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Religious Activities on Public Property: How the Eruv Fits Into Evolving Free Exercise and Establishment Clause Jurisprudence

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Contents

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Abstract: This paper examines the constitutionality of eruvim in the context of evolving First Amendment jurisprudence. The eruv, or eruvim for plural, is a symbolic boundary created through hanging wires around a community, thus allowing observant Jews to carry or push objects on the Sabbath. Under Jewish law, one must build the eruv on public lands and obtain public approval. Prior to the Supreme Court's current conservative tilt, courts approached First Amendment litigation regarding the eruv in a relatively uniform manner. Courts historically held that erecting an eruv did not violate the Establishment Clause and also held that the Free Exercise Clause only required that a municipality provide an exemption for an eruv's construction in the face of a non-generally applicable or non-neutral policy. Now, however, long held Establishment and Free Exercise Clause jurisprudence is, and likely will, continue to change. These changes are challenging assumptions surrounding the constitutionality of erecting an eruv. This paper will argue that while the framework that courts will use to examine the legality of constructing an eruv will change, the results of these changes will not affect whether constructing an eruv violates the Establishment Clause or whether a municipality is required to grant an exemption for the construction of one under the Free Exercise Clause. Rather, this paper will argue that this new framework will present proponents of eruvim with the opportunity to defend their right to a Free Exercise exemption through challenging the ways courts approach issues of religious practice occurring on public lands. Such challenges will provide proponents of eruvim with the chance to draw legal parallels to indigenous struggles over access to their sacred sites and in the process potentially change longstanding precedent regarding the free exercise of religious practices on government owned property.

I. Introduction

On February 16, 2023, The New York Times published an article on the construction of an eruv around most of Brooklyn.[1] After detailing how Jewish law, or halacha as it is known, encompasses thirty-nine distinct work-related Sabbath prohibitions, the article highlighted the legal workaround to one of those prohibitions—the prohibition against carrying objects outside of one's home.[2] This workaround is known in Hebrew as an eruv, or eruvim for plural.[3] The Article noted how because of the eruv's construction, observant Jews in most of Brooklyn can now carry

[1] Joseph Berger, *For Strictly Observant Jews in Brooklyn, the Sabbath Expands*, N.Y. TIMES (Feb. 16, 2023), https://www.nytimes.com/2023/02/16/nyregion/brooklyn-observant-jews.html.
[2] *Id.*
[3] Alexandra Lang Susman, *Strings Attached: An Analysis of the Eruv Under the Religion Clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 93, 94 (2009).

their house keys, push their young children in strollers, and use mobility devices on the Sabbath.[4] Interestingly, despite the eruv's ancient halachic origins, the modern eruv is constructed through hanging a wire around a community, often on public property.[5]

Yet, despite its utility and inconspicuous nature, the eruv sometimes attracts public controversy.[6] For example, the February, 2023 article in The New York Times is notable for the controversy it generated.[7] Not only did the online publication of the article provoke comments from anti-Semites, but it also generated angry criticism of Orthodox Judaism and religion in America at large.[8] In one instance, a reader commented on the article that the Orthodox Jewish community in Brooklyn were "[h]iding behind religion, like most fanatics."[9] In another comment, a reader shared that Brooklyn's eruv represented "the First Amendment gone wild."[10] Comments such as these demonstrate the divisive debates that sometimes surround the establishment of an eruv in America.[11]

Furthermore, these divisive debates often expand beyond the internet and into every day American communities, as well as into the country's judicial system. Out of the more than 130 eruvim in America, only a few of them generated controversy.[12] Nonetheless, American communities are often the site for conflicts over eruvim, which devolve into litigation.[13] Notably, Tenafly, New Jersey, became synonymous with eruvim opposition in the early 2000s, which led

[4] Berger, *supra* note 1.
[5] Michael Lewyn, *Zoning and Land Use Planning*, 48 REAL EST. L.J. 473, 473 (2020).
[6] *Id.*
[7] Mira Fox, *Why that New York Times Article on the Brooklyn Eruv is Sparking Controversy*, FORWARD (Feb. 17, 2023), https://forward.com/culture/536789/new-york-times-brooklyn-eruv-crown-heights/.
[8] *Id.*
[9] *Id.*
[10] Berger, *supra* note 1.
[11] *See generally* Fox, *supra* note 7.
[12] *See* Susman, *supra* note 3 at 93-94.
[13] *Id.*

to litigation.[14] More recently, the town of Jackson, New Jersey, opposed the erection of an eruv until a Jewish group sued the town.[15] While the arguments surrounding eruvim take on many different forms outside of courts, the arguments within courts almost always come down to issues relating to the First Amendment.[16]

Moreover, these legal disputes implicate questions regarding both the Establishment and Free Exercise Clauses as they relate to allowing religious activity on public property.[17] When one examines the existing law regarding eruvim, it is clear that the current legal status of an eruv is that it does not violate the Establishment Clause and that it is not always required by the Free Exercise Clause.[18] Still, even if the Free Exercise Clause does not always compel a municipality to provide an exemption for an eruv's construction, courts sometimes hold that a municipality must provide an exemption for one due to the municipality's non-generally applicable and non-neutral policy towards the eruv.[19] It is worth noting, however, that much of the focus of prior eruvim litigation was centered on law that is now either obsolete or being rapidly called into question by the Supreme Court's new right-wing majority.[20] Therefore, now with precedent rapidly evolving away from a strong Establishment Clause and towards a more robust Free Exercise Clause, there is a question of whether the legal status of eruvim will change and whether this change will have a greater effect on religious practice in America.[21]

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[14] *Id.* at 100.
[15] Michael Lewyn, *Bringing Judaism Downtown: A Smart Growth Policy for Orthodox Jews*, 51 U. BALT. L. REV. 37, 43 (2021).
[16] Susman, *supra* note 3 at 95.
[17] *See generally* Lewyn, *supra* note 5.
[18] *Id.* at 492.
[19] *See id.*
[20] *See e.g.,* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).
[21] *See e.g., Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring); *Kennedy*, 142 S. Ct. at 2428.

Ultimately, this paper concludes that although rapidly evolving Free Exercise and Establishment Clause jurisprudence is unlikely to influence the overall constitutionality of eruvim, this changing legal framework will present proponents of eruvim with the opportunity to defend their right to an exemption through challenging the ways courts approach issues of religious practice occurring on public property. In establishing these arguments this paper will first seek to define an eruv, while also highlighting some of the arguments surrounding it. Next, to better understand where Free Exercise and Establishment Clause jurisprudence stand in regard to eruvim, this paper will explore how precedent regarding those two clauses have changed over time. Afterwards, this paper will briefly explore past eruvim litigation to showcase how courts have previously treated the legal status of eruvim under the First Amendment. Finally, this paper will dive into how recent changes in First Amendment jurisprudence will impact the status of eruvim, while specifically focusing on some of the new arguments that proponents of eruvim can make to further evolve the law regarding religious practice on public property.

II. Introduction to Eruvim

According to the Torah, a person may work for six days, "but on the seventh day [] [a person] shall have a Sabbath of complete rest."[22] The Mishnah, a code of Jewish law from the 2nd-century, interprets the Torah's biblical order to forbid thirty-nine distinct categories of labor on the Sabbath.[23] Because one of the many prohibitions outlined in the Mishnah includes carrying objects from one abode to another, observant Jews are not able to carry or push objects outside of their homes on the Sabbath.[24] This prohibition is alleviated by the Mishnah itself, which provides for

[22] Lewyn, *supra* note 5 at 474.
[23] *Id.*
[24] *Id.*

the eruv.[25] In Hebrew, eruv means to mix or join together.[26] When an eruv is erected all the separate abodes within it are joined together, thereby allowing all Jews within the eruv to carry on the Sabbath.[27]

Although an eruv is simply made through hoisting a wire around a community, there are a number of key steps involved in the erecting of an eruv. Firstly, before a Jewish community can erect an eruv, which they do with their own private funds, they must seek permission from a "secular official with jurisdiction over the area in question."[28] Also, this initial step involves the government "leasing" its property for a small fee.[29] Aside from the political procedure required for establishing an eruv, Jewish practice also requires certain physical procedures to be followed.[30] In particular, an eruv "must be at least forty inches high, roofless, and continuous," while also containing small rubber markers on the poles that hold up the wire.[31] These rubber markers are called *lechis* and represent door posts, thus creating a symbolic doorway into the eruv's protected abode.[32] Due to these various requirements eruvim are almost always constructed through affixing the wire and *lechis* on publicly owned utility poles.[33]

Moreover, despite what many eruvim critics believe, the concept of the eruv is both ancient and deeply rooted in Jewish American historical practice.[34] While the eruv was first written about in the 2nd-century Mishnah, Talmudic sources claim the eruv dates all the way back to the time of King Solomon.[35] Regardless of how old the eruv is as a concept within Jewish practice, its roots

[25] Charlotte Elisheva Fonrobert, *The Political Symbolism of the Eruv*, 11 JEWISH SOC. STUD. 9, 9 (2005).
[26] Lewyn, *supra* note 5 at 474.
[27] *Id.*
[28] Susman, *supra* note 3 at 95.
[29] *Id.*
[30] *Id.* at 94.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 99.
[35] Fonrobert, *supra* note 25 at 9.

in America date back to the 1890s when the Jewish community of St. Louis erected one.[36] However, the eruv's emergence in American suburbs date only to the 1960s.[37] Today, there are over 80 eruvim in the New York City metropolitan area alone, thus showing the prevalence of eruvim in modern American suburban life.[38]

Even though the eruv has deep roots within America, people sometimes oppose the erection of one on numerous grounds.[39] According to the anthropologist Susan H. Lees, who studied the aforementioned Tenafly eruv dispute, many residents of Tenafly who opposed the eruv rooted their non-legal arguments in larger demographic concerns.[40] Many of the people who subscribed to these demographic arguments feared that the construction of an eruv would lead to Tenafly becoming far more Orthodox Jewish, thus causing the following consequences: negative changes in real estate values; worse public schools; and unwelcome changes in commercial centers.[41] Lees noted how these animus based fears were made explicitly clear in town council meetings and in letters to the Tenafly mayor.[42] Also, Lees observed that many of the opponents of the eruv were other Jews living in Tenafly who feared that the demographic shifts caused by the eruv's construction would ghettoize Tenafly or make it more similar to insular Ultra-Orthodox Jewish settlements in the West Bank.[43]

Despite these arguments against erecting an eruv, supporters of eruvim make numerous compelling arguments in favor of constructing them.[44] Most obviously, many eruvim proponents

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[36] Lewyn, *supra* note 5 at 474.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 478.
[40] Susan H. Lees, *Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenafly, New Jersey*, 27 CONTEMP. JEWRY 42, 46 (2007).
[41] *Id.* at 55-56.
[42] *Id.*
[43] *Id.* at 66.
[44] *Id.* at 60; Susman, *supra* note 3 at 98-99.

will argue that the eruv simply makes the lives of Orthodox Jews easier by permitting them to carry on the Sabbath.[45] For Orthodox Jewish people with young children, who need to be pushed or carried, an eruv can facilitate movement on the Sabbath that would otherwise be prohibited.[46] Moreover, the same can be said for Orthodox Jews who struggle with mobility and require the assistance of canes, walkers, wheelchairs, or crutches.[47] Being able to carry on the Sabbath is all the more important when one considers that Orthodox Jewish practice prohibits driving on the Sabbath, while also requiring that prayer be accomplished in groups of no smaller than ten adult males.[48] Therefore, the only possible way for Orthodox Jews to gather for Sabbath prayer is by walking to a meeting spot, which will likely involve the carrying of various objects, such as house keys, food, prayer books, and medicines.[49]

In addition, proponents of eruvim often make arguments focused on the character of the communities in which they hope to live.[50] For instance, many eruvim proponents will point out that they should have the freedom to practice their religion in communities that promote inclusiveness.[51] Such arguments emphasize the hope for inclusive and welcoming communities.[52] In other cases, eruvim proponents erect eruvim with the hope that more Orthodox Jews will move to their community.[53] This hope mirrors the fears of many eruvim opponents who are worried about demographic shifts in their communities.[54]

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[45] Susman, *supra* note 3 at 98.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Lees, *supra* note 40 at 49-50, 60.
[51] *Id.*
[52] *Id.*
[53] Susman, *supra* note 3 at 99.
[54] Lees, *supra* note 40 at 46.

III. Constitutional Framework

Despite that many non-legal arguments regarding an eruv focus on community and demographics, many of the legal arguments are centered around the public aspects of the eruv.[55] Because erecting an eruv involves government approval to use government property, all eruv cases that have been reported implicate issues relating to either the Free Exercise Clause or the Establishment Clause.[56] Therefore, in order to better grasp these legal arguments, it is important to understand the evolution of constitutional jurisprudence regarding the Free Exercise and Establishment Clauses.

A. Free Exercise Clause: The Push to Overrule *Smith* and Return to the Burden Test

Prior to contemporary Free Exercise jurisprudence, a claimant seeking a government exemption under the Free Exercise Clause needed to show a burden on their religious exercise.[57] After claimants established the existence of a burden, courts would apply strict scrutiny, thus paving the way for an exemption in the face of a burdensome regulation, action, or law.[58] This approach was first explicitly laid out in the Supreme Court cases of *Sherbert v. Verner* and *Wisconsin v. Yoder*.[59]

In order to understand what a burden on religion means, it is best to look at how *Sherbert* and *Yoder* defined it. In *Sherbert*, the petitioner, a Seventh Day Adventist, was denied unemployment benefits after being fired for not working on her Sabbath and because she could

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[55] *Cf.* Charlotte Elisheva Fonrobert, *Installations of Jewish Law in Public Urban Space: An American Eruv Controversy,* 90 CHI-KENT L. REV. 63, 64 (2015).
[56] *See generally* ACLU of N.J. v. City of Long Branch, 670 F.Supp. 1293 (D.N.J. 1987); East End Eruv Ass'n v. Village of Westhampton Beach, 828 F.Supp.2d 526 (E.D.N.Y. 2011); Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach, 778 F.3d 390 (2d Cir. 2015); Smith v. Community Bd. No. 14, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002).
[57] Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (citing Sherbert v. Verner, 374 U.S. 398 (1963)).
[58] *Sherbert*, 374 U.S. at 403.
[59] *See generally id.*; *Yoder*, 406 U.S. at 205.

not find work that would allow her take off for her Sabbath.[60] She argued that the state owed her unemployment benefits under the Free Exercise Clause, despite the fact that the state required her to be available to work on her Sabbath to qualify for the benefits.[61] Ultimately, the Supreme Court granted her a Free Exercise exemption, by holding that the state's denial of unemployment benefits constituted a burden on her religious practice.[62] In so holding, the Court espoused that the denial of such benefits amounted to a coercive measure that forced the petitioner to either "forfeit[] benefits, on the one hand, [] [or] abandon[] one of the precepts of her religion" on the other.[63] To the Court, such a choice is indistinguishable from a fine enacted to punish religious practice.[64]

Similarly, to *Sherbert*, *Yoder* defined a religious burden in terms of coercive fines.[65] In *Yoder*, Amish parents were convicted and fined for refusing to send their teenage children to school.[66] Such refusal, was in accordance with the Amish religious tradition.[67] The Supreme Court reversed the conviction and fine by holding that the state's position vis-à-vis the Amish practice did not withstand strict scrutiny.[68] In getting to the strict scrutiny analysis, the Court made clear that the state's law, even if generally applicable, burdened the Amish by coercively punishing them for their religious practice.[69]

Nevertheless, sometime after *Sherbert* and *Yoder*, the Court made it clear that not all government actions inhibiting religion constituted a burden.[70] In *Lyng v. Northwestern Indian Cemetery Protective Association*, the United States Forest Service proposed that it would build a

[60] *Sherbert*, 374 U.S. at 399-401.
[61] *Id.* at 401.
[62] *Id.* at 403.
[63] *Id.* at 404.
[64] *Id.*
[65] *Yoder*, 406 U.S. at 220.
[66] *Id.* at 207-08.
[67] *Id.* at 209.
[68] *Id.* at 234.
[69] *Id.* at 220.
[70] *See generally* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

road through the Six Rivers National Forest on land that was held to be sacred by the indigenous Yurok, Karok, and Tolowa peoples.[71] It was argued that this road "would cause serious and irreparable damage" to the sacred area, thus destroying a necessary part of the indigenous peoples' belief systems.[72] Despite, the serious consequences of the road on religious practice, the Supreme Court refused to enjoin the federal government.[73] Instead, the Court held that government actions on publicly owned property, which made practicing religion more difficult or impossible, did not constitute a form of coercion as required under *Sherbert* and *Yoder*.[74] Additionally, the court reasoned that even if the road "virtually destroyed the . . . Indians' ability to practice their religion," the government's rights over their property mattered more.[75]

Nonetheless, after decades of relying on the burden analysis, the Court adopted a new Free Exercise rule that, today, closely represents the contemporary rule.[76] After years of relying on the *Sherbert* and *Yoder* framework, the Court changed course in its landmark *Employment Division v. Smith* decision.[77] In *Smith*, the Court adopted the current rule that "a 'valid and neutral' law of general applicability" will always be deemed constitutional.[78] Through this holding, the Court departed from the burden test.[79] Under *Smith's* approach, a law deemed not to be neutral or generally applicable needed to withstand strict scrutiny.[80] Yet, even with this rule, *Smith* did not overturn the *Sherbert* or *Yoder* era cases. Instead, the Court noted that *Sherbert* stood for the principle that a law, which contained a system of individualized exemptions, needed to provide

[71] *Id.* at 442.
[72] *Id.*
[73] *Id.* at 451-52.
[74] *Id.* at 449.
[75] *Id.* at 451-52.
[76] *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990).
[77] *See generally id.*
[78] *Id.* at 879.
[79] *Id.* at 884-88.
[80] *Id.*

those exemptions to religious practice, unless a compelling interest could be found.[81] Also, *Smith* explained that *Yoder* still constituted valid law because it stood for the principle that a law that implicated multiple constitutional protections was subject to strict scrutiny.[82] It is worth mentioning that opposition to *Smith* was originally so fierce that Congress enacted the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Person Act (RLUIPA).[83] As currently interpreted, RFRA reinstates the burden analysis to issues of federal law, and RLUIPA applies the burden test to issues relating to land use and prisons.[84] Since the passage of RFRA, some states followed suit and have passed their own RFRAs.[85]

Moreover, despite *Smith's* broad sweeping rule, exemptions proliferated and continue to increase under the Court's new right-wing majority.[86] Since *Smith*, courts espoused numerous ways in which a law or governmental action may be viewed as neither neutral and nor generally applicable.[87] Specifically, there are three categories of law or actions that may require the government to provide an exemption under the Free Exercise Clause.[88] The first type of laws or actions that can lead to a Free Exercise exemption are the ones that provide for a categorical exemption, such as the regulation at issue in the Third Circuit case *Fraternal Order of Police v. City of Newark*.[89] In that case, then-Judge Alito held that a police department's policy that forbid

[81] *Id.* at 884.
[82] *Id.* at 881.
[83] *See* 42 U.S.C. § 2000bb; *see also* 42 U.S.C. 2000cc-2000cc-1.
[84] *Id.*
[85] MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 150 (5th ed. 2022).
[86] *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); *see also Fulton*, 141 S. Ct. at 1868; Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).
[87] *See generally Lukumi*, 508 U.S. 520; *see also Fulton*, 141 S. Ct. 1868; *Roman Cath. Diocese*, 141 S. Ct. 63.
[88] *See* Fraternal Ord. of Police v. City of Newark, 170 F.3d 359, 365 (3d. Cir. 1999); *see also Fulton*, 141 U.S. at 1878; MCCONNELL, *supra* note 85 at 178.
[89] *See Fraternal Ord. of Police*, 170 F.3d at 359.

the growing of beards, including for religious purposes, was unconstitutional because the policy categorically allowed for the growing of beards within certain secular limited circumstances.[90]

The second type of laws or actions that can lead to a Free Exercise exemption are the ones that provide for an individualized assessment, such as the law at issue in *Fulton v. City of Philadelphia*.[91] In that case, the city of Philadelphia refused to contract with a Catholic charity because the charity denied fostering to same sex couples.[92] The city justified its refusal based on a previous contract that it had signed with the charity that provided that the charity "shall not reject . . . a family . . . based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner [of the Department of Human Services]."[93] Although an exception had never been granted by the Commissioner in any context, the Court held that the "mere ability of the Commissioner to make exceptions" rendered the city's denial a Free Exercise violation.[94]

Lastly, the third type of laws or actions that can lead to a Free Exercise exemption are the ones that violate the principle of the most favored nation.[95] Under this doctrine, laws, regulations, or state actions that treat similarly situated secular and religious activities differently violate the Free Exercise Clause if the religious activity is being comparatively disfavored and the government cannot show a compelling interest.[96] This principle was first established by the Supreme Court in their Covid-19 Pandemic shadow docket cases, where religious institutions were being treated with stricter public health restrictions than similarly situated secular institutions.[97]

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[90] *Id.* at 365.
[91] *See Fulton*, 141 U.S. at 1878.
[92] *Id.* at 1874.
[93] *Id.* at 1878.
[94] MCCONNELL, *supra* note 85 at 186.
[95] *See generally Roman Cath. Diocese*, 141 S. Ct. 63; Tandon v. Newsom, 141 S. Ct. 1294 (2021).
[96] *Tandon*, 141 S. Ct. at 1296.
[97] *See id.; Roman Cath. Diocese*, 141 S. Ct. at 66-67.

In addition to these proliferating exemptions, many of the justices on the Court today wish to overturn *Smith* and return to the burden analysis under *Sherbert* and *Yoder*.[98] In the concurrences to *Fulton*, for example, six out of the nine justices proposed overturning *Smith*.[99] While three of those justices are against returning to *Sherbert* and *Yoder*, an opinion written by Justice Alito, and joined by Justice Gorsuch and Justice Thomas, support the idea of analyzing state laws through the burden framework.[100] Therefore, in the future, there is a good chance that the burden analysis will replace *Smith*, while many of the exceptions to *Smith* remain valid law.

B. Establishment Clause: The Recent Rejection of the *Lemon* and Endorsement Test

Unlike Free Exercise Clause jurisprudence, which is yet to overturn prior precedent completely, the jurisprudence surrounding the Establishment Clause is in a novel legal territory.[101] Prior to this development, however, courts often applied what is known as the *Lemon* test and the endorsement test to issues of government establishment.[102] The *Lemon* test was first fully articulated in the case *Lemon v. Kurtzman* and provides that a law or government action does not violate the Establishment Clause if the following criteria are met: (1) the statute has a secular legislative purpose; (2) the law's principal or primary effect is one that neither advances nor inhibits religion, and; (3) the statue must not foster an excessive governmental entanglement with religion.[103] On the other hand, the endorsement test is seen as an offshoot of the *Lemon* test, and it dictates that courts must inquire whether the government's actions have endorsed religion based upon the perception of the reasonable observer.[104] Regardless of the two tests' historical usages,

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[98] *See Fulton*, 141 S. Ct. at 1882-884 (Alito, J., concurring) (Barrett, J., concurring).
[99] *Id.*
[100] *Id.* at 1924 (Alito, J., concurring).
[101] *See generally Kennedy*, 141 S. Ct. 2407 (2022) (overruling Lemon v. Kurtzman, 403 U.S. 602 (1971)).
[102] *Application of the Lemon Test*, CORNELL L. SCH.: LEGAL INFO. INST. (last visited Oct. 22, 2022) https://www.law.cornell.edu/constitution-conan/amendment-1/application-of-the-lemon-test.
[103] *Lemon*, 403 U.S. at 612-13.
[104] Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

the Supreme Court recently overruled both.[105] Now Establishment Clause jurisprudence is strictly centered on whether the conduct at issue is deeply rooted in America's history and tradition.[106]

Consequently, to better understand the Court's new establishment clause framework, it is wise to look at the cases that have adopted the historical approach to Establishment Clause claims. Although the majority opinions in *Town of Greece v. Galloway* and *American Legion v. American Humanist Association* adopted the historical test to hold the legal validity of certain government endorsed prayer and religious symbols—on the grounds of their deep historical roots in the United States—the case that officially overturned *Lemon* was *Kennedy v. Bremerton School District*.[107] In *Bremerton*, a public high school football coach lost his job after praying on the school's football field post football games.[108] Through applying its new historical test, the Court held that the coach's praying did not violate the Establishment Clause because it occurred while he was off-duty and not in his role as a government employee. In applying the test, the Court focused on the concept of coercion and how historically the government could not "make a religious observance compulsory."[109] Specifically, the Court reasoned that the government does not coerce people just because the government's religious conduct, or support, creates "discomfort."[110] Additionally, the Court espoused that the Establishment Clause should not be used as a tool that suppresses religious liberty because historically the Establishment Clause was used as a tool that complemented the Free Exercise Clause.[111]

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[105] *Kennedy*, 142 S. Ct. at 2428.
[106] *Id.*
[107] Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)*;* American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2088-089 (2019); *Kennedy*, 142 S. Ct. at 2428.
[108] *Kennedy*, 142 S. Ct. at 2451.
[109] *Id.* at 2429.
[110] *Id.* at 2427.
[111] *Id.* at 2431.

Aside from emphasizing coercion, historical records indicate that there are at least several other historical hallmarks of establishment. While the Supreme Court is yet to announce a truly workable test for the historical understanding of the Establishment Clause, legal scholars have adopted their own interpretations on what Establishment Clause jurisprudence might look like moving forward.[112] For example, scholars Michael McConnell and Nathan Chapman argue, in their book *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*, that the Establishment Clause was added to the Bill of Rights to prevent "the use of [federal] government power to foster or compel uniformity of religious thought and practice."[113] Thus, the whole point of the Establishment Clause was to prevent a governmental establishment, which at the time of America's founding was the norm amongst the British and colonial governments.[114] In making this argument, McConnell and Chapman highlighted the six elements of establishment that were common amongst the various establishments that existed at the time of the country's founding.[115]

Moreover, according to McConnell and Chapman the six elements of establishment represent the hallmarks of establishment which the Establishment Clause was trying to prevent.[116] Therefore, any historical understanding of the Establishment Clause must consider the following six elements: (1) government control over doctrine, religious governance, and clergy; (2) compulsory church attendance; (3) governmental financial support for religion through taxes; (4) prohibitions on worship in dissenting churches; (5) governmental use of church for public

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[112] *See generally* NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE 9-32 (Geoffrey R. Stone ed., 2023).
[113] *Id.* at 10.
[114] *Id.* at 10-11.
[115] *Id.* at 18.
[116] *See id.* at 10; *see also* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring) (suggesting that the Court should replace the *Lemon* test with a historical test that utilizes McConnell's six hallmarks of establishment as a guide in Establishment Clause cases).

functions, and; (6) restricting political participation to members of a specific church.[117] Given these six elements and hallmarks, the Establishment Clause is not about the government endorsing religion broadly, but is about it preventing the control and suppression of it.[118]

IV. Past Eruv Litigation

After considering the evolution of modern First Amendment jurisprudence, it is imperative to recognize how prior eruvim litigation fits into this framework. As of today, there are five eruvim controversies that are reported in caselaw.[119] While the specific facts of each case are not entirely important to this paper's analysis, it is critical to note how these cases analyzed the eruv under, then-existing, constitutional law. It is also noteworthy that while some of these reported cases are concerned with issues of the Free Exercise Clause, others are centered around issues of the Establishment Clause.[120] In addition, one of the five reported cases addresses both issues of the Free Exercise and Establishment Clauses.[121]

Nevertheless, even though these cases differ in certain respects, they share common themes. Almost all of these cases, for example, justify their dispositions and holdings by focusing on the eruv's visibility.[122] Additionally, all of the Free Exercise cases look at how regulations around the eruv are enforced to determine whether an exemption is warranted.[123] Also, all of the Establishment Clause cases turn to examining the eruv's secular purposes under the *Lemon* or

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[117] CHAPMAN, *supra* note 112 at 18.
[118] *Cf. Kennedy*, 142 S. Ct. at 2428 (holding that coercion, history, and tradition should be the guidepost for Establishment Clause claims, instead of the *Lemon* and endorsement test).
[119] *See generally ACLU of N.J.*, 670 F.Supp. 1293; *East End Eruv Ass'n*, 828 F.Supp.2d 526; *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d 390; *Community Bd. No. 14*, 491 N.Y.S.2d 584; *Tenafly Eruv Ass'n*, 309 F.3d 144.
[120] *See generally ACLU of N.J.*, 670 F.Supp. 1293; *East End Eruv Ass'n*, 828 F.Supp.2d 526; *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d 390; *Community Bd. No. 14*, 491 N.Y.S.2d 584; *Tenafly Eruv Ass'n*, 309 F.3d 144.
[121] *Tenafly Eruv Ass'n*, 309 F.3d at 176.
[122] *See ACLU of N.J.*, 670 F.Supp. at 1295; *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395; *Community Bd. No. 14*, 491 N.Y.S.2d at 948; *Tenafly Eruv Ass'n*, 309 F.3d at 167.
[123] *See Tenafly Eruv Ass'n*, 309 F.3d at 167; *East End Eruv Ass'n*, 828 F.Supp.2d at 539.

endorsement tests.[124] Crucially, all of the eruvim cases were decided using precedent that is either no longer of value or that has recently been called into question.[125]

A. The Eruv's Visibility

As already alluded to, despite that an eruv is displayed on public property, its invisibility assists courts in analyzing its constitutionality under both the Free Exercise and Establishment Clauses. This fact about the eruv's inconspicuous nature has been noted in at least a couple of scholarly journals.[126]

Under the previous Free Exercise framework, the issue of the eruv's visibility played an important role when courts applied strict scrutiny.[127] Particularly, in the Tenafly dispute, the Third Circuit highlighted the eruv's "inconspicuous" nature after having already established that the town's policy of not allowing the eruv was not neutral or generally applicable.[128] In that case, the town of Tenafly sought to block the construction of an eruv through using a pre-existing clutter ordinance that did not allow for any object to be affixed to the town's utility poles.[129] The court held that the town's unequal enforcement of the ordinance, through allowing holiday celebrations and house numbers to be affixed to the poles, brought it outside of *Smith's* protection and thus applied strict scrutiny to the enforcement of the ordinance.[130] In defending their policy from strict scrutiny, the town attempted to distinguish the eruv from other objects that the town had allowed on the poles by pointing out that the eruv was "permanent" in nature, while the other objects were

[124] *See ACLU of N.J.*, 670 F.Supp. at 1295; *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395; *Community Bd. No. 14*, 491 N.Y.S.2d at 947-48; *Tenafly Eruv Ass'n*, 309 F.3d at 175.
[125] *See ACLU of N.J.*, 670 F.Supp. at 1293; *East End Eruv Ass'n*, 828 F.Supp.2d at 526; *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 390; *Community Bd. No. 14*, 491 N.Y.S.2d at 584; *Tenafly Eruv Ass'n*, 309 F.3d at 144.
[126] Fonrobert, *supra* note 55 at 71; Lewyn, *supra* note 5 at 488.
[127] *Tenafly Eruv Ass'n*, 309 F.3d at 172.
[128] *Id.*
[129] *Id.* at 151-52.
[130] *Id.* at 167.

not.[131] Yet, the court refused to accept this argument by espousing that the town's enforcement of its clutter ordinance was under-inclusive because the town had, for years, allowed extremely noticeable fixtures on the poles, while at the same time not allowing relatively "inconspicuous" and "unobtrusive" *lechis* to be attached to the same poles.[132]

Furthermore, it can be argued that the issue of the eruv's invisibility is even more crucial in the Establishment Clause context.[133] Every single eruv case that addressed the issue of the Establishment Clause focused on the issue of visibility.[134] While some of these cases analyzed the issue of the eruv by strictly using the *Lemon* test, others employed the *Lemon* test alongside the endorsement test.[135] In the context of the endorsement test, the eruv's visibility is all the more relevant because the reasonable observer would be unlikely to see the eruv in the first place.[136] In *Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, for example, the plaintiff's complaint introduced the issue of visibility by arguing that "the eruv, of course, will not go unnoticed; rather it will be a constant and ever-present symbol . . . [that] the Village ha[s] been transformed for religious use."[137] Despite the plaintiff's contention, the court in that case highlighted the eruv's invisible nature, while also espousing that the plaintiff ultimately did not "allege that [] [the eruv] contain[ed] any overtly religious features."[138] Given this information, the court had little trouble concluding that no reasonable observer would draw that a state actor was endorsing religion.[139]

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[131] *Id.* at 172.
[132] *Id.*
[133] Fonrobert, *supra* note 55 at 71.
[134] *See ACLU of N.J.*, 670 F.Supp. at 1295; *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395; *Community Bd. No. 14*, 491 N.Y.S.2d at 948; *Tenafly Eruv Ass'n*, 309 F.3d at 167.
[135] *See ACLU of N.J.*, 670 F.Supp. at 1295; *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395; *Community Bd. No. 14*, 491 N.Y.S.2d at 947-48; *Tenafly Eruv Ass'n*, 309 F.3d at 175.
[136] Fonrobert, *supra* note 55 at 70-71.
[137] *Id.* at 70.
[138] *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395.
[139] *Id.* at 396.

B. The Role of Equal Enforcement Under a *Smith* Analysis

Aside from an eruv's visibility, courts have examined whether town ordinances blocking eruvim were enforced in an unequal manner when deciding on a Free Exercise exemption.[140] As already mentioned, the court in *Tenafly Eruv Association v. Borough of Tenafly*, held that the town's ordinance was neither generally applicable, nor neutral because the town enforced it unequally.[141] Because the Tenafly case was decided prior to the Court's most favored nation principle cases, the Third Circuit did not rely on that line of reasoning in rendering its decision.[142] Rather, the third circuit relied partially on the decision in *Fraternal Order of Police*.[143] According to the court, just as the no beard growing policy in that case was enforced discriminatorily, so too was the ordinance in Tenafly.[144] To the court, it did not matter that Tenafly's ordinance did not provide for exemptions on its face, because in practice Tenafly's enforcement essentially created a system of tactic or express exemptions.[145]

The fact that town ordinances are often enforced in an unequal manner does not mean that they always are.[146] In *East End Eruv Association v. Village of Westhampton Beach*, the United States District Court in the Eastern District of New York was asked to provide a Free Exercise exemption to an eruv association that sought to erect an eruv in the Long Island towns of Southampton, Quogue, and Westhampton Beach.[147] Southampton wished to block the eruv association from constructing an eruv by citing a sign ordinance passed by the town.[148] Unlike in the Tenafly case, the court in this matter found that the Southampton defendant did not enforce its town sign

[140] *See Tenafly Eruv Ass'n*, 309 F.3d at 167; *East End Eruv Ass'n*, 828 F.Supp.2d at 539.
[141] *Tenafly Eruv Ass'n*, 309 F.3d at 167.
[142] *See generally id.*
[143] *Id.* at 166-67.
[144] *Id.*
[145] *Id.* at 167.
[146] *East End Eruv Ass'n*, 828 F.Supp.2d at 539.
[147] *Id.* at 529-30.
[148] *Id.* at 532.

ordinance in an unequal or "selective" manner.[149] By making this finding, the court applied *Smith* to Southampton's sign ordinance because the rigorous enforcement presented a neutral and generally applicable policy.[150] In applying *Smith,* the court upheld the ordinance, thereby refusing to grant a Free Exercise exemption.[151]

C. The Eruv's Secular Purposes Under the *Lemon* Test

Additionally, in the context of the Establishment Clause, courts routinely hold eruvim have secular purposes and thus are constitutional under the *Lemon* test.[152] Although courts find all three *Lemon* test factors satisfied to show that there is no Establishment Clause violation when examining eruvim, courts often go to great lengths to establish the first prong of the *Lemon* test.[153] For instance, the court in *ACLU of NJ v. City of Long Branch*, held that the municipality of Long Branch maintained a secular purpose when it approved the construction of an eruv.[154] According to the court, this state action was secular because the eruv allowed observant Jews to more easily engage in secular activities during the Sabbath, such as pushing baby carriages and going to the park.[155] Despite that this analysis seems to ignore that the whole need for an eruv is rooted in religious beliefs, other courts have held similarly to the court in the *ACLU of NJ*. In another

[149] *Id.* at 539-40.
[150] *Id.* at 540.
[151] *Id.*
[152] *See ACLU of N.J.*, 670 F.Supp. at 1295; *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395; *Community Bd. No. 14*, 491 N.Y.S.2d at 947-48.
[153] Despite differing in many respects, courts that analyze the eruv under the remaining two *Lemon* test factors share some similarities in how the eruv is analyzed. One of the major aspects of the eruv that courts acknowledge when examining it under the final two *Lemon* test prongs is the fact that the eruv is funded via private, as opposed to public, funds. Courts routinely highlight the privately funded nature of the eruv in holding that the eruv neither advances religion nor excessively entangles the government with religion. *See Community Bd. No. 14*, 491 N.Y.S.2d at 948 (holding that the second *Lemon* test prong was satisfied because New York City did not need to use public funds to support the eruv's construction); *See also See ACLU of N.J.*, 670 F.Supp. at 1297 (holding that the third *Lemon* test prong was satisfied because Long Branch did not have to use public funds to construct the eruv); *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 396 (espousing that the eruv does not excessively entangle the government because private parties financed it).
[154] *ACLU of N.J.*, 670 F.Supp. at 1295.
[155] *Id.*

instance, a court, in the case *Smith v. Community Board*, held the state's approval of an eruv showed a secular purpose because the eruv required that the town's seawall be maintained.[156] Whatever, the secular purpose may be, it is apparent from the caselaw that eruvim present no Establishment Clause issue in a time when courts applied the *Lemon* test.[157]

V. How Current Constitutional Patterns Impact the Status of Eruvim

Undoubtedly, because First Amendment jurisprudence evolved so rapidly since the last eruv case was decided, courts will likely need to apply a different analysis the next time the issue is litigated.[158] More specifically, the last eruv case to be decided was *Jewish People for the Betterment of Westhampton Beach* in 2015.[159] Since it was decided both Free Exercise and Establishment Clause jurisprudence changed.[160] After all, since 2015, the Court's intention to overrule *Smith* has become clear.[161] Additionally, the Court drastically changed the approach to Establishment Clause issues by overturning *Lemon* and its progeny.[162] Yet, despite all of this change and prospective change, if one were to examine eruvim law based upon how the law evolved, and how it is likely to continue to evolve, one would find that it is unlikely that the legal status of eruvim will alter. Rather, all that will likely change is the framework courts use to analyze the legality of eruvim.

A. An Examination of Free Exercise Eruvim Claims in a post-*Smith* World

In a post *Smith* world, courts will be able to rely on much of the Supreme Court's more recent precedent, thus ensuring that the overall constitutionality of eruvim remains unchanged. Because many eruvim cases will likely arise where a town's ordinance is being enforced unequally,

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[156] *Community Bd. No. 14*, 491 N.Y.S.2d at 947-48.
[157] *See e.g., id.*
[158] *See e.g., Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring); *Kennedy*, 142 S. Ct. at 2428.
[159] *See generally Jewish People for the Betterment of Westhampton Beach*, 778 F.3d 390.
[160] *See e.g., Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring); *Kennedy*, 142 S. Ct. at 2428.
[161] *See Fulton*, 141 S. Ct. at 1882, 1883 (Barrett, J., concurring) (Alito, J., concurring).
[162] *See Kennedy*, 142 S. Ct. at 2428.

courts will be able to turn to numerous Supreme Court precedents to provide an exemption.[163] Even if *Smith* is overturned, courts will still likely be able to rely on the reasoning found in *Tenafly Eruv Association*, that held that unequal enforcement was the equivalent to providing for an individualized exemption.[164] Also, unlike when the Tenafly case was decided, proponents of eruvim now have more caselaw to utilize.[165] For example, the majority opinion in *Fulton* suggests that it does not matter whether the government granted an individualized assessment or exemption.[166] Rather, to the majority in *Fulton*, all that matters is whether the law or regulation at issue leaves room for the government to grant an individualized assessment or exemption.[167] Therefore, any ordinance that allows for an individualized assessment or exemption can be found to violate the Free Exercise Clause under a strict scrutiny standard of review, even if the town never granted an individualized assessment and always strictly enforced its ordinance.

Additionally, in the context of an unequally enforced ordinance, eruvim proponents will potentially be able to rely on the most favored nation principle.[168] In many ways, the decision of the court in *Tenafly Eruv Association* reflects the most favored nation principle. In the Tenafly case, the court reasoned that the house numbers on the utility poles at issue were inherently similar to the eruv because both were permanent fixtures.[169] The court espoused that the different and unequal treatment between the house numbers and the eruv suggested a discriminatory purpose behind the town's actions.[170] This reasoning directly compares to the most favored nation principle because one can argue that the house numbers and the eruv are similarly situated objects and the

[163] *See Tenafly Eruv Ass'n*, 309 F.3d at 167.
[164] *Id.*
[165] *See Fulton*, 141 S. Ct. at 1874, 1883; *Roman Cath. Diocese*, 141 S. Ct. at 65; *Tandon*, 141 S. Ct. at 1296.
[166] MCCONNELL, *supra* note 85 at 186.
[167] *Id.*
[168] *See Tandon*, 141 S. Ct. at 1296.
[169] *See Tenafly Eruv Ass'n*, 309 F.3d at 172.
[170] *Id.* at 167-68.

only difference between them is that one is secular and the other is religious.[171] Thus, just as pandemic restrictions unequally applied to similarly situated secular and religious entities during the Covid-19 Pandemic, so to can proponents of eruvim argue that unequally applied ordinances do the same.

Nevertheless, if a town's ordinance does not contain an individualized assessment option, or is not being enforced unequally, then proponents of eruvim will need to demonstrate a burden.[172] In the event that *Smith* is overruled, then courts will no long hold that a law, regulation, or governmental action is constitutional just because it is generally applicable and facially neutral.[173] Rather, it is extremely likely that courts will treat laws that currently fall under a *Smith* analysis by applying the old *Sherbert* and *Yoder* framework.[174] This is all the more likely considering that three out of six justices who currently want to overturn *Smith* have called for returning to the old burden framework without any major caveats.[175] Therefore, under the *Sherbert* and *Yoder* framework, a Free Exercise eruvim claimant will need to show that a town is burdening their religion in order for a court to apply strict scrutiny.[176] While a scenario in which a town's ordinance does not contain an individualized assessment option or is not being enforced unequally seems unlikely to occur, it is possible as per the case of *East End Eruv Association*.[177]

Moreover, in the event that a case like *East End Eruv Association* is considered in a post *Smith* world, then it is not entirely certain that a court will find a burden. While eruvim proponents, in cases like this, can attempt to argue that the lack of an eruv burdens them as a community because it prohibits them from freely moving on the Sabbath, it is unlikely that a court relying

[171] *See Tandon*, 141 S. Ct. at 1296.
[172] *See Fulton*, 141 S. Ct. at 1924 (Alito, J., concurring).
[173] *Id.* at 1883.
[174] *Id.* at 1924.
[175] *Id.*
[176] *Id.*
[177] *East End Eruv Ass'n*, 828 F.Supp.2d at 539-40.

strictly on *Sherbet* and *Yoder's* framework will find a burden. Under *Sherbert*, for example, a town that denies a claimant the opportunity to build an eruv is not making the claimant choose between "forfeiting benefits, on the one hand, [] [or] abandoning" their religion on the other hand.[178] Therefore, *Sherbert* would likely foreclose proponents of eruvim from making an argument based on a community burden because no benefits are being used coercively by the government the way they were used in *Sherbert*.[179]

Nonetheless, *Yoder* presents a better, but still imperfect, argument for proponents of an eruv trying to overcome an *East End Eruv Association* style ordinance. According to *Yoder*, a law that forces a community to "either abandon belief and be assimilated into society at large or be forced to migrate to some other and more tolerant region" could be argued to be a burden.[180] In this context, eruvim proponents may try to argue that an ordinance, similar to the one in *East End Eruv Association*, places a burden on their community by forcing them to choose between carrying on the Jewish Sabbath on the one hand or moving to a more tolerant municipality on the other. Yet, such an argument is imperfect because unlike the Amish in *Yoder*, who faced a coercive burden in the form of a criminal fine, proponents of eruvim will face no such fine or punishment as a result of not being able to practice their religion.[181] Thus, when read together, *Sherbert* and *Yoder* make it clear that the negative "impact" of a law on religion is not constitutionally problematic under the Free Exercise Clause, unless the government employs a coercive policy to achieve that effect.[182]

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[178] *Sherbert*, 374 U.S. at 404.
[179] *Id.*
[180] *Yoder*, 406 U.S. at 218.
[181] *Id.*; *see also* Navajo Nation v. United States Forest Serv., 853 F.3d 1058, 1071-072 (9th Cir. 2008).
[182] *Lyng*, 485 U.S. at 457.

Instead, a municipality denying the erection of an eruv on public property through a similar ordinance to the one in *East End Eruv Association* compares more to *Lyng* because there is no coercion.[183] *Lyng* makes it clear that *Sherbert* and *Yoder* require that it is "the form of the government's restraint on religious practice" that matters and not its effects when analyzing the presence of a burden in the Free Exercise Clause context.[184] Similar to *Lyng*, where a government's decision regarding its own property rendered indigenous peoples' religious practice impossible, a decision by a town to prevent an eruv on government property renders the ability for observant Jews to practice their religion much more difficult.[185] Yet, just like in *Lyng*, the mere negative effect on religious practice borne out of the government's own property use is not a cognizable burden in the Free Exercise context because no true coercion exists.[186] Thus, in cases like *East End Eruv Association*, it is likely that no Free Exercise exemption will be granted in the future. In this sense, the constitutional outcome would be the same as if *Smith* never ends up being overruled in the first place because in either case a court would not grant a Free Exercise exemption.[187]

B. An Examination of Establishment Clause Eruvim Claims in a Post-*Lemon* World

Just as the status of eruvim under the Free Exercise Clause would not change much, it is unlikely that the legality of eruvim under the Establishment Clause has altered. Even though every published eruvim Establishment Clause case relied on *Lemon*, courts today will not have a difficult time holding that eruvim do not violate the Establishment Clause based upon a historical understanding of the clause.[188] For example, the concept of coercion is not implicated by the

[183] *See generally id.* at 439.
[184] *Id.* at 467 (Brennan, J., dissenting).
[185] *Id.* at 449 (majority opinion).
[186] *Id.* at 457-58.
[187] *East End Eruv Ass'n*, 828 F.Supp.2d at 539-40.
[188] *See ACLU of N.J.*, 670 F.Supp. at 1295; *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395; *Community Bd. No. 14*, 491 N.Y.S.2d at 947-48; *Tenafly Eruv Ass'n*, 309 F.3d at 175.

erection of an eruv any more than it was implicated in *Bremerton*.[189] If a high school football coach visibly praying did not constitute coercive action in *Bremerton*, then it is clear that an invisible wire does not constitute coercion either.[190] There is nothing compulsory about erecting an eruv.[191] No one is being forced to act or think differently as a result of an eruv, despite some people's concerns for what it might do to the demographics of a community.[192] Nor does it matter if the existence of an eruv makes some people uncomfortable, because such facts did not matter in *Bremerton*.[193] Just as allowing a football coach to pray promotes religious liberty, so too does a town's endorsement of an eruv.[194]

Aside from coercion, the eruv does not implicate any of the other historical hallmarks of establishment.[195] When comparing the establishment of an eruv to the six elements of establishment, as defined in McConnell and Chapman's most recent book, it is apparent that the erection of an eruv does not resemble any of the elements.[196] Notably, the government approving the construction of an eruv does not inherently showcase the government's control over religion, nor does it establish denominational favoritism.[197] The approval of an eruv, rather, is in line with the Court's notion of denominational neutrality because it merely provides Jews access to a resource that other religions can presumably have access to as well.[198] Also, because eruvim are built using private funds, there is no issue of governmental support through taxes, which was one of the many hallmarks of establishments in the colonial era.[199] Therefore, although the

[189] *Kennedy*, 142 S. Ct. at 2430.
[190] *Id.*
[191] *Id.* at 2429 (espousing compulsory actions violate Establishment Clause).
[192] *Id.*
[193] *Id.* at 2427.
[194] *Id.* at 2431.
[195] CHAPMAN, *supra* note 112 at 18.
[196] *Id.*
[197] *Id.*
[198] Larson v. Valente, 456 U.S. 228, 245 (1982).
[199] CHAPMAN, *supra* note 112 at 18.

Establishment Clause analysis for eruvim slightly changes after the overruling of *Lemon*, it is clear that the overall legality of the eruv will not change.

VI. Eruvim as a Religious Activity on Public Property

Finally, even though the overall constitutionality of eruvim will remain largely unchanged, the potential application of *Lyng* in certain contexts, where there is no coercion, presents eruvim proponents with the opportunity to argue for an exemption by challenging the ways courts approach issues of religious practice occurring on public property. Particularly, because courts will likely not allow certain eruvim claims to proceed under the Free Exercise Clause due to the lack of a coercive based burden, eruvim proponents will benefit from using arguments being employed by indigenous advocates that call for changes in Free Exercise jurisprudence.[200] Although the burdens on indigenous peoples' religious practice is borne out of years of colonial oppression and land dispossession, while the burdens placed on eruvim proponents are not, both will be potentially placed in a position where they have to argue against *Lyng's* coercion requirement and prove a cognizable burden to the courts in order to use public property for religious purposes.[201]

One way in which eruvim litigants may challenge *Lyng* is through looking at how RFRA and state RFRAs expand the definition of burden. In the case *Apache Stronghold v. United States*, for example, Religious Liberty Law Scholars argued in an amici brief that although RFRA endorses

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[200] *See* Brief for Religious Liberty Law Scholars, as Amici Curiae Supporting Plaintiff-Appellant, Apache Stronghold v. United States, 38 F.4th 742 (9th Cir. 2022) (No. 21-15295), 2021 WL 1256601; Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005).

[201] *See* Frederick Hoxie, *Retrieving the Red Continent: Settler Colonialism and the History of American Indians in the US,* 31 ETHNIC & RACIAL STUD. 1153, 1157 (2008). It is important to note that under *Lyng*, it is not considered coercion for the government to use its property in any way it sees fit, even if the government's property use causes religious people to suffer. Indigenous practice is particularly vulnerable under this rule because the state promotes a system of land dispossession that targets sacred sites central to many indigenous beliefs, and such a practice is not considered a legal burden no matter how harmful it is to indigenous peoples' religion. After all, this was the central issue underlying the controversy in *Lyng* itself. This rule will also make eruvim cases that are similar to *East End Eruv Association* less likely to proceed under the Free Exercise Clause in a post-*Smith* world because the way in which those cases implicate government owned property.

"the test outlined in *Sherbert* and *Yoder*, it does not adopt those decisions' definition of substantial burden, nor does it state those decisions' fact patterns are the only burdens qualifying as substantial."[202] The argument that the burden analysis under RFRA is more expansive than *Sherbert* and *Yoder's* definition is all the more compelling when one examines both RFRA's relationship to RLUIPA and precedent in various circuits.[203] Most notably, Congress intended RFRA's definition of burden to be interpreted alongside RLUIPA's definition of burden. This is important because RLUIPA's provisions require the Act to "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted."[204] Thus, eruvim litigants in states with their own RFRAs can rely on this expansive definition if the state's RFRA is based substantially on the federal government's version.

Further, eruvim proponents that choose to rely on state RFRAs that are based substantially on the federal government's version can make arguments that RFRA and RLUIPA related caselaw and legislative history call for a more expansive definition of burden than *Lyng*. In the University of South Dakota Law School's law review, one article made the argument that a number of circuits define RFRA and RLUPA's burden broadly.[205] For example, in the case *Yellowbear v. Lampart*, then-Judge Gorsuch held that a substantial burden included action that pressured a claimant to feel as if they needed to break their religious practice.[206] Surely, denying observant Jews the ability to erect an eruv applies pressure on them to break their religious practice. Also, in RFRA's own legislative history, the performance of autopsies on bodies of people belonging to religions that do not permit them was described to potentially constitute a burden.[207] Amici briefs submitted in

[202] Brief for Religious Liberty Law Scholars, *Apache Stronghold*, *supra* note 200 at 6.
[203] *Id.* at 6, 9.
[204] *Id.* at 6.
[205] Zackree S. Kelin & Kimberly Younce Schooley, *Dramatically Narrowing RFRA's Definition of "Substantial Burden" in the Ninth Circuit*, 55 S.D. L. REV. 426, 456-57 (2010).
[206] Yellowbear v. Lampart, 741 F.3d 48, 55-56 (10th Cir. 2014).
[207] S. Rep. No. 103-111 at 8, reprinted in 1993 U.S.C.C.A.N. 1892, 1897 (1993).

indigenous Free Exercise cases point to the autopsy example as proof that Congress intended there to be burdens that fall outside of the typical *Sherbert* and *Yoder* analysis.[208]

Additionally, eruvim litigants, especially ones based in states without their own RFRAs, can try to turn to property law doctrines in an attempt to bypass the challenges presented by *Lyng*. One of the property law doctrines that scholars writing about *Lyng* suggest indigenous people use to try and circumvent *Lyng* is the public trust doctrine.[209] Traditionally, "[a]t its core, the public trust doctrine is the idea that there are some resources, notably tidal and navigable waters and the lands under them that are forever subject to state ownership and protection in trust for the use and benefit of the public."[210] The doctrine is rooted in Roman law, but was later used by English commoners to prevent the monarchy from denying them certain natural resources.[211] Although the doctrine's historic usability applies mainly to water-related and minerals rights, Professor Kristen A. Carpenter contends that the doctrine can be applied in ways that allow citizens to "express their values" on publicly owned property.[212] Through this reading of the public trust doctrine, Free Exercise claimants can use the doctrine to effectuate their values in favor of religious freedom on publicly owned lands.[213] Despite this far-fetched application, the public trust doctrine may just be the tool claimants, who remained blocked by *Lyng*, need to overcome the hurdle of government suppression of their religious practice.[214]

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[208] Kelin, *supra* note 205 at 460-61.
[209] Carpenter, *supra* note 200 at 1121.
[210] Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 699 (2006).
[211] Carpenter, *supra* note 200 at 1121.
[212] *Id.* at 1124.
[213] *Id.* at 1125.
[214] *Id.*

VII. Conclusion

In conclusion, even though First Amendment jurisprudence has rapidly evolved, and continues to evolve, the overall outcome of eruvim litigation will remain substantially unchanged. While eruvim are both relatively inconspicuous and inconsequential to the average non-observant Jewish person, there is no denying that their introduction into a community can cause quite the public debate. While these debates take on many forms outside of the courtroom, they always focus on the Free Exercise and Establishment Clauses in the courtroom. This fact relates to the need for an eruv to be built on public property, thus calling into question the role religion should play in America's public life. Although, prior to the Supreme Court's recent right-wing shift, courts upheld eruvim as not violating the Establishment Clause, courts only compelled communities to provide for an exemption for an eruv under the Free Exercise Clause when strict scrutiny was triggered, which was not always the case.

While it is predicted that the eruv's overall legal status will remain largely in place, courts will be using a different analysis to determine the eruv's legality. Notably, this different legal analysis will likely no longer rely on important precedent, such as *Smith* and *Lemon*, that once played a central role in determining the eruv's constitutionality. Further, by examining eruvim through the Supreme Court's shifting constitutional law jurisprudence, new issues come to light regarding the constitutionality of using public spaces for religious practice. These issues are all the more relevant in a world where many Americans no longer wish to associate with religious practices. Yet, these issues also speak to wider problems of inclusivity in the context of public lands. Such debates draw parallels to indigenous struggles over access to their sacred sites and call into question long held but misguided precedent.