, regardless of whether the conditions impact constitutionally protected rights.³⁵⁷ For example, the State of New York could do away with family visitation programs entirely and all inmates would lose the benefit of family visits. If New York decides to keep the family visitation program in place, the “greater-includes-the-lesser” rationale allows the State to condition participation in the visitation program on participation

352. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). The right-privilege distinction stems from a famous utterance by Justice Holmes, then on the Supreme Judicial Court of Massachusetts. The future Supreme Court Justice wrote that a person “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 518 (Mass. 1892).

353. See Reich, *supra* note 352, at 742 (tracing the increasing applicability of the Due Process Clause); see also, e.g., *Scopes v. State*, 289 S.W. 363, 364-65 (Tenn. 1927) (holding that a teacher has “no right or privilege to serve the state except upon such terms as the state prescribe[s]” and that in dealing with its employees *qua* employees the state is not constrained by the Fourteenth Amendment).

354. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1441 (1968).

355. 397 U.S. 254 (1970); see also Van Alstyne, *supra* note 354, at 1462-64 (charting the erosion of the “right-privilege” distinction and the rise of alternative doctrines, employing substantive due process approaches, to check the increasing power of government).

356. See *Goldberg*, 397 U.S. at 262.

357. Cf. *Warner III*, 115 F.3d 1068, 1077-78 (2d Cir. 1997) (Winter, J., dissenting) (contending that Warner took initiative in selecting AA in the hope of receiving a more favorable sentence to which he was not constitutionally entitled); *Griffin v. Coughlin*, 673 N.E.2d 98, 120-21 (N.Y. 1996) (Bellacosa, J., dissenting) (observing that Griffin “voluntarily chose” to place his religious beliefs at risk in exchange for privileges to which he was not unqualifiedly entitled).

in a rehabilitation program based on AA. The prisoner's price of enjoying the benefits of the program is, in effect, the surrender of constitutional rights.

B. The Doctrine of Unconstitutional Conditions

The right-privilege distinction had been criticized long before its ultimate rejection. In 1926, Justice Sutherland wrote what has become the most familiar presentation of the doctrine of unconstitutional conditions, the approach to government benefits that eventually superseded the right-privilege distinction:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.³⁵⁸

No case thus far considering AA as a probation condition or requirement for prisoner privileges has examined the doctrine of unconstitutional conditions as a grounds to declare state-imposed AA participation as unconstitutional. The unconstitutional conditions doctrine, however, captures nicely the dynamic of the unequal bargaining relationship between the government and an AA participant and can serve to protect constitutional liberties from government encroachment via indirect methods.³⁵⁹ The doctrine requires that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."³⁶⁰ In *McDaniel v. Paty*,³⁶¹ Justice

358. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926). For a general overview of this doctrine, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989), and, as it may apply to the Establishment Clause, see Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989). Other commentators have assessed certain probation requirements in light of the unconstitutional conditions doctrine. See, e.g., Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139, 170-86 (1993) (contraception).

359. Cf. Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1048 (1991) ("The function of an unconstitutional conditions doctrine is to preserve certain protected constitutional liberties in an environment of pervasive governmental activity.").

360. Sullivan, *supra* note 358, at 1415.

361. 435 U.S. 618 (1978).

Brennan applied this idea to a Free Exercise claim and stated that “government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.”³⁶² In the context of this Note, the “benefits” withheld include visitation rights, parole, or continued freedom from incarceration; the “right” surrendered is the liberty to worship or not worship a God according to the dictates of one’s own conscience. The prison authorities cannot force an inmate to attend a Catholic Mass or a Jewish service; nor can they do so indirectly by offering a reduced sentence to the inmate who attends such services. Once the determination is made that AA is a religion the outcome for mandatory AA programs under the doctrine of unconstitutional conditions is ineluctable: the government cannot induce AA participation through the provision of benefits to those who participate.³⁶³ Moral philosopher Robert Nozick abstracts the effect of a coercive proposal on the weaker party in an exchange:

If the alternatives among which Q must choose are intentionally changed by P, and P made this change in order to get Q to do A, and before the change Q would not have chosen (and would have been unwilling to choose) to have the change made (and after it’s made, Q would prefer that it hadn’t been made), and before the change was made Q wouldn’t have chosen to do A, and after the change is made Q does A, then Q’s choice to do A is not fully his own.³⁶⁴

Viewed in this light, wardens and judges who condition benefits on participation in AA programs are making religious choices for their charges, a role that the state cannot assume. The government, knowingly or not, is using its monopoly over the selection and provision of benefits in the prison and probation systems to channel inmates and probationers into religious programs. Harm is not done just to those brave or resourceful enough to assert their rights but also to the untold number who feel they have little choice but to comply.

362. *Id.* at 639 (Brennan, J., concurring).

363. In *Sherbert v. Verner*, the Court followed similar logic, finding that a state violated Sherbert’s right to free exercise when it withheld her unemployment compensation benefits because she refused to work on Saturdays for religious reasons. *See* 374 U.S. 398, 410 (1968). The Court stated that Sherbert, a Seventh-day Adventist, was forced to choose between receiving benefits from the state and following her religion. *See id.* at 404.

364. Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE AND METHOD* 440, 463 (Sidney Morgenbesser et al. eds., 1969).

CONCLUSION

As theologian Richard Neuhaus has written, “[r]eligion is incorrigibly interventionist;”³⁶⁵ this is especially true of the Judeo-Christian brand, with its claim to universal truths.³⁶⁶ Despite its formal disclaimers and protestations, AA, in its history, theory, and practice, closely tracks, and sometimes appropriates, elements of Judeo-Christian monotheism. While AA disavows any claim to metaphysical and eschatological insight, the very fact that the program is based on the belief that supplication to a higher power is necessary to cure the disease of alcoholism ascribes meaning to the divine. Participation in the Fellowship and adherence to the Twelve Steps then becomes a form of worship or homage.

The demonstrated success of AA is sure to tantalize embattled prison administrators and sentencing judges as a valuable aid in their efforts to rehabilitate prisoners and DUI offenders. But the enlistment of a religious instrument by the state to achieve even a salutary end comports with neither law nor history. As James Madison asserted in his seminal writing on religious liberties, *Memorial and Remonstrance*, “[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.”³⁶⁷ The notion that a prisoner’s or probationer’s conscience is less inviolable than that of an unfettered citizen vitiates the sanctity of the First Amendment and does a disservice to the rehabilitative functions of prison and probation.

The argument in some instances may be made that prisoners or probationers freely choose to participate in AA programs to receive benefits to which they are not constitutionally entitled; however, it is far too late in religious freedom jurisprudence to suggest that the government should seek to commodify religious rights and liberties.³⁶⁸

365. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* 144 (1984).

366. *See id.*

367. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *THE COMPLETE MADISON* 299, 300 (Saul K. Padover ed., 1953).

368. Many commentators have made the argument that certain constitutional rights are inalienable, or should be treated as such. *See, e.g.*, MICHAEL WALZER, *SPHERES OF JUSTICE* 100-03 (1983) (citing a list of so-called “blocked exchanges”—things that cannot be bought or sold in the United States—including personal liberty, First Amendment rights, and the right to marry and procreate); Margaret Jane Radin, *Property and Personhood*, 34 *STAN L. REV.* 957, 974 n.59 (1982) (“Those things which constitute the will or personhood must, however, be inalienable.”) (citing GEORGE FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* § 66 (T. Knox trans., 1821)).

The Supreme Court has long viewed religious freedom as an essential attribute of an individual's identity; to encourage the alienability of religious liberty demeans and cheapens the Religion Clauses and, consequently, injures personal identity. Benefits of family visitation, reduced sentences, and more favorable probation terms should not accrue only to those who are willing to subscribe to the state's choice in religiously-oriented substance abuse treatment providers. The targeting of benefits in this fashion obliterates government neutrality and the principle of equality under the law as surely as the indiscriminate imposition of harm. To allow the state to advance religion under the guise of rehabilitation in conjunction with the "purchase" of religious rights in the closed market of the prison or the monopolistic market of probation denigrates the concept of religious liberty in America.

As a result of decades of rising crime rates and a revival of the importance of self-responsibility in our society, criminals elicit little sympathy from the populace. The imposition of a religious system on some of the most vulnerable members of our society, however, should not serve as an outlet for our pervasive sense of frustration with crime, criminals, and the overburdened criminal justice system. Although probation and confinement diminish some constitutional rights of individuals, these circumstances alone do not trump the Establishment Clause, which has an independent vitality that reaches into the darkest dungeons. For inmates and probationers, the wall of separation between church and state is not superseded by prison fences or the terms of probation. If religious indoctrination is countenanced as acceptable in these contexts, the reach of the Establishment Clause is reduced, replaced by the "considered judgment" of prison authorities and the wide discretion of sentencing judges. This result bodes ill for the principle of separation of church and state.